SRI LANKA:
STATE OF HUMAN RIGHTS 2009 -2010

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STATE OF HUMAN RIGHTS 2009 - 2010

This report covers the period
January 2008 to December 2009

Law & Society Trust
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ABBREVIATIONS & ACRONYMS

ACF	Action Against Hunger
APRC	All Party Representative Committee
AHRC	Asian Human Rights Commission
CA	Court of Appeal
CAT	Convention Against Torture
CCA	Coast Conservation Act
CCD	Colombo Crime Division
CEA	Central Environmental Authority
CFA	Ceasefire Agreement
CEDAW	Convention on the Elimination of All Forms of Violence against Women
COHRE	Centre for Housing Rights and Evictions
COI	Commissions of Inquiry
CPA	Centre for Policy Alternatives
CRC	Convention on the Rights of the Child
CBR	Community based Rehabilitation
CWC	Ceylon Workers' Congress
DIG	Deputy Inspector General
DMC	Disaster Management Centre
DO	Detention Order
DPO	Disabled Persons' Organisation
EIA	Environment Impact Assessment
EIAR	Environmental Impact Assessment Report

EPDP	Eelam People's Democratic Party
EPL	Environmental Protection Licenses
ER	Emergency Regulations
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulation
ERW	Explosive Remnants of War
EU	European Union
FR	Fundamental Rights
FTZ	Free Trade Zone
GA	Government Agent
GBV	Gender Based Violence
GMOA	Government Medical Officers' Association
GOSL	Government of Sri Lanka
GS	*Grama Sevaka*
GSMB	Geological Survey and Mines Bureau
GSP	Generalised System of Preferences
HC	High Court
HRC	Human Rights Commission
HSZs	High Security Zones
ICC-NHRI	International Coordinating Committee of National Human Rights Institutions
ICCPR	International Covenant on Civil & Political Rights
ICESCR	International Covenant on Economic, Social & Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross

IDP	Internally Displaced Person
IEE	Initial Environmental Examination
IEER	Initial Environmental Examination Report
IIGEP	International Independent Group of Eminent Persons
ILO	International Labour Organisation
IMF	International Monetary Fund
INGO	International Non Governmental Organisation
JMO	Judicial Medical Officer
LBT	Lesbian, Bisexual and Transgender
LDCs	Least Developed Countries
LRCs	Land Release Certification
LST	Law & Society Trust
LTTE	Liberation Tigers of Tamil Eelam
MoD	Ministry of Defence
MPCS	Multi-Purpose Cooperative Societies
MRE	Mine Risk Education
MSF	*Médecins Sans Frontières*
NEA	National Environmental Act
NESOHR	North-East Secretariat for Human Rights
NFZ	No Fire Zone
NGO	Non Governmental Organisation
NHRC	National Human Rights Commission
NIC	National Identity Card
NPC	National Police Commission

NRFI	Non Relief Food Items
NWPC	North Western Provincial Council
OIC	Officer-in-Charge
PAA	Project Approving Agencies
PARC	Protective Accommodation and Rehabilitation Centres
PSO	Public Security Ordinance
PTA	Prevention of Terrorism Act
PTF	Presidential Task Force
SC	Supreme Court
SCM	Supreme Court Minutes
Sri L.R.	Sri Lanka Law Reports
SEZ	Special Economic Zones
SGBV	Sexual and Gender-based Violence
SLA	Sri Lanka Army
SLAF	Sri Lanka Armed Forces
SLRC	Sri Lanka Rupavahini Corporation
SLPI	Sri Lanka Press Institute
STF	Special Task Force
TEC	Technical Evaluation Committee
TID	Terrorism Investigation Department
TMVP	*Tamil Makkal Viduthalai Pulikal*
UDA	Urban Development Authority
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Convention against Torture

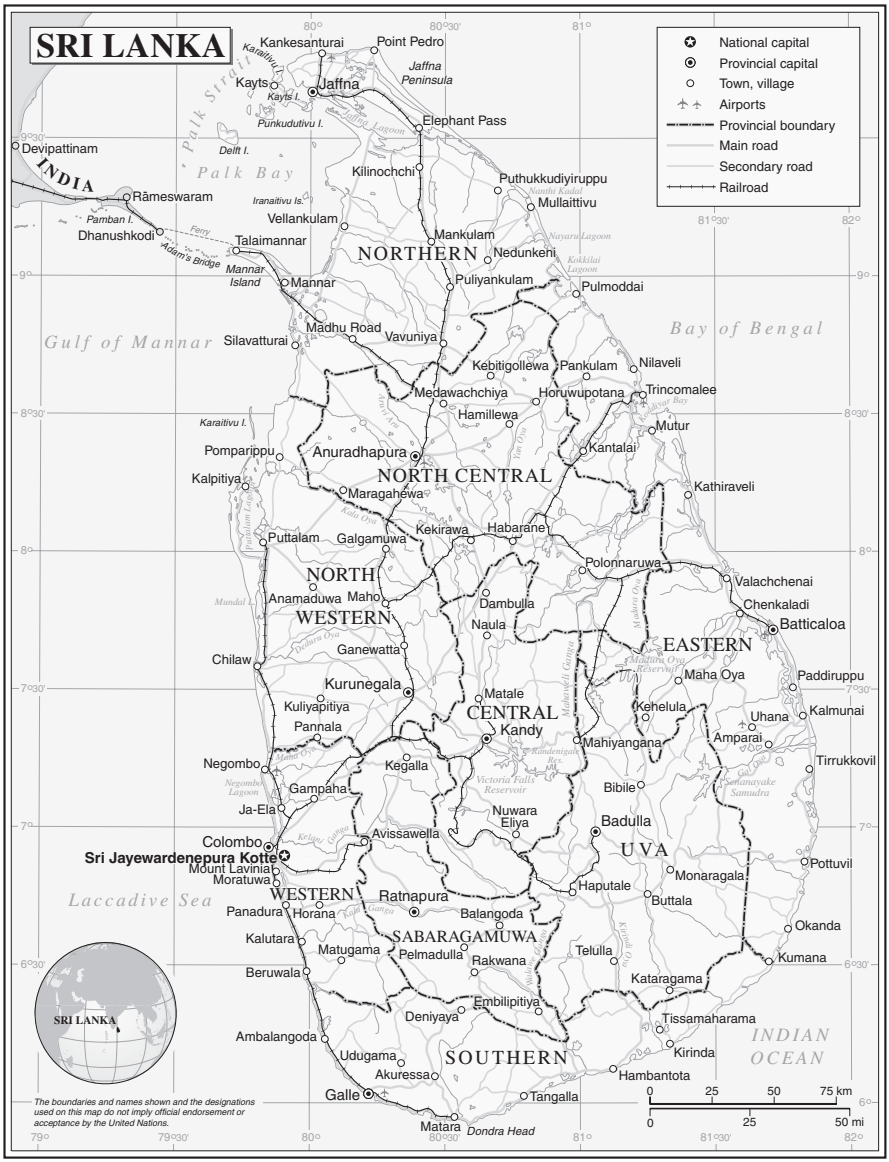
UNDP	United Nations Development Programme
UNHCR	Office of the UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNHRC	UN Human Rights Council
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNP	United National Party
UPFA	United People's Freedom Alliance
UPR	Universal Periodic Review
UXO	Unexploded Ordinances
WFP	World Food Programme
WGAD	Working Group on Arbitrary Detention
WGEID	Working Group on Enforced and Involuntary Disappearances
WHO	World Health Organization
WMA	Waste Management Authority
WSG	Women's Support Group

FOREWORD

Since 1990, LST publishes the annual State of Human Rights report as a means of assessing Sri Lanka's compliance with international human rights norms and domestic obligations. The SHR serves both as a measure of Sri Lanka's achievements during the period, and also as a means of identifying the key areas of concern for human rights activists in that year. The chapters are authored by experts in their respective fields and necessarily contain some overlap due to the cross-cutting nature of many of the rights under review.

Departing from the usual practice, LST decided to cover a 24 month period of January 2008 to December 2009 in this Report. This is due to the unique picture of human rights that emerged in this period after the formal end to the Ceasefire Agreement in early 2008 leading to intensification of fighting between the Government forces and the LTTE throughout that year and the end of the armed conflict in mid 2009.We hope the reader will find this Report as a useful means of engaging with the main issues that emerged during this period for advocacy, research and reform.

Law & Society Trust
Colombo



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I

OVERVIEW OF THE STATE OF HUMAN RIGHTS IN 2008-2009

Gehan Gunatilleke[1]

1. Introduction

Sixteenth January 2008 marked the formal arrival of a tumultuous period for the respect, protection and promotion of human rights in Sri Lanka, as the Ceasefire Agreement (CFA) between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) was officially terminated.[2] The ceasefire period had witnessed a reasonable improvement in the human rights situation in Sri Lanka. However, with the introduction of new emergency laws in 2005[3] and the proliferation of ceasefire violations, this situation had gradually begun to deteriorate. The termination of the CFA crystallized this depreciation and ushered in a new era exemplified by a brutal military campaign against the LTTE and typified by fear, paranoia and the suppression of dissent.

---

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2 'Sri Lanka: Government abolishes the ceasefire agreement from 16 January 2008', *ReliefWeb* at http://reliefweb.int/node/253636, 4 January 2008; 'Sri Lanka ceasefire formally ends', Roland Buerk, *BBC*, at http://news.bbc.co.uk/2/hi/south_asia/7190209.stm, 16 January 2008.

3 Emergency Regulations No. 1 of 2005, published in Gazette Extraordinary No.1405, No. 1 of 2005" /14 of 13 August 2005.

The official narrative, however, paints a starkly different picture. In its report to the Human Rights Council under the Universal Periodic Review (UPR) process in 2008, the Government of Sri Lanka stated that after it eliminated the presence of the LTTE from the entirety of the Eastern Province, it began 'taking steps to harmonise the economic, social and political life of people who have lived in a conflict affected environment for over two decades.[4] According to the government, '[t]hese efforts include reestablishment of civil administration, short-term and long-term economic development activity and infrastructure development to sustain economic progress.'[5] The government also claimed that 'political structures at the local level are being reinvigorated in order that the democratic rights of people of the East can be safeguarded and advanced.'[6] Since 2008, the government has maintained that its campaign against the LTTE was essentially humanitarian; that the reintroduction of draconian emergency laws was necessary in the interests of national security; and that keeping the media on a tight leash was crucial to maintaining the morale of the forces.

The state of emergency in the country was enforced throughout 2008 and even after the completion of military operations in May 2009. This emergency rule witnessed a sharp rise in the number of arrests and detentions taking place both under emergency regulations and the Prevention of Terrorism Act No. 48 of 1979 (PTA).[7] In May 2009, the armed forces of the government defeated the LTTE, capturing all remaining LTTE-controlled territory and killing its leadership, including Velupillai Prabhakaran. The atrocities committed by both parties to the conflict were manifold. Violations of international human rights and humanitarian law allegedly committed by the government during the

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4 National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Sri Lanka, A/HRC/WG.6/2/LKA/1, 2 May 2008 ('National Report to Human Rights Council'), at p.4.

5 *Ibid.*

6 *Ibid.*

7 Human Rights Watch, 'Sri Lanka: Country Summary – January 2009', at http://www.hrw.org/en/node/79245, ('HRW Country Summary').

final stages of the war became the subject of international controversy. Similarly, the violations committed by the LTTE were well documented and routinely condemned by the international community.[8]

This chapter presents an overview of the human rights situation in Sri Lanka during the two-year period from 1 January 2008 to 31 December 2009. The chapter is presented in three sections. Section 1 discusses the present legal and political framework pertaining to the protection and promotion of human rights in Sri Lanka. Section 2 presents an overview of the situation in relation to specific human rights issues and highlights the significance and impact of key events during the period of assessment. The concluding section presents certain observations with respect to the future of human rights in Sri Lanka, particularly in the post-conflict context.

2. Legal and Political Framework

This section examines the legal framework within which human rights are respected, protected and promoted in Sri Lanka. The analysis covers both the present framework and the improvements to the framework which the government proposed at the beginning of the period of review. The section also assesses the level to which proposals for improvement were implemented by the end of the period.

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[8] US Dept. of State – Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Sri Lanka', *Country Reports on Human Rights Practices*, March 11, 2010, at http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136093.htm ('U.S. Country Report'). According to the study: 'During the final months of the war, the LTTE engaged in torture, arbitrary arrest, and detention; denied fair public trials; arbitrarily interfered with privacy; and denied freedoms of speech, press, assembly, and association. The LTTE prevented civilians under its control from crossing over to government-held territory by shooting and killing those attempting to escape. As the conflict intensified, the LTTE forcibly recruited both adults and children for combat and reportedly located mortars and other heavy weapons near or in civilian encampments, drawing government military fire in the process. Until its defeat in May, the LTTE continued to organize bomb attacks in areas that it did not control, particularly in the south, targeting military, political, and civilian persons and property.'

2.1 The Fundamental Rights Chapter

The Chapter on Fundamental Rights in the Constitution provides a basic framework for the respect and protection of civil and political rights in Sri Lanka. The Chapter, however, does not address economic, social and cultural rights nor does it recognize environmental and group rights. Yet it appears that the government recognizes the essential indivisibility and interdependence of human rights.[9] In its 2008 report to the UN Human Rights Council, the government acknowledged that 'guaranteeing the full spectrum of human rights is essential to instill confidence in the human rights protection machinery available to [the people], and also allow Sri Lanka to better fulfill its obligations under the various international human rights treaties the country has ratified, via expression and enforcement through the supreme law of the land' (*sic.*).[10] Accordingly, the government established a Steering Group to draft a constitutional charter of rights. This group was expected to 'assist in reinforcing the values of respect for human dignity of all the people of Sri Lanka—regardless of ethnicity, culture, language, religious affiliation, gender, caste or any similar factors.'[11] Furthermore, the envisaged countrywide consultation process was expected to lead to greater awareness on human rights issues and the protection framework in Sri Lanka, and was intended to 'bring together people from different ethnic groups and social backgrounds to discuss and agree on the key components of the human rights charter.'[12] The project, as conceived at the beginning of 2008, was certainly an ambitious one, described as 'laudable' by some who participated in the Universal Periodic

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9 See '*National Report to Human Rights Council*', at p.21. Also see, UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5. The paragraph in its entirety reads: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

10 '*National Report to Human Rights Council*', at p.21.

11 *Ibid.*

12 *Ibid.*

Review.[13] However, no signs of implementing the project were evident at the end of 2009. The range of such initiatives that have not ventured beyond the drawing board sets a disappointing precedent in terms of the genuineness of the present government's commitment to human rights.

2.2 Thirteenth Amendment and Devolution

One of the 'key national priorities' identified by the government in its report to the Human Rights Council was the full implementation of the Thirteenth Amendment to the Constitution.[14] The government stated in its report that the proposed power sharing mechanism under the Thirteenth Amendment will 'permit ethnic minorities to participate more effectively in public life and to secure greater representation of their interests in the formulation of policy relating to matters directly affecting their lives.' [15]

Hence prior to the conclusion of military operations, the government voiced its intention to implement the Thirteenth Amendment in order to present a lasting political solution to the ethnic conflict.

In the meantime, the All Party Representatives Committee appointed in 2006 for the purpose of setting out a framework for constitutional reform, submitted its proposals to the President in early 2008. The Committee was split on a number of issues. However, a majority group within the Committee released a set of proposals that were perceived by many as fairly progressive. The majority group recommended *inter alia* exclusive legislative power to the provinces in respect of devolved subjects,[16] devolution of

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13 Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: Sri Lanka, A/HRC/8/46, 5 June 2008 ('Report of the Working Group'), at p.7.

14 *Ibid.*

15 *Ibid.* at p.20.

16 Clause 7.2 of the APRC proposals in R. Yogarajan & Nizam Kariapper (eds.), 'Proposals made by the All Party Representative Committee to form the basis of a new Constitution' (June 2009) ('APRC Proposals').

police powers,[17] the establishment of a Constitutional Court[18] and the establishment of a Second Chamber comprising representatives from the provinces.[19] The proposals also discussed several options with respect to the governance of the Northern and Eastern provinces.[20] One such option was the merger of the Northern and Eastern Provinces after an interim period of ten years and a referendum in the Eastern Province. These proposals were largely seen as 'Thirteenth Amendment Plus', and an improvement of the current framework for devolution. Such proposals were anticipated to form the fundamental basis for constitutional reform in the post conflict period.

The Provincial Council elections for the Eastern Province were held in May 2008 amidst much anticipation amongst government supporters and apprehension amongst dissenting groups. As discussed later in this chapter, the elections were far from peaceful. Moreover, the elections were boycotted by the Tamil National Alliance, a key minority party, owing to a security threat posed by armed cadres of the Tamil Makkal Viduthalai Pulikal (TMVP).[21] The TMVP jointly contested with the government and eventually won the elections, with its then leader Sivanesathurai Chanthirakanthan *alias* Pillaiyan being named Chief Minister of the Eastern Provincial Council. The elections marked a significant milestone in the government's alleged efforts to engender a political solution to the ethnic question. The elections were also touted as a step towards fully implementing the Thirteenth Amendment. Importantly, these were the first Provincial Council elections to be held in the Eastern Province since the controversial demerger of the Northern and Eastern Provinces

17 *Ibid.* at clause 10.3.

18 *Ibid.* at clauses 3.3 to 3.6.

19 *Ibid.* at clause 5.1c.

20 *Ibid.* at clause 6.10.

21 The TMVP was originally founded by Vinayagamoorthy Muralitharan *alias* Colonel Karuna when he broke away from the LTTE in 2004. However, the group began to display signs of splintering when a new leader, Sivanesathurai Chanthirakanthan *alias* Pillaiyan emerged in late 2007. Skirmishes between the two factions within the TMVP were reported throughout 2008.

consequent to a decision of the Supreme Court.[22] The merger was very much a concession to the Tamil-speaking people of the North and East of the country as envisaged by the Thirteenth Amendment. Hence the elections, which were held only for the Eastern Province, amounted to a clear departure away from the notion of a merged North and East.

Despite progress made during the early part of the period of review, opposition to even the Thirteenth Amendment became particularly vocal following the end of a successful military campaign against the LTTE in mid-2009.[23] Thus began a period of governmental procrastination over the full implementation of the Thirteenth Amendment. By the end of 2009, there were virtually no signs that the government intended to fully implement the Amendment's scheme for devolution. The non-implementation of the Thirteenth Amendment itself signaled the lack of governmental commitment towards a meaningful political solution in the post conflict context.

2.3 Seventeenth Amendment

The Seventeenth Amendment to the Constitution establishes an independent Constitutional Council mandated to make appointments to key public institutions. The Amendment received the unanimous support of all political parties and was seen as a genuine effort to place checks on executive power and to ensure the independence of key public institutions. However, in March 2005, the first term of the Constitutional Council came to an end and no new appointments were made to the Council owing to a range of reasons mostly to do with the lack of political will.[24] The President thereafter assumed the authority to make direct appointments to public institutions. Throughout the period of review, the President continued

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22 See *Wijesekara and Others v. Governor of the North-East Provincial Council* SC (FR) Application No. 243, 244 and 245/06 – (per Sarath N. Silva C.J.), judgment delivered on 16 October 2006.

23 'The 13th Amendment as a political solution', RMB Senanayake, *Groundviews*, 15 July 2009, at http://groundviews .org/2009/07/15/the-13th-amendment-as-a-political-solution.

24 See Cyrene Siriwardena, 'Public Institutions and de-politicization: Rise and the fall of the 17th Amendment' in Elizabeth Nissan (Ed.) *Sri Lanka State of Human Rights 2007* (2007), at p.237.

to make such direct appointments, the most controversial of which was perhaps his appointment of the Attorney General in December 2008. The international community expressed grave concerns over the non-constitution of the Constitutional Council.[25] Moreover, local civil society actors filed fundamental rights applications seeking to compel the formal constitution of the Council and challenge certain direct appointments made by the President.[26]

The government identified the strengthening of the National Human Rights Commission (NHRC) as a priority in its report to the Human Rights Council.[27] The government contended that 'the need to expand the mandate and powers of the Commission [had] been overshadowed by the debate over the perceived unconstitutionality of appointment of the Commissioners by the President due to the non-functioning of the Constitutional Council mechanism' (*sic*.).[28] Two initiatives were devised to address this problem: first, a Parliamentary Select Committee on the Seventeenth Amendment was appointed to explore possible constitutional amendments that can forestall any future impasse in the formation of the Constitutional Council; and second, a Motion was presented in Parliament proposing the establishment of a Select Committee of Parliament to

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25 Amnesty International, 'Sri Lanka: Amnesty International Submission to the UN Universal Periodic Review Second session of the UPR working group, 5-16 May 2008', at http://www.amnesty.org/en/library/info/ASA37/003/2008 ('Amnesty International Report to the UPR'). According to the report, '[i]n February 2006, following the resignation of two senior Supreme Court Judges from the three member Judicial Services Commission (JSC), new appointments to the JSC were made directly by the Chief Justice and the President Mahinda Rajapaksa rather than through the [Constitutional Council]. This undermined the credibility and authority not only of the two judges but also of the JSC. In April 2006 the President appointed members to the National Police Commission and the Public Service Commission. In May 2006 the President unilaterally appointed new members of the Human Rights Commission after their predecessors' terms of office had expired.'

26 See for example SC (FR.) Application Nos. 297/2008 and 578/2008. The applications respectively challenged the non-constitution of the Constitutional Council and the direct appointment of the Attorney General by the President. The basis of the applications was that the President was bound by the Constitution to formally constitute the Council and that all acts carried out by him in contravention to the Seventeenth Amendment were accordingly illegal.

27 '*National Report to Human Rights Council*', at p.21.

28 *Ibid.*

study the statutory mandate and powers of the Commission with a view to enhancing its powers and functions.[29]

However, owing to the non-constitution of the Constitutional Council, the President decided to make direct appointments to the NHRC. This predicament, together with admitted challenges in terms of capacity, has led to a loss of public confidence in the institution. Furthermore, during the UPR session on Sri Lanka, several Member States including Canada, Germany and the United Kingdom raised questions regarding the challenges faced by the NHRC and its recent downgrading to 'observer status' by the International Coordinating Committee for the Promotion and Protection of Human Rights (ICC).[30] Thus the challenges faced by the NHRC appear to be twofold: first, its composition raises serious questions regarding its political independence; and second, its functional capacity is visibly inadequate.

2.4 Emergency Regulations and the PTA

An overview of some of the salient features of the emergency regime in Sri Lanka is presented in this section. It is noted that this topic is dealt with in greater depth elsewhere in this publication.

Under Article 155 of the Constitution, the President is authorized to issue emergency regulations (ERs) 'amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.' The

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29 *Ibid.*

30 '*Report of the Working Group*', at p.17. Also see Asian Human Rights Commission, 'Sri Lanka: National Human Rights Commission Downgraded for Failure in Human Rights Responsibilities', 18 December 2007, at http://www. humanrights.asia/news/forwarded-news/FS-049-2007. The Commission was downgraded to a 'B' Grade institution by the ICC due to its non-compliance with the Paris Principles. Apart from the obvious loss of credibility, the practical consequences of such a downgrading is quite serious considering the fact that this would result in a loss of the NHRC's right to participate in the Human Right Council and other Human Rights fora. Though one cannot draw definite conclusions, it is also possible to speculate that such a downgrading was a contributive factor to the ultimate loss of Sri Lanka's seat in the Human Rights Council. This in fact was the first time in the history of the ICC that any institution had been downgraded as such.

said Article also deems the Public Security Ordinance No. 25 of 1947 (PSO) to be a law enacted by Parliament. Section 5 of the PSO empowers the executive *inter alia* to issue Emergency Regulations that may authorize detention without charge or trial; authorize entry, search and seizure of property; amend any law (other than the Constitution) or suspend its operation; and create special courts to prosecute offenders, including under the ERs themselves.[31] Additionally, the executive may exempt officials acting under the Act 'in good faith' from criminal prosecution or civil suits.[32] The ERs of 2005 certainly provide for the above.[33] Moreover, the provisions of the ERs threaten to impose unjustified and disproportionate restrictions on the right to freedom of expression. For example, Regulation 20 gives any member of the security forces of any rank the official power to arrest suspects and seize property.

Understanding the symbiotic relationship between the ERs and the Prevention of Terrorism Act No. 48 of 1979 (PTA) is also important. Under section 9(1) of the PTA, the Executive is authorized to detain persons without charge or trial for up to 18 months. As pointed out by Amnesty International, '[a]lthough a moratorium was placed on the use of the PTA at the outset of the ceasefire agreement…the PTA has been invoked in a number of cases of detention of media workers.'[34] Under the amendments introduced to the ERs on 6 December 2006, the government was authorized to deploy the military for cordon-and-search operations and to detain without charge anyone suspected of terrorist activities.[35] Regulation 6 criminalizes not only 'terrorism' and 'any specified terrorist activity', but also 'any other activity in furtherance of any act of terrorism or specified terrorist activity committed by any person, group or groups

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31 Also see Amnesty International, 'Sri Lanka: Silencing Dissent', at http://www.amnesty.org/en/library/info/ASA37/ 001/2008 (February 2008) ('Silencing Dissent'), at p.9.

32 *Ibid.*

33 See Regulation 19 of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005, 13 August 2005.

34 'Silencing Dissent', at p.9.

35 *Ibid.* at p.11.

of persons.'[36] Such provisions appear to be vaguely worded and therefore may be interpreted as criminalizing a wide range of activities, including media investigations and reporting.[37]

The government later sought to introduce a new set of ERs in 2008, which increased the aggregate number of months a person could be detained under ERs from twelve to eighteen months.[38] Several groups including the Centre for Policy Alternatives challenged the 2008 ERs in the Supreme Court.[39] It was argued that the new Regulations violated the fundamental rights of the people and ought to be struck down owing to their arbitrary and unreasonable nature. Chief Justice Sarath N. Silva was inclined to agree with the arguments of the petitioners and granted leave to proceed in the application. The intervention of Court subsequently led to the settlement of the matter, as the Deputy Solicitor General appearing on behalf of the state agreed to the impugned regulations being stayed.[40] The case marked a rare instance of successful litigation during the period, particularly given the fact that judges were usually deferential towards executive and administrative authorities when it came to matters of counter terrorism and national security.

Though Article 155 authorizes the present emergency regime, the government has previously conceded that Article 4(d) of the Constitution provides that the suspension of fundamental rights even under a state of emergency is not permitted.[41] Yet Article 15(7) of the Constitution permits the restriction of the freedom of speech and expression if such

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36 *Ibid.* Regulation 7 provides that 'no person shall… promote, encourage, support, advise, assist, act on behalf of; or organize or take part in any activity or event of, any person, group, groups of persons or an organization which acts in contravention of regulation 6 of these regulations.' Similarly, Regulation 8 criminalizes 'any transaction in any manner whatsoever', with individuals or groups 'which act[s] in contravention of regulations 6 and 7 of these regulations.'

37 *Ibid.* at p.11.

38 See Emergency Regulations published in Gazette No.1561/11 dated 5 August 2008.

39 *Centre for Policy Alternatives v. Defence Secretary and Others* SC (F.R.) Application 351/08, SC Minutes of 15.12.2008 (per S.N. Silva CJ.).

40 *Ibid.* at p.4.

41 '*National Report to Human Rights Council*', at p.2.

restrictions are prescribed by law *inter alia* in the interests of national security. The said Article also declares: 'For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.' Hence some commentators have recommended that the Constitution should resolve this complexity by being more specific that emergency powers can only be used in 'exceptional circumstances as defined under international human rights law.'[42] As discussed later in this chapter, the present emergency regime has occasioned the routine violation of fundamental rights throughout the two years under review. Moreover, the post-conflict situation has unfortunately failed to witness much improvement. Even after the end of hostilities in mid-2009, the government continued to declare a state of emergency and enforce Emergency Regulations.

2.5 The Press Council Law of 1973

On 9 July 2009, the government officially reactivated the Press Council Law No. 5 of 1973. This Act proscribes the publishing of articles that discuss internal communications of the government and decisions of the cabinet, matters relating to the military that could affect national security, and details of economic policy that could lead to artificial shortages or speculative price increases. Moreover, the Act authorizes the government to fine or impose punitive measures including lengthy prison terms on those violating its provisions. Journalists staged several demonstrations against the resurrection of the Press Council throughout the latter part of 2009.[43]

One of the main issues concerning the Press Council, as presently constituted under the Press Council Law, is the nature of its composition. Section 3 of the Law empowers the President to appoint the members of

[42] 'Silencing Dissent', at p.9.

[43] See '*U.S. Country Report*'.

the Council.[44] Hence it appears that the resurrection of the Press Council has provided the executive branch with yet another avenue of controlling the media and suppressing dissenting voices.

3. An Overview of Human Rights Issues: 2008-2009

This section examines a range of human rights issues that emerged throughout the period 2008-2009 and assesses the government's response to these issues. Some of these issues are discussed in greater detail in the subsequent chapters of this publication. What is presented below is mainly an overview of the salient aspects of each human rights issue.

3.1 Child Soldiers

The LTTE and the TMVP continued to recruit child soldiers in 2008 and 2009 in the North and East of Sri Lanka, despite the government's policy of 'zero tolerance' on child combatants. According to Amnesty International, families in the Batticaloa District remained fearful of child recruitment by armed cadres of the TMVP.[45] In late 2008, reports from the Ampara District indicated an increase in abductions carried out by the TMVP. Moreover, unconfirmed reports suggest that the LTTE sharply increased child recruitment in response to government military operations in the district of Kilinochchi. Many of these cases are not reported possibly due to fear of reprisals.[46] Reports from the conflict zone in 2009 stated that both boys and girls as young as twelve years were forced to join the fighting.[47] The numbers of children killed in fighting were unknown, but

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44 Section 3(1) of the Law reads: 'The Council shall consist of—(a) the person for the time being holding office as the Director of Information (in this Law referred to as "the Director"); and (b) six other members appointed by the President, of whom—(i) one shall be a person to represent the working journalists, such person being selected from a panel of not more than seven persons nominated by the journalists associations in Sri Lanka, and (ii) one shall be a person to represent the interests of the employees of newspaper businesses, such person being selected from panels of not more than three persons nominated by each registered trade union of such employees.'

45 '*Amnesty International Report to the UPR'*, at p.3.

46 See '*HRW Country Summary'*.

47 'See *'U.S. Country Report'*.

the government reported 527 former LTTE child soldiers in its custody several months after the end of the war in 2009. By the end of 2009, these children were being held in government-run detention centres, which, according to some reports, provided rehabilitation in accordance with international standards.[48]

It was reported that forced recruitment by the LTTE increased significantly during the final stages of the war. This policy had far-reaching consequences for persons, including children, who were arrested and detained by government forces during this period. Short-term forced recruitment or even mere association with the LTTE usually resulted in immediate detention of these persons. Moreover, such involvement often resulted in the treatment of these persons, including children, as 'hard core' LTTE cadres—a label that clearly did not reflect the complexity of their involvement with the LTTE.

In its report to the UN Human Rights Council, the government identifies as a key national priority the '[r]ehabilitation and reintegration of former combatants—particularly children and young persons in need of training for productive employment.'[49] The report further states that the efforts to eradicate child recruitment are supported by the Commissioner-General of Rehabilitation appointed by the President in 2006 to direct rehabilitation and reintegration of former child combatants into society. Moreover, the government claims that it has 'actively engaged with its international partners including the United Nations Security Council's Working Group on Children and Armed Conflict on measures to eradicate this practice.'[50] The government reportedly made significant progress towards its goal of eliminating the child soldier problem amongst the TMVP.[51] Accordingly, by 31 December 2009, the United Nations Children's Fund (UNICEF)

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48 *Ibid.*

49 '*National Report to Human Rights Council*', at p.22.

50 *Ibid.* at p.18.

51 'United Nations Agency says TMVP has released child soldiers and no longer carrying arms in public', Walter Jayawardhana, *Asian Tribune*, 9 May 2008, at http://wwwbahnhof.asiantribune.com/node/11047.

reported that the number of child soldiers still involved in the TMVP was down to five.[52] However, a recent report issued by the U.S. State Department suggests that the precise whereabouts of these five children were yet unknown to both the TMVP and the government.[53]

3.2 Internally Displaced Persons

The issue of internal displacement in Sri Lanka received a great deal of international attention during the period of review. Hence the international community often criticized the government's handling of internally displaced persons (IDPs). This section only discusses some of the overarching issues pertaining to IDPs during the period of review, as the subject is dealt with in much greater detail later in this publication.

On 9 September 2008, the government ordered the UN and non-governmental organizations (NGOs) to leave the Vanni region owing to security risks. However, from September onwards, the government permitted some international UN workers to accompany food convoys into the Vanni region, though humanitarian access remained extremely limited. Due to these restrictions, displaced populations faced immense hardship including the lack of shelter and restricted access to food and medicine. Moreover, according to Amnesty International, tens of thousands of families were forced to live in the open during the rainy season in November 2009.[54]

Two issues pertaining to IDPs require further reflection. First, the alleged underestimation of displaced persons in the conflict zone. Second, the arbitrary detention of IDPs following the conclusion of military operations.

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52 See 'U.S. Country Report'.

53 *Ibid.*

54 Amnesty International, 'Sri Lanka: Human Rights in Democratic Socialist Republic of Sri Lanka - 2009', at http:// www.amnesty.org/en/region/sri-lanka/report-2009, ('AI 2009 Report'). See also 'HRW Country Summary'.

It was alleged that the government consistently underestimated the number of civilians trapped behind LTTE lines, leading to a severe shortage of food and medicine shipped into the no-fire zones during the final months of fighting.[55] Some international observers accused the government of deliberately lowering their estimates in an effort to starve the civilians out from behind LTTE lines to cause more difficulties for the LTTE soldiers.[56] The government often prevented the International Committee of the Red Cross (ICRC) from delivering medicine, including all anesthetics to trapped civilians, stating that the LTTE may use it to treat wounded soldiers.[57] It is difficult to estimate how many civilians may have died as a result of this shortage of food and medicine.

Following the conclusion of military operations in May 2009, some 280,000 civilians were placed in camps located in Vavuniya.[58] As many as 245,000 of these displaced persons were subsequently detained in "Welfare Centers" and deprived of the freedom of movement.[59] The government justified the detention of the *entire* IDP group on grounds of national security, since remaining separatist elements were alleged to have infiltrated this group.[60]

During the months of detention at the Menik Farm Welfare Centre and other smaller camps, international observers and local legal experts questioned the legality of this long-term detaining of IDPs under the law, including the Emergency Regulations and the PTA. These laws require that any detainee be specifically named and detained pending further

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55 See '*U.S. Country Report*'.

56 *Ibid.*

57 *Ibid.*

58 'Sri Lanka: War Displaced Start to Pick Up the Pieces', Integrated Regional Information Networks (IRIN), 3 February 2010, at http://www.unhcr.org/refworld/docid/4b6aba4cc.html.

59 See Human Rights Watch, 'Sri Lanka: Government Breaks Promises that Displaced Can Go Home', 19 October 2009, at http://www.hrw.org/en/news/2009/10/19/sri-lanka-government-breaks-promises-displaced-can-go-home.

60 'LTTE Cadres Infiltrate Northern IDP ranks – Minister', *Official Website of the Government of Sri Lanka*, 28 August 2009, at http://www.priu.gov.lk/news_update/Current_Affairs/ca200908/20090828ltte_cadres_infiltrate_northern_idp_rank s.htm.

investigations, and informed of the reason for the detention.[61] Moreover, the official treatment of this group of IDPs patently violated the UN Guiding Principles on Internal Displacement. The specific principles that were violated included Principle 1, which provides that IDPs shall not be discriminated against on the ground that they are internally displaced; Principle 3, which casts the primary duty and responsibility to provide protection and humanitarian assistance to IDPs on national authorities; and Principle 14, which guarantees to every IDP the freedom of movement and the right to move freely in and out of camps or other settlements. However, neither the provisions of the Guiding Principles nor their apparent violation received adequate attention in the exchange that ensued between the domestic human rights community and the Sri Lankan Government.[62]

Large-scale returns of IDPs began in the final three months of 2009. Many of those released were unable to return to their actual homes due to significant damage from the war or uncleared land mines. By the end of 2009, an additional 108,000 IDPs remained in the government-run Menik Farm IDP camps near Vavuniya. IDPs remaining in Menik Farm were not given freedom of movement until December 2009, when a system of temporary exit passes was implemented for those who had not yet been returned to their districts of origin and remained in Menik Farm. Some observers still insisted this exit pass system did not qualify as freedom of movement.[63] It was not until early 2010 that most of the detained IDPs were released to their relatives.[64]

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61 See '*U.S. Country Report*'.

62 The principles were, however, referenced by Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons in his statement at the 64th Session of the General Assembly, Third Committee, Item 69(b), 26 October 2009.

63 See 'U.S. Country Report'.

64 'Over 182,000 IDPs Released and Resettled', *Official Website of the Government of Sri Lanka*, 10 March 2010, at http://www.priu.gov.lk/news_update/Current_Affairs/ca201003/20100310over_182000_ idps_released_resettled.htm.

Prior to this crisis, the government had identified the following key national priorities in its report to the Human Rights Council:[65]

- Implementation of an action plan for IDPs and conflict affected communities, including host communities;
- Development of a comprehensive and uniform compensation policy for the displaced and dispossessed; and
- Consultations on and the enactment of a bill on the rights of IDPs.

However, no such policies were implemented during the IDP crisis of 2009. The government routinely denied basic fundamental rights to IDPs and did not effectively coordinate with local or international aid agencies that were asked to provide assistance on short notice. Moreover, the government failed to coordinate with military personnel in the home locations of IDPs. The government did, however, cooperate with the UNHCR and other humanitarian organizations in assisting IDPs. Yet it ended access for ICRC's protection work in IDP camps in July 2009, requesting that a new, postwar operating mandate be negotiated before such work could be resumed.[66] By the end of 2009, this negotiation was not yet complete, thereby leaving the ICRC unable to provide protection support in the IDP camps.[67]

3.3 Attacks and Killings

The LTTE was allegedly responsible for several attacks in 2008 and 2009 on political opponents as well as civilians.[68] Bomb blasts in urban areas throughout the period resulted in over 70 civilian deaths and some 250 casualties. On 9 February 2009, an LTTE female suicide bomber killed 28 persons and injured 64 others at an IDP rescue center. Moreover, on 20 February 2009, two LTTE airplanes launched a suicide attack on

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65 '*National Report to Human Rights Council*', at p.22.

66 See '*U.S. Country Report*'.

67 *Ibid.*

68 *Ibid.* Also see '*AI 2009 Report*'.

Colombo. One of the planes struck the Inland Revenue building, exploding on impact and killing two civilians. On 10 March 2009, a LTTE suicide bomber attacked a local mosque's parade in Akuressa, Matara District, killing fifteen persons and injured dozens of others, including several government ministers and local officials.

The assassination of Lasantha Wickrematunge, the Editor of *The Sunday Leader*, in January 2009, was perhaps the most shocking of all recent attacks on media personnel. Wickrematunge was a prominent figure in the media and described as a 'virulent critic of the Mahinda Rajapaksa government.'[69] Following the assassination, a number of suspects, mostly linked to the armed forces, were taken into custody for their alleged involvement. However, no formal charges had been instituted against any individual by the end of 2009.

Throughout 2008 and 2009, it was reported that the government increasingly used allied paramilitary groups to carry out its counter-insurgency strategy. At the Human Rights Council session in June 2008, Professor Philip Alston, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, expressed concerns about the government relying extensively on paramilitary groups to maintain control in the East and in Jaffna, noting that there was evidence that these groups carried out extrajudicial executions.[70] The Eelam People's Democratic Party (EPDP), operating in the Jaffna Peninsula, and the People's Liberation Organization of Tamil Eelam operating in the Vavuniya District, were reportedly responsible for unlawful killings and enforced disappearances.[71]

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69 'Editor of Sri Lankan Daily Assassinated,' B. Muralidhar Reddy, *The Hindu*, 9 January 2009, at http://www.hindu.com /2009/01/09/stories/2009010956091400.htm.

70 See 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Addendum: Follow-up to Country Recommendations', A/HRC/8/3/Add.3, 14 May 2008, at p.14.

71 See 'AI 2009 Report'; 'U.S. Country Report'.

Several other notable killings were witnessed during the period of review. On 1 January 2008, T. Maheswaran, a Tamil Member of Parliament and vocal critic of the government, was killed while attending a religious event at a Hindu temple.[72] In May 2008, as many as 22 people were killed and 26 abducted during and after Provincial Council elections in the Eastern Province.[73] According to official accounts, other deaths occurred when security forces took suspects to the scenes of their alleged crimes, and shot and killed them while they allegedly tried to escape. For example, on 13 March 2009, four of the six persons arrested in connection with the killing of a schoolgirl in Trincomalee, were reportedly killed. Two of the six were allegedly killed in the jungle near Kinniya by LTTE forces. Subsequently, the police shot and killed one person who tried to escape as he was being transferred to court, and a fourth suspect died in police custody.[74] Moreover, in November 2008, TMVP leader, Sivanesathurai Chanthirakanthan *alias* Pillaiyan's private secretary, Kumaraswamy Nandagopan was killed, allegedly by supporters of rival leader, Vinayagamoorthy Muralitharan *alias* Karuna Amman.[75]

The government's response to the spate of attacks and killings during 2008-2009 has been far from satisfactory. The prime example of this inadequacy is the case involving the assassination of Lasantha Wickrematunge. Hence, in general, the government has been slow to conduct investigations and bring perpetrators to justice. A startling example of complete governmental inaction involved the killing of a young man at a polling station in a Colombo suburb on 25 April 2009—the day of the Western Provincial Council elections. United Peoples Freedom Alliance (UPFA) candidate Duminda de Silva was involved in an altercation at a polling site in Mount Lavinia. De Silva had pulled out a gun prior to being pushed into his vehicle by his security personnel. Soon afterwards, a shot was fired from inside the vehicle killing a young man in the crowd.[76] Remarkably,

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72 See 'HRW Country Summary'.

73 *Ibid.* Also see '*AI 2009 Report*'.

74 See '*U.S. Country Report*'.

75 *Ibid.*

76 *Ibid.*

the ensuing case was dropped shortly after, and no further investigations were carried out.[77]

3.4 Abductions and Disappearances

The government's counter-insurgency strategy allegedly involved the use of enforced disappearances, which were widely reported in the North and East as well as in the South. Many enforced disappearances took place inside High Security Zones (HSZs) and during curfew hours,[78] raising strong presumptions in terms of the involvement of security personnel. According to the U.S. State Department Report, '[r]eliable statistics on the number of disappearances were difficult to obtain, but estimates from some sources ranged from 300 to 400 for the year 2009, with the majority occurring in the north and east.'[79] A striking example of the impunity with which disappearances took place during the period of review was the disappearance of Sebastian Goodfellow, a driver for the aid agency Norwegian Refugee Council, on 15 May 2008. It is widely speculated that an armed group operating with the tacit support of government security forces was responsible for the abduction.[80] Moreover, no suspects were arrested in connection with the disappearance.

On 7 May 2009, four persons in a white van and wearing Sri Lanka Army uniforms abducted Stephen Sunthararaj, project manager at the Centre for Human Rights and Development. The police had previously held Sunthararaj with no charges since February 2009. He was subsequently released by the courts, which ruled that there was no evidence upon which he could be charged with a crime.[81] Sunthararaj's wife received ransom demands in the weeks after his abduction, but she was not able to win his release and received no further word about her husband.[82]

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77 *Ibid.*

78 See '*AI 2009 Report*'.

79 See '*U.S. Country Report*'.

80 See '*AI 2009 Report*'. Also see 'Disappeared driver still missing after 6 months', *NRC Sri Lanka* 19 November 2008, at http://www.nrc.no/?did=9355587.

81 See '*U.S. Country Report*'.

82 *Ibid.*

Meanwhile, in the East, credible sources linked the TMVP to the 29 October 2009 abduction of Sankarapillai Shantha Kumar, a member of the Non government Organization Consortium in Akkaraipattu in the Ampara District. Although family members filed a complaint with police, Kumar remained missing at the end of 2009, with no progress on the investigation.[83] Similar reports of disappearances were reported in the IDP camps set up after the end of military operations in mid-2009.[84] Witnesses and victims who were released after their abductions often identified the perpetrators as Tamil-speaking armed men using white vans without license plates.[85]

In its report to the Human Rights Council in 2008, the government highlighted the need to establish one authoritative source of information relating to these incidents.[86] The government undertook to maintain a database of reported incidents through the National Human Rights Commission and the Ministry of Disaster Management and Human Rights. Moreover, assurances were given that the Police had initiated discussions on collecting and collating data through the modality of the Inter-Ministerial Committee.[87] At the end of 2009, this framework was hardly evident, as little or no information regarding abductees were made available to their respective families.

This inadequacy is also reflected at the international level. The Working Group on Enforced or Involuntary Disappearances expressed grave concerns over the number of reported cases of enforced disappearances in the country.[88] The Working Group sent four cases under its urgent action procedure to the government. The cases involved: Sivakumar Ponnampalam, last seen in November 2008 and allegedly abducted by

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83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 'National Report to Human Rights Council', at p.16.

87 *Ibid.*

88 *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/31, 21 December 2009, at p.107.

the Police Special Task Force; Vijayanathan Vellasamy, allegedly abducted by the Security Forces in December 2008 in the Trincomalee District; Sivanantharuben Sivarasa, allegedly abducted on 20 April, 2009 by Navy personnel; and Sountherrajan Kandasamy Sountherrajan, who was abducted by police officers in Vavuniya, on 13 June 2009.[89] It is noted that the government's response to these communications did not yield any information as to the whereabouts of the abductees.

3.5 Arbitrary Arrests and Detentions

According to Human Rights Watch, 'Tamil civilians, including many who relocated to Colombo from Jaffna and other locations in the north and east, continue[d] to face arbitrary arrests and detentions, round-ups, orders of eviction, and new forms of registration' throughout 2008.[90] Amnesty International estimated that over 1,000 Tamils were in detention without charge; some in detention for several years.[91] Moreover, in September 2008, the police ordered all Tamils who had arrived from the North and East in the last five years to register with the authorities. [92]

In 2009, in addition to the detention of thousands of IDPs in 'welfare' camps, the government routinely arrested and detained Tamil citizens.[93] Observers speculate that although many were released within two days where no official detention order was produced, others were detained for much longer.[94] Some arrests appear to be patently arbitrary. For example, in June 2009, the police detained Chandrasiri Bandara, an astrologer, for one week without charge for negative forecasts concerning the President.[95]

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89 *Ibid.* at pp.105-106.

90 See 'HRW Country Summary'.

91 See 'AI 2009 Report'.

92 *Ibid.*

93 See '*AI 2009 Report*'.

94 *Ibid.*

95 *Ibid.* Also see 'Sri Lanka astrologer is arrested', *BBC News*, 26 June 2009, at http://news.bbc.co.uk/2/hi/8120859.stm.

The government's response to this predicament has been somewhat confusing, if not downright bizarre. For instance, the government denied the actual *detention* of IDPs in welfare camps—instead claiming that the IDPs were held in camps due to dangerous demining activities.[96] However, the government had previously released tens of thousands of IDPs to live with host families in towns and villages free of mines.[97] Moreover, whenever detention was admitted, the government claimed to be conducting a screening process to weed out LTTE suspects from the internment camps. However, the precise nature of the screening process was unknown, and none who passed the supposed 'screening' were being released. The same confusing pattern is evident in the response of the Attorney General's Department to the scores of fundamental rights applications alleging the arbitrary arrest and detention of Tamil citizens. In many such cases, the policy of the Department was to request for further time on the basis that investigations were pending or that an indictment would be filed soon.[98]

In its submission at the UPR session on Sri Lanka, Amnesty International expressed concerns over the lack of clarity over procedures to be followed after arrests.[99] The organization also commented that the government did not maintain a centralized register of detainees, which contravened Article 10(3) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance.[100] Hence it is crucial that basic due process rights are granted to all persons arrested and detained by the government and that a central list of detainees is made publicly available.

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96 See Andrew Stroehlein, 'The Situation in Sri Lanka', International Crisis Group, 1 October 2009, at http://www.crisis group.org/en/ publication-type/speeches/2009/the-situation-in-sri-lanka.aspx.

97 *Ibid.*

98 Centre for Human Rights & Development, 'Challenges and Issues', at http://www.chrdsrilanka.org/PAGES/ activitiesLAP.html.

99 See '*Amnesty International Report to the UPR'*, at p.3.

100 The Declaration was adopted by the United Nations by General Assembly resolution 47/133 of 18 December 1992.

3.6 Denial of the Right to a Fair Trial[101]

During the period 2008-2009, the case of journalist, J.S. Tissainayagam was perhaps the quintessential example of a denial of the right to a fair trial. The Terrorism Investigation Division (TID) of the Sri Lanka Police arrested Tissainayagam in March 2008. The journalist was charged *inter alia* with inciting the commission of acts of violence or racial or communal disharmony by publishing certain articles in the North-Eastern Monthly Magazine in 2006 and 2007.[102] During his trial, Tissainayagam claimed that he was harassed and threatened by the TID while under detention, which had led to an involuntary confession.[103]

The three charges against Tissainayagam under the PTA were: (1) that he intended to cause the commission of acts of violence or racial or communal disharmony through the printing or distribution of the magazine '*North Eastern Monthly*'; (2) that he intended to cause the commission of acts of violence or racial or communal disharmony through the publishing of particular content in the said magazine; and (3) that he collected funds from *non-governmental organizations* for the publishing of the said Magazine (emphasis added). One of the editorials relied on in the indictment was headlined: 'Providing Security to Tamils now will define northeastern politics of the future.' The excerpt specifically cited in the indictment reads: 'It is fairly obvious that the government is not going to offer them [Tamil Civilians] any protection. In fact it is the state security forces that are the main perpetrator of the killings.' By analyzing the three charges and the excerpt in the indictment, it becomes fairly obvious that the conviction of Tissainayagam on the first and third charges was contingent on his conviction on the second charge, which was the only charge that was 'content based'. The entire case therefore rested on proving that the

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101 See '*U.S. Country Report*'.

102 See CNN, 'Jail Sentence for Dissident Sri Lankan Reporter Condemned', available at http://edition.cnn. com/2009/WORLD/asiapcf/09/01/sri.lanka.journalist.

103 See Law & Society Trust (LST), 'Briefing Note on Tissainayagam Case: 17 September 2009 - Case of J.S. Tissainayagam', available at www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc.

article, and more specifically the excerpt, was published with the intention of 'causing the commission of acts of violence or racial or communal disharmony.'[104]

Therefore, the sole contention of the state during the trial was that an article written by a *Tamil* journalist accusing a predominantly *Sinhalese* Army of killing Tamil civilians was likely to incite the commission of acts of violence by Sinhalese readers against Tamils, or lead to racial or communal disharmony. Yet this theory seldom found its way into the media, as the government successfully distorted the controversy into one revolving around Tissainayagam's links to the LTTE.[105] The government achieved this feat through the relentless use of propaganda on official governmental websites during the pendency of the case—a strategy that clearly prejudiced the trial and violated Article 14 of the International Covenant on Civil and Political Rights.[106] Even those in the civil society who campaigned for Tissainayagam's release focused on the issue of journalistic freedom, rather than emphasizing that Tissainayagam's links to the LTTE had nothing to do with his indictment. In the courtroom, however, there was simply no link that could be drawn between the accused's liaisons with the LTTE—albeit during the ceasefire period where even government officials habitually liaised with the LTTE—and the actual indictment.

In August 2009, the High Court of Colombo sentenced Tissainayagam to a maximum sentence of 20 years rigorous imprisonment for arousing 'communal feelings' by writing and publishing articles that criticized the government's treatment of Sri Lankan Tamil civilians affected by the war, and for raising funds for a magazine in which the articles were published

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104 Section 2(1)(h) of the Prevention of Terrorism Act No. 30 of 1981.

105 Ministry of Defence Sri Lanka, 'Background: Thissanayagam Case and Others', at http://www.defence.lk/ new.asp?fname=20081222_01); 'Tissanayagam found guilt on terrorism: sentenced 20 years imprisonment', at http://www.defence.lk/new.asp ?fname=20090831_07.

106 International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

in furtherance of terrorism.[107] The High Court judgment was severely criticized for being politically motivated.[108] One major issue related to the judge's acceptance of the confession, despite a host of evidentiary discrepancies. Moreover, the judge appeared to disregard the fact that no prosecution witnesses were summoned to prove the articles could incite ethnic disharmony, but instead relied on her own judgment and on a defense witness's evidence that the articles were factually incorrect. Surprisingly, the judge dismissed the evidence of four other witnesses on the basis that they were of the same political beliefs as the accused. Hence the trial of Tissainayagam was marred by prejudicial media coverage, which perhaps culminated in a judgment that neglects to consider the gaping holes in the prosecution's case. Indeed, Tissainayagam's continued incarceration during the period under review attracted severe international condemnation.

3.7 Freedom of Speech and Expression

The subject of free speech and expression receives more specific attention in a later chapter in this publication. However, some of the key developments in this area are briefly discussed in the present section.

It was reported in 2008 that the relatively small community of media workers in the North and East of Sri Lanka continued to face intimidation. Editors of a number of newspapers based in the North and East were asked to report to military camps. Moreover, there were reported incidents of unidentified armed men entering newspaper offices late at night.[109]

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107 'Convicted: Two articles and a confession: 20 yrs RI: A Summary of the Order', *The Sunday Leader*, 31 August 2009, at http://www.thesundayleader.lk/archive/20090906/convicted.htm.

108 'J.S. Tissainayagam, journalist lauded by Obama, is jailed in Sri Lanka', Rhys Blakely in Mumbai, *The Sunday Times* (UK), 1 September 2009, at http://www.timesonline.co.uk/tol/news/world/asia/ article6815885.ece; 'A travesty of justice: The sentencing of J.S. Tissainayagam', *Groundviews*, 1 September 2009, at http://groundviews.org/2009/09/01/ a-travesty-of-justice-the-sentencing-of-j-s-tissainayagam.

109 'Silencing Dissent', at p.22.

On 7 January 2008, a group of men in civilian clothes raided the house of journalist, Poddala Jayantha and interrogated him. The men appear to have been police officers in civilian clothes, as the vehicles in which they arrived were identified as a police jeep and the Minister of Mass Media and Information later admitted that a police team had visited the house accidently.[110] Jayantha was later abducted and severely beaten in June 2009. The latter attack seemed to have been encouraged by the government, which aired photos of journalists—including a close-up of Jayantha—during a statement by the Inspector General of Police, Jayantha Wickramaratne, who called certain journalists 'traitors who would be dealt with.'[111]

Moreover, on 25 January 2008, Lal Hemantha Mawalage, a journalist working for the Sri Lanka Rupavahini Corporation (SLRC) was stopped at night by two men who attempted to stab him. A number of Sri Lankan media associations condemned the attack and linked it to a previous incident in December 2007, where SLRC personnel clashed with government Minister, Mervyn Silva.[112]

On 23 May 2008, Keith Noyahr, Deputy Editor of *The Nation*, was abducted from his home in Colombo and returned the next day severely beaten. The journalist chose not to speak publicly about what took place during his abduction.[113] The incident reflects two important features of the culture of media repression in Sri Lanka. First, the incident itself reflects the extent to which journalists at all levels are exposed to violence and intimidation. Second, it reflects the level of self-censorship amongst journalists and the general reluctance of victims to come forward and point out perpetrators. This phenomenon certainly demonstrates the success of the campaign to suppress the media through violence and

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110 *Ibid.* at p.23.

111 See '*U.S. Country Report*.'

112 'Silencing Dissent', at pp.23-24.

113 See '*AI 2009 Report*'. Also see 'No complaints against assault against mediamen – President', *Sunday Observer*, 27 September 2009, at http://www.sundayobserver.lk/2009/09/27/oostory.asp?sid=20110510_09&imid=No-complaints. jpg&dt=%5BMay%2010%202011%5D.

intimidation. It is also indicative of the fact that the perpetrators are those with considerable political influence.

This pattern continued throughout 2009. On 27 February 2009, three men in civilian clothes and three men in police uniforms in a van abducted Nadesapillai Vithyatharan, the Editor of the *Sudar Oli*, a leading Tamil-language newspaper. Following the intervention of foreign diplomats, the police announced that he had been arrested.[114] Authorities held Vithyatharan until April 25, and then released him without charges.[115]

Violence against journalists was certainly not limited to the South. On 28 May 2008, Jaffna-based journalist Paranirupasingam Devakumar was hacked to death by unidentified attackers while returning home. Devakumar had been reporting on abuses by the EPDP, a Tamil political party that enjoyed the support of the government.[116] Meanwhile, the Jaffna-based newspaper, *Uthayan* reported that it had received a threat on the telephone on 6 January 2008, demanding that the paper cease publication.[117] Throughout 2008, civilians living in LTTE-held areas were denied access to a variety of print and broadcast media. 'The Voice of the Tigers' radio and LTTE-controlled newspapers remained the primary source of information. The LTTE was also involved in intimidation of journalists and others critical of the organization.[118]

As discussed above, the assassination of the Chief Editor of the *Sunday Leader* and *Morning Leader* newspapers, Lasantha Wickrematunge, was a significant blow to the media industry and to media freedom in general. Apart from this heinous crime, on 2 January 2009, men in an unregistered white van burned the broadcasting station of television station, MTV/MBC. The police failed to respond to requests for additional security, and

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114 See '*U.S. Country Report.*' Also see 'Sudar Oli Editor arrested', *BBC Sinhala.com*, 26 Feb 2009, at http://www.bbc. co.uk/sinhala/news/story/2009/02/090226_sudaroli.shtml.

115 See 'U.S. Country Report.'

116 See 'AI 2009 Report'.

117 'Silencing Dissent', at p.23.

118 *Ibid.* at pp.25-26.

four days later armed men, arriving in unregistered vans, destroyed the studio with guns, clubs, grenades, and a claymore mine. Five suspects were arrested a fortnight later, but the magistrate concerned granted them bail. At the end of 2009, no progress had been made in the investigations relating to the incident.[119]

There was broad consensus amongst international human rights organizations that the state played a distinct role in perpetuating the suppression of the media during 2008-2009. For instance, in 2008, Amnesty International expressed concerns regarding the public campaign launched by the state media and some government officials against human rights defenders, including media workers, who participate in lobbying and advocacy for the promotion and protection of human rights.[120]

The media industry did, on occasion, collectively rise to meet the government's perceived attempts to restrict media freedom in the country. In late 2008, during the height of military operations in the North and East, the then Minister of Mass Media & Information issued certain Regulations under section 31 of the Sri Lanka Rupavahini Corporation (SLRC) Act.[121] The Regulations intended to establish a new licensing regime for private television broadcasting stations and to monitor and regulate such broadcasting stations. Regulation 19 empowered the Minister to suspend the permission granted to a licensee to operate any channel for a specified period, in the interest of the public or in the interest of national security. Furthermore, Regulation 28 empowered the Minister to appoint a Consultative Committee with certain broad powers including the power to hold inquiries to determine whether programmes broadcasted by licensees were detrimental to the interests of national security.

These Regulations appeared to establish a mechanism through which the government could regulate *programme content*—a largely unprecedented

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119 See '*U.S. Country Report*.'

120 'Silencing Dissent', at p.30.

121 Act No.6 of 1982. The said Regulations were published in the Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1570/35 on 10th October 2008.

regime of control. Hence the Regulations were met with widespread criticism, mostly on the grounds that it was *ultra vires* and that it led to excessive governmental control over private broadcasting stations. Critics including the Centre for Policy Alternatives (CPA) argued that the Regulations went beyond the 'technical, financial and professional' grounds for regulation stipulated in section 28 of the SLRC Act.[122]

The Supreme Court responded positively to the series of petitions filed on behalf of private telecommunication companies, political parties and civil society. Upon the direction of the Court, discussions were initiated to establish a vastly watered-down regulatory regime, which adopted a consultative process involving numerous stakeholders. Despite the fact that the Court never made an official pronouncement on the matter, as it was settled out of Court, the case remains one of the few recent examples of successful campaigns against excessive governmental control over the media.

3.8 Impunity

The government made several commitments to address impunity in its report to the Human Rights Council in 2008. The report identified the general reluctance of victims and witnesses to participate in criminal proceedings as one of the key reasons for the government's inability to effectively investigate human rights violations and prosecute perpetrators.[123] Hence the government specifically undertook to enact legislation for the protection of victims of and witnesses to crime. It was hoped that this enactment would 'ensure greater participation in investigations and prosecutions of human rights violations including cases of torture, killings, abductions and disappearances which remain unresolved due to lack of evidence.'[124]

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122 See *Centre for Policy Alternatives* v. *Minister of Mass Media & Others*, SC (FR.) Application No. 478/2008, Petition.

123 'National Report to Human Rights Council', at p.17.

124 *Ibid.*

Yet despite these undertakings, there were no reported convictions of perpetrators of serious human rights violations in 2008. The Presidential Commission of Inquiry (COI), formed under international pressure to investigate sixteen incidents of grave human rights abuses, failed to make any significant progress. The process was so flawed that the International Independent Group of Eminent Persons (IIGEP), after regularly raising serious concerns, eventually withdrew from its observer role.[125] Four Sri Lankan commissioners also resigned.[126] The IIGEP stated that the COI had not been able to investigate cases in an efficient and independent manner in accordance with international standards. In June 2009, amidst much criticism and a virtual stalemate in many of the pending cases, the COI ceased operations.[127] The COI submitted a report to the President, which unfortunately was never made public. Moreover, the COI reportedly investigated only seven of the seventeen cases it was asked to review. One of the high profile cases that the COI did complete involved the 2006 killing of seventeen local staff of the French NGO, Action contre la Faim (ACF). The COI reportedly determined that ACF was principally to blame for the deaths for having allowed their employees to work in an area where violence was likely to occur. The COI also exonerated all government security forces by concluding that the LTTE was responsible for the killings, contrary to many independent analyses of available evidence that pointed towards government involvement, namely the police, Muslim Home Guard, and Special Task Force members.[128]

A separate Commission of Inquiry set up to investigate abductions, disappearances, killings, and unidentified bodies completed its mandate on 31 December 2009 with a final report to the President due in early 2010.

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125 See 'HRW Country Summary'.

126 *Ibid.* Also see Amnesty International, 'Twenty Years of Make-believe: Sri Lanka's Commissions of Inquiry' (2009) ('Twenty Years of Make-believe'), at p.6.

127 Amnesty International, 'Sri Lanka: Presidential Commission Of Inquiry Fails Citizens', 17 June 2009, at http:// www.amnesty.org/en/for-media/press-releases/sri-lanka-presidential-commission-inquiry-fails-citizens-20090617.

128 See '*U.S. Country Report*'. For a comprehensive analysis of the ACF case, see 'Twenty Years of Make-believe', at pp.21-25.

In November 2009, the Commission informed the press that in many cases relatives of disappeared persons had not filed reports with the local police, hampering investigations.[129] Other observers commented that this was likely due to a fear of reprisals and a strong belief that the local police were unlikely to be of any real assistance.[130]

Impunity was not limited to government quarters. It its 2009 report, Human Rights Watch described the violations committed by the TMVP as a 'shocking display of impunity'. [131] The group is suspected of numerous serious abuses of human rights including the abduction of hundreds of teenagers to serve as child soldiers, and the torture, holding as hostage and killing of hundreds of civilians.[132] There have been no official investigations into these allegations. In fact, the founder of the group, Vinayagamoorthy Muralitharan *alias* Karuna Amman, enjoys government support and was inducted as a Member of Parliament in October 2008. His induction came despite being sentenced to nine months in prison for traveling on a false diplomatic passport in the United Kingdom.[133] Muralitharan's entry into Parliament was later described as 'a travesty of justice' by some international human rights groups.[134]

In its submission to the UN Universal Periodic Review in 2008, Amnesty International expressed grave concern about 'the persistent climate of impunity for human rights abuses in the context of the conflict, reported by human rights activists and other civil society actors in Sri Lanka.'[135] The organization hence emphasized the urgent need for systematic monitoring and prompt, impartial and effective investigations.[136] Despite the government's

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129 See '*U.S. Country Report*'; '*AI 2009 Report*'.

130 *Ibid.*

131 See 'HRW Country Summary'.

132 *Ibid.*

133 See 'Gotabhaya 'gave me passport", *BBC Sinhala.com*, 25 January 2008, at http://www.bbc.co.uk/sinhala /news/story/2008/01/080125_karunajail.shtml.

134 See Amnesty International, 'Sri Lanka: Karuna's presence in Parliament a travesty of justice', 7 October 2008 at http://www.amnesty .org/fr/node/6116.

135 '*Amnesty International Report to the UPR*', at p.4.

136 *Ibid.*

expressions of commitment to human rights and the international community's condemnation of human rights abuses, by the end of 2009, little progress had been made towards ridding the country of impunity.

3.9 The International Framework

The period of review may be described as one of the most turbulent times for the Government of Sri Lanka at international fora. On 21 May 2008, Sri Lanka lost its bid for reelection to the UN Human Rights Council. A broad coalition of national and international NGOs raised strong objections to Sri Lanka's candidacy, pointing to its poor human rights record and failure to meet past commitments to the Council.[137] According to a report released by Human Rights Watch in 2009, 'several influential actors, including co-chairs of the peace process in Sri Lanka—the European Union, Japan, Norway, and the United States—denounced abuses by government and LTTE forces and called on all sides to respect civilian life and humanitarian space.'[138] The government's response throughout the period was hardly cordial. Senior government officials sharply criticized many eminent international figures who voiced concerns over the deteriorating human rights situation in Sri Lanka. Some, such as UN Secretary General Ban Ki-moon and Nobel Laureates Bishop Desmond Tutu, Adolfo Pérez Esquivel, and Jimmy Carter were crudely described as 'LTTE dupes' or 'sympathizers'.[139] There were also aggressive public statements from senior government officials in 2008 against international agencies, including the UN, with many accused of being LTTE supporters or sympathizers. Moreover, according to Human Rights Watch, 'Humanitarian aid agencies' operations were significantly affected with restrictions on movement and difficulties obtaining visas and work permits for expatriate staff.'[140]

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137 See 'HRW Country Summary'.

138 *Ibid.*

139 *Ibid.* Also see The Ministry of Defence, Sri Lanka, 'Letter to Jimmy Carter by an ordinary Sri Lankan Citizen', http://www.defence.lk/new.asp?fname=20080525_05; The Carter Center, 'Statement From The Carter Center on Upcoming U.N. Human Rights Council Elections' 16 May 2008, at http://www.cartercenter.org/news/pr/ human_rights_council_elections.html.

140 See 'HRW Country Summary'.

The recurrent tension between the government and international actors was also evident in the government's interpretation of its treaty body obligations. In its report to the Human Rights Council, the government highlighted that an important matter for consideration was the implications of the recent judgment of the Supreme Court in the *Singarasa case*.[141] The 2006 judgment had sent shockwaves through the human rights community, as it called into question the President's authority to accede to the Optional Protocol of the ICCPR. Thus the government was confronted with the difficult task of resolving the several questions raised by the judgment in relation to the application of international treaties in domestic law and also the fulfillment of obligations under international law.[142]

In July 2008, Sri Lanka rejected the recommendation made by at least ten states during its Universal Periodic Review to establish an independent human rights monitoring mechanism, in co-operation with the UN High Commissioner for Human Rights, despite a dysfunctional domestic criminal justice system.[143] As discussed above, this was a highly contentious issue, as many human rights actors including then High Commissioner for Human Rights, Louis Arbour, strongly advocated for the establishment of an OHCHR[144] country presence in Sri Lanka to provide for independent monitoring of the human rights situation and to provide technical assistance to the National Human Rights Commission.[145] This recommendation, however, was never implemented.

In May 2009, certain member states of the UN Human Rights Council attempted to adopt a strong resolution condemning the military strategy of the Sri Lankan government during the final stages of its military campaign against the LTTE and calling for independent investigations into the alleged

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141 *Nallaratnam Singarasa v. The Attorney General* S.C. Spl. (LA) No. 182/99, decided on 15 September 2006.

142 '*National Report to the Human Rights Council*', at p.21.

143 See '*AI 2009 Report*'.

144 Office of the High Commissioner for Human Rights.

145 See '*AI 2009 Report*'. Also see 'Official Press Release of the High Commissioner' on 13 October 2007, at http://reliefweb.int /node/245932.

violations of international humanitarian law.[146] The draft resolution did not, however, receive the full support of the Council members and was ultimately defeated. In its stead, a heavily watered down resolution was passed by the Council, *inter alia*, '[w]elcoming the conclusion of hostilities and the liberation by the Government of Sri Lanka of tens of thousands of its citizens that were kept by the Liberation Tigers of Tamil Eelam against their will as hostages, as well as the efforts by the Government to ensure the safety and security of all Sri Lankans and to bring permanent peace to the country.'[147] The defeat of the draft resolution, is indicative of the deep politicization of the Human Rights Council and the inherent weaknesses within its structure and composition.[148]

Notwithstanding developments in the Human Rights Council, both the European Union and the United States drew attention to the poor human rights record of the government and the possible commission of war crimes by armed forces during the final stages of the war.

On 18 October 2008, the European Commission adopted a decision to investigate the effective implementation of certain human rights conventions in Sri Lanka.[149] Such compliance was one of the conditions under which Sri Lanka benefitted from the more generous tariff preferences offered under the EU's special incentive arrangement for

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146 See S-11/... Draft decision on the human rights situation in Sri Lanka, Human Rights Council, Eleventh special session, A/HRC/S-11/L.2, 25 May 2009.

147 See S-11/1 Assistance to Sri Lanka in the promotion and protection of human rights, Human Rights Council, Eleventh special session, A/HRC/S-11/2, 26 June 2009, at p.4.

148 The resolution was ultimately passed with 29 votes in favour of it. The voting was as follows: *In favour*: Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia (Plurinational State of), Brazil, Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia; *Against*: Bosnia and Herzegovina, Canada, Chile, France, Germany, Italy, Mexico, Netherlands, Slovakia, Slovenia, Switzerland, United Kingdom of Great Britain and Northern Ireland; *Abstaining*: Argentina, Gabon, Japan, Mauritius, Republic of Korea, Ukraine.

149 European Commission Directorate General for Trade, 'EU Generalised System of Preferences: Commission initiates investigation on the effective implementation of certain human rights conventions in Sri Lanka' at http://trade.ec.euro pa.eu/doclib/docs/2008/october/tradoc_141139.pdf.

sustainable development and good governance (the GSP+). At the end of the period of review, less than hospitable exchanges between the EU and the Government of Sri Lanka continued to take place, with the former emphasizing on the paltry human rights record of Sri Lanka and the latter contending that an international investigation would entail an interference with state sovereignty.

Moreover, the U.S. Department of State submitted a report to Congress in 2009 highlighting certain allegations that war crimes and crimes against humanity were committed during the final stages of the war in Sri Lanka.[150] Though the report did not arrive at any concrete conclusions due to a dearth in verifiable evidence, it listed out allegations including the targeting of civilian objects, killing of captives or combatants seeking to surrender, disappearances and poor humanitarian conditions, all of which are clear violations of international humanitarian law. Both the government and the LTTE were listed as the alleged perpetrators of such violations, though a majority of the allegations pertained to the government. Notwithstanding the acknowledged limitations in the State Department's ability to collect and corroborate information,[151] the report in many ways set the stage for intense and often highly polarized discussions on Sri Lankan war crimes both at domestic and international fora. Hence the question of war crimes may very well become the singular most important issue that confronts the country in the immediate future.

4. Conclusion

2008-2009 was a challenging period for human rights in Sri Lanka. It was also a period of transition. Hence, in many ways, these two years have set the stage for a new era of hope where a steady improvement in the human rights situation could be expected. Yet a critical analysis of Sri Lanka's track record during 2008 and 2009 reveals certain ominous signs of things to

150 U.S. Department of State, 'Report to Congress on Incidents During the Recent Conflict in Sri Lanka' (2009), at http: //www.state.gov/documents/organization/131025.pdf.

151 *Ibid.* at p.9.

come. Many of the promises made by the government during Sri Lanka's Universal Periodic Review in 2008 turned out to be false. Moreover, a culture of triumphalism has rapidly enveloped the nation, which would no doubt be detrimental to future efforts towards sustainable peace and reconciliation.

Looking into the future, the government must now focus on dramatically improving the human rights situation in the country. As public confidence in local institutions has waned, the government must, first and foremost, establish a strong and independent mechanism for the monitoring of human rights. Hence the constant offers made by the OHCHR to help build national capacity must be taken seriously. It seems only logical that an international independent monitoring mission is established—at least as an interim measure—to provide timely assistance to the NHRC and accelerate the process in which its capacity and credibility is rebuilt.

Moreover, the government must establish independent mechanisms to investigate alleged abuses committed during the last two years, particularly during the final stages of the military conflict. In this context, the culture of impunity that is now entrenched in Sri Lanka requires urgent attention. Past domestic efforts to investigate violations, including the infamous COIs, have failed miserably at securing justice. Hence the Government of Sri Lanka must establish an investigatory mechanism that retains its independence from political manipulation and enjoys the endorsement of all stakeholders including the minority communities that were most affected by the armed conflict. This mechanism should strike a fine balance between restorative justice and certain elements of retributive justice where perpetrators of gross human rights violations are punished.

Human rights, and necessarily the violation thereof, is increasingly becoming a matter of international concern. The flagrant violation of human rights, if left largely unaddressed at the domestic level, may be regarded as an assault on the entire regime of international law. Thus it is not difficult to anticipate serious scrutiny of human rights violations in Sri Lanka by the international community in the upcoming year. How the country responds now will determine how it is judged by history.

II

INTEGRITY OF THE PERSON

Ambika Satkunanathan[1]

1. Introduction

The years 2008 and 2009 were decisive in the history of Sri Lanka. January 2008 saw the formal abrogation of the Ceasefire Agreement (CFA) leading to an escalation of the armed conflict ending with the defeat of the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. The second half of 2009 was no less volatile as nearly 300,000 internally displaced persons (IDPs) were housed in closed camps under, initially, conditions that failed to meet basic standards. This two year period was important also because the state stepped up both formal and informal restrictions on the exercise of human rights and strengthened the national security apparatus, effectively shrinking space available for dissent by using the war rhetoric. These developments had a profound impact on the integrity of the person. This chapter will illustrate that while the integrity of the person was adversely affected during the hostilities, the effect of the consolidation of power in the executive and lack of viable and functioning accountability mechanisms has had a more far reaching impact on the ability of citizens to safeguard their physical integrity and exercise basic human rights. Incidents that took place during the war which impacted adversely on the integrity

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of the person provide examples rather than a comprehensive catalogue of events. The chapter will discuss different forms of violations and the factors that shaped them, such as the introduction of new emergency regulations, and will examine state responses to these issues.

2. Impunity

The human rights situation in Sri Lanka deteriorated sharply from 2008 to 2009 with widespread impunity for violations and no attempt was made by the state to hold perpetrators of human rights violations accountable. With the victory in the North, the state began moving towards consolidating power and stepped up its crackdown on dissent. Further, the operation of armed-politico groups in the North and East during this period resulted in increased insecurity and a general climate of lawlessness.

The breakdown of the rule of law was illustrated by the extra-judicial manner in which several state officials and entities functioned. While many rights violations were inextricably linked to the armed conflict others were exacerbated by the prevailing militarized atmosphere, characterised by increased checkpoints, military presence and continued military influence over civil administration in the North, lack of effective local remedies and breakdown of existing social structures.

Law enforcement agencies have shown a persistent lack of will to investigate and bring perpetrators of human rights violations to justice. As referred to in the introductory section, the government expanded the national security apparatus, claiming it was required to strengthen the hands of the armed forces and police to win the war against the LTTE. This led to increasing impunity resulting in serious violations of human rights by state forces. With the escalation of the conflict, spaces for expressing dissent and challenging impunity shrunk rapidly and did not improve after the conclusion of the military offensive.

An incident involving a high ranking police official, who (along with his son and wife) was alleged to have been involved in the abduction and assault of IT student Nipuna Ramanayake, illustrates the magnitude of the

problem and challenges likely to be faced addressing systemic disregard for the rule of law:

According to the complaint lodged by a student who witnessed the abduction, he and Nipuna had been walking along a road when a jeep stopped nearby and armed men alighted from the vehicle, threatened them and dragged Nipuna away by force. Nipuna in his statement to the police and media said he was then blindfolded, pistol whipped by the abductors, taken to an unknown destination and pushed into a room where he was beaten with wooden poles and hockey sticks by several persons including the wife and son of SSP Vas Gunawardena, head of the Colombo Crime Division (CCD). Nipuna said he was blindfolded again and taken by jeep to the CCD office in Dematagoda and that SSP Vas Gunawardena joined them on the way. Nipuna was later released by the police into the custody of his parents.[2] The motive for the abduction was apparently a personal dispute between students. During the investigations it was revealed that the jeep belonged to the Colombo Crime Division and that Nipuna was kept in police custody. When the incident became public, the SSP was transferred to Police Headquarters and the Kaduwela Magistrate ordered the arrest of his son, Ravindu Gunawardena, and prevented him from leaving the country.[3] Following this Gunawardena's wife was arrested along with 8 other suspects. All were later granted bail.[4] Gunawardena himself was not arrested and to public knowledge was not subject to a disciplinary inquiry either.

Several new Emergency Regulations (ERs) promulgated in 2008 and 2009 also impacted adversely on the integrity of the person. On 5 August 2008, the government enacted emergency regulations amending Regulation 19 of August 2005 and included a provision which extended the maximum

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2 'Investigation on student abduction', *BBCSinhala.com* at http://www.bbc.co.uk/sinhala/news/story/2009/08/090807_vassgunawardena.shtml

3 'Ex-ccd chief gives statement on Malabe student attack', Asif Fuard, *Sunday Times,* 23 August 2009.

4 'All suspects in student assault case allowed bail,' Anjula Nishantha, *The Island,* 13 October 2009.

period of detention under a detention order (DO) issued by the Secretary of the Ministry of Defence, from 12 to 18 months[5] provided the person is produced before a magistrate every 60 days. The amendment also included a regulation that authorised shifting a person detained under Regulation 19 from fiscal custody to a place of detention stipulated in the detention order authorising his/her extension of detention.[6] These provisions compromised the physical integrity of the person by increasing the vulnerability of detained persons to torture and ill treatment.

3. Minorities under Threat

Minorities were placed under increasing scrutiny, particularly during the escalation of the conflict, with the introduction and stepping up of several security measures such as restrictions on the movements of the population of the North and cordon and search operations. Arrests, detention, disappearances and extra-judicial killings continued in 2008 and 2009, with the majority of the victims being Tamil.

In the immediate post-conflict period minorities felt a sense of vulnerability which has to be viewed within the context of the speech by President Mahinda Rajapakse on 19 May to mark the 'defeat of terrorism' and the 'end of the war', where he stated that the term 'minorities' has been erased from the vocabulary.[7] This apparent rejection of their ethnic identity and political demands coupled with the general climate of hostility, suspicion and government fear of LTTE infiltration into the Tamil community resulted in Tamils being placed under intense scrutiny and security checks. Groups that were in a situation of vulnerability to threat and attack constituted members of the minority communities- i.e. the IDPs (both Tamil and Muslim), Tamil humanitarian workers and the Tamil population in general who are under suspicion for being members or supporters of

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5 Regulation 1 (a) of Extraordinary Gazette 1561/11 of 5 August 2008.

6 Regulation 2 of Extraordinary Gazette 1561/11 of 5 August 2008.

7 Full speech at Ministry of Defence website: http://www.defence.lk/new.asp?fname=20090519_04 [July 12, 2009]

the LTTE, as well as human rights defenders, media personnel and any individual or group that expressed dissent.

4. The Eelam War IV

During and following the final phases of the armed conflict, sometimes referred to as the Fourth Eelam War, both the government forces and the LTTE were accused of indiscriminate attacks on civilians.

In July 2008, Army commander, Sarath Fonseka stated that for the first time in the history of the conflict the armed forces were working according to an overall military plan, 'which involved killing as many LTTE fighters as possible'. He also said "We don't go for the territory, we go for the kill"[8]. These comments illustrate the government's no holds barred approach to the armed conflict during the period. In fact, the military showed utter disregard for the importance of the protection of civilians since it resulted in the failure to adhere to principles of humanitarian law, which require warring parties to make a distinction between civilians and combatants and avoid indiscriminate attacks.

While the military offensive in the North intensified, the blackout of news from the conflict areas made it impossible to obtain statistics on attacks on civilians or casualty figures. The UN has estimated that close to 7,000 persons were killed during this period[9], which many believe is a conservative estimate. According to a Human Rights Watch report released on 21 2009 February, there were approximately 1,123 fatalities and 4027 casualties over a three week period from 20 January to 13 February[10]. In February 2009, UN Under Secretary-General for Humanitarian Affairs, John Holmes expressed concern about civilian casualties in the LTTE controlled areas

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8 'Sri Lanka army chief says just a year needed to finish Tigers', *Lankapress,* 30 June at http://www.lankapress.com/3.html_

9 'Ban denies UN covered up death toll in Sri Lanka', Louis Charbonneau, *Reuters,* 1 June 2009 at http://www.reuters.com/article/idUSTRE5507PG20090601

10 Human Rights Watch 'War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni', February 2009, p. 3.

and impressed upon the government the need to ensure adequate care and reception facilities for those crossing into government controlled areas. He identified the need for rapid and transparent registration procedures, reinforcing the civilian nature of the camps, facilitating family reunification and greater freedom of movement, and ensuring the earliest possible return of IDPs to their homes as challenges ahead.[11]

In the days leading up to the end of the armed conflict there were reports of continued shelling of the government declared No Fire Zone (hereinafter the Zone or NFZ). Although many sources placed responsibility upon the government, the state said it had stopped using heavy weaponry and blamed the LTTE.[12] During this period photographs depicting the plight of the civilians, who spent days without adequate food, shelter, water and sanitation and basic health care in the NFZ appeared in the international media and provoked international outrage.[13]

Unable to send food convoys to the LTTE controlled area by land, the World Food Programme (WFP) began delivering food by sea to those in the newly government designated safe zone. [14] These deliveries were based on government estimates, which were much lower than UN figures, of the population remaining trapped in LTTE controlled areas.[15] This resulted in less aid than required being sent to civilians in the LTTE controlled areas.[16]

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11 'Chief urges greater action to save civilians in Sri Lanka', 21 February 2009 at http://www.un.lk/media_centre/archived.php#

12 'Sri Lanka war hospital hit again', *AL Jazeera,* 13 May 2009 at http://english.aljazeera.net/news/asia/2009/05/20095131040721771.html ; Thomas Fuller 'Sri Lanka halts heavy weapon attacks on rebels' *New York Times,* 27 April 2009 at http://www.nytimes.com/2009/04/28/world/asia/28lanka.html

13 Most of the photographs were circulated via email by doctors who were in the NFZ.

14 'Over 3000 MT food delivered, P. Sivaramakrishnan, *BBCSinhala.com*, 4 May 2009 at http://www.bbc.co.uk/sinhala/news/story/2009/05/090504_wfp_displaced.shtml

15 On 10 Feb 2009 Minister for Human Rights Mahinda Samarasinghe stated that only 120,000 people remained in the conflict zone contradicting the UN figure of 250,000- 'Feeling civilians "killed by the LTTE", *Al Jazeera at http://english.aljazeera.net/news/asia/2009/02/2009210102032103854.html*

16 Sri Lanka: Growing concern over civilians trapped in conflict zone', *Hunger in the News-WFP,* 7 April 2009 at http://www.wfp.org/news/hunger-in-the-news?page=6&tid=311

According to the report of the Secretary-General on the Protection of Civilians 2009, 'even prior to the intensification of hostilities in Sri Lanka, (i.e. before the last phase of active armed conflict) restrictions on the movement of relief items into areas controlled by the LTTE hindered the provision of humanitarian assistance to those in need. Essential items, such as construction materials, were prohibited. The resulting shortages of construction materials affected meeting the shelter and sanitation needs of the affected population, while requests for medicines and for fuel quotas for humanitarian organisations often went unanswered, were only allowed in part, were delayed or were denied. As a result, hospitals were consistently short of essential medicines and lacked sufficient fuel to operate generators, refrigerators and ambulance services'.[17] This situation only worsened following mass displacement. For instance, there were no functioning health facilities in the Zone and basic medical supplies such as sutures and painkillers were not available leading to infections and possible amputations.[18]

Information on the plight of the civilians was relayed outside the NFZ by Sri Lankan Tamil doctors, Thurairaja Varatharajah, Thangamuttu Sathyamurthi and V. Shanmugarajah, who had been working in the Zone for several months. These doctors, who managed to escape the NFZ during the final days of the war, were detained by the military for allegedly leaking false information to the media. They were released on bail following a news conference arranged by the authorities at which they recanted their claims and stated they had inflated figures on casualties due to pressure from the LTTE[19]. During this period the LTTE prevented civilians from leaving the NFZ by often shooting and killing them. The group also engaged in increased forced recruitment of both adults and children.[20]

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17 *Report of the Secretary-General on the Protection of Civilians*, 29 May 2009, S/2009/277, p. 20.

18 Briefing on the humanitarian situation in Sri Lanka by John Holmes, 26 March 2009 at http://warwithoutwitness.com/index.php?option=com_content&view=article&id=88:26-march-2009-briefing-on-the-humanitarian-situation-in-sri-lanka-by-john-holmes-un-&catid=41:daily-hr-report&Itemid=65

19 'Sri Lanka medics allowed to work', Swaminathan Natarajan, 8 October 2009 at http://news.bbc.co.uk/2/hi/south_asia/8297568.stm

20 'LTTE killing civilians, UN says', *AL Jazeera,* 17 Feb 2009 at http://english.aljazeera.net/news/asia/2009/02/200921620151665741.html

When satellite images of the NFZ which showed evidence of aerial bombardment and shelling were released on the website of UNOSAT[21] the government accused the UN of engaging in spying on Sri Lanka. In response UNOSAT Programme Manager Francesco Pisano told the media that the report was compiled to assist UN agencies and aid organizations in Sri Lanka and had been inadvertently placed on their website.[22] The UN in Sri Lanka in a letter to Minister Mahinda Samarasinghe stated that the images taken of the 'no-fire' zone by UNOSAT was not done secretly but with the consent of the government with whom the information was shared.[23]

Following the end of the war nearly 300,000 IDPs were detained in closed camps in Vavuniya. These sites were guarded by the military, over-crowded and provision of basic services was well below accepted international standards, particularly during the initial months. People were not allowed to leave the camps and had to queue for hours to obtain food, health care and access sanitation facilities. Water shortages were common as were overflowing toilets.[24] There were also reports of communicable diseases such as chickenpox and deaths due to lack of access to medical care were reported.[25]

The plight of vulnerable groups such as the elderly, the disabled, those with mental health issues and unaccompanied children and young persons, caused particular concern. In many instances, these persons had travelled to government controlled areas alone or had become separated from their families and had no carers, rendering them unable to access food, health

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21 'Leaked UN satellite images 'show haven for Sri Lanka refugees was bombed, Jeremy Page, *The Times,* 1 May 2009 at http://www.timesonline.co.uk/tol/news/world/asia/article6201379.ece

22 *Ibid.*

23 'Photographs were taken with consent of government-UNO, 6 May 2009 at http://www.lankatruth.com/index.php?option=com_content&view=article&id=1920:photographs-were-taken-with-consent-of-government-uno&catid=34:lead-news&Itemid=50

24 Amnesty International 'Unlock the Camps in Sri Lanka: Safety and Dignity for the Displaced Now- A Briefing Paper', London, 10 August 2009, pp 18-20 at http://www.amnestyusa.org/countries/sri_lanka/unlockthecamps.pdf

25 *Ibid.*

care etc.[26] Disturbingly, the magistrate of Vavuniya found that 30 starvation deaths had taken place as of 27 April and on average 5 deaths took place daily.[27] In some cases elderly and physically disabled people and those with mental health concerns were found sitting alone or sleeping under trees. The restriction on the freedom of movement of IDPs meant that even those who had the option of staying with a host-family were forced to stay in the camps. Although the government agreed to release those over the age of sixty to relatives living outside the camps, the process was slow.[28]

Conditions faced by civilians during the last stages of the war illustrate the severe strain they experienced in safeguarding their physical integrity and security. Further, the approach of the government in either discounting or challenging the reports of various humanitarian agencies including the ICRC and seeking to prevent them from engaging in protection work with the displaced, posed considerable additional obstacles to safeguarding the integrity of the person. This was nowhere more evident than in the subsequent arrest and treatment of the doctors in the NFZ who throughout the war were engaged in both protecting lives and advocating for increased protection of civilians through sharing information with the world outside the NFZ.

4.1 Violations of International Humanitarian and Human Rights Law during Eelam War IV

During the two year period under review in this chapter various violations of humanitarian and human rights law have taken place. Since detailed reports on these issues by international and local human rights groups are available, this section will present only a general contour of the issues of concern for the sake of completeness.

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26 'In search of refuge for elderly IDPs', Himangi Jayasundere, *Norwegian Refugee Council,* 9 July 2009 at http://www.nrc.no/?did=9427931

27 B/827/9, 27 April 2009.

28 As at 31 December 2009 108,106 persons remained in the camps- OCHA Joint Humanitarian Update, 19 Dec 2009 -1 Jan 2010.

4.2 Right to Liberty and Freedom of Movement

As early as July 2008 civilians displaced by the military offensive in the North and fleeing the Vanni were interned at a camp at Kalimoddai in the Mannar district clearly violating both international law such as Article 12 (1) of the International Covenant on Civil and Political Rights and Article 14 (1) (h) of the Constitution of Sri Lanka, both which protect an individual's freedom of movement. It was reported that those in the camp were subjected to restrictions on movement with their movement regulated by a pass system whereby a family member had to guarantee the person's return in the evening. Only 30 such passes were reportedly issued each day.[29] The Sri Lankan government argued that the persons were being kept in the camp for their own protection against reprisals from the LTTE. Even those returning from India were detained at the camp. This was followed by the establishment of a similar camp in Sirukkandal and later Menik Farm in Vavuniya to house close to 300,000 IDPs where restrictions were at first even tighter.

4.3 Protection of Civilians in Armed Conflict

During the last stages of the war civilian protection was increasingly under threat by both the government and the LTTE despite the obligation to respect customary rules of humanitarian law. Rules 1, 6 and 7 require a distinction to be made between civilians and combatants with attacks directed only to combatants; customary rule 11 prohibits indiscriminate attacks and rule 15 requires parties to the conflict to take all feasible precautions to avoid and minimize incidental loss of civilian life. The government has been accused of indiscriminate and possible disproportionate aerial bombardment and artillery attacks, and the LTTE reportedly used civilians as human shields by preventing them from leaving the combat zone, deployed their cadres in crowded civilian spaces and engaged in forcible recruitment, including of children.[30]

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29 Human Rights Watch, 'Besieged, Displaced, and Detained: The Plight of Civilians in Sri Lanka's Vanni Region', 23 Dec 2008, pp 10-14 at http://www.hrw.org/en/node/78844/section/1

30 Human Rights Watch *'War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni,* , February 2009; , International Crisis Group,*War Crimes in Sri Lanka*, Asia *Report no 191*, 17 May 2010.

Philip Alston, the UN Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions reiterated these concerns in his 2010 report through reference to the Urgent Action letter dated 30 April 2009 he sent the government regarding civilian casualties, which points out that a violation of the right to life of civilians and non-combatants is a contravention of humanitarian law; to date he has not received a response.[31] Alston's report also states that 6432 persons were killed over a four month period from 20 January 2009 to 21 April 2009, of whom 5580 were killed in the government declared NFZ. It was reported that 85% had died as a result of shelling despite government announcement in February that heavy weapons would no longer be used. Alston's report further states that shelling continued in April after yet another government announcement on 27 April that heavy weapons would not be used.[32]

Since the end of the war there have been several calls for an independent and credible international investigation of possible war crimes committed by both parties to the conflict; calls which have been dismissed by the government.

4.4 Child Recruitment

The Special Representative of the Secretary-General on Children and Armed Conflict in her report to the Human Rights Council covering the period May 2009 to May 2010[33] sets out the findings of her Special Envoy Patrick Cammaert's visit to Sri Lanka in December 2009, which include concerns about the re-integration of former child combatants, confinement of children in camps and recruitment and re-recruitment by Inaya Bharathi, an affiliate of Deputy Minister Vinayagamoorthy Muralitharan, alias Karuna, in the Eastern Province.

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31 A/HRC/14/24/Add1- 18 June 2010, p. 253.

32 *Ibid,* p. 254.

33 A/HRC/15//58-

Cammeart in his report details child recruitment by LTTE, which increased during the last stages of the conflict[34], and expresses concern about many who were recruited as child combatants and were sent to adult surrendee centres as they were over 18 at the end of the war[35], although the Paris Principles and Commitments 2007 require that these persons be treated with special consideration. As of December 2009, all but two child combatants had been located or released. These two cases are instances of recruitment attributed to 'commander' Inaya Bharathi in Ampara in the Eastern Province.

The report also describes the context following the end of the war when the government announced that even those who 'had spent even one minute with the LTTE' should surrender to the authorities. Parents therefore 'surrendered' children who were taken away, sent first to adult sites and later to centres for children. There are no known guidelines which were followed with regard to screening the children, ascertaining their level of involvement and determining the level and duration of 'rehabilitation'[36] to which they had to be subjected.[37] Children in the centres did not know the proposed length of their stay; even though maximum period of stay as stipulated in the legal framework is one year, many children had already spent time in the adult centres and experienced delay in the processing of their cases. Therefore, their total period in the custody of the state exceeded one year.

Cammeart also identified other shortcomings in the legal process that don't provide adequate protection for children, such as the absence of parents and guardians during the magisterial inquiry. Although the law allows the release of children into the care of their parents, magistrates rarely chose this avenue. According to Cammeart, in the months preceding his visit, the

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34 *Mission report of the visit of Major General (ret.) Patrick Cammaert, Special Envoy of the Special Representation for Children and Armed Conflict to Sri Lanka* 5-11 December 2009, p.5 at http://www.un.org/children/conflict/_documents/SriLankavisitReport09.pdf

35 *Ibid, p.6*

36 The process of rehabilitation of child surrendees is governed by Emergency Regulation 1580/15 of December 2008.

37 Cammaert p.8.

Vavuniya magistrate had released only 7 girls in various stages of pregnancy into the care of their parents.[38] Other concerns include the militarisation of the rehabilitation and reintegration process; for instance, 40% staff at the Poonthotam and Ratmalana centres were members of the Cadet Corps.[39]

5. Extra-Judicial Killings

Following the resumption of the conflict during the years under review there was a dramatic increase in the number of extrajudicial killings. As in the case of disappearances and abductions, these killings were alleged to have been committed primarily by state security forces for counter insurgency purposes and by Tamil armed groups, including the LTTE to eliminate rivals, although police killings of criminal suspects also took place during the period. According to the report of Philip Alston, the Special Rapporteur on Extra-Judicial Arbitrary or Summary Executions covering the period January 2009 to April 2010, Sri Lanka is one of 15 countries which received the most number of communications along with Iran, Saudi Arabia, Yemen, China, Sudan and Iraq. At the same time Sri Lanka was also one of the countries that had responded to the Special Rapporteur's communications with a less than 30% no response rate.[40]

Several politicians were assassinated in 2008:

United National Party (UNP) MP Maheswaran was gunned down in a temple as he was returning after religious observances on New Year's day. The UNP blamed the government for his assassination citing the downgrading of his security.[41] Investigations revealed the assassin had been employed by the Eelam People's Democratic Party (EPDP.) Prior to his death, Maheswaran had made statements to the media that he had information regarding the perpetrators of the abductions that were taking

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38 Cammaert, p.11.

39 Cammaert,p.12.

40 *Report of the Special Rapporteur on Extra-judicial, arbitrary and summary executions*, A/HRC/14/24, 20 May 2010, p. 26.

41 'Leading Sri Lanka Tamil MP killed', BBC, 1 January 2008 at http://news.bbc.co.uk/2/hi/7166560.stm

place in Jaffna, which he attributed to the EPDP.[42] Several persons were arrested in connection with the killing, and the police claimed that the main accused, who worked for the Ministerial Security Division, had committed the crime on the instructions of the LTTE.[43]

The Minister of Nation Building D.M. Dassanayake succumbed to injuries suffered in a roadside claymore attack in Ja-Ela on 8 January 2008.[44]

Maheswari Velayudan, Consultant to Social Services and Social Welfare Minister Douglas Devananda and the EPDP's representative to the APRC, was gunned down on 13 May 2008 by three armed men, believed to be from the LTTE while she was visiting her sick mother at her residence in Karaveddi, Kankaesanthurai. She succumbed to her injuries at the Jaffna Teaching hospital.[45]

Fr. Karunaratnam, Chairman of the North-East Secretariat for Human Rights (NESOHR), which was founded in 2004 as part of the 2002 Norwegian facilitated peace process, was killed on April 20 2008.[46] The claymore attack took place on the Mallavi-Vavunikulam road in the Vanni while his vehicle was being towed home from the Maangulam Church. The LTTE claimed the attack was undertaken by a Deep Penetration Unit of the Sri Lanka Army (SLA) and stated that his vehicle was well known in the area, implying Fr. Karunaratnam was the intended target of the claymore attack. The SLA condemned the killing and denied responsibility, instead blaming the death on internecine feuds.[47]

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42 'Maheshwaran's cry for justice', Dilrukshi Handunnetti, *Sunday Leader,* 6 January 2008.

43 'Maheswaran's killing: The MSD, the IGP, the EDPD and the govt', Dilrukshi Handunnetti, *Lankanewspapers.com*, 6 Jan 2008 at http://www.lankanewspapers.com/news/2008/1/23327_space.html

44 'A Sri Lankan minister is killed by bomb,' 'D.M. Dassanayake, *New York Times,* 8 January 2008 at http://www.nytimes.com/2008/01/08/world/asia/08iht-lanka.1.9075692.html

45 Maheswari Velayutham shot dead in Jaffna, Lankanewspapers.com, 14 May 2008 at http://www.lankanewspapers.com/news/2008/5/27875.html

46 'Fr. Karunaratnam killed', *Sri Lanka Guardian,* 20 April 2008.

47 'Death of Rev.Fr. Karunaratnam: Army refutes LTTE allegations, *Newsline,* 22 April 2008 at http://www.priu.gov.lk/news_update/Current_Affairs/ca200804/20080422death_of_rev_fr_karunaratnam.html

In July 2008, the remains of around twenty-one persons along with pieces of clothing were found on an uninhabited land in Palamimadu in Batticaloa, by persons digging a well close to a displacement camp.[48] The Batticaloa Judicial Medical Officer (JMO) concluded that the persons, both men and women, had been killed around five years ago. Following the discovery advanced laboratory tests were ordered on the remains to ascertain the identity of the persons. Cartridges of the kind used on T-56 rifles were also found at the spot. Reportedly, investigations are continuing.

On 25 August 2009, Channel Four TV released video footage of the SLA executing naked, bound and blindfolded persons, purportedly LTTE cadres killed in the north in 2009. The images were reportedly recorded by a soldier on a mobile phone. Eight bodies were shown in total in the video. The government challenged the authenticity of the video, denied allegations that its forces carried out extrajudicial executions and cast doubt on the independence of the source of the video, a group called Journalists for Democracy in Sri Lanka. The government then sought the assistance of four experts to analyse the tape. The reports of these experts stated that the image was captured on a camcorder or similar equipment rather than on a mobile phone as claimed, that it had been edited and undergone substantial audio dubbing. Further, according to them a time lapse between the time the shot was fired and when it was recorded meant it would have had to be recorded at a particular distance from which a mobile phone was incapable of capturing images with clarity. [49]

Philip Alston, the Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions expressed concern about the lack of impartiality of the experts recruited by the government to analyse the tape and pointed out that two of the four said experts were part of the SLA, the body whose conduct was being called into question while the third had been contracted by the state to provide assistance in similar matters in the

48 'Digging a well: Sri Lanka IDPs find skeletons', *Tamilweek.com,* 16 July 2008 at http://tamilweek.com/news-features/page/63.

49 'Channel 4 video an absolute fake- experts,' Shanika Sriyananda,*Sunday Observer,* 20 Sept 2009.

past.[50] After a lively exchange of correspondence with Rajiva Wijesinha, the Secretary to the Ministry of Human Rights and Disaster Management, Alston requested independent experts to undertake an analysis of the video. The findings by the three experts in forensic pathology, forensic video analysis and firearm evidence, rebutted the findings of the Sri Lankan experts and stated that the video contained 'strong elements of authenticity'[51]. Tamils Against Genocide and *The Times* also commissioned experts to study the video and all found no evidence of tampering and affirmed the authenticity of the video.[52]

6. Custodial Torture & Deaths

Several cases of custodial torture and deaths were reported during 2008 and 2009 and the state made no observable progress in improving the type and effectiveness of preventive and remedial measures; many problems identified in previous years continued to prevail. The UN Special Rapporteur on Torture in his report raises concern about the lack of legal obligation to initiate ex-officio investigations; the failure to prosecute perpetrators; and the use of reparations by the state as a substitute for prosecution.[53] He goes on to say that he had communicated with the GOSL requesting information about follow up of the recommendations of his 2007 visit to the country but to date had received no response.[54]

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50 'Sri Lanka should permit an impartial investigation into the Channel 4 videotape says UN expert', *transCurrents,* 17 Sept 2009 at http://transcurrents.com/tc/2009/09/

51 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Addendum, 18 May 2010, p.278.

52 Rhys Blakely, 'Sri Lankan war crimes video is authentic, Times investigation finds', *The Times,* 15 Dec 2009; Evidence submitted to the People's Tribunal in on Sri Lanka- Dublin, Ireland, 4 Jan 2010 at http://www.tamilsagainstgenocide.org/Docs/DublinTribunal/TAG-PPT-Extra-judicial%20Executions.pdf

53 *Interim report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, 10 Aug 2010, A/65/273, p. 13.

54 *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 Feb 2010, A/HRC/13/39/Add.6, p. 202.

There is no comprehensive data on the number of cases of custodial torture and deaths, but numerous cases were reported during the period under review.

A case of custodial torture and killing of two youths in Angulana in 2009 resulted in public outrage and subsequent arrest of the perpetrators. The victims, Dinesh Tharanga Fernando, a fisherman and Dhanushka Udaya Aponsu, a gym instructor, were taken into custody by the Angulana Police on the evening of 12 August at the Podujaya School premises in Angulana. The victims had been returning home after work and were stopped by police in the Lunawa area as they had allegedly teased a young woman who was reportedly in a relationship with an officer attached to the post.[55] The police informed the parents of the two men that they would be released the following morning, but when family members called over at the station early the next day, they were told that the suspects had been handed over to the Mount Lavinia Police. While on the way to the Mount Lavinia Police Station, Dinesh's family heard that his body was lying near the Ratmalana Cooperative stall and Dhanushka Udaya's body had been found near the Lunawa Bridge. The families claimed that two men who were detained in the same police cell with their sons told them the youths had been severely beaten in the night and taken away in a jeep before dawn.[56]

Tension prevailed in Angulana the following morning when residents of the area expressed their anger by obstructing train services between Moratuwa and Colombo protesting against the killing. A large crowd of more than 1000 angry residents vented their fury by staging a protest in the area and subsequently surrounded the Angulana Police and began attacking it with stones. Army and Police Anti-Riot Squads were immediately summoned to the scene to control the tense atmosphere which continued till late in the afternoon.[57] Seven Policemen including the

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55 'Sri Lanka outcry over police brutality,' Charles Haviland, *BBC News,* 29 Oct 2009.

56 *Ibid.*

57 'Funerals of youth killed by Sri Lanka police took place', *The Colombo Times,* 16 Aug 2009 at http://www.thecolombotimes.com/component/content/article/7328-funerals-of-youth-killed-by-sri-lanka-police-took-place-

Officer in Charge (OIC) of the Angulana Police were arrested.[58] As at 31 December the accused were awaiting trial.

7. Disappearances

Sri Lanka has a long history of disappearances, mainly related to two events in its political history; the youth insurrection in the South in the late 1980s, and the decades-long conflict in the North and East. Following the end of the 2002 cease-fire and resumption of conflict between the Sri Lankan government and the LTTE in 2006, there was a dramatic increase in abductions and disappearances.

While in the past disappearances related to the armed conflict took place mainly in the North and East, after hostilities resumed in 2006 an increasing number of disappearances also took place in the capital city of Colombo and its suburbs.[59] This was due in part to the large scale migration of North and East residents to Colombo during the CFA period, which the government feared masked the movement of LTTE cadres to Colombo. Disappearances could also be attributed to the emergence of the LTTE breakaway group TMVP, which functioned as a paramilitary force and was used by the state to identify or 'screen' LTTE cadres.[60]

State security forces, the LTTE, paramilitary groups -- particularly the Karuna faction/TMVP -- and criminal groups were all strongly implicated in engaging in abductions and disappearances. Sometimes political opponents were abducted in order to silence them, in other instances persons were abducted for the purpose of extorting money.[61] In the context of a deteriorating security environment criminal groups

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58 'Police kill 2 youth', Lankanewspapers.com, 14 Aug 2009 at http://www.lankanewspapers.com/news/2009/8/46829_space.html

59 Bureau of Human Rights, Democracy and Labour, U.S. Department of State, *2008 Human Rights Report: Sri Lanka*, 25 February 2009 at http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119140.htm

60 *Ibid.*

61 *Ibid.*

increasingly committed abductions for the purpose of extorting funds. Tamil and Muslim professionals have been the primary target of this practice, with incidents reported throughout the country, including Colombo.[62]

The 1999 report of the Working Group on Enforced and Involuntary Disappearances (WGEID) found that the Emergency Regulations and the Prevention of Terrorism Act, elements of which were also incorporated in new counter-terrorism regulations adopted in December 2006, were the main reason for the continuation of enforced disappearances.[63] As of December 2009 both remained on the statute books and continued to be enforced.

In June 2008 the WGEID issued a statement expressing concern about the high number of disappearances in Sri Lanka, particularly the vulnerability of women and humanitarian aid workers.[64] During this period 212 cases were reported to the WGEID.[65] The WGEID in its report for the period 5 December 2008 to 13 November 2009 states that 5,651 cases were outstanding at the end of the year under review.[66] Ninety- six new cases which allegedly took place during 2006 and 2008 in Colombo, Trincomalee, Mannar, Vavuniya and Jaffna and cited the police, military and security forces were reported to the Group.[67] In 2009, 100 cases were reported.[68] WGEID's request for a visit to Sri Lanka remained outstanding

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62 International Crisis Group 2007, *Sri Lanka's Human Rights Crisis*, Asia Report No.135, 14 June; Sri Lanka's disappeared: Gang demands Tamil exiles pay ransom for kidnapped relatives', D. McDougall, *The Independent*, 6 April at http://www.independent.co.uk/news/world/asia/sri-lankas-disappeared-gang-demands-tamil-exiles-pay-ransom-for-kidnapped-relatives-805256.html

63 *Report of the Working Group on Enforced and Involuntary Disappearances*, E/CN.4/2000/64/Add.1, 21 Dec 2009.

64 *Report of Working Group on Enforced and Involuntary Disappearances*, A/HRC/10/9, 25 Feb 2009, p. 73.

65 *Ibid*, p. 73.

66 *Report of Working Group on Enforced and Involuntary Disappearances*, A/HRC/13/31, 21 December 2009, p. 146.

67 *Ibid*, p. 147.

68 *Ibid*, p. 150.

following a response from the government that it would not be able to schedule the visit during the proposed dates. Although a reminder was sent on 20 July 2009, as at the end of the reporting period there has been no response from the government.[69] The government is also yet to report to the Group on the implementation of the recommendations issued following WGEID visits in 1991, 1992 and 1999.

8. Arbitrary Arrest & Detention

Sri Lanka has been ruled by emergency for the larger part since independence with successive governments over the years citing the armed conflict as a justification for maintaining emergency rule.

The Emergency Regulations (ER) imposed under the Public Security Ordinance and from 1979, the Prevention of Terrorism Act (PTA) served as a comprehensive and draconian legislative framework for countering terrorism. The ERs bestow broad powers on the police and armed forces to arrest and detain suspects for lengthy periods without trial. There are virtually no checks and balances and in many instances the exercise of power is not subject to judicial review.

The result for many years has been the targeting of mainly Tamil men who have been arrested on the basis of their ethnicity and region of residence or origin - the North and East. These young men are arrested and kept incommunicado for months without charges being filed. There are several sections of the PTA which enable the police and armed forces to arbitrarily detain with impunity. For instance, section 9 (1) of the PTA allows the detention of a person under a detention order (DO) for a period of three months initially in 'such place and subject to such conditions as may be determined by the Minister', and is renewable for a maximum of 18 months.

[69] *Ibid*, p. 149.

The PTA was effectively suspended under the Article 2.12 of the 2002 Ceasefire Agreement (CFA) but in December 2006 following a suicide attack on Defence Secretary Gotabhaya Rajapaksa the government announced its re-imposition[70], and also introduced tough new emergency regulations. With the escalation of hostilities from 2006, the formal abrogation of the CFA in January 2008, and the re-proscription of the LTTE in January 2009, arrests and detention of minority youth increased.[71] In most instances, these cases were not reported as illustrated by the report of the Working Group on Arbitrary Detention (WGAD) for the period which identifies only 6 men and 2 women and 6 men as 'persons concerned' in its reports for the periods 1 December 2007 to 30 November 2008[72] and 1 December 2008 to 30 November 2009[73] respectively. According to human rights lawyers and groups, persons are also being arbitrarily detained under the PTA and ER for non-terrorist offences. .

Surrendees

When nearly 300,000 IDPs crossed over from LTTE controlled territory during and following the end of the war, persons suspected to be LTTE cadres were detained by the SLA. Some surrendered at Omanthai and others did so after government announcements ordering people who had spent any time with the LTTE to identify themselves to the SLA. Still others were arrested out of displacement camps on suspicion of links to the group.

Regardless of whether the person actually 'surrendered' nearly 12,000 persons were identified as 'surrendees' and detained, allegedly for 'rehabilitation,' under Emergency Regulation 22. There was no transparent process to screen IDPs in order to separate combatants from non-combatants and for many, no due process before they were detained. Since

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70 http://www.wsws.org/articles/2006/dec2006/sril-d09.shtml; http://www.wsws.org/articles/2006/dec2006/sril-d09.shtml

71 For instance, on 26 March 300 persons were arrested in a search operation in Gampaha- *'Amnesty International Report 2010: Sri Lanka'*, Amnesty International, 28 May 2010.

72 *Report of the Working Group on Arbitrary Detention*, A/HRC/10/12, 16 Feb 2009.

73 *Report of the Working Group on Arbitrary Detention* A/HRC/13/30, 15 Jan 2010.

all civilians who lived in the LTTE controlled areas by necessity had some contact with the LTTE, the absence of a transparent screening mechanism meant that all IDPs were under suspicion and subject to restrictions on liberty and freedom of movement.

According to reports, screening took place in various forms in the IDP camps from where persons were taken to either rehabilitation camps or detention centres. Often family members were not informed where the person was being taken or provided with proof of arrest or detention in the form of the arrest receipt as stipulated by the Presidential Directives on Arrest and Detention.[74]

When the number of IDPs who crossed over into government controlled areas remained small, persons were detained at the northern town of Omanthai, then sent to the police station and produced before a magistrate who decided whether they were sent to the IDP camps, a rehabilitation centre or a detention centre.[75] Following the large influx of people, most were sent to the camps and detained/arrested at a later time. Most were not produced before a magistrate or given any opportunity to challenge their detention. Months after being detained at the centres, at the end of 2009, these persons were yet to benefit from rehabilitation programmes. Visits by family members to those detained in these camps were not allowed initially, but later permitted.

Neither the ICRC nor any other protection agency has had access to persons at the centres since July 2009. Further, these persons, some of whom as at December 2009 had been detained for nearly a year, did not benefit from or enjoy procedural safeguards such as access to legal counsel. It appears that most have not been provided information regarding their legal status or the rehabilitation process. At the end of 2009, in line with the Emergency Regulations (ER), only two "Protective Accommodation and Rehabilitation Centres" (PARC) had been officially established (by

[74] International Commission of Jurists, 'Beyond lawful constraints: Sri Lanka's mass detention of LTTE suspects', Sept 2010, pp-8-16.

[75] *Ibid.*

Notification published in the Gazette) for the purpose of receiving and housing adult surrendees: one site at Thellipallai, Jaffna and another at Senapura, Welikanda in Polonnaruwa. It continues to remain unclear whether the legal framework, in the form of Emergency Regulation 22, was applied to those being held at an unknown number of temporary centres.

During this period, the majority of surrendees had limited access to basic services, vocational training and recreational activities. Since ICRC lost access to persons at such centres, there has been no independent means of ascertaining the total number of surrendees. Reportedly, approximately 20 percent of surrendees are women[76], a number of whom were pregnant and it is not known whether their specific needs and vulnerabilities were addressed. Although some agencies, such as IOM, have had access to the centres, no agency has had access to undertake protection monitoring.

Regulation 22(8) entitles surrendees to meet parents, relations or guardians every fortnight with the permission of the officer-in-charge of the Centre, but testimonies indicate that no uniform procedures or rules for visits were applied at all centres. Many families have complained that they have not had contact with, nor know the whereabouts of relatives who were separated and taken away by the Sri Lanka Armed Forces (SLAF); it is thus possible that some surrendees have had no contact with their families.

Regular visits to the centres were not organised for those continuing to live in IDP camps. In the case of persons who were taken away from the centres for further investigation, it is not known if all family members were provided with arrest receipts as stipulated in Regulation 20 (9) of August 2005.

The government, with the assistance of the United Nations Development Programme (UNDP) and the International Labour Organisation (ILO) formulated a 'National Action Plan of the National Framework Proposal

[76] 'What is happening to ex-LTTE cadre surrendees?,' D.B.S. Jeyaraj, 30 July 2010, at http://dbsjeyraj.com/dbsj/archives/1599

for Reintegration of Ex-combatants into Civilian Life in Sri Lanka', but as of December 2009 it had not received cabinet approval. Nor had the government indicated a timeline for implementation of the plan. The Action Plan refers to the Emergency Regulations of 2005 and subsequent amendments as the applicable legal frameworks, but lacks clarity and does not adhere to international human rights standards.

For example, it states that the 'period of stay in the temporary centres prior to the arrival at the PARCs may be included in the maximum period of centre-based rehabilitation,' making the period discretionary, not mandatory. Further, the Action Plan does not state who has the power to make this determination and the criteria upon which it will be based. Currently, the decision-making authority with regard to the 'surrendees' lies entirely with the Secretary to the Ministry of Defence and there are no oversight or review mechanisms.

Regulation 22 (2) fails to provide a clear definition of a 'surrendee' except to state that anyone who surrenders in relation to an offence under certain laws, such as the Prevention of Terrorism Act, would be considered a surrendee. It further requires the person to give a written statement that s/he surrendered voluntarily. Concerns regarding the voluntary nature of 'surrender' remain.

A 'surrendee' can be held for a period of twelve months. At the end of this period there are two options: the person could be released after review by the Secretary to the Ministry of Defence or the period of rehabilitation could be extended for up to twelve months (in three month increments). It is important to note that any time after the expiration of three months after a person is first assigned to a centre, s/he can be investigated if s/he is suspected of committing an offence set out in ER 22 (2). Therefore, being part of the rehabilitation programme does not preclude the person from being arrested for an offence. As there is no mention of the period within which the investigation should be concluded, prosecution could be initiated against a person any time before the conclusion of the period of rehabilitation. The surrendee, therefore, has no certainty regarding his/

her legal position. Until the end of the rehabilitation period the surrendee would not know whether s/he might be prosecuted. If the person is prosecuted and found guilty, the Court may again order rehabilitation as part of the sentence.[77]

9. Threats against Human Rights and Humanitarian Workers and Journalists

During 2008 & 2009, a general climate of fear and intimidation prevailed for human rights defenders, humanitarian workers and media personnel with threats originating from both state and non-state actors. Emergency regulations were used to conduct arbitrary arrests and detain and stifle dissent by political opponents, journalists, and civil society activists. Government officials publicly stated that human rights violations were inevitable in times of conflict, and they would be addressed when the country had eliminated the problem of terrorism. Moreover, they added that speaking out against government policies would not be tolerated as it served to undermine the government.[78]

Lawyers defending fundamental rights petitions and other human rights cases have also been threatened by Sinhala nationalist groups[79] and some have experienced threats to physical security.[80] Human rights organizations, particularly those located outside Colombo, reported regular surveillance and often threats by state and non-state actors.[81] A number of well known human rights activists chose to leave the country during the period because of reported threats to their security. The marked absence of

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77 ER 22 (13).

78 'Sri Lankan Prime Minister denounces newspaper lawyers are traitors', *World Socialist Web,* 25 July 2009 at https://www.wsws.org/articles/2009/jul2009/sril-j25.shtml

79 'Mahason battalion threatens human rights lawyers', *Transcurrents,* 22 October 2008 at http://transcurrents.com/tc/2008/10/post_50.html

80 In Sept 2008 two grenades were thrown at the house of lawyer J.C. Weliamuna. Also see 'Ministry of Defence names Sunday Leader lawyers as traitors', *The Colombo Times,* 12 July 2009 at http://www.thecolombotimes.com/component/content/article/6230-ministry-of-defence-names-sunday-leader-lawyers-as-traitors

81 Interviews with human rights organisations.

clear statements from the government condemning attacks against human rights defenders along with failure to investigate incidents heightened the insecurity faced by these persons. Moreover, threats by government ministers and members of the current regime and public comments which appeared to incite or justify violence against human rights defenders led to increased impunity.[82] There was limited or sometimes no recourse at all for those under threat. There have been no investigations or prosecution of perpetrators, and the absence of safe houses or internal flight options further compromised the safety of vulnerable persons.

The deterioration was recognised by the Special Rapporteur on Human Rights Defenders who stated that in Sri Lanka 'A climate of fear and intimidation reigns over those defending human rights, especially over journalists and lawyers'[83]. She went on to say that she considers that the safety of defenders has worsened considerably by 2009, most significantly following denunciations of human rights abuses committed by parties to the conflict, of corruption by state officials and of impunity. Serious and fatal aggression against journalists and the media became common occurrences as witnessed in the killing of the journalist Lasantha Wickremetunga and attacks on major media outlets.[84]

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82 *Op.cit.* note 79.

83 Sri Lanka: UN Experts deeply concerned at suppression of criticism and unabated impunity', 9 February 2009 at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8323&LangID=E

84 *Ibid.*

10. State Responses

10.1 Judicial Responses

Since a separate chapter in the State of Human Rights report deals with judicial developments and fundamental rights jurisprudence, this section seeks only to cite a few decisions that provide a snapshot of judicial responses to the violation of the integrity of the person.

Although the Supreme Court is highly sophisticated, and over the years has had a progressive tradition of jurisprudence, its role has become increasingly politicised, particularly under the last powerful Chief Justice who retired in June 2009.[85] This trend was buttressed by the corresponding politicisation of the Attorney-General's Department.[86] During this period, a severe decline in the number of fundamental rights petitions being given leave to proceed was noted.[87] In relation to cases under the PTA and ERs, both decisions to prosecute and the final outcome of the case could be pre-determined, like for instance the case of journalist Tissanayagam.

The judiciary, particularly magistrates, exhibited reluctance to challenge the detention and treatment of detainees by the police and armed forces for reasons ranging from collegial and social connections to lack of human rights awareness.[88] The fear of exercising judicial oversight in cases of detention and prosecutions under the ERs and PTA were particularly acute[89] and compounded by ethnic and national security dimensions. Many persons detained under the PTA and ER also reported difficulties obtaining legal representation.[90]

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85 *Sri Lanka's Judiciary: Politicised Courts, Compromised Rights, Asia Report No. 172*, 30 June 2009, p. 8.

86 *Ibid*, p. 9.

87 *Ibid,* p. 12.

88 *Ibid,* p. 17.

89 *Ibid,* p. 18.

90 *Ibid.*

Despite this there have been positive decisions by the Courts, but a lack of political will has hampered implementation. The Supreme Court in its decision on the petition filed by a person who 'disappeared' and was later found at the Terrorism Investigation Department (TID) found that the registration of Tamils from the North and East had not in this case been ordered by the police, but by the Citizens Committee, and that the Police Spokesman had passed false information when he implied that the arrest was an order by the Police with the approval of the Attorney-General. Most importantly, the Court instructed the police to inform the family when a person is taken into custody and issue a receipt of arrest.[91]

The Court granted the Centre for Policy Alternatives (CPA) leave to proceed in an application challenging an amendment to the ER, which gave extraordinary discretion to the Executive to decide the place, manner and period of detention and extended the period of detention from a year to a year and a half. The CPA complained these provisions would lead to an abuse of discretion and violate the fundamental guarantees provided under international and domestic law to the manner of depriving the liberty of an individual according to the law and provide room for custodial torture.[92]

On the other hand, a decision relating to mandatory sentencing in rape cases adversely impacted upon the physical integrity of women. In this case, the Supreme Court ruled that mandatory sentencing violated judicial discretion and hence found the relevant section conflicted with Articles in the Constitution, including the equality provision.[93] This is cause for concern as the legal system in Sri Lanka is not particularly sensitive to the needs of victims in gender based violence cases which often tend to be ruled in favour of the defendant based on prejudices rather than evidence. Women's groups expressed concern about the issue being left to judicial discretion.

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91 http://www.lankanewspapers.com/news/2008/9/32709_space.html

92 *Centre for Policy Alternative v. Gottabaya Rajapaksa* SC (FR) Application No. 351/2008

93 SC Reference No. 30/2008

In July 2008 the Ceylon Workers Congress (CWC) filed a fundamental rights petition challenging police non-compliance with Supreme Court directions in carrying out search operations. Counsel for the petitioners stated that during a search operation in Wellawatte police officers had asked persons for their bank account details, requested them to complete forms that were only in Sinhala and asked for Grama Sevaka certificates in order to undertake police registration.[94] Many persons who were picked up during the operation were detained for a long period at the police station. Further, though Citizens Committees were functioning, counsel claimed they were not particularly effective as the representatives were selected by the OICs of the areas. The Court while cautioning any officer who failed to follow the said guidelines also stated that as per Sri Lanka's obligations under international law, the state was required to protect the right to privacy of individuals. The Court directed the petitioner in consultation with civil society organisations to nominate persons to the Committees to 18 police stations in Colombo and 15 stations in Colombo North and South. It also ordered the publication of its decision in Sinhala and Tamil newspapers.[95] The petitioner was directed by the Court to submit representations to the Additional Solicitor General and Director of the Legal Unit of the police department if persons were detained beyond the stipulated period. Court further ordered that the local police who conduct search operations should be accompanied by members of the Committee.[96]

Magistrates have also made positive orders that have strengthened protection of the integrity of the person. In April 2009, the Vavuniya Magistrate found that several starvation deaths had occurred amongst the elderly in the IDP camps because of inadequate facilities and services. He emphasized the need to protect the rights of the elderly, women and children and ordered the compilation of details of people in the camps

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94 "Police spokesman had passed false information: SC', Susitha R. Fernando, 23 Sept 2008 at http://www.lankanewspapers.com/news/2008/9/32709_space.html

95 *Ibid.*

96 It is interesting to note that the Chief Justice who delivered the Sinharasa judgment which challenged the applicability of international human rights law in Sri Lanka has in this judgment referred to Sri Lanka's international obligations.

who were above 60, which was to be made available to the Grama Sevakas (GS) in the concerned welfare centres. The order also required anyone over 60, living alone in the welfare centres and ill to be sent to an elders' home and given care, and mandated the release of persons above the age of 60 who had family who were willing to accommodate them.[97]

Similarly, the Trincomalee Magistrate's Court gave a positive ruling in the case of a man who was arrested by the Navy while crossing into government controlled territory on 1 April 2008 and handed over to the Kuchiveli police. The man was detained for 90 days under a DO at the end of which the police sought to transfer him to a surrendee camp. His counsel argued that he should not be sent to a surrendee camp as he was not a terrorist, had not been involved in any terror activities and had not 'surrendered'. The court found that he could not be sent to a surrendee camp since he had not surrendered. It further pointed out that the government did not stipulate the period for which he would be kept at the surrendee centre. Based on these factors, the court decided that it would be a contravention of law to send him to a surrendee camp and ordered his release.[98]

The request of the Special Representative of the Secretary-General on the Independence of Judges and Lawyers to visit Sri Lanka has been pending since 1999.

10.2 National Human Rights Commission

The International Coordinating Committee of National Human Rights Institutions (ICC) downgraded the status of the Human Rights Commission from 'A' to 'B' in October 2007 due to its failure to meet international standards of independence as well as its non compliance with the Paris Principles in relation to the appointment of its members; the President appointed the members instead of the Constitutional Council as stipulated by the 17th Amendment to the Constitution. During the period under review, the performance of the HRC has been lacklustre at best, with

97 B/827/9, 27 April 2009.

98 B.R.2763/2008, 2 July 2008.

the Commission failing to even perform most of its core functions. For instance, the Commission made no attempt to proactively engage with the SLA and the Police and urge them to report arrests and detentions under the Prevention of Terrorism Act (PTA) or an Emergency Regulation and formulate means of tracking such arrests, despite routine failures by the SLA and police to comply with legal requirements to do so. Under the Human Rights Commission Act, the Commission should be informed of such arrests and the place at which the person is being detained, no later than forty-eight hours from the time of arrest. The Commission also has to be informed of any transfer or release and the new place of detention, yet this provision too is not adhered to.

During the period under review, the HRC considerably scaled down visits to police stations and other places of detention; neglecting its mandate under section 28 (2) of the Human Rights Commission Act which empowers any person authorized by the Commission to enter and inspect a police station, prison or place of detention and speak to the detainees. The HRC's failure to act to protect detainees reflects both a lack of political will and the reality of its reduced funding – a material manifestation of the state's lack of interest in ensuring the HRC's effectiveness. The lack of respect and regard on the part of the government for the HRC, as illustrated by the initial refusal of permission to the Commission to visit closed IDP displacement camps in Vavuniya, has contributed to its virtual debilitation. The HRC was later allowed to visit with the permission of the military. [99]

10.3 Commission of Inquiry & the International Independent Group of Eminent Persons (IIGEP)

The Commission of Inquiry established by Presidential Warrant in November 2006 to 'Investigate and Inquire into Serious Violations of Human Rights' (COI), had a limited mandate to investigate 15 cases dating from 1 August to 16 October 2006 within one year (an additional case was later added making the total number of cases 16). It concluded its tenure

[99] Country of origin information bulletin: Sri Lanka, UK Border Agency, 13 Oct 2009.

in June 2009 without fulfilling its mandate. The COI investigated only seven of the sixteen cases and held public hearings in even fewer cases.[100] The reports of the completed 7 cases were handed over to the President but to date have not been made public. Investigations were completed on the killing of the five youth in Trincomalee; the abduction and killing of 14 villagers while they were travelling from Muttur to Kantale; the killing of 51 people in Sencholai; the killing of 10 Muslim villagers at Redealla; the killing of 68 bus passengers in Kebetigollawa; the killing of the 98 navy personnel at Digampathana and the killing of 17 Aid workers of the French INGO, Action Against Hunger (ACF). Justice Udalagama, the Chairperson of the COI stated that setting up a permanent commission comprising local personalities to inquire into allegations of serious violations of human rights against the security forces and police was one of the main recommendations made by the COI in its final report.

The International Independent Group of Eminent Persons (IIGEP) established in February 2007 to observe the work of the COI with the aim of ascertaining whether it was functioning according to international norms and standards, formally ended its observation role in Sri Lanka on 31 March 2008. The relationship between the COI and the IIGEP became increasingly fractious and hostile following the expressions of concern by the IIGEP regarding, amongst others, the lack of progress of investigations, the role played by the Attorney-General which adversely impacted on the independence of the COI, the lack of financial independence of the COI and lack of victim and witness protection schemes. [101] In its final statement issued on 15 April, the IIGEP cited these reasons for its termination and stated that it could not 'see that its' continued involvement in the work of the Commission could change the situation, and it has decided to withdraw'.[102] The statement further said

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100 'Sri Lanka', *Freedom House,* at http://www.freedomhouse.org/uploads/fiw10/Sri_Lanka_FIW2010.pdf

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

102 Concluding public statement of the International Independent Group of Eminent Persons, 15 April 2008.

that 'Despite their best efforts, the Eminent Persons have concluded that they have accomplished all that is possible within the constraints of the prevailing situation'.[103] The COI refuted the conclusions of the IIGEP and issued a statement defending its work.[104] In the statement it also defended the office and role of the AG which it claimed was independent despite inherent contradictions and regular practice that illustrated a pro-state bias. In addition, the COI failed to address adequately the lack of victim and witness protection and lack of legislation on command responsibility by merely stating that there was no legislation in Sri Lanka on these issues. The Attorney-General, C.R. De Silva, issued a similar statement vociferously defending the role of the office in which he stated that since the IIGEP was created by the President, its membership did not have the authority to terminate the functions of the body. He further called the reasons given for the termination as 'mere excuses' and accused the IIGEP of trying to 'buttress the argument that there exists a dangerous situation in Sri Lanka and that national institutions are not independent and efficacious, and hence it would be necessary to establish in Sri Lanka a UN Human Rights Monitoring Mission'.[105]

10.4 Commission Established to Study the US Department of State Report

At the beginning of November 2009, President Mahinda Rajapakse appointed a five member committee consisting of D.S.Wijesinghe P.C., Nihal Jayamanna P.C., C.R. de Silva P.C., Ms. Mano Ramanathan and Ms. Jezima Ismail to study the report issued by the U.S. Department of State on the final phase of the war, with the aim of ascertaining the veracity of the allegations in the report and submitting recommendations. Although the Committee was tasked with submitting a report by 31 December 2009, at the end of the year it was not known whether the Committee had done so.

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103 *Ibid.*

104 Response of the COI to the Public Statement No.6 of the IIGEP, 7 April 2008.

105 Response of the Attorney-General to the 6th Public Statement of the IIGEP, 8 April 2008.

10.5 Reparations

Currently, there is no national policy or comprehensive programme to provide compensation and reparations to victims of rights violations.

10.6 Legislation

In July 2008, the Assistance and Protection to Victims of Crimes and Witnesses Bill was presented to Parliament by the Minister of Justice and Legal Reform. The Bill has many shortcomings, including the establishment of the division to provide protection within the Police Department, headed by a senior Deputy Inspector General of Police, thereby compromising its independence. The Bill was never passed.

11. Conclusion

The years 2008 and 2009 witnessed the escalation and conclusion of the armed conflict between the government of Sri Lanka and the LTTE, which as this chapter details, resulted in an environment where the armed forces and various arms of the state were able to exercise excessive powers in an arbitrary manner without checks, leading to violations of human rights that impacted adversely on the integrity of the person. While the government pledged a peaceful Sri Lanka following the end of the armed conflict on 19 May 2009, the seven month period following the end of the armed conflict did not see a vast improvement in the state of human rights with the government exhibiting no political will to protect and promote basic rights and freedoms.

III

JUDICIAL PROTECTION OF HUMAN RIGHTS

Sumudu Atapattu[1]

1. Introduction

The Supreme Court of Sri Lanka is vested with the sole and exclusive jurisdiction under Article 126 of the Constitution to hear and determine any question relating to alleged infringement or an imminent infringement of a fundamental rights or a language right by executive or administrative action. Thus, in relation to fundamental rights, the Supreme Court exercises original jurisdiction.

This chapter surveys the seminal cases decided by the Court during 2008 and 2009. It will discuss the cases under Articles 10, 11, 12, 13 and 14 and discuss the relief granted to the applicants. It will also flesh out any important principles that the jurisprudence of the court elicited. Despite a rather slow start, the Court has, over the years, made a significant contribution to the development of law relating to fundamental rights in Sri Lanka. For the first time in many years, one case actually dealt with Article 10 (freedom of conscience and religion). However, writ application cases that impinge on fundamental rights or property rights are beyond the scope of this chapter.

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2. Cases under Article 10

Ven Ellawala Medanada Thero and six others v. *Sunil Kannangara, District Secretary, Ampara and 64 others*[2] is one of the handful of cases that involved the alleged violation of, *inter alia*, Article 10. This case involved the action taken to alienate about 60 acres of land to 500 families who were entirely of the Muslim community. The land in question was within close proximity to a very old Buddhist temple and the petitioners argued that the settlement of a large number of Muslims within close proximity to a *Raja Maha Viharaya* would bar any further expansion of Sinhala Buddhist resident who are currently living close to the temple. Such action further discriminates against Sinhala and Tamil people who are without land and is biased in favor of Muslims. It would further infringe the freedom of religion of the people living in the area. The Court noted that State land is held by the executive in trust for the People and may be alienated only as permitted by the law…. The impugned alienation is bereft of any legal authority and has been effected in a process which is not *bona fide*. The court acknowledged that the temple in question is one of the 16 most venerated sites of Buddhists in the country and the proposed action has raised very sensitive questions with regard to Buddhists in the area as well as the entire country. Furthermore, this action favors Muslims because it does not take into account claims of landless persons from other ethnic groups.

Thus, the Court dealt with two distinct issues here: (a) whether the purported action was a violation of Article 10; and (b) whether it was biased in favor of a particular ethnic group. On both accounts, the Court held that there was a violation of rights. On the one hand, the petitioners' right to exercise their freedom of conscience and religion has been violated and, on the other, entertaining the request by a particular ethnic group violated the rights of other ethnic groups to be treated equally. This case gives rise to an interesting question in this context: if the landless group in question consisted of Sinhala Buddhists, could the decision to resettle

[2] SC (FR) Application No 178/08, SC Minutes, 06/01/2009.

them here be challenged by another ethnic group? They certainly may not have been able to argue that the impugned action violated their freedom of religion, but they could still have argued that one ethnic group was favored over the others. Thus, relying on the principle advanced in this case, such a decision could have been challenged under Articles 12(1) and 12(2), rather than under Article 10.

3. Cases under Articles 11 and 13

Since most cases involve both Articles 11 and 13, these cases will be discussed together. Many of the cases filed before the Supreme Court reveal that torture and illegal arrest and detention are still prevalent in Sri Lanka[3] despite the judgments handed down by the Court year after year admonishing police officers for their behavior and reiterating the right of people to be free from torture. Several cases reveal how innocent people have been tortured or illegally arrested or often subjected to both while attending to their day to day activities.

Thus, in the case of *Uduwa Athukoralage Chandrasena* v. *Sub-Inspector Buddhika and others*,[4] the petitioner alleged that he was arrested while on his way to attend a funeral and was assaulted. Justice Bandaranayke delivering the judgment of the court, referred to Dr ARB Amerasinghe's book where he stated that: " ….. a total denial supported by a conspiracy of silence, the medical evidence is very often sufficient to prove that the acts complained of did take place [sic]."[5]

The case of *Bandula Samarasekera* v. *Vijitha Alwis, OIC, Ginigathhena Police Station and others*,[6] involved the alleged arrest and detention and subsequent brutal assault of the petitioner and a local exorcist (kattadiya) on the ground

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3 See Kishali Pinto-Jayawardena's chapter in *Sri Lanka: State of Human Rights 2007*, chapter III where she notes a decline in cases under Article 126 and particularly those filed under Article 11.

4 SC (FR) Application No 258/2007, SC Minutes 13/5/2009.

5 ARB Amerasinghe, *Our Fundamental Rights of Personal Security and Physical Liberty* (1995) p 47.

6 SC (FR) Application No 107/2007, SC Minutes 14/9/2009.

that they were "treasure hunters." In a harsh critique of the behavior of the police officer in question, Justice Bandaranayake said:

> It is the duty of a police officer to use his best endeavor and ability to prevent all crimes, offences and public nuisances and more importantly to preserve the peace. In order to carry out his duties efficiently and effectively, it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police officers must possess a higher standard of moral and ethical values than that is expected from an average person.
>
> The facts and circumstances of this application clearly demonstrate the lack of such higher standards of ethical and moral value that is expected from a police officer.[7]

Justice Bandaranayake quoted *Amal Silva* v. *Kodituwakku*[8] where Justice Atukorale said that "nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment."[9] Holding that the petitioner's fundamental rights under Articles 11 and 13(1) have been violated by the acts of the 1st respondent, the Court directed the 1st respondent to personally pay a sum of Rs 50,000 to the petitioner as compensation and costs. The state was ordered to pay a sum of Rs 15,000 as compensation and costs due to the violation of Article 13(2) while in the custody of the Kandy Police Station.

The case of *Romesh Cooray* v. *LAS Jayalath, Sub-Inspector of Police, Crimes Division and others*[10] also involved the alleged torture and illegal detention of the petitioner. It also involved the concurrent jurisdiction of the

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7 *Ibid.*

8 1987, 2 Sri LR 119.

9 *Ibid.* It is interesting to note that Kishali Pinto-Jayawardena states that the reference to this case in relation to cases filed under Article 11 is now "almost inevitable," see supra note 2, p70.

10 SC (FR) Application No 663/2003, SC Minutes 2/7/2008.

Human Rights Commission in relation to violations of human rights and whether the application is time barred because the petitioner failed to file the application within the one month time period stipulated in the Constitution. Overruling the preliminary objection of the respondent that the application is time barred because it has been filed before the HRC within one month, the Court proceeded to discuss the meaning of torture. The respondent's view was that only conduct that is "qualitatively of a specially reprehensible kind"[11] would meet the criteria laid down in Article 11 and that the conduct complained of in this case falls short of that standard. The court, pointing out that this wording comes from the General Assembly resolution 3452 (xxx)[12] and relying on the case of *Collins v Jamaica* (filed before the Human Rights Committee)[13] and other cases,[14] noted that:

> "torture, cruel, inhuman and degrading treatment or punishment could take many forms, viz., psychological and/physical and the circumstances of each case would have to be carefully considered to decide whether the act/s in question had led to a violation of Article 11 of the Constitution."[15]

The Court was of the view that, when the allegations are considered in the light of section 12 of the Act against Torture[16] and the medical evidence available, the act complained of was "qualitatively of a specially reprehensible kind."[17] The Court held that there was a violation of Article 13(1) and ordered that a sum of Rs 100,000/- be paid by the State as

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11 *Ibid.*

12 Adopted by the UN GA at its 30th session in 1975.

13 Communication No 240/87 filed before the UN Human Rights Committee and views of the Committee of 19/7/1994.

14 The Court referred to *Kumarasena v. Sub-Instpector Sriyantha and others* (SC (FR) Application No 257/93, SC Minutes 23/5/1994, *Wijayasiriwardena v. Kumara, Inspector of Police, Kandy and two others*.

15 *Supra* note 9.

16 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No 22 of 1994.

17 *Supra* note 9.

compensation and Rs 15,000/- be paid by the 1st-3rd respondents personally within 3 months from the date of the judgment.

The case of *Premachandra Epa, Attorney-at-law on behalf of MK Gunathilake* v. *KB Keerthirathna, SP, Tangalle and others*[18] also involved the alleged torture of the petitioner. The 1st respondent in this case had made a statement to the Medical Officer who examined the petitioner to the effect that without assaulting he cannot obtain information. Moreover, it was argued by the respondents in this case that the petitioner is not a person of unblemished character and, therefore, he is not entitled to the protection of Article 11. Rejecting this argument the Court pointed out that it has "over and over emphasized the fact that the protection guaranteed in terms of Article 11 of the Constitution would not be denied to a petitioner merely on the basis of his character."[19]

Noting that the right guaranteed by Article 11 is an absolute right, the Court quoted Atukorale J in *Amal Sudath Silva* v. *Kodituwakku, IP and others*:[20]

> Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard-core criminal whose tribe deserves no sympathy. ***But if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our Constitution.***[21]

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18 SC (FR) Application No 123/2004, SC Minutes 27/5/2008.

19 *Ibid.*

20 1987 2 Sri L.R. 119.

21 *Ibid* (emphasis added).

In the case of *Mallikage Padma Wijesooriya and M. Christie* v. *GWRG Thilekaratne and others*[22] which involved the alleged violations of Articles 11, 13(1) and 13(2), the Court again admonished the conduct of the police officer in question stating that his conduct "is corrupt, immoral and criminal and descends way below the minimum standard of a civilized society let alone that of a disciplined Police Force."[23]

The Court had the occasion to discuss the issue of torture and the rights of prisoners in the case of *Suranjith Hewamanne* v. *Gayan Christhantha, Jail Guard and others*.[24] Extensive reference was made to international law on the issue of torture and rights of prisoners by the Court as well as previous decisions by the Supreme Court, particularly the decision of *Amal Sudath Silva*, quoted above. While two judges of the Court were of the view that allegations of torture had been established, Justice Amaratunga dissented on the ground that the petitioner had failed to establish, on a balance of probabilities, the allegations of torture.

In the case of *MD Nandapala* v. *Sergeant Sunil and others*,[25] Justice Thilakawardane delivering the judgment of the Court stated that leave to proceed was granted "taking into consideration the gravity and seriousness of the allegations directed against members of the Police Force of Sri Lanka…"[26] and that "such allegations are indicative of the increasingly typical hardships suffered by the people of this country while engaged in their lawful pursuit of travel on our public roads in the exercise of their fundamental right to freedom of movement….."[27] The Court noted that for an arrest to be lawful, there must be a reasonable suspicion for arrest *at the time of arrest*[28] and held that no police officer has the right to

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22 SC (FR) Application No 298/2005, SC Minutes 25/1/2008.

23 *Ibid.*

24 SC (FR) Application No 128/2003, SC Minutes 14/5/2008.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 The Court referred to *Namasivayam v. Gunawardene* (1989) 1 Sri LR 394; *Piyasiri v. Fernando, ASP,* (1988) 1 Sri L.R. 173 and *Elasinghe v. Wijewickrema and Others* (1993) 1 Sri L.R. 163.

arrest a person on a vague general suspicion and that "vague, general and nebulous information is insufficient to serve the sole basis for a reasonable suspicion:"[29]

> That the Courts have been unwilling to allow the power of arrest to evolve into a glorified fact-finding tool is due to recognition of the importance placed on human rights and individual liberty in our legal system. Time and time again, the learned judges of our Courts have interpreted "reasonable suspicion" restrictively, in order to protect and promote the rights and freedom of the people of Sri Lanka. Reasonable suspicion is certainly not a fanciful, illogical, irrational, or nebulous suspicion but, rather, one based on a reasonable interpretation of the facts and circumstances of the case, at the relevant time.[30]

4. Cases under Article 12

Like in previous years, the majority of the cases filed during 2008-09 relate to alleged infringement of Article 12(1). Many of them related to the non-promotion of the petitioner to a higher rank or the non-appointment of the petitioner to a particular position. Some of the salient cases will be discussed here.

The cases of *Deepthi Kumara Guaratne and two others* v. *Dayananda Dissanayake, Commissioner of Elections*[31] and *Sirimasiri Hapuarachchi and two others* v. *Dayananda Dissanayake, Commissioner of Elections*[32] involved the refusal to register new political parties called *Sri Lanka Peratugami Pakshaya* and *Eksath Janatha Permuna* on the ground that such action violated their fundamental rights guaranteed under Articles 12(1) and 14(1)(c).[33] In denying the application for registration, no reasons for the decision were given. The

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29 *Supra* note 23.

30 *Ibid.*

31 SC (FR) Application No 56/2008, SC Minutes 19/3/2009.

32 SC (FR) Application No 67/2008, SC Minutes 19/3/2009.

33 Article 14(1)(c) deals with the freedom of association.

Court discussed at length whether the failure to give reasons for a decision amounted to a violation of the principles of natural justice.

Noting that while the failure to give reasons is not a fatal error and does not mean that no valid reasons existed, the Court, however, pointed out that the status of the law has changed dramatically with the adoption of the recommendations of the Franks Committee report[34] to an increased recognition of the duty to give reasons:

> It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. *Where no reasons are given the individual may be forgiven for concluding that he has been the victim of an arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out.*[35]

The Court relied on several previous judgments of the Court and noted that when the court is requested to review a decision and the petitioner has established a *prima facie* case, the failure to give reasons become crucial:[36]

> If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons – and so also, if reasons are suggested, they were in fact not the reasons, which actually influenced the decision in the first place.[37]

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34 Report of the Committee on Administrative Tribunals and Enquiries commonly known as the Franks Committee [Cmnd. 218 (1957)] referred to in the judgment.

35 Emphasis in original.

36 *Wijepala v. Jayawardene*, SC (FR) Application No 89/95, SC Minutes, 30/6/1995.

37 Emphasis in original.

The Court also relied on the decision in *Suranganie Marapana* v. *The Bank of Ceylon and others*[38] where the Court emphasized that there should be sufficient reasons to support decisions of public servants beyond doubt. Thus, the court held that the petitioner's fundamental rights under Article 12(1) have been violated by the act of the 1st respondent. The Court directed him to re-consider the application submitted by the petitioners and to give reasons for his decision.

The Court discussed the definition of equality in several cases. Thus, in *TA Ananda Dhamadasa and others* v. *Ariayratne Hewage, Secretary, Ministry of Education and others*,[39] the Court quoted from Justice Bhagwati's decision in *Royappa* v. *State of Tamil Nadu*:[40]

> Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies.[41]

Pointing out that the object of Article 12(1) is to treat all persons equally, unless there is some rational reason to distinguish a particular group or persons, the Court relied on the criteria laid down in *Ram Krishna Dalmia* v. *Justice Tendolkar*[42] to justify such classification:

1. "The classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

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38 (1997) 3 Sri L.R. 156.

39 SC (FR) Application No 206/2006, SC Minutes 9/1/2008.

40 AIR 1974 SC 555.

41 *Ibid.*

42 AIR 1958 SC 538.

2. That the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved."[43]

The Court also discussed the issue of the time limit of one month laid down in Article 126 of the Constitution and noted that the earlier cases adopted a strict interpretation of this time limit while later cases have affirmed that the Court has a discretion to entertain an application made outside the time limit in suitable cases. The Court referred to *Edirisuriya* v. *Navaratnam*[44] and others where it was held that while the time limit is mandatory, in a fit case the Court would entertain an application made outside the time limit provided an adequate excuse for delay could be adduced. The Court further held that the "watershed of all the decisions was *Gamaethige* v. *Siriwardena*[45] in which Mark Fernando J held that:

> The time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to involve the jurisdiction of this court, this court has discretion, possibly even a duty, to entertain an application made within one month after the petitioner ceased to be subject to such restraint. The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man-made disaster,

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43 *Ibid.* See also *GG. Siryani Malkanthi v. Justice PRP Perera and others* (SC (FR) Application 326/2007, SC Minutes 23/6/2008) where Justice Bandaranayake relied on Sir Ivor Jennings where he said that among equals the law should be equal and should be equally administered. However, every differentiation cannot be regarded as an instance of discrimination. What it forbids is unequals being treated equally and equals being treated unequally:
The right to equality thus postulates the concept that all persons similarly circumstances should be treated similarly and that there cannot be any discrimination among persons, who are similarly circumstanced."
Therefore, reasonable classification is allowed.

44 1985 1 Sri L.R. 100.

45 1988 1 Sri L.R. 385.

> would have to be considered in an appropriate case when it arises … while the time limit is mandatory, in exceptional cases on the application of the principle *lex non cogit ad impossibilia* , if there is no lapse, fault or delay, on the part of the petitioner, this court has a discretion to entertain an application made out of time.[46]

Justice Bandaranayake also referred to the decision in *Nama Sivayam* v. *Gunawardena*[47] where it was stated by Sharvananda CJ that Article 126(2) must be given a generous and purposive construction and in order to make the remedy meaningful to the applicant, the one month period should be calculated from the time that he is under no restraint: "A literal interpretation of the period of limitation will defeat the petitioner's right to his constitutional remedy."[48] Justice Bandaranayake also referred to *Gomez* v. *University of Colombo*[49] where it was held that a challenge should be brought when a particular issue was first known not when a termination based on that issue was carried out.

RF Rasquinho and others v. *Sri Lanka Land Reclamation & Development Corporation and others*[50] involved the Attidiya wetland which is located within a larger area declared as a Reclamation and Development Area by the Sri Lanka Land Reclamation and Development Corporation (SLLRDC) under its Act of incorporation and raised important questions with regard to the Public Trust Doctrine. The petitioners' contention in this case is that the 1st respondent (SLLR&DC) has illegally leased an extent of about 30 acres of land to the 18th respondent (Attidiya West Park Island Resort (Pvt) Ltd) for a period of 50 years. This lease agreement, however, did not empower this company to construct a hotel on this property. On the basis of the lease, the 18th respondent had obtained permission from the 9th respondent (Tourism Authority) to construct a 20 room hotel. The

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46 *Ibid.*

47 1989 1 Sri L.R. 394.

48 *Ibid.*

49 2000 1 Sri L.R. 273.

50 SC (FR) Application No 455/2007, SC Minutes 19/11/2008.

petitioners alleged that the Board of Investment (3rd respondent) from whom fiscal concessions were obtained by the 18th respondent had not taken into consideration the fact that the proposed hotel was located in a Reclamation and Development Area and that the original approval did not include the construction of a hotel. Thus, they argued that leasing of land originally acquired from the public for water retention and drainage for the construction of a hotel is in breach of the legal basis of the acquisition of land, and an abuse of statutory power in violation of the public trust which entails the exercise of such power.

The petitioners further alleged that the 18th respondent had filled up a substantial extent of the lake obstructing the drainage system which has resulted in flooding of houses and roads and directly affecting some of the petitioners living in the area. The canal and drainage system in the area was developed as the Greater Colombo Flood Control and Environmental Improvement Project Phase III funded by the Japan Bank for International Corporation. Serious objections to the dredging activities were raised by the Lake Crescent Environmental Group which includes some of the petitioners noting that such activities have a serious impact on the marshy ecology which includes numerous species of fauna and flora. Furthermore, it was alleged that it would cause serious problems of flooding and erosion of the embankments.

Taking all facts into consideration the Court held that the lease of an area of approximately 30 acres of land including the Bolgoda lake land reservation and the island is void *ab initio* and of no effect or force in law. The Court also referred to the total lack of transparency in the process and to the illegal activities carried out by the 18th respondent and directed that "remedial measures taken early to ensure that the environmental damage that has been caused be reversed and the drainage facilities are restored to avoid the flooding of houses and roads referred to above."[51] The 1st respondent was directed to submit a report to the court within two months of remedial measures to be taken. In an interesting twist the

[51] *Ibid.*

Court said in response to 18th and 19th respondents' submission that they have incurred considerable expenditure, that since such construction has been carried out illegally and in violation of the fundamental rights of the petitioners, there cannot be a legal claim for compensation. However, as an equitable measure, the court directed the 1st and 3rd respondents to pay in equal proportion upto 50% of the value of buildings so far constructed. They are not, however, entitled to be compensated for any filling or other structures including the swimming pool that is purported to have been constructed. The Court ordered the 1st and 3rd respondents to pay the petitioners a sum of Rs 250,000 each as costs.

Devundara Narayanage Sanath Ravindra v. *Mahinda Pathirana, OIC, Police Station, Kochchikade and others*[52] involved the alleged violation of Articles 12(1) and 14(1)(g) of the Constitution. Although the respondents in this case were police officers, the allegations interestingly did not relate to Articles 11 and 13 as is usually the case. This case involved the alleged seizure of the petitioner's liquor from his restaurant without giving a valid reason when the petitioner had a valid liquor license. Holding that the respondents violated the petitioner's fundamental rights under the aforementioned Articles, the court pointed out that their conduct is "altogether unbecoming of officers vested with the duty of maintaining law and order. The State has failed to have adequate supervision over the conduct of these officers."[53] The Court ordered the state to pay the petitioner a sum of Rs 300,000/- as compensation and Rs 15,000/- as costs. The Registrar of the Court was directed to send a copy of the judgment to the Inspector General of Police for appropriate disciplinary action against the respondents.

The cases of *WKH Wegapitiya* v. *AHM Fowzie and others*[54] and *Ven Thiniyawala Palitha Thero and others* v. *AHM Fowzie and others*[55] involved similar issues

52 SC (FR) Application No 485/2004, SC Minutes 16/12/2008.

53 *Ibid.*

54 SC (FR) Application No 535/2008.

55 SC (FR) Application No 536/2008.

and were taken together.[56] These involved the alleged infringement of fundamental rights under Article 12(1) by: (a) hedging agreements entered into by the 3rd respondent on behalf of the 2nd respondent (Ceylon Petroleum Corporation); and (b) the sale price of petroleum products, particularly, petrol. The applications have been filed in the public interest on the basis that the sale price of petrol is not commensurate with world market prices. The petitioner alleged that the public has not benefitted from the reduction in world gasoline prices due to the illegal hedging agreements. The Court made an interim order suspending payments under hedging agreements and the Monetary Board was directed to investigate into this issue with the assistance of the Criminal Investigation Department of the Police. The Court then directed the Monetary Board to refer the results of the investigation to the Commission to Investigate Bribery and Corruption.

With regard to the issue of price of petrol, the Court decided to lay down a pricing formula to be addressed as a national issue above party politics and noted that the 2nd petitioner being a Member of Parliament had agreed to cooperate in such an exercise. The Secretary to the Treasury was directed to submit a report on the taxes and levies with the suggested pricing formula and that the benchmark figure should be taken as US $56.06 per barrel of imported refined petrol. The Court directed that the price of petrol be adjusted on the basis of the formula in Annex A and the Ceylon Petroleum Corporation was directed to comply with the order from midnight of 17/12/2008 and to ensure that sales take place without undue interruption. Petitioners or any affected persons can file papers in Court in respect of any infringement of this directive.

4.1 Sugathapala Mendis' Case

The case of *Sugathapala Mendis and Raja Melroy Senanayake* v. *Chandrika Bandaranayake Kumaratunge and others*[57] involved the public trust doctrine

[56] SC Minutes 21/7/2008.

[57] SC (FR) Application No 352/2007, SC Minutes 8/10/2008. There were several intervenient petitioners in this case.

and acquisition of public land for private purposes. The petitioners alleged that the land in question was "knowingly, deliberately and manipulatively sold to a private entrepreneur to serve as an exclusive and private golf resort in Sri Lanka, one carrying a membership fee of Rs 250,000/-."[58] The counsel for the petitioners submitted that this was a violation of the equal protection clause guaranteed under Article 12(1) which assures to the People the rule of law. It was further submitted that the facts reflected a flagrant betrayal of the 1994 government's policy of transparent governance and eliminating corruption. They further noted that the most disturbing factor in the case was that those alleged to have been involved in the case were those from the highest echelons of the executive including the former President of the country. It was further submitted that this Court was the "last bastion of hope" to the people. Given the complexities of the case, we will pay considerable attention to the facts of the case.

(a) The Facts of the Case:

Given the complexity of the case, the salient facts are summarized as follows:

- A large tract of land situated in Kalapaluwawa, Rajagiriya, was acquired by the then Minister of Lands under the Land Acquisition Act No 9 of 1950 (as amended from time to time) for the public purpose of urban development and for increasing the parliamentary complex and for providing water retention as a low lying area. This fact has not been contested by the respondents.

- A declaration was issued in 1988 to notify the owners of the land being acquired.[59] Some of these owners have intervened in the case. Compensation was paid to the owners and a certificate of vesting was issued, vesting the land with the 3A respondent (UDA). The document

[58] *Ibid.*

[59] Section 5 of the Act mandates that the Minister before acquiring land, "shall" make a written declaration that such land is needed for a public purpose and will be acquired under the Act.

declared that the land had been acquired for a public purpose and that "the land should not be utilized for any other purpose than that for which it was originally acquired."[60]

- Despite the urgency of acquiring the land, no action had been taken for approximately nine years. On May 14th, 1997, the 7th Respondent (BOI) approved a proposal submitted by one Shantha Wijesinghe (Managing Director, Asia Pacific Golf Course Ltd) to establish a golf course on 150 acres of this land. This land has been recommended to Asia Pacific by the UDA. Asia Pacific also proposed the construction of a park, football pitch, cricket pitch and a hawker centre, which was to be made available to the public "ostensibly to satisfy in some minimal way the original purpose for which such land was acquired."[61]

- Through a Cabinet Memorandum dated February 9th, 1998 the 1st respondent submitted a strong recommendation of the project and of its participants. The 1st respondent also advocated in favor of the promoters' request for special concessions accompanying the transfer of land solely (a) because of the proposed size of the project and (b) in light of the "benefit of having an additional golf course in Colombo." This did not spell out the benefit to the public and Cabinet approval was granted on 4th March 1998 without query, clarification and/or amendment.

- The Director General of the BOI then requested the UDA to prepare a lease agreement with Asia Pacific in conformity with the aforementioned Cabinet memorandum. UDA did so, without inquiring as to whether the proposed activity served or accorded with the public purpose for which land was originally acquired.

- Around the 19th of February 2000, an area of about 19 acres of this land was allocated to the Kaduwela Pradeshiya Sabha for the purpose of developing a public playground.

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60 *Supra* note 56.

61 *Ibid.*

- The BOI requested the Minister of Urban Development to consider the feasibility of a request made by Asia Pacific to obtain this land (19 acres allocated to the Pradeshiya Sabha) in order to enhance the appearance of the entrance to the golf course.

- Shortly thereafter, an internal Board Paper allowed for a license indenture to Asia Pacific, free of charge, of 41 acres of low-lying land, in addition to the 140 acres of land already leased. On May 30, 2000, the Board of Management of UDA approved this.

- An undated UDA board paper sought to make several changes to the above transaction: (a) to license to Asia Pacific, free of charge, a further 44 acres of low-lying land situated in front of the leased land for a duration of 99 years; (b) to amend the First License for 41 acres to survive for 99 years and narrow the rights of the UDA to revoke the license only where Asia Pacific fails to comply with the terms of the license; (c) to reallocate the 19 acres of land allocated to the Pradeshiya Sabha; (d) to allow Asia Pacific to build 100 luxury holiday villas on stilts in the marsh area previously designated as unavailable for development; and (e) to remove the restrictions prohibiting the sale of the acquired land to third parties and permit Asia Pacific to sell the holiday villas on a freehold basis.

- Cabinet approval was granted on January 31, 2001 for the above mentioned actions "in flagrant disregard of the public purpose specifically contained as a condition attached to this land."[62]

- The BOI and Asia Pacific formally entered into an agreement on June 21, 2001. A Deed of Rectification was executed on August 9, 2001 to amend the lease agreement to reflect the aforementioned changes. UDA then invited the Cabinet to determine the sale price of the land to be sold to Asia Pacific.

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62 *Ibid.*

- The 6th Respondent (Sumal Perera) became a beneficial owner of 50% of Asia Pacific through Access Holdings purchase of 1,500,000 shares of the company's stock. The original shareholders continued to hold the remaining 50% of the shares.

- On June 19, 2002, the then Minister of Trade & Commerce submitted a Cabinet Memorandum to cancel the allocation of lands to AP but a week later, withdrew the Memorandum without reason.

- The UDA and Asia Pacific entered into Agreement to Sell on March 3, 2003 which effected the transfer of the land for approximately Rs 60 million.

- On June 17, 2003, the original shareholders sold the remaining shares to Access Holdings resulting in Access Holdings owning 100% of Asia Pacific.

- The Sri Lanka Land Reclamation and Development Corporation issued its approval on December 24, 2003 for the revised master plan which contemplated the construction of villas and the use of marsh land previously designated as flood retention areas.

(b) The Discussion of the Public Trust Doctrine

The Court discussed at great length the public trust doctrine in this case. Pointing out that "[T]he principle that those charged with upholding the Constitution – be it a police officer of the lowest rank or the President – are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People"[63] the Court went on to note that the powers held by organs of the government originate with the People and are entrusted only as a means of exercising governance and "with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is

[63] *Supra* note 56.

not for personal gain or favor , but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes."[64] Quoting the Supreme Court decision of *Bulankulame* v. *Secretary, Ministry of Industrial Development*[65] where the public trust doctrine was applied in relation to the environment, the Court pointed out that the public trust doctrine is enhanced by the Directive Principles chapter.

The Court articulated that under the PTD, taken together with Article 27, all state actors are obliged to act in furtherance of this trust and "they must follow this duty even when a furtherance of the trust necessarily renders inadequate an act or omission that would otherwise legally suffice. It is not enough to argue that procedure has been followed when procedural compliance results in a violation of the public trust:"

> That action was either taken or not taken due to contravening orders from a superior or because reliance upon another entity's or individual's discretion was deemed sufficient, is simply not a defense afforded to state institutions or state actors.[66]

The Court quoted the decision in *Bandara* v. *Premachandra*[67] where it was held that the public trust doctrine must be upheld not only for purposes of good governance but also for sustainable economic development of the country especially for the economically challenged, the disadvantaged and the marginalized.

The Court also dealt with two preliminary objections made by some of the respondents: (a) the petition is time barred and (b) petitioners lack standing. With regard to the first issue, the court noted that large scale development projects are of a continuing nature and for the court to ignore that would be to ignore the continuing nature of the violations

64 *Ibid.*

65 2000 3 Sri L.R. 243.

66 *Supra* note 56.

67 1994 1 Sri L.R. 301.

that stem from those projects. With regard to the issue of standing, the Court relying on the opinion in *Bulankulame case* stated that petitioners to such litigation cannot be disqualified on the basis that their rights extend to the collective citizenry of Sri Lanka. The Court held that the petitioners have a constitutional right, given by Article 17 read with Articles 12 and 126 of the Constitution, to bring forward their claims. To hold otherwise, the Court stated, would deprive people from seeking accountability from institutions to which they have conferred power and to allow injustice to be left unchecked simply because of technical shortcomings.[68]

(c) Substantive Issues

(i) Public Purpose

Referring to the Preamble of the Urban Development Authority Law No 41 of 1978, the Court noted that the primary purpose of establishing the UDA was to promote "integrated planning and implementation of economic, social and physical development of certain areas."[69] This is an extremely important power, one so important that the UDA must err on the side of caution and exercise extreme care when taking decisions particularly with regard to the safety of people and the environment. Unfortunately, the evidence submitted reveals that the UDA had failed to discharge its duty, even marginally.

Pointing to the haste in which the UDA seems to have acted and despite obtaining CEA approval for the EIA prepared by the NBRO, the Court, however, noted that "[T]he mere fact that the various environmental authorities said the project *could be done*, does not in itself suggest that it *should have been done*."[70] In particular, the Court pointed that the Sri Lanka Land Reclamation and Development Corporation (SLLR&DC) has categorically deemed that remaining land was not available for development

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68 The Court relied on the decisions in *Egodawele* v. *Dissanyake*, SC Minutes 4/3/2001, *Sriyani* v. *Iddamalgoda*, SC Minutes 12/10/2002).

69 *Supra* note 56.

70 *Ibid.* Emphasis in original.

because it was necessary to preserve it for flood retention purposes and cannot be allowed for filling. The Court further pointed out that such approvals must be deemed as conditions precedents for the UDA analysis, rather than the basis for their decision:

> Given the weight and extent of these conditions, the UDA, as an autonomous body having sole discretion over conveyance of the land, was under a duty to weigh with the utmost care the perceived benefits of such a development project against the significant and potentially damaging changes – the Environmental Impact Assessment Report warned of irreversible ecosystem changes and habitat fragmentation – that would have to be made to the Acquired Land, land already fit and functioning for the water retention purpose for which it was originally acquired.[71]

The Court pointed out that if the approval of other entities is all that was required, then the UDA need not exist and the decisions of other entities whether or not the land in question should be developed is a "repugnant abdication of their responsibility as an authority created specifically to hand the multi-faceted nature of land alienation and development."[72] While the UDA listed the benefits of the project one thing notably lacking is any significant benefit of a direct nature to the community of the people of the Battaramulla area. This is contemplated by the requirement of "public purpose" imposed by the law as a condition of acquisition of land: if the intention of the drafters was to define "public purpose" to include *any* benefit, however marginal, then they would not have imposed this restriction at all. Justice Tilakawardane writing the judgment of the court noted that it is highly unlikely that this express restriction be negated by such broad interpretation. Referring to *Framji* v. *Secretary of State*[73] the Court noted that the primary object of the public purpose requirement is the general interest of the community:

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71 *Ibid.*

72 *Ibid.*

73 17 BOM L.R 100 (PC).

> It is to be emphatically noted that public purpose connotes as the primary object, public utility and benefit of the community as a whole. Accordingly, we are of the opinion that the tenuous benefits advanced by the UDA, even taken together, fail to meet even the threshold meaning intended by the law of public benefit posed by the aforementioned 'public purpose' restriction.[74]

(ii) Environmental Implications of the Project

The Court noted that the filling up of the land could affect the fragile ecosystem of wetlands and referred to several Indian cases that discussed the importance of wetlands. In *People United for Better Living in Calcutta* v. *State of West Bengal*[75] Banerjee J explained the nature of wetlands and their importance as follows:

- Each wetland functions as an ecosystem where all the components depend on each other. Often changes to one element results in the destruction of the whole;

- Wetlands form a vital part of the world's ecosystem as well;

- Wetlands rely on an established water drainage pattern. Any population nearby inevitably alters water drainage patterns and affects the wetlands;

- Wetlands provide the habitat for a vast number of living creatures, which rely on them for food, shelter and as a breeding place;

- Wetlands play an important role in the water cycle, cleaning and purifying water and also help control flood water; and

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74 *Supra* note 56. The Court also pointed out that "beautification" is too abstract and the need of the people for affordable housing is far more urgent than the cosmetic improvement of the land.

75 AIR 1993 Calcutta 215.

- There is growing evidence that wetlands are a vital link in the food chain

Referring to the EIA prepared by the NBRO the Court pointed out that the land that was alienated to Asia Pacific is home to nine threatened species of animals. If the UDA was sincere about the environmental safety of the project, it should have at least investigated the viability of mitigatory measures to determine whether these species could be adequately preserved. While some deliberation has been done on flood control, there has been little concern expressed in relation to degradation of fauna and flora and long-term effects of development on the ecosystem, microclimate and the surrounding water table. Pointing out that only one page has been devoted in the EIA report to monitoring activities which is hardly sufficient for an area home to endangered species, the Court referred to the Indian Supreme Court decision of *Vellore Citizens' Welfare Forum* v. *Union of India*[76] which analyzed the need to balance the impact of development projects on the environment:

> …. Where there is an identifiable risk of serious or irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. The burden of proof in such cases is therefore placed firmly on the developer or industrialist who wishes to alter the *status quo*…..[77]

This is a clear reference to the precautionary principle, a cardinal principle of international environmental law.[78] The Court also referred to the Indian Supreme Court decision in *AP Pollution Control Board* v. *Nayudu*[79] where the court stressed that preservation of the environment is a goal that must be sought for its own sake, not simply because of economic or other benefits:

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76 (1995) 5 SCC 647.

77 *Ibid.*

78 See Sumudu Atapattu, *Emerging Principles of International Environmental Law* (2006), chapter 3.

79 (1992) 2 SCC 718.

> …. The environment must not only be protected in the interest of health, property and economy, but also for its own sake. Precautionary duties are triggered not only by concrete knowledge of danger but also by a justified concern or risk potential.[80]

Moreover, UDA's contention that development of the land would stop illegal occupation and other illegal activities being carried out on the land in question is insufficient to justify the decision to allow developing the land. Such illegal acts could have been stopped by recourse to the UDA law. The Court noted that the written submissions have referred to other successful golf course projects in Sri Lanka. However, the issue is whether, given the nature of land as one acquired under the Land Acquisition Act, consisting of valuable marshland and reserved for a public purpose, the decision to implement such a project is in furtherance of the trust that people have reposed in the Government. The facts of the case show otherwise: (a) UDA's decision to use unrevised Chief Valuer's valuation as a basis for rent (b) its decision to convey land free of charge when so many thousands of people desperately need housing (c) altering the project to provide free hold alienation of state land (d) to do so with prices derived from the aforementioned evaluation all go to show that these actions have benefited only a few persons and resulted from the "unquestioned obedience" to the 1st Respondent's Cabinet Memorandum.

The court referred to the case of *People United for Better Living in Calcutta* v. *State of West Bengal*[81] where that court discussed the efforts made in the US to give a monetary value to wetlands taking into account the various functions they contribute, including water purification and as a habitat for species. The Court was of the view that the UDA saw this land as being valuable because of its developmental potential "and not as a valuable natural resource providing both environmental and long-term economic benefits in its unaltered state."[82]

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80 *Ibid.*

81 AIR 1993 Calcutta 215.

82 *Supra* note 56.

(iii) The Public Trust Doctrine

Given the facts of the case (the various concessions given to Asia Pacific and valuing the property far below the market value etc.), the Court stressed that the UDA's actions amount to a total abdication of its authority to the dictates of the 1st respondent (the then President of the country) is in violation of the public trust doctrine and of Article 12(1) of the Constitution. By facilitating a massive reduction of the value of the land the UDA has extinguished any economic benefit sought by it: "We emphatically note that the UDA is under no duty to protect the profitability of the developers to which they have alienated land."[83] By consistently reversing every restriction that was originally placed on the land, the UDA "effectively converted land acquired from the citizenry for a public purpose into land optimized for premium private benefit."[84]

The Court also pointed to the failure of UDA to deal with Asia Pacific for filling the land prior to CEA approval of the amended EIA report which could be construed as a violation of the agreement and the mandatory requirements of environmental laws of the country. Although the UDA was instrumental in creating the present situation, the Court noted that "to view the excesses in the instant case as resulting solely from the actions of the UDA would be grossly myopic. There is no doubt that several other actors engaged in the facilitation of this transaction."[85]

The Court pointed out that another player in this saga is the BOI which was established to foster and generate economic development of Sri Lanka by promoting and facilitating foreign investment. However, even the most well conceived project may end up as a disaster if those at the helm lack the necessary skill and financial strength to see a project to its completion. The BOI also has a duty to scrutinize the character and nature of the investors to ensure that they don't have a criminal agenda or that the funds have not been obtained through illegal means. The Court pointed out that

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83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

the evidence unfortunately reveals that "rather than acting in furtherance of the Public Trust, the BOI failed to engage in the required analysis of the Original Shareholders and of Asia Pacific, a review that, if properly performed, would have raised serious questions as to the existence of the principal foreign investor as well as the sincerity, integrity and bona fides of the Original Shareholders as developers."[86] With regard to question No 1 on the BOI application that requested the names and addresses of collaborators and their bankers, and information relating to the business background, Asia Pacific did not provide any bank references, financial audits or independent testimonials regarding its financial and managerial background. Despite submitting insufficient information, the BOI issued a letter to Asia Pacific stating that the application was satisfactorily completed. Asia Pacific subsequently informed the BOI that the project will include the construction of villas and BOI ultimately entered into an agreement with Asia Pacific in 2001 providing it with a 12 year tax holiday. However, no evidence has been submitted to suggest that any investigation took place on the creditworthiness of Asia Pacific. In fact, no inquiry was made to ascertain whether Mr Yangihara, the Japanese sole investor, even existed. The Court stressed that the lack of such evidence is disturbing and indicates that no effort was made to investigate the economic and managerial particulars submitted by the Original Shareholders. The BOI granted approval within two months of the application which "**failed to contain any concrete financial or independent references of the collaborators**."[87] The Court was of the view that Mr Yangihara was a fictitious person merely included to show foreign involvement and that the BOI did not discharge its due diligence obligation required for determining the feasibility of the project. The Court also pointed out that further evidence is available to show that the BOI allowed an undercapitalized company to obtain significant tax concessions which are only available to highly-capitalized projects. Even three years after entering into an agreement with Asia Pacific, the BOI still did not know the financial particulars of the company which, the Court stressed, is a

[86] *Ibid.*

[87] Emphasis in original.

clear violation of the public trust. The actions of the UDA and BOI indicate that it was part of a larger agenda to consummate the transaction, although if the proper procedure were to be followed, the project would not have been approved.

(iv) Action of the 1st Respondent (Former President of the Country)

The Court emphatically noted with regard to the part played by the 1st respondent that:

> No single position or office created by the Constitution has unlimited power and the Constitution itself circumscribes the scope and ambit of even the power vested with the President who sits as the head of this country.[88]

The Constitution requires the President to perform the duties and functions of the President and uphold and defend the Constitution. A similar duty vests in a Minister. The Court referred to the need to comply with the rule of law when exercising Presidential power in a very harsh manner:

> While the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owned to its People. This means that whilst they can use their private power and their private property in an unfettered manner when granting any privileges and favors….. **their public power must only be used strictly for the larger benefit of the People, the long term sustainable development of the country and in accordance with the Rule of Law**.[89]

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88 *Supra* note 56.

89 *Ibid.* Emphasis in original.

The Court stressed that consequent to this framework the land, economic opportunities and other assets must be handled under the stringent limitations of trusteeship imposed by the public trust doctrine and must be used for the benefit of the entirety of the citizenry and, "we repeat, not for the benefit of granting gracious favors to a privileged few, their family and/or friends."[90] Moreover, the Court stressed that being a creature of the Constitution, the President's powers are necessarily limited by the Constitution:

> **In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust**, any attempts on the part of the President to do so should not be followed by the officials for doing so will (i) result in their own accountability under the Public Trust Doctrine, betraying the trust of good governance reposed in them under the Constitution by the People of this nation, in whom sovereignty reposes and (ii) render them sycophants unfit to uphold the dignity of public office.[91]

Although the 1st respondent had argued in her defense that she sought to cancel the transaction when she saw the project undergoing substantial change, the Court held that evidence suggests to the conclusion that the 1st respondent had failed to function in a manner consistent with a public officer, must less an Executive President, and in doing so "has completely betrayed the position of trust bestowed upon her by the Constitution and by the People of Sri Lanka. The 1st respondent has grossly abused her power."[92] The Court could not have been more harsh or direct in its critique of the then President's actions in this case. In response to the 1st respondent's assertion that her action was "normal" and that it is an everyday commercial reality that commercial transactions seek to make

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90 *Supra* note 56.

91 *Ibid.* Emphasis in original.

92 *Ibid.*

profit, the Court stressed that the **sale of a company after obtaining state-subsidized assets and inordinately favorable tax incentives is anything but an "everyday commercial reality."**[93] The Court critiqued the conduct of the 1st respondent severely:

> Given the fact that the 1st respondent actively and successfully lobbied the Cabinet for concessions for Asia Pacific beyond and in excess of the guidelines she herself has promulgated in her capacity as President, it is patently disingenuous for the 1st Respondent to now abdicate responsibility and claim ignorance of the nefariousness of the transaction. Quite simply, it is unacceptable and reprehensible for the 1st Respondent to have made use of the power conferred upon her by the People to advance this Project, and now distance herself from the responsibilities inherent to such power.[94]

Although the 1st respondent asserted that she sought to take action 'no sooner' than she found out about substantial changes to the project, the Court noted that she had actually waited two years to take such action and it is certainly not based on her appreciation of the need for environmental protection. These actions reveal "an incompetence and an unacceptable abdication of responsibility of the most powerful state official of Sri Lanka."[95] The Court quoted with approval the judgment of Chief Justice Sarath Silva in *Senerath* v. *Kumaratunga*:[96]

> The case of the Petitioners is that the 1st Respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the People and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is

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93 *Ibid.*

94 The Court noted the fact that this was not the only instance in which the 1st respondent had interceded in land alienation procedures.

95 *Supra* note 56.

96 2007 SC (FR) Application 503/2005 SC Minutes.

> an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equality before the law.[97]

The Court further stressed that the President, like all other citizens, is subject to the rule of law[98] and the fact that they are immune from being sued while in office does not mean that such immunity will indefinitely shield those serving as President from punishment for violations made while in office and "as such, should not be a motivating factor for Presidents – present and future – to engage in corrupt practices or in abuse of their legitimate powers."[99] Quoting with approval Justice Fernando's decision in *Karunatillaka's case*[100] the Court stressed that Article 35 prohibits legal proceedings while in office and does not prohibit action when he/she is no longer in office: "immunity is a shield for the doer, not the act"[101] and that it does not transform an unlawful act into a lawful one. The Court held that to hold otherwise would be to suggest that the President is above the law and beyond the reach of its restrictions and quoted with approval Justice GPS de Silva's decision in *Premachandra* v. *Major Montague Jayawickrema*[102] where he relied on Wade: … "**in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms**."[103] Thus, the Court held that the 1st respondent had betrayed the public trust and infringed Article 12(1) of the Constitution.

(v) The Investment Environment and lacuna in the Law

The Court also referred to economic liberalization policies of the then government which transformed the closed-system of economic policies

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97 *Ibid.*

98 Court referred to the case of *Karunathilaka* v. *Dissanayake* [1999] 1 Sri L.R. 157 where Justice Fernando stated that "the immunity conferred by Article 35 is neither absolute nor perpetual."

99 *Supra* note 56.

100 *Supra* note 97.

101 Quoting *Karunathilaka* v. *Dissanayake*, supra note 97.

102 [1994] 2 Sri L.R. 90.

103 Emphasis in original.

practiced then. However, the example of the instant case showed, not the benefits of an open economy but the negative effects of the politicization:

> The transaction before discloses a patent systematic failure of the public bodies charged with adequately and accurately judging the viability of what was ostensibly a foreign investment project. The UDA and BOI both engaged in a cursory analysis of the particulars of the transaction and issued their approval largely on the basis of the recommendations of other approval authorities and the directives of the Cabinet, despite significant evidence that, if properly reviewed, would have in all likelihood disclosed the falsity of the application.[104]

Noting that the fundamental flaw in the investment system is that bodies such as UDA and BOI are ultimately "under the thumb" of the executive heads of the country, the Court stated:

> There can never be any expectation that corruption will not rear its ugly head when no definitive, public guidelines to ensure transparency and accountability exist. As long as the investment infrastructure remains politicized to the extent as revealed in this case, coercive forces will continue to relegate the autonomy afforded to these agencies to the realm of theory and transactions laced with characteristics of fraud and corruption will continue to be shuffled through to completion.[105]

The Court observed that there is a lacuna in the law establishing appropriate guidelines which would counter such imbalances. It directed the appropriate state authorities to adopt law that will serve as checks and balances to fill the void in the law with regard to lack of supervision. The UDA, BOI and all other agencies involved in investment in Sri Lanka must take steps to create publicly available guidelines regarding the mechanisms

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104 *Supra* note 56.

105 *Ibid.*

of approval. The Court noted that an open auditing and tendering process should include: (i) an analysis of the direct costs of the project; (ii) an analysis of the indirect costs, including social costs; (iii) an analysis of the basis for calculation; (iv) a detailed analysis and publication of the reasons for choosing the project in question in light of the relevant alternatives; and (v) publication of details of potential benefits and drawbacks of the project.

Referring to the Indian Supreme Court's decision in *ICELA* v. *Union of India*[106] where it was stated that "the enactment of a law and tolerating its infringement, is at times worse than not enacting a law at all,"[107] the Court noted that in this case, the end result of a tainted investment process was the approval of a project that sought to reap profit through land originally acquired for a public purpose directly contravening the public purpose nature inherent to acquired land.

(d) The Court Decision, Declarations and Orders

The Court held that that the entire transaction was the result of actions, omissions and decisions made in violation of the public trust doctrine and, therefore, resulted in a violation of Article 12(1) of the Constitution. Moreover, the Court declared that because these were executed without lawful authority, the operative documents by which the transaction was implemented were invalid in law and null and void. The Court further made the following orders and declarations:

- All the land conveyed to Asia Pacific is declared null and void *ab initio* and the total extent of the land reverts to the UDA through a Deed of Cancellation and registered with the Registrar of Lands within one month of the judgment and a copy to be filed in court.

- Given that part of this land has already been built upon, the Court finds it prudent to make use of it to provide for relocation of governmental

106 AIR (1997) SC 3519.

107 *Ibid.*

agencies as a means of decentralizing it from Colombo's commercially sensitive areas. UDA, CEA and SLLR&DC should submit to court a joint master plan within three months of the judgment to bring as much of the land as possible back to the flood retention purpose for which the land was initially taken;

- UDA will pay to Asia Pacific a sum representing the cost of construction of the buildings as at the date of construction, excluding all other development of the land to be assessed by the Chief Valuer within four months of the judgment. The UDA shall withhold the sum of public funds spent by the Kaduwela Pradeshiya Sabha and return that money to the Pradeshiya Sabha which shall expend this money for projects that benefit the public;

- Asia Pacific is permitted to remove all movables within four months of the judgment and hand over vacant possession of the land free of any encumbrances on or before February 8, 2009.

- The decisions that have been taken by the Cabinet of Ministers with regard to this project are of no force or effect in law as they have been an endorsement of actions taken in violation of the public trust and, therefore, resulted in an infringement of Article 12(1) of the Constitution.

- As head of Cabinet, and herself responsible for the issuance of the Cabinet Memorandum P3 that set in motion the entire transaction, the 1st respondent is ordered to pay Rs 3 million to the State as compensation no later than January 31, 2009: "We believe such a token payment of the real loss to the state of several hundreds of millions, will serve to "remind" present and future state actors and agencies (i) of their paramount duty to further the Public Trust and (ii) that their actions are subject to the Rule of Law."[108]

[108] *Supra* note 56.

- With regard to the private actors who make use of government corruption to procure special benefit and thereby deprive citizens of their fundamental right to equality, the Court noted, relying on the cases of *Hameed* v. *Ranasinghe*[109] and *Faiz* v. *Attorney General*[110] that it has the power to determine and mete punishment for private actors. Therefore, 5th respondent (Mr Ronnie Peiris) is ordered to pay Rs 2 million, and 9th, 10th and 11th respondents are each ordered to pay Rs 1 million to the State no later than January 31, 2009.

- Direct the 15th Respondent (the Bribery Commissioner) to conduct an immediate injury of the entire transaction

- Order an investigation into the particulars of the alienation of land in Narahenpita to Lifestyle Heath Services (Private) Limited by the Bribery Commissioner

- Order costs in the sum of Rs 500,000/- to be paid to each of the petitioners and Rs 100,000/- to each of the intervenient petitioners by the 1st(former President), 3A (UDA), 4th (Asia Pacific Golf Course Ltd), 5th (Ronnie Peiris), 7th (BOI), 9th (Shantha Elroy Godwin Wijesinghe), 10th (Siva Selvaratnam) and 11th respondents (S. Gressel Selvaratnam) in equal proportion.

(e) Analysis

This case elucidates many important principles, particularly principles of good governance. It stresses that nobody, including the President of the country, is above the law and immunity from courts does not mean that they are immune in perpetuity. Public officials are under a duty to uphold the rule of law and the public trust doctrine. Land acquired for a public purpose cannot be alienated for private gain and public officials entrusted with the public trust doctrine have to exercise a duty of care in all their actions.

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109 [1983] 1 Sri L.R 104, 118.;

110 [1990] 1 Sri L.R 372.

The declarations and orders made in this case also merit mention here – implementing the principle that nobody is above the law, the former President herself was ordered to pay compensation to the State – this is unprecedented in the history of the fundamental rights jurisprudence of the country. In another important move, the court held that it has the power to make orders against private individuals where they have made use of government corruption for their private gain. Again in an unprecedented move, the Court ordered private citizens to pay compensation and costs in this case. This case is illustrative of government corruption and manipulation of public officials by higher authorities to confer profit on a handful of individuals. It is a lesson for anybody who holds public office starting from the highest authority – the President of the country - and a reminder that nobody is above the rule of law.

4.2 The Case of Vasudeva Nanayakkara v. NK Choksy

The case of *Vasudeva Nanayakkara* v. *NK Choksy, former Minister of Finance, and others*[111] involved *ultra vires* acts of a high ranking public officer, similar to the case discussed above, to confer gains on a private individual. Action was filed by the petitioner in the public interest for the alleged infringement of Article 12(1). It was alleged that the 8th respondent (PB Jayasundera) who functioned as the Chairman of the Public Enterprise Reform Commission (PERC) caused the sale of shares of Lanka Marine Services Ltd. (LMSL), a wholly owned company of the Ceylon Petroleum Corporation (CPC) which was a profit making, debt free, tax paying company to the 18th respondent - John Keells Holdings Ltd. -without prior approval of the Cabinet of Ministers in a process that was not transparent and was biased in favor of the 18th respondent. It was further alleged that he did not obtain a valuation from the Government Valuer and relied instead on a business valuation from a private bank. The sale price of Rs 1.2 billion pales into insignificance when considering the profits of LMSL for the sale year which was Rs 2.45 billion. Moreover, an illegal state grant was given to LMSL by the then President within the Port of Colombo in

[111] SC (FR) Application 209/2007, SC Minutes 21/7/2008.

January 2005 nearly 2.5 years after the sale of shares stating that it was made upon the payment of Rs 1.2 billion by LMSL to the government – however, no such money was ever paid. It was further alleged that the 18th respondent obtained tax free status for its investment in LMSL from the BOI and that "the impugned privatization was lopsided and moved in the reverse direction of public enterprise reform by converting a tax paying Public Enterprise to a tax free private enterprise which claimed a monopoly in the relevant business."[112]

The petitioner also relied on the Central Bank Annual Report of 2004 which stated that the privatization of LMSL had not yielded the expected results, requiring further reforms in the sector. The petitioner further alleged that after the bid of JKH was accepted, the specimen of the common user facility (CUF) agreement was amended by PB Jayasundera at the behest of JKH and a new clause was included which provided that the government, Sri Lanka Ports Authority and CPC that all bunkers would be supplied using the CUF. This prevented an alternative supply of bunkers and created a monopoly in LMSL now owned by JKH. After their bid for the purchase of LMSL shares was rejected, the 32nd respondent obtained a license in terms of Section 5 of the Petroleum Products (Special Provisions) Act No 33 of 2002 to distribute petroleum which included the supply of bunkers. The respondent commenced an off-shore operation of supplying bunkers using ships and a main tanker. LMSL owned by JKH caused SLPA to prevent this operation under the terms of clause 8.2 of the CUF. After many rounds of litigation, the Court of Appeal struck down clause 8.2 as being inconsistent with the provisions of Act No 33 of 2002.

The main allegation here was that PB Jayasundera, Chairman of PERC, and 20th respondent (S. Ratnayake, Director JKH) worked hand in glove to clinch wrongful benefits to JKH. The petitioners relied on the conclusion of the Committee on Public Enterprises (COPE) of Parliament which inquired into this matter as follows:

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112 *Ibid.*

> This transaction had been executed blatantly without Cabinet approval, with several flaws causing loss and detriment to the Government, and demonstrating it to be a questionable "fix", and is therefore *ab-initio* bad in law, null and void.[113]

The Court pointed out that in this case, the inquiry before the Court is different. The Court has "to focus on the applicable law and ascertain whether the impugned executive action was an arbitrary exercise of power, serving a collateral purpose and defeating the object of the law….." Thus, the Court first turned to the provisions of the Public Enterprises Reform Commission of Sri Lanka Act No 1 of 1996. The Court noted that PERC marks a watershed in the progression of government policy from a state owned to a privately owned market driven economy. At both ends of the spectrum, the process had been intended to benefit the People. Therefore, the Court rejected the objection raised by the respondents who denied that this law has a public interest component and that the petitioner lacked *locus standi* to vindicate such public interest as being misconceived and myopic.

Referring to the PERC law the Court noted that the "the function of the Commission is to advise and assist the Government on the reform of public enterprises…"[114] A further aspect to be noted is that all the objects of the PERC are intended primarily to benefit the people and public enterprise reform should be a transparent process circumscribed by an abiding public interest. The Court, on this basis, rejected the objection that the petitioner lacks *locus standi*: "The objection not only ignores the significance of the impugned transaction in the broad canvas of an economic paradigm shift but also ignores the salient aspects of the Law …"[115]

(a) Liberalization of Bunkering

The Court noted that CPC has a monopoly in the entire sector of petroleum trade and industry including bunkering. Bunkers were supplied

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113 *Ibid.*

114 Emphasis in original.

115 *Supra* note 110.

by the CPC through its subsidiary LMSL via a network located within the Port of Colombo. The initial proposal for liberalization of bunkering was contained in a Cabinet Memorandum dated May 24, 2000 presented by the Minister of Shipping. It made no reference to a sale of shares of LMSL. After considering this Memorandum, the Cabinet referred the matter to a Committee of Officials for a report. The Committee made several recommendations including the liberalization of the bunkering sector and permitting a limited number of parties to operate bunker services within the territorial waters of Sri Lanka; for PERC to seek offers through an open tender process for the importation and marketing of marine fuel. The Committee recommended adopting a cautious approach of preserving the monopoly of LMSL within the port and liberalizing the sector by the grant of three licenses for the supply of bunkers outside the port. PERC was entrusted with the task of making recommendations regarding this process. It is significant that the Committee did not recommend the sale of shares of LMSL. The Cabinet granted approval to the proposals in the Memorandum which included two recommendations made by the Minister of Shipping on August 17, 2000. The Cabinet thus approved the process of reform on a phased out basis. The benefits to the Government were identified as higher income tax, employment generation and the possibility of charging a license fee for the use of Sri Lanka's territorial waters.

The petitioner contended that any action by PERC must be within the confines of the recommendations made by the Committee as approved by the Cabinet. Thus the task of PERC was to make recommendations to the Cabinet on the following: (a) the process of calling for tenders through an open tender; (b) the process of privatization and the removal of monopoly given to LMSL within a period of one year; and (c) operation of a fully liberalized regime of bunkering services after the privatization of LMSL.

However, PERC did not make any recommendations on any of these matters and embarked on a course of action devised by itself. On October 28, 2001, PERC published a notification inviting proposals from the private sector to participate in the marine fuel market in Sri Lanka within

its territorial waters stating that there will be no limit to the number of licenses to be issued. The Court pointed out that this was contrary to the Cabinet decision which limited the number of licenses to three and also restricted the services in the first year to outside the Port of Colombo.

The issue of licenses required a new legal regime which is contained in Petroleum Products (Special Provisions) Act No 33 of 2002. The notice calling for proposals was made more than one year prior to the adoption of this law. No recommendation was made by Jayasundera as required by the Cabinet decision as to the process of granting three licenses initially.

PERC published another notice on February 8, 2002 inviting Expressions of Interest for the purchase of 90% shares in LMSL stating that the notice was being published on behalf of the Government. It must be stressed that the Cabinet of Ministers did not authorize PERC to do so. The proposal was that PERC should make recommendations as to the grant of licenses. The process of privatization was to follow the successful implementation of the licensing scheme and neither the Committee nor the Minister envisaged the situation where LMSL is privatized without a successful operational licensing scheme in place.

Chief Justice Sarath Silva stressed that the course of action adopted by PERC "of dampening the liberalization process and publishing a notification with an obvious overbreadth, shorn of the necessary legal machinery….. has to be viewed in a dim light."[116] It was contrary to the Cabinet decision and had the effect of favoring the would-be purchaser of LMSL shares who will continue to have a monopoly in providing bunkering services.

It was further alleged by the petitioner that Jayansundera had acted contrary to Public Finance Circular No FIN 358(4) dated November 29, 1999 which Jayansundera himself had issued. It requires the appointment of a Cabinet Approved Tender Board (CATB) and a Technical Evaluation

[116] *Ibid.*

Committee (TEC) intended to ensure transparency, fairness and honesty in the procurement process. Leaving aside the fact that Jayasundera's contentions that the appointment of a CATB was not a practice in relation to the sale of Government shares, such a Board would have afforded a mechanism to seek redress for the grievances relating to lack of transparency and unfavorable treatment. Moreover, it would have ensured that the Cabinet was apprised of the process of evaluation of bids. The Court thus held that steps taken by Jayasundera and PERC in effecting a sale of LMSL was not mandated by the Cabinet and is "manifestly contrary to the process that had been authorized. The procedure adopted is also contrary to the Public Finance Circular issued by Jayasundera himself!"[117]

In response to Jayasundera's contention that PERC was acting as the agent of the Government and, therefore, was empowered to follow appropriate procedures, the Court pointed out that the PERC Act allows PERC to act as the agent of the Government only *if so authorized* to do so. The Court pointed out that what Jayasundera has in fact done was to engage in "a process which was diametrically opposed to the policy as laid down in the Cabinet decision."[118]

While the evaluating of LMSL shares was pending at the Chief Valuer's office, Jayasundera decided to get a business evaluation done by DFCC Bank and paid a sum of Rs 750,000/- plus taxes for this service. The Court questioned as to why a public officer who was reluctant to pay an incentive allowance to another public officer was so generous to a private bank and noted that this action was not based on a lawful exercise of power under the PERC Act and was contrary to the decision of the Cabinet of Ministers and "completely contrary to the basic tenets of public sector procurement."[119]

Based on the valuation, Jayasundera fixed the floor price for bids of 90% of LMSL shares at Rs 1.2 million which was less than half the amount

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117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

that had been recovered by way of profits by LMSL during the last four years. Jayasundera paved the way for the continuation of the monopoly by adding clause 8.2 to the CUF Agreement after the offer of JKH was accepted. In a harsh critique, the Court referred to Jayasundera's conduct as follows:

> Jayasundera's conduct in the matter of obtaining the valuation is basically not authorized by the Cabinet, is characterized by inexplicable haste; erratic; apparently designed to suit his own objectives; contrary to all accepted procedures and further removed from a lawful exercise of power under the PERC Act of tendering well considered advice and a recommendation to the Cabinet."[120]

A Technical Evaluation Committee (TEC) was appointed by the then Secretary to the Treasury, C. Ratwatte, entirely on the recommendation of Jayasundera. He had approved and signed every paper that had been put to him by Jayasundera without raising any questions. Despite having fallen below the threshold that was required under the marking scheme, the TEC continued to evaluate the bid of JKH as an individual bid where its bid was rejected on the basis that the collaborator Chemoil Corporation sought a monopoly of eight years; however, a monopoly is not possible under the terms that were offered. The only person that checked on the work of the TEC was Jayasundera.

An application for investment relief was submitted by Ratnayake on behalf of JKH and for tax relief to the BOI in respect of "new investment." With regard to the particulars of collaborators, only the name of JKH was entered and no reference was made to any other collaborator or foreign investor. Significantly, the particulars of the proposed investment carried all the details of LMSL without actually giving its name. The application had suppressed the truth and was falsely referred to as a new investment in order to quality for investment relief. No reference was made to FAMM

[120] *Ibid.*

in the application and corroborated the fact that it was included in the EOI was only to get past the threshold of 70 marks.

By letter dated July 11, 2002, BOI informed JKH that its application for investment relief was approved and that there will be no income tax for a period of three years. The Court noted the irony here that LMSL was owned by CPC which was a tax paying enterprise. As a result, a profit making tax paying public enterprise became a tax free private enterprise. The object of the liberalization process was to increase the volume of bunkering and thereby increase the revenue yield to the State and not convert tax paying public enterprises into tax free private enterprises.

Although approval was granted by BOI, it could not give any tax relief to JKH since only new investments qualified for such relief. Therefore, the applicable regulation was amended to include an investment formed by an acquisition of assets of an existing enterprise which the Court noted was "tailor made" to fit the acquisition of assets of LMSL by JKH. The agreement was amended to ensure tax relief to JKH. The Court criticized such behavior as follows:

> This process to say the least makes a mockery of the Rule of Law and the equal protection of the law. If the law can be bent and amended to suit an individual purpose and to confer a benefit to any party that was not due under the existing law, the hallowed principle of equality before the law, will be denuded of its essential and abiding meaning.[121]

A pre-bid conference was convened by Jayasundera on April 30, 2002 well before the TEC report was completed. Parties who were shortlisted were notified that they could submit proposals. However, there were no guidelines laid down by the Cabinet or a CATB which appeared to have enabled Jayasundera to device a procedure of his choice being far removed from the provisions of PERC. Moreover, Jayasundera agreed

[121] *Ibid.*

to a suggestion by Ratnayake that a provision be included in the draft CUF agreement that all bunkers handled and transported within the Port of Colombo will have to use the CUF. Thus, clause 8.2 was added to the CUF which would result in any party supplying bunkers having to use LMSL tanks. When the 32nd respondent engaged in an off-shore operation to supply bunkers, LMSL sought injunctive relief followed by a writ application. The Court of Appeal held that clause 8.2 was invalid as it was inconsistent with Act No 63 of 2002. Chief Justice Sarath Silva stressed in this case that what is relevant in this case is the executive action of including clause 8.2: "The fact that judicial action set right the wrongful executive action cannot be availed of by the party who secured the wrongful executive action in its favor and went to the extent of enforcing the wrongful executive action in Court."[122]

Despite his assertion that there would be no monopoly, Jayasundera's subsequent action was contrary to this position: (a) he refrained from acting on the specific decision of the Cabinet; and (b) without any consultation agreed to the inclusion of clause 8.2 in the CUP. The Court stressed that Jayasundera's function under PERC law was only to advise and assist the Government and not to commit the Government to an undertaking that was completely contrary to the Cabinet decision.

Jayasundera's justification for the inclusion of clause 8.2 was that it was done to maintain a level playing field among all bunker operators which the Court stated appeared biased in relation to one with a single player. The court pointed out that it cannot accept the contention that "when there is a yielding hand there is nothing illegal to take something more."[123] The Court pointed out that JKH knew very well that this was not a mere sale, but a sale of shares owned by a Public Corporation in an extremely lucrative venture and that transparency and action taken according to the law should underpin the validity of the transaction. The objective of the Cabinet was not to preserve a monopoly but to enhance competition, to

122 *Ibid.*

123 *Ibid.*

lower bunker prices, improve facilities and thereby increase the revenue yield to the State. The obvious purpose of including clause 8.2 was to drive away competitors.

(b) Ultra vires Acts of Public Officials

The Court next considered the authority of Jayasundera to make the deviation in question and pointed out that the question whether a public officer can act in excess of authority and enter into agreements that would be binding on the State on the basis of ostensible authority has been settled more than half a century ago. The Court referred to *AG* v. *AD de Silva*[124] where the Privy Council considered this question:

> All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. **No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists**.[125]

In the case of *Rowlands* v. *AG*[126] the Court considered whether the principle of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance:

> Now in the field of agency, in so far as it concerns contracts seeking to impose liability upon the Crown, the common law doctrine that the agent need have only ostensible authority does not apply, and his authority must be actual.[127]

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124 54 NLR 529.

125 Emphasis in original.

126 72 NLR 385.

127 *Supra* note 110.

The Court pointed out that it is clear that these Respondents (18th-20th) got an advantage over other competitors through the yielding hand of Jayasundera and his ostensible authority cannot be a shield for these respondents to safeguard what they secured in an illegal, arbitrary and biased exercise of executive power.

With regard to the transfer of land at Bloemendhal Street, the Court stressed that Jayasundera had no mandate from the Cabinet or anyone else "to make an astounding representation that title to 8 Acres of State Land would be transferred without any payment, in such a casual manner, on a sheet of paper that does not bear even a signature."[128] Pointing out that a special grant or lease of state land for a nominal price can be done only by the President for a charitable purpose, the Court stated that Jayasundera has arrogated to himself a power that even the President did not have.

With regard to Jayasundera's justifications given in relation to the transfer of land, the Court pointed out that his assertion that land was to form part of the assets of LMSL is a nebulous statement because land is immovable property with clearly defined legal means of acquiring ownership. The question was whether at the material time the land was in law an asset of LMSL. It has been part of the Port of Colombo. The statement that CPC holds freehold title to the land and that cabinet approval was obtained for the transfer was part of Jayasundera's imagination. Stating that the turning point was the communication that no additional payment will be due, the Court stressed that Jayasundera had no authority whatsoever to make that communication. It is seen that the valuation of land had been done in a most cursory manner.

It is clear from the terms and conditions of the Agreement that the CPC had no title to the land. Hence the government is brought in with an obligation to ensure the transfer of land without any payment to JKH:

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128 *Ibid.*

> The Agreement is so biased in favor of the JKH that it even includes a clause that the land should be transferred free and all associated costs should be borne by the CPC since the sale of 90% of shares of LMSL to JHK was "structured" on such basis. It is significant that this "structuring" was only done in the unauthorized communication made by Jayasundera…. And thereby an illegal obligation was cast on the Government of Sri Lanka to "ensure" the transfer of 8 Acres 2 Roods 21.44 perches of land that comes within the declared limits of the Port of Colombo free of any charge whatsoever, to JKH. The transfer has to be done within 1 year and to add insult to injury LMSL (now owned by JKH) is entitled to enforce this Agreement by a "order for specific performance."[129]

The Court stressed that alienation of State land is regulated by law and finally governed by the Constitution and "cannot possibly be the subject matter of such an outrageous legal fiction as contained in the Agreement which was admittedly prepared by Jayasundera and the PERC."[130] Finally the then President made a grant under the State Lands Ordinance stating that it was done in consideration of Rs1.2 million paid to the State by LMSL. However, no such money was ever paid to the Government. Thus, the grant is bad in law "solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents."[131] The Court pointed out that under normal circumstances such a statement would be verified by the Treasury, in this case such a check is not there since by now the very same Jayasundera is now appointed as the Secretary to the Treasury.

The Court further pointed out that the validity of the grant must be examined in the light of provisions of the 13th Amendment to the

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129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

Constitution which provided for the establishment of Provincial Councils and vested legislative power with regard to matters falling within the Provincial Council List. One such item on the list is land. Appendix II states that state land continues to vest in the Republic, subject to certain restrictions. Thus, the power to make grants under the State Lands Ordinance is restricted by the provisions of Appendix II which establishes an interactive legal regime in respect of State Land within a Province. While the ultimate power vests in the President, it is subject to the conditions in Appendix II. Alienation or disposition of State land within a Province shall be done in terms of the applicable law only on the advice of the Provincial Council. Thus, the Court held that the alienation of land was unlawful.

The Court held that the entire process of the sale of shares of LMSL to JKH had been done without lawful authority. Jayasundera from the very commencement of the process acted outside his authority of the applicable law and the Cabinet memorandum: "He has not only acted contrary to the law but purported to arrogate to himself the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased in favor of JKH."[132]

Finally, with regard to the issue whether the petitioner's fundamental rights have been violated the Court pointed to three well established principles of Constitutional law:

That the rule of law is the basis of our Constitution as affirmed by the Court in *Visvalingam* v. *Liyanage*[133] and *Premachandra* v. *Jayawickrema.*[134] It "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative or wide discretionary authority on the part of the Government."[135]

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132 *Ibid.*

133 [1983] 1 Sri L. R. 236.

134 [1994] 2 Sri L.R. 9.

135 Quoting Dicey, *Law of the Constitution*, 202.

The principle enunciated in Articles 3 and 4 of the Constitution[136] – that the respective organs of the Government are custodians for the time being to be exercised for the People. In *Bulankulame and others* v. *Secretary, Ministry of Industrial Development*,[137] this Court pointed out that the resources of the State are the resources of the People and the organs of State are guardians to whom the people have committed the case and preservation of those resources.

There is a positive component in the right to equality guaranteed by Article 12(1) as decided in *Senarath* v. *Chandrika Bandaranayake Kumaratunga*.[138] Where the Executive, being the custodian of the People's power, acts *ultra vires* and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to bring such action before the Court.

(c) Court Decision and Declarations

Thus, the Court held that the Petitioner has established a sufficient *locus standi* in the public interest and has established an infringement of the fundamental rights guaranteed under Article 12(1) of the Constitution by the arbitrary exercise of executive power primarily by the 8th respondent who at the relevant time functioned as the Chairman of PERC.

The Court noted that although ordinarily a declaration by the Court that an infringement of a fundamental right would result in the restoration of the *status quo*, the court must decide whether the implications of the impugned executive action are severable. Holding that the grant of land, the grant of investment relief and the entering into the CUF Agreement are severable from the sale of shares, the Court allowed the relief prayed in the petition and declared the Presidential Grant as null and void. The Court further ordered 18th, 19th, 20th and 21st respondents to vacate the land

136 Also affirmed in the Determination of the Divisional Bench re: Constitutionality of the proposed 19th Amendment to the Constitution [2002] 3 Sri L.R. 85.

137 [2000] 1 Sri L.R 243.

138 SC (FR) Application 503/3005, SC Minutes 3/5/2007.

within one month of the judgment and restore possession to Sri Lanka Ports Authority. Furthermore, the CUF Agreement was declared null and void and the SLPA may enter into fresh Agreement for the use of facilities within the Port. Furthermore, all agreements entered into between BOI and LMSL were declared null and void and the Commissioner General of Inland Revenue was directed to recover all taxes due.

The Court was of the view that action of PB Jayasundera has not only been arbitrary and *ultra vires* but also biased in favor of JKH and the allegation that he has worked in collusion with S. Ratnayake of JKH to secure illegal advantage to the latter, contrary to public interest, is established. Therefore, the Court directed the 8th respondent to pay a sum of Rs 500,000/- as compensation to the State. The 18th-21st respondents were directed to pay the petitioner a sum of Rs 250,000/- as costs. The Registrar of the Court was directed to send a copy of the judgment to the Commissioner General of Inland Revenue to take action as directed by the Court.

5. Relief

Like in previous years, the main relief granted to petitioners has been an award of compensation and costs. However, several cases stand out due to the extensive nature of the orders made by the Court. Thus, in the case of *Nandapala* v. *Sergeant Sunil and others*[139] the Court ordered:

1. A declaration that the petitioner's rights under Articles 11, 12(1) and 13(1) have been violated

2. An inquiry is to be held by an independent inquiring officer of the National Police Commission as to why no action was taken regarding the recommendations of SP Homagama.

3. The 2nd respondent is ordered to report to the Court within two months of the judgment as to why he chose to submit a fraudulent

[139] SC (FR) Application NO 224/2006, SC Minutes 27/4/2009.

document in Court (the copy of the Inquiry Report filed by him had the report of SP Homagama deliberately removed) and why he should not be held in Contempt of Court

4. The Attorney General will consider pursuing an indictment of the 3rd respondent for recording a fabricated statement of the petitioner regarding his driver's license.

5. National Police Commission must publicly set forth effective, practical procedures that provide for supervision of police officers of all ranks, "in recognition of the lack of effective self-governance with respect to superior officers as evidenced by the present case."[140]

6. The National Police Commission must create awareness and training programs that will sensitize officers to the importance of their duties, with special focus on outstations.

7. A division with the Police Force – called internal affairs – be created to investigate and speedily review incidents of professional misconduct by members of any rank of the Police Force.

This is perhaps the first time that such an extensive order has been made by the Court in such harsh terms with regard to the conduct of police officers. The two cases discussed above in relation to the excesses of public officials - *Sugathapala Mendis and Raja Melroy Senanayake* v. *Chandrika Bandaranayake Kumaratunge and others*[141] and *Vasudeva Nanyakkara* v. *NK Choksy, former Minister of Finance and others*[142] - also stand out in relation to the orders made by the Court and the relief granted to the petitioners.

The case *Arjuna Ranatunga* v. *Gamini Lokuge, Minister of Sports and Public Recreation and others*[143] involved the alleged violation of the petitioner's

140 *Ibid.*

141 *Supra* note 56.

142 *Supra* note 110.

143 SC (FR) Application No 51/2009, SC Minutes 25/5/ 2009.

fundamental rights under Article 12(1) of the Constitution by the act of 1st respondent by the removal of the petitioner as the Chairman of the Interim Cricket Committee which he alleged has seriously affected his reputation as an international cricketer. It was further argued that his dismissal without a hearing is in violation of principles of natural justice and that the removal was arbitrary and unreasonable since no reasons for this decision were given. While the petitioner did not seek monetary relief, the court awarded a sum of Rs 100,000/- as nominal compensation. The Court further declared that the document removing the petitioner should not be construed as a blemish on the petitioner.

The case of *Dr Ariyawansa* v. *Dr Mendis and others*,[144] involved the transfer scheme for Senior Medical Administrative Grade which was the culmination of a consultative process and gazetted in April 2007. Under the terms of this gazette, all officers who had completed five years in that grade in one station were liable to be compulsorily transferred. Based on this scheme, several Medical Administrators applied for transfers but some of them were deferred by the Public Service Commission (PSC) for a further period of 3 years, on the basis that the criterion relating to completion of five years should be construed as being applicable from the date of the gazette - i.e. April 2007. The petitioners argued that the decision of the PSC violated Article 12(1) of the Constitution and led to the stalling of the entire transfer scheme.

The PSC in their objections argued that the period of five years should run from the date of the gazette. The Chief Justice noted in this case that the purpose of this provision was to ensure that no officer served in one station for more than five years. If the PSC's interpretation were to be adopted, it would denude the provision of its essential meaning. In other words, the scheme would come into effect only 5 years from 2007. The Court noted that the words, "all officers who have completed a five years [sic] period in one station" clearly contemplate that the past period of

144 SC (FR) 49/2008, Appellate Law Recorder 2008 (2), page 5. It must be mentioned here that the writer did not have access to the full judgment and is commenting only on the summary of the judgment available in the ALR.

service should be taken into account. There is an element of administrative efficiency in ensuring that no officer serves in a given station for more than five years. A further consequence of the decision made by the PSC is that the entire list became unimplementable. An officer who has been transferred after a period of five years on a compulsory basis would resist any administrative effort to transfer him, citing the relief granted to the nine officers in question. The Court was thus of the view that there is a clear violation of Article 12(1) and the entire transfer scheme has gone by default as a result of the individual concessions that had been granted.

With regard to the contention that the officers have a legitimate expectation that the minute in question would apply prospectively, the Court noted that the only legitimate expectation here is the possibility of a periodic transfer. The Court allowing the application set aside the order of the PSC.

6. Conclusion

During 2008-09 the Court handed down several significant judgments and made several orders that were unprecedented in the history of fundamental rights jurisprudence of the country. Two cases in particular stand out with regard to the severe criticism made of the actions of the former President of the country and *ultra vires* acts of public officials: *Sugathapala Mendis and Raja Melroy Senanayake* v. *Chandrika Bandaranayake Kumaratunge and others*[145] and *Vasudeva Nanyakkara* v. *NK Choksy, former Minister of Finance and others.*[146] The Court emphasized that nobody is above the law and the immunity from prosecution shields the doer and not the act. Moreover, such immunity does not exist in perpetuity. Public officials are required to uphold the sacred trust entrusted to them by the public and actions not conforming to this standard can be challenged.

Of particular significance is the order made by the Court in an unprecedented move ordering the former President to pay compensation

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145 *Supra* note 56.

146 *Supra* note 110.

to the State amounting to Rs 3 million as "token payment" which the Court hoped would serve as a reminder to the present and future state officials that everybody is subject to the rule of law and that their paramount duty is to further the public trust. It is also noteworthy that some of the orders made by the Court are very detailed and specific, reminiscent of the decisions of the Indian Supreme Court. Thus, for instance in *Sugathapala Mendis' case* the Court ordered the Bribery Commissioner to look into some of the transactions that were of a shady nature. It ordered the CEA, UDA and SLLR & DC to submit to the Court a joint master plan on how to restore the filled up marshy land within a specified period of time. Similarly, in *Vasudeva Nanayakkara's case*, the Court ordered, *inter alia*, a copy of the judgment be sent to the Commissioner of Inland Revenue to collect income tax from the respondent company. Moreover, the court ordered restitution in this case and declared all illegal transactions as being void *ab initio*. In the case of *Nandapala* v. *Sergeant Sunil and others*, the Court ordered the Attorney-General to consider pursuing the indictment of the 3rd respondent for recording a fabricated statement. It also ordered the National Police Commission to publicly set forth effective and practical procedures with regard to the supervision of police officers of all ranks and to create awareness and training programs to sensitize police officers with regard to their duties and a division within the Police Force be created to investigate incidents of professional misconduct by members of any rank of the police force.

Sugathapala Mendis' case is significant in another respect: the Court specifically stated that it has the power to make orders against private individuals where such individuals have made use of government corruption for private gain. Thus, the Court ordered these individuals to pay compensation to the State.

All in all, the years 2008-09 saw the elucidation of several important principles which made a significant contribution to the fundamental rights jurisprudence of the country. The extensive nature of the orders made, declaring that illegal acts have no force in law, that reasons for decisions have to be made, that no one is above the law, that immunity

from prosecution shields the doer, that the court has power to make orders against private individuals where they make use of government corruption for private gain, that public officials have to act within their statutory power, ordering compensation to be paid to the State, making directives to various government officials to oversee the implementation of the judgment as well as creating awareness programs for police officers, are all features of the cases decided during the years under review. It is hoped that these judgments are actually implemented by the parties to whom they are directed.

Like in previous years, no cases were filed under Article 12(2) and the majority of the cases were filed under Article 12(1). The years under review saw the rare decision in a case involving the violation of Article 10. While the actual number of cases may have declined, it would be premature to consider that despite the extensive jurisprudence of the court, cases of illegal arrest and detention and torture are things of the past. On the contrary, the number of cases decided during the years under review and Court pronouncements on the issue points to the fact that incidents of torture and illegal arrest and detention are unfortunately still prevalent in our society.

IV

EMERGENCY RULE

Saliya Edirisinghe[1]

1. Introduction

Sri Lanka for the most part of the past 30 years or more has been subject to 'Emergency Rule'. The term 'Emergency Rule' means the assumption of regulation making power by the President under the provisions of the Public Security Ordinance No. 25 of 1947 as amended (PSO). The emergency regulation making power granted by the PSO enables the President to make laws bypassing Parliament.

This chapter at the outset briefly explains the legal framework relating to the exercise of emergency regulation making power by the President. This explanation is provided with a view to enabling the reader better understand some of the issues considered herein.

The 'Emergency Rule' regime (covering the whole of Sri Lanka) which commenced on 13 August 2005 immediately after the assassination of Foreign Minister Lakshman Kadirgamar continued through the years 2008 and 2009. The emergency regulations that were in force in 2005 and 2006 can be ascertained from the chapters on 'Emergency Rule' appearing in the publications, Sri Lanka: State of Human Rights 2006 & 2007. Regulations

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made during 2007 are listed (with some regulations annotated) in Annex 1 to this chapter.

Regulations made in 2008 and 2009 are dealt with in this chapter. Among them is a new regulation relating to children who surrender or are arrested in circumstances related to the armed conflict. This paper also examines some of the regulations which were in force at the beginning of 2008, and which continued through until the end of 2009, in the context of events that unfolded during this period. These regulations include those which provided for the disposal of dead bodies circumventing the normal law relating to inquests, created an environment not conducive to the holding of free and fair elections and, exerted a stifling effect on trade union activity.

Bail in respect of persons in custody under emergency regulations has been considered in the earlier publications mentioned above. This issue is not revisited, but some further analysis of the regulations relating to bail are embarked upon to highlight the oppressive nature of the provisions and to condemn their continuation.

This paper also examines the en masse detention of those who sought protection in government controlled areas during the final stages of the conflict, a detainee's rights to legal consultation and representation, and looks at an unsuccessful attempt at toughening emergency regulations relating to executive detention of persons.

It should be noted that this chapter does not discuss cases filed against persons for breach of emergency regulations. However, in passing, the writer would like to draw attention to a case which engaged international attention, namely, the *Tissanayagam case,*[2] where one of the three charges preferred against the accused, a journalist, was a charge under an emergency

[2] Colombo High Court Case No. 4425/2008.

regulation.[3] The accused was convicted in August 2009 on all charges and sentenced to 20 years rigorous imprisonment.

The gazettes and other related material referred to in this chapter have been accessed at the Nadesan Centre Library. Although the Library takes particular care to monitor the gazettes relating to emergency rule, it is yet possible that some gazettes may not have been received by the Library or come to its attention. Therefore, it is possible that some information may have been missed out. This paper is based on the English version of the regulations, and in certain instances the English and Sinhala versions differ, and the legal effect of this has to be taken into account.

2. Legal Framework Relating to the Exercise of Emergency Regulation Making Power

State power in Sri Lanka is generally exercised in line with the doctrine of separation of powers, whereby the executive, legislature and judiciary function independently of each other. Legislative power is vested in Parliament, and Article 76(1) of the Constitution[4] prescribes that 'Parliament shall not abdicate or in any manner alienate its legislative power, and shall not set up any authority with any legislative power.' However, provision is made in Article 76(2) of the Constitution for 'Parliament to make, in any law relating to public security, provision empowering the President to make emergency regulations in accordance with such law.'

The Public Security Ordinance is a law relating to public security in which provision has been made empowering the President to make emergency regulations. However it was made by the pre-independence legislature which was the State Council of Ceylon. It is because of this constitutional requirement for '*Parliament* to make, in any law relating to public security, provision empowering the President to make emergency regulations…'

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3 The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006, published in the Gazette Extraordinary No. 1474/5 of 6 December 2006.

4 Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

(emphasis added) that Article 155(1) of the Constitution states that 'The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament'.

2.1 Emergency Regulation Making Power, Scope and Limitations

Before the President can make any emergency regulations, a Proclamation has to be published in the Gazette declaring that the President has invoked the provisions of Part II of the PSO. This is the Part in the PSO that contains the provisions empowering the President to make emergency regulations. The Proclamation serves the important purpose of giving the public notice that the President has assumed emergency regulation making power. Issuing of the Proclamation is commonly referred to as a 'declaration of emergency'. The PSO authorizes the President to issue a Proclamation only 'where in view of a public emergency, the President is of the view that it is expedient so to do in the interests of public security and the preservation of public order or the maintenance of supplies and services essential to the life of the community.'[5] A Proclamation may come into operation (in legal language invoke the provisions of Part II of the PSO) forthwith or on a future date as specified in the Proclamation, and may apply to the whole of the country or to such part or parts as stated in the Proclamation.

Section 5, which is contained in Part II of the PSO, contains the provisions that empower the President to make emergency regulations. The President may make emergency regulations "as appears to him to be necessary or expedient in the interest of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community." Emergency regulations come into force when made by the President,[6] and have the 'legal effect of over-riding, amending or suspending

[5] Section 2(1) of the PSO.

[6] Section 11 of the PSO.

the operation of the provisions of any law except the provisions of the Constitution.[7] However, there are provisions in the Constitution, which permit the restriction of certain of its provisions, namely the fundamental rights provisions, by emergency regulations in specified circumstances.[8]

Fundamental rights are contained in Chapter III of the Constitution. The fundamental rights that may be restricted by emergency regulations are the rights to: equality;[9] freedom from arrest except according to procedure established by law and the reason for arrest,[10] production of an arrestee before a judge according to law and further deprivation of liberty only upon the order of such judge made according to law;[11] presumption of innocence;[12] prohibition on retroactive offences;[13] freedom of expression;[14] freedom of assembly;[15] freedom of association;[16] freedom to form and join a trade union;[17] freedom to manifest a religion;[18] freedom to promote one's culture and to use one's language;[19] freedom to engage in lawful occupation;[20] freedom of movement and choosing of residence within Sri Lanka,[21] and freedom to return to Sri Lanka.[22]

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7 Article 155(2) of the Constitution.

8 Articles 15(1) and 15(7) of the Constitution.

9 Article 12 of the Constitution.

10 Article 13(1) of the Constitution.

11 Article 13(2) of the Constitution.

12 Article 13(5) of the Constitution.

13 Article 13(6) of the Constitution.

14 Article 14(1)(a) of the Constitution.

15 Article 14(1)(b) of the Constitution.

16 Article 14(1)(c) of the Constitution.

17 Article 14(1)(d) of the Constitution.

18 Article 14(1)(e) of the Constitution.

19 Article 14(1)(f) of the Constitution.

20 Article 14(1)(g) of the Constitution.

21 Article 14(1)(h) of the Constitution.

22 Article 14(1)(i) of the Constitution.

The fundamental rights that cannot be restricted by emergency regulations are the rights to: freedom of thought, conscience and religion;[23] freedom from torture or from cruel, inhuman or degrading treatment or punishment;[24] fair trial;[25] prohibition of punishment by way of death or imprisonment except by an order of a competent Court,[26] and remedy for the violation of a fundamental right by executive or administrative action.[27]

The President can revoke a proclamation of emergency[28] or alter or revoke any emergency regulation made.[29] A valid and operating Proclamation is a pre-requisite to keeping in force emergency regulations. Therefore, upon the revocation or lapse by operation of law of a Proclamation, all emergency regulations that were in force at the time of revocation cease to be legally valid, but anything validly done under such a regulation remains unaffected.[30]

2.2 Parliamentary Control of Emergency Regulations

When making emergency regulations, the President exercises legislative power delegated by Parliament. Since Parliament can not abdicate or alienate its legislative power, provisions exist to ensure the control of this delegated legislative power of the President. The controlling function is performed by having control over both the Proclamation as well as the emergency regulations promulgated.

A Proclamation which has come into operation is valid for a period of one month at a time, provided it receives parliamentary approval within

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23 Article 10 of the Constitution.

24 Article 11 of the Constitution.

25 Article 13(3) of the Constitution.

26 Article 13(4) of the Constitution.

27 Article 17 of the Constitution.

28 Section 2(2) of the PSO.

29 Section 5(3) of the PSO.

30 Section 4 of the PSO.

14 days from it coming into operation. If no such approval is granted by Parliament, the Proclamation lapses after 14 days of coming into operation.[31] When a Proclamation is not approved by Parliament or is revoked, no Proclamation made within the next ensuing 30 days will come into operation unless it receives the prior approval of Parliament.[32] Furthermore, Parliament can alter or revoke any emergency regulation.[33]

2.3 Judicial Control of Emergency Regulations

There are provisions in the PSO that seek to prevent courts from examining the validity of a Proclamation[34] or an emergency regulation.[35] These are commonly called 'ouster clauses'. Although the Supreme Court has ruled in a case decided in 1980[36] that the ouster clause contained in the PSO in respect of a Proclamation of Emergency[37] prevented the Court from reviewing the validity of the Proclamation, it is unlikely that this decision will be followed considering the subsequent development of the law relating to fundamental rights. In regard to the ouster clause in the PSO in respect of an emergency regulation, the Supreme Court has ruled that it has the power to strike down emergency regulations when they violate fundamental rights provisions, and in fact has struck down emergency regulations on this basis.[38]

There is also an ouster clause in the Constitution, in respect of a Proclamation of emergency, which was brought in with the 13th

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31 Article 155(6) of the Constitution.

32 Article 155(7) of the Constitution.

33 Section 5(3) of the PSO.

34 Section 3 of the PSO.

35 Section 8 of the PSO.

36 *J.A. Yasapala v. Ranil Wickremasinghe and Others,* FRD(1).

37 Section 3 of the PSO.

38 *Joseph Perera Alias Bruten Perera v. The Attorney-General* [1992] 1 Sri L.R. 199); *Karunathilaka and Another v. Dayananda Dissanayake, Commissioner of Elections and Others* [1999] 1 Sri L.R. 157; *Lilanthi de Silva v. Attorney-General and Others* [2000] 3 Sri L.R. 155; *N.W. Jayantha Wijesekera and Others v. Attorney-General and Others* SC(FR) Application Nos. 243/06, 244/06, 245/06, SC Minutes 16 October 2006.

Amendment to the Constitution.[39] The Supreme Court has not yet ruled on the validity of this provision.

3. Unsuccessful Attempt to Amend Regulations 19 and 21 of the EMPPR[40]

Regulation 19 deals with preventive detention ordered by the Defence Secretary. Regulation 21 refers to persons detained under Regulation 19, and makes provision *inter alia* for these detained persons to be produced before a competent court before the expiry of ninety days, and to be detained in fiscal custody in a prison.

The writer has examined these two regulations in a previous chapter of this publication[41] and expressed the view that provisions in Regulation 21 should have been in respect of persons arrested under Regulation 20 (for committing an offence under an emergency regulation) and not in respect of those detained under Regulation 19 (preventive detention), and that the reference in Regulation 21 to Regulation 19 was a drafting error.

However, these regulations remained uncorrected, and it appeared that the government proceeded on the basis that there has been no drafting error.

Regulations 19 and 21 were amended on the 5th of August 2008.[42] The amendment to Regulation 19 *inter alia* made Sections 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 [43] inapplicable to persons taken into custody and detained under this regulation, ousted judicial discretion in granting bail to persons in preventive detention, and

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39 Article 154J.

40 The Emergency (Miscellaneous Provisions and Powers) Regulation, No.1 of 2005 published in the Gazette Extraordinary No. 1405/14 of 13 August 2005.

41 See Sri Lanka: State of Human Rights 2007, Chapter 5.3 ' Preventive detention (Regulation 19), arrest (Regulation 20) and detention under Regulation 21'.

42 Published in the Gazette Extraordinary No. 1561/11 of 05 August 2008.

43 These sections *inter alia* require a peace officer to produce a person arrested before a Magistrate within 24 hours of arrest.

made provision for the Defence Secretary to extend the maximum period of preventive detention from one year to one and a half years.

Regulation 21 was amended by rescinding the previous regulation and substituting a new one. The new Regulation 21 empowered the Defence Secretary to issue a further detention order in respect of persons who had been in preventive detention and subsequently placed in fiscal custody (under the rescinded Regulation 21). This further detention could be made only in the interests of national security, and had to be made in accordance with the provisions of Regulation 19. When such a further detention order was made, the person subject to it was to be detained in the place specified in such order, and the court which had previously placed such person in fiscal custody was required to order that the person be detained in terms of the detention order and in the place specified in the order.

The substance of these two amendments was that the normal law relating to the production of a person in custody before a Magistrate within 24 hours was made inapplicable to a person detained under Regulation 19 and such person could be produced before a magistrate within a reasonable time but not later than 30 days. Furthermore, the Defence Secretary was authorized to take back into executive custody a person who had previously been in preventive detention and subsequently placed in fiscal custody, and to keep such person in a place specified in the detention order.

These two amendments were challenged in the public interest in a fundamental rights application[44] *inter alia* on the basis that the denial to a person in preventive detention the protection granted by the normal law of being brought before a magistrate within 24 hours, the ousting of judicial discretion in granting bail, and the protracted executive detention of up to one and a half years, infringe or imminently infringe

[44] S.C. (FR) Application No. 351/08.

the fundamental rights guaranteed under Articles 12(1)[45] 13(2)[46] and 13(5)[47] of the Constitution.

The Supreme Court granted the petitioners leave to proceed with the application. The State subsequently agreed to the staying of the impugned amendment, and thereupon the Supreme Court stayed the operation of these two amendments on 15 December 2008, which resulted in the previous regulations 19 and 21 being restored.

4. Continuing Problem of Obtaining Bail for Detainees from Magistrates

The issue of obtaining bail for persons in custody in different situations such as those in preventive detention under Regulations 19 of the EMPPR, those who have been in preventive detention and subsequently remanded by a magistrate under Regulation 21 EMPPR, and those charged for offences under emergency regulations in a Magistrate's or High Court, have been dealt with in a previous chapter of this publication.[48] These matters are not revisited here, but some other aspects that relate to the incarceration of persons under emergency regulations are briefly considered below.

Regulation 19 empowers the Defence Secretary to order a person into preventive custody for a period of up to one year, and to detain such person in a place authorized by the IGP. However, Regulation 21(2) limits this period to 90 days and also provides for the officer in charge of the place of detention to release the detainee. Regulation 21(2) states that:

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45 "All persons are equal before the law and are entitled to the equal protection of the law."

46 "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

47 "Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person".

48 Sri Lanka: State of Human Rights 2007, Chapter IV EMERGENCY RULE, under heading 6 'Provision for bail'.

'Any person detained in pursuance of provisions of regulation 19 in a place authorized by the Inspector-General of Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that regulation, and shall at the end of that period be released by the officer in charge of that place unless such person has been produced by such officer before the expiry of that period before a court of competent jurisdiction; and where such person is so detained in a prison established under the Prisons Ordinance – …'.

In a fundamental rights case where the issue of Regulation 21(2) conflicting with the power given by Regulation 19 to the Defence Secretary to order the detention of a person up to one year in a place authorized by the IGP came up for consideration, the State conceded that '[I]n terms of the Regulations 19(1) and 21 of the Emergency Regulations No. 1 of 2005 the detainee should have been transferred to fiscal custody after 90 days from the date of arrest'. [49]

However, Regulation 21(3) states that when a person who has been detained under Regulation 19 is produced in terms of Regulation 21(2) within ninety days before a court of competent jurisdiction, 'such court shall order that the (sic) such person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance". From a plain reading of this regulation it appears that detention in fiscal custody is open-ended. Nevertheless, this provision has to be considered in the light of the above mentioned fundamental rights case where the State conceded that the provision in Regulation 21(2) relates to transfer of custody. In such a situation, it follows that the detainee has to be released by the magistrate after the detainee has served the period of custody (preventive detention) which is stated in the order.

For example, if the period of detention specified by the Defence Secretary was less than one year, say for example 120 days, and the custody of the detainee is transferred to the fiscal at the end of 90 days, then Regulation

[49] SC (FR) Application No. 173/2008.

21(3) will have to be read down to mean that the order of the magistrate to fiscal custody will be only for the remaining period of 30 days.

On the other hand, if the initial preventive detention order was for the maximum period permitted under regulation 19 which is one year, then it follows from the above reasoning that the detainee has to be released by the magistrate after the detainee has served the balance period of preventive detention in fiscal custody.

Let us now turn to consider a different issue. There are instances where a detention order states that the person ordered to be taken into custody under regulation 19 is also suspected of being concerned in the commission of offences under emergency regulations, and states these offences in the order of detention. Although Regulation 20 provides for the arrest of a person reasonably suspected of being concerned in the commission of an offence under an emergency regulation, there is no provision in the EMPPR or in any other emergency regulation which authorizes the executive to order the detention of such a person for the purpose of investigation. In such a situation, it is submitted that Section 5 of the Code of Criminal Procedure becomes applicable, which states that:

'All offences –

(a) under the Penal Code,

(b) under any other law unless otherwise specially provided for in that law or any other law,

shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of this Code'.

Emergency regulations are made under the Public Security Ordinance, and therefore, offences created by emergency regulations are 'offences made under any other law'.

Therefore, in instances where a preventive detention order also states that the person is suspected of being concerned in committing offences under emergency regulations, in terms of the above Section, provisions relating to investigations in the Code of Criminal Procedure should apply. In terms of these provisions, the magistrate has the power to monitor the progress of the investigations and to terminate proceedings if there is no evidence that an offence has been committed.

Let us look at another issue. It was mentioned previously that in terms of Regulation 21(3), where a person who has been detained under Regulation 19 is produced within ninety days before a court of competent jurisdiction, 'such court shall order that the (sic) such person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance'. And it has been already stated that the period for which the person will be detained in fiscal custody (remand) appears to be open-ended. However, it is submitted that such open-ended remanding would be contrary to the fundamental right to freedom from arbitrary detention guaranteed by Article 13(2) of the Constitution on the following legal analysis.

Article 13(2) states: 'Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by **law**'. (emphasis added)

Therefore, it can be seen that one of the rights guaranteed by Article 13(2) is that a person in custody shall not be further deprived of his liberty except upon the order of a judge made in accordance with procedure established by *law*. The Constitution restrictively defines the term 'law' as follows: " 'law' means any Act of Parliament, and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council".

Regulations are made by the President *under* the Public Security Ordinance, and therefore are not 'law'. In fact, emergency regulations fall within the constitutional definition of 'written law'.[50]

Although emergency regulations may in certain situations *restrict* the enjoyment of some of the fundamental rights including the rights provided by Article 13(2) of the Constitution, the rights provided by Article 13(2) cannot be completely denied. Therefore, the constitutional right of a person not to be detained 'except upon and in terms of the order of a judge made in accordance with procedure established by *law*' cannot be completely denied. Regulation 21(3) is a 'written law' and not 'law' as recognized by the Constitution. Thus, Regulation 21(3) which purports to place a detainee in open-ended custody not merely restricts, but denies to the detainee the constitutional right not to be detained except in accordance with procedure established by *law*, and consequently violates the detainee's above mentioned fundamental right guaranteed by Article 13(2) of the Constitution.

5. A detainee's rights to legal consultation and representation

A person taken into custody under Regulation 19 (preventive detention) is detained in a place authorized by the IGP. The place of detention can be a prison established under the Prisons Ordinance, and where this is the case, all the provisions of the Prisons Ordinance and rules made thereunder except the provisions and rules relating to visits to and correspondence of prisoners, apply to such detainees.

However, the IGP may 'permit visits to, and the correspondence of, such person in such manner and at such time and place, as the Inspector-General of Police may from time to time direct'.[51] Another provision empowers the IGP to make any provisions of the Prisons Ordinance or

[50] See Article 170 of the Constitution.

[51] Proviso (a) of Regulation 19(3).

rules made thereunder applicable to a detainee, inapplicable, or to make them applicable with amendments or modifications.[52]

There are similar provisions in Regulation 21 as well.

There have been instances where detainees have been held without allowing them access to their lawyers, presumably on the basis that the above provisions empower the IGP to do so.

An important question arises whether such denial is lawful, and this issue is examined in detail below.

The right of a person detained under emergency regulations to consult and instruct a lawyer of his choice to represent him in court needs to be firmly established. In fact, more than two decades ago, the Supreme Court in considering a detainee's right to legal representation when detained under an Emergency Regulation (Regulation 17) similar to the present Emergency Regulation relating to preventive detention (Regulation 19) stated:

> '… [I]n Sri Lanka there is no fundamental right to legal representation in a person held on a detention order under Regulation 17 until, of course, the matter is brought to court. I might add that as a matter of practice, the courts have whenever the circumstances warranted it and with suitable safeguards, permitted visits by lawyers to *detenues* to enable them to make representations against the validity of detention orders. In the instant case, such an order was made…'. *Kumaranatunga v. Samarasinghe, Additional Secretary of the Ministry of Defence and Others,* [1983] 2 Sri L.R.63, at page 83.

Reading the above opinion of the Court, one may wonder how "the matter is brought to court" if the person detained has no fundamental right to legal representation, and the detainee has been refused access to

[52] Proviso (b) of Regulation 19(3).

his lawyers. Well, the matter can be brought to court, because the Supreme Court has made Rules that enable lawyers to petition the Supreme Court on behalf of a detainee without the lawyer meeting the detainee. This matter will be dealt with later on.

Turning back to the opinion of the Supreme Court in the above mentioned case, it is important to note that the Supreme Court took the view that "…there is no fundamental right to legal representation in a person held on a detention order under Regulation 17…" (which was the preventive detention regulation at that time) when considering the detainee's lawyer's submission that the detainee's right to legal representation emanated from Article 13(3) of the Constitution. This Article provides that 'Any person **charged** with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court'. (emphasis added).

The reasoning of the Court was that the rights granted by Article 13(3) of the Constitution relate to a person who stands charged (accused) in a Court, and not to a person who has not been so charged.

A detainee's right of access to legal counsel was considered again many years later in the case Sunil Rodrigo (on behalf of Sirisena Cooray) v. Chandananda de Silva and Others [1997] 3 Sri L.R. 265. In that case, the Court observed that a detainee had a right of access to his lawyer, and took this view, inter alia, on the basis that such access was the norm (at page 271).

The rights of persons in preventive detention to consult their lawyers regarding the violation of their fundamental rights, and the confidentiality of such discussions, were the subject matter of a complaint to the Human Rights Commission of Sri Lanka in 2007. (Application No. HRC/3900/07/I(v)).

The detainees had been kept in the Boossa detention camp, and according to the complainants, they were prohibited from informing their lawyers about matters relating to their arrest and detention, and were permitted

only to talk about matters relating to their welfare. Furthermore, the detaining authorities had insisted on listening to the conversations between the detainees and their lawyers.

Regrettably, the Human Rights Commission took the view that restricting the detainees to discuss with their lawyers matters relating only to their welfare, and insisting on listening to the consultations, did not violate the fundamental rights of the detainees. (Decision dated 31 January 2008).

In view of the foregoing, it is important to ascertain (a) whether there is, or is not, an unfettered constitutional right in a person, detained under emergency regulations, to consult and instruct a lawyer to complain to the Supreme Court regarding the violation of his or her fundamental rights; (b) whether there is, or is not, a right under the normal law, which entitles a detainee to consult and instruct a lawyer to complain through his or her lawyer to a judicial or other institution established for the administration of justice.

Let us now turn to examine these issues separately.

5.1 A detainee's constitutional right to legal consultation and representation

Fundamental rights provisions contained in Chapter III of the Constitution include the freedom from arbitrary arrest or detention (Articles 13(1) and 13(2)). Furthermore, the remedy for the infringement of fundamental rights by executive or administrative action is provided as a *separate fundamental right* in Article 17 of the Constitution. This right, which cannot be restricted, states:

> 'Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter'.

Article 126 of the Constitution, which also cannot be restricted, provides:

126 (1) '…

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself *or by an attorney-at-law on his behalf,* within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges. (emphasis added).

(3) …

(4) …

(5) …'

Although the enjoyment of certain fundamental rights can be restricted by law, including by emergency regulations, the right granted by Article 17 of the Constitution, as stated above, is not a right that can be so restricted. Therefore, a person who alleges that any of his fundamental rights have been infringed, has an *unrestrictable constitutional right,* to complain 'himself or by an attorney at law on his behalf … to the Supreme Court'.

When a detainee in the exercise of his unrestrictable fundamental right guaranteed by Article 17 (read with Article 126) of the Constitution chooses to complain to the Supreme Court "by an attorney at law on his behalf", such a detainee has by necessary implication an inherent fundamental right to have access to his attorney at law for the purpose of

consultation and giving the necessary instructions. Refusing the detainee access to his attorney at law, denies to the detainee his unrestrictable fundamental right guaranteed to him by Article 17 (read with Article 126) of the Constitution, and constitutes a separate and distinct infringement of the detainee's fundamental right guaranteed by Article 17 of the Constitution.

It is true that the Supreme Court has made rules that enable an attorney at law to petition the Supreme Court regarding the infringement of fundamental rights of a person, and to obtain ratification of the matters alleged in the fundamental rights application subsequently from the person concerned. (Rules 44 (3) & (4) of the Supreme Court Rules 1990 published in the Gazette Extraordinary No. 665/32 on 07 June 1991). However, this is an additional benefit that is provided to a person by the Supreme Court through its Rule making power, and cannot be construed as denying to the detainee the specific and unrestrictable fundamental right of complaining *"himself* or *by an attorney at law on his behalf* … to the Supreme Court" as provided by Article 17 (read with Article 126) of the Constitution.

On the other hand, should the detainee decide to exercise his constitutional right guaranteed by Article 17 (read with Article 126) of complaining to the Supreme Court *himself,* it is submitted that such a detainee has a right to consult and obtain legal advice from his or her lawyer before complaining to the Supreme Court.

The Supreme Court in the case Fernando v. Sri Lanka Broadcasting Corp. [1996] 1 Sri. L.R. 157 recognized the existence of implicit constitutional rights which make express constitutional rights meaningful. This opinion of the court, which was expressed over a decade ago, has never been doubted.

5.2 A detainee's statutory right to legal representation

There is also provision in the normal law that entitles a detainee (or for that matter any person) to be represented by an attorney at law, including

before any court, for the purpose of asserting the rights of such detainee (or person). This right is provided in Section 41 (1) of the Judicature Act No. 2 of 1978 which states:

> *'…every person who* is a party to or *has or claims to have the right to be heard* in any proceeding in any such court or other such institution [established by law for the administration of justice] *shall be entitled to be represented by an attorney-at-law'*. (emphasis and words within brackets added).

In terms of the above statutory provision, a person who has, or claims to have, the right to be heard in any proceeding before any court is entitled to be represented by an attorney at law.

Article 17 (read with Article 126(2)) of the Constitution grants a detainee a right to claim that his or her fundamental rights have been infringed, inter alia, by such detention. Furthermore, a detainee can claim a right to invoke the writ jurisdiction to challenge his detention. Also, a detainee has a statutory right provided by the Human Rights Commission of Sri Lanka Act No 21 of 1996 to complain to the Human Rights Commission of Sri Lanka regarding the infringement of his fundamental rights. Then again, there are other rights and relief that can be asserted before the civil courts by persons who, among other things, have been subject to unlawful deprivation of liberty.

A detainee, therefore, has a statutory right provided in Section 41(1) of the Judicature Act that entitles him or her to be represented by an attorney -at-law when asserting any of the above mentioned rights before a court or other institution established for the administration of justice.

Although this statutory right can be restricted by emergency regulations, this has not been done. Even if such an attempt is made, such a regulation cannot pass the test of reasonableness. It is not possible to think of a reason as to why a detainee should be denied the opportunity of asserting his or her constitutional, statutory or other civil law rights. It is submitted

that inherent in the detainee's statutory right to be represented by an attorney at law is the right of access to such attorney at law for the purpose of consultation and giving the necessary instructions.

Although Emergency Regulations 19 and 21 of the EMPPR contain provisions that empower the IGP to stipulate conditions upon which persons are to be detained, it is submitted these provisions cannot be availed of for the purpose of negating or restricting the express statutory right provided in Section 41(1) of the Judicature Act. This is because, although emergency regulations can amend or override provisions in any law (and that would include Section 41(1) of the Judicature Act), emergency regulations cannot confer powers on others to amend or override provisions in any law.

5.3 Restricting a detainee's complaints to his or her lawyer

Recognizing that a person in detention has a constitutional as well as a statutory right to access to his or her attorney at law for the purpose of consulting and giving instructions in regard to the legal assertion of the detainee's rights, the next significant question that arises is whether any restrictions can be imposed on the matters that the detainee can discuss with his or her lawyer.

Preventing a detainee from discussing with his or her lawyer matters relating to arrest, detention, torture and other fundamental rights, will in effect, deny the detainee's fundamental right to complain to the Supreme Court through an attorney at law regarding the infringement of those fundamental rights. This denial, as explained before, constitutes a separate violation of the detainee's fundamental right guaranteed by Article 17 (read with Article 126) of the Constitution. Furthermore, such restrictions will also deny to the detainee the other legal rights to access justice through an attorney at law which have been explained previously, and consequently, give rise to the violation of the equal protection of the law guaranteed to the detainee by Article 12(1) [53] of the Constitution.

[53] 'All persons are equal before tha law and are entitles to the equal protection of the law.'

6. En masse Detention of Persons who Sought Refuge in Government Controlled Areas

The armed conflict with the LTTE which had gone on for many years in varying levels of intensity came to an end on the 19th of May 2009, when the LTTE was completely militarily defeated by the Sri Lankan security forces.

During the closing stages of the armed conflict, the LTTE, faced with an imminent military defeat at the hands of the Sri Lankan security forces, resorted to various prohibited acts such as using the civilian population in the areas under its control as a human shield and preventing them from leaving the conflict areas. However, as the conflict reached its peak, and with the Sri Lankan security forces providing safe corridors for people in the clutches of the LTTE to escape the conflict areas, many people began to come over to safe areas under the control of the Sri Lankan security forces. During the last stages of the conflict, tens of thousands of people began flocking into these 'safe areas', and there was suspicion that LTTE cadres and operatives had mingled with the civilians and entered into the 'safe areas'.

Upon the conclusion of the armed conflict, these people who came over to the 'safe areas' were not permitted to leave these 'safe areas' by the Sri Lankan security forces. The legal basis on which tens of thousands of these people were so detained is not clear, and thus it is necessary to scrutinize the emergency regulations which contain provisions to restrict the physical liberty of an individual, to ascertain whether any provisions of these regulations could have been applied to deny the freedom of these people.

Emergency regulations that affect the physical liberty of the individual are Regulations 18, 19, 20, 21, 22 and 22A of the EMPPR. But before considering these regulations, it will be useful to examine the constitutional guarantees that relate to arrest and deprivation of liberty.

Freedom from arbitrary arrest and detention are constitutional guarantees and Article 13(1) of the Constitution provides that 'No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest'. Article 13(2) of the Constitution provides that 'Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law'.

It can be seen from the above constitutional provisions that Article 13(1) provides two rights, namely, (i) right to freedom from arbitrary arrest, and (ii) the right of a person arrested to be informed the reason for arrest. The rights provided by Article 13(2) are (i) the right of a person deprived of personal liberty to be brought before the judge of a competent court according to procedure established by law, and (ii) the right not to be further deprived of personal liberty except on the order of such judge made according to procedure established by law.

Although the enjoyment of the above constitutional rights may be restricted by emergency regulations on certain grounds including in the interests of national security, these rights being constitutional rights, cannot be totally denied.

Let us now turn to consider whether any of the emergency regulations mentioned above could have been used to deprive the physical liberty of all the people who fled the conflict zone and entered the 'safe areas' in government controlled territory during the closing stages of the armed conflict with the LTTE.

First and foremost, it is necessary to point out that the wording used in all the emergency regulations mentioned above makes it clear that deprivation of liberty cannot be done 'en masse' but only on an individual basis.

Regulation 18 permits the Defence Secretary (including an Additional Secretary of Defence) to order the restriction of movement of a person. The person making the order has to form the opinion that in respect of a particular person, it is necessary to restrict his movement to prevent him from acting in any manner prejudicial to national security or to the maintenance of public order etc. The person making the order has to form the opinion on reasonable grounds judged objectively. The restriction order may *inter alia* prohibit the person from being in any area except the area permitted by the order.

Regulation 19 authorizes the Defence Secretary (including an Additional Secretary of Defence) to order that a person be taken into custody and detained in custody to prevent such person from acting in a manner prejudicial to national security or to the maintenance of public order etc. Here again, the person making the order of detention has to base his opinion on reasonable grounds judged objectively. This period of detention can be up to one year, and this form of detention is commonly called 'preventive detention'.

Regulation 20 authorizes arrest when there is reason to suspect that a particular person has committed an offence under an emergency regulation, and the reason for arrest has to be informed to the person arrested – vide Article 13(1) of the Constitution. It must be noted that a person arrested under Regulation 20 has to be handed over to the nearest police station within 24 hours of arrest,[54] and the person making the arrest is required to give a written acknowledgement of arrest to a family member or close relative of the person arrested. There is no provision in the emergency regulations to detain by executive order a person arrested under Regulation 20.

Regulation 21 makes provision *inter alia* for a person who has been arrested and detained under Regulation 19 (preventive detention) to be produced before a competent court before the expiry of 90 days, and for such court

[54] Regulation 20(2) of the EMPPR.

to order the detention of that person in the custody of the Fiscal in a prison established under the Prisons Ordinance.

Regulation 22 contains provision for the rehabilitation of a person who surrenders in connection with certain specified offences including offences under any emergency regulation or 'through fear of terrorist activities'. A person who surrenders under this regulation is required to give a written statement to the effect that that person is surrendering voluntarily. A person who surrenders must within 10 days be handed over to the Commissioner General of Rehabilitation who assigns the surrendee to a 'Protective Accommodation Centre'. The Defence Secretary is required to order the keeping of the surrendee for a period not exceeding 12 months in the Centre. Prior to the expiry of 12 months, the Commissioner General is required to send a report to the Defence Secretary, who may then either release the surrendee, or may, with the recommendations of the Commissioner General and the Advisory Committee, extend the rehabilitation three months at a time, up to a total of one year. There is also provision to charge the surrendee for any offence he may have committed.

Regulation 22 A: This regulation is dealt with in detail later on, and therefore is not examined at length here. Briefly this regulation applies to a child (defined as a person under 18 years of age) who has been forcibly recruited as a combatant etc or who has committed an offence while in the above circumstances, or who fears being subjected to the above circumstances, or who through fear of threats or reprisal, surrenders or is arrested. Such child has to be produced before a magistrate within 24 hours of surrender or arrest, and the Magistrate is given discretionary powers as to the manner in which such child should be treated, with emphasis being placed on the protection and best interest of the child, including returning the child to the parents or guardian.

As stated above, the requisite opinion to restrict the movement or to detain a person has to be formed on reasonable grounds, and one of the constitutional provisions in Article 13(1) requires that the grounds

or reasons as to why that person's physical liberty is being curtailed has to be informed to the person arrested. Furthermore, a person cannot be detained to find out if that person has committed an offence or on a speculative basis to prevent a person from committing an offence.

When examining these regulations, it becomes clear that none of them could have been used for the purpose of detaining 'en masse' the people who fled the conflict areas and moved into the 'safe areas' provided by the government. The writer is not aware of any other law including the PTA[55] that could have been used to detain tens of thousands of people en masse for months on end.

However, even by the end of 2009, which was more than six months after the end of the armed conflict, tens of thousands of people including women, children, elderly and the infirm, remained in detention without the sanction of any known law. While it was likely that LTTE cadres and operatives would have masqueraded as civilians and entered the 'safe areas', and conceding the government's right to segregate the LTTE cadres and operatives from the civilians, this exercise had to be carried out under the law.

Given the sheer numbers involved and the exigencies of the post conflict situation, difficulties would have arisen in identifying and separating LTTE cadres and operatives from the civilian population. However, whatever the difficulties, this could not justify the detaining of tens of thousands of people in detention facilities for months on end, in a manner that was inconsistent with their constitutional guarantees including those relating to arbitrary arrest and detention, presumption of innocence, livelihood, freedom of movement and the rule of law.

It is disappointing that the government was incapable of swiftly putting into place a process of separation of civilians from LTTE cadres and operatives in a manner that was consistent with the constitutional guarantees of the

[55] Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979.

people who fled the conflict areas into the designated 'safe areas' provided by the government. This failure on the part of the government does not help the process of post-conflict justice and reconciliation that is vital for Sri Lanka's progress.

7. Disposal of Dead Bodies

Emergency regulations relating to the disposal of bodies of persons who may have died as a result of action taken in the course of duty by the police or armed services were contained in Regulations 54 to 58 of the EMPPR of 13 August 2005. These regulations were repealed on 13 October 2005[56] but reintroduced again on the 8 June 2006.[57]

Provisions for the disposal of dead bodies have been a feature of most 'emergency rule' regimes in the past and have attracted sustained and severe criticism from human rights activists. The manner in which inquest proceedings under the normal law are circumvented at the discretion of the members of the police and armed forces, the wide discretionary powers granted to the executive including the manner of disposing of the dead body, and the secrecy of the post mortem report, are some of the provisions that received the strongest condemnation.

The regulations relating to the disposal of dead bodies become applicable 'where a police officer or a member of the armed services has *reason to believe* that the death of any person may have been caused as a result of any action taken in the course of duty either by him or any officer subordinate to him, or where any person dies in police or military custody'.[58] In such a situation, 'notwithstanding anything to the contrary in Chapter XXX[59]

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[56] Emergency (Temporary Suspension of Regulations) Regulations, No.3 of 2005, published in the Gazette Extraordinary No. 1414/22 of 13 October 2005.

[57] Amendment of Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, published in the Gazette Extraordinary No. 1448/21 of 08 June 2006.

[58] Regulation 54 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, published in the Gazette Extraordinary No. 1448/21 of 08 June 2006.

[59] This Chapter contains provisions relating to the inquests of deaths.

and Section 9[60] of the Code of Criminal Procedure Act, No. 15 of 1979 or the provisions of *any other written law*' (footnotes and emphasis added), the facts relating to the death have to be reported to the Inspector General of Police or to the nearest Deputy Inspector General of Police.[61]

Thereupon, the Inspector General of Police (IGP) or the Deputy Inspector General of Police (DIG) is required to direct an officer not below the rank of Assistant Superintendent of Police to proceed to the scene and to record his observations, take charge of any probable productions, to record statements from any persons acquainted with the circumstances relating to the death and, where a body is found, to report such to the Magistrate[62].

The Magistrate is required to direct a government Medical Officer to forthwith hold a post-mortem examination, and after its conclusion, to hand over the dead body to the DIG for disposal.

The DIG is required to hand over the body to any relations who may claim it, subject to conditions that may be imposed in the interest of national security or the preservation or maintenance of public order.

However, provision is made granting the DIG discretion not to hand over the body to relations on grounds of national security or the preservation or maintenance of public order, and to order the burial or the cremation of the body in accordance with such steps as may deem necessary in the circumstances.

Thereafter, *if* an application is made by the IGP, an inquiry into the death is held by the High Court in Colombo. In such a situation, the Medical

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60 Provides jurisdiction to a Magistrate's Court to inquire in to deaths by violence, or when occurred suddenly, or when body found without knowing how such person came by his death etc.

61 Regulation 54 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, published in the Gazette Extraordinary No. 1448/21 of 08 June 2006.

62 These provisions are found in Regulation 55 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, published in the Gazette Extraordinary No. 1448/21 of 08 June 2006.

Officer who conducted the post-mortem examination is required to send the report to the High Court and is prohibited from disclosing its contents to anyone unless authorized by the High Court. In conducting the inquiry, the High Court is required to record the evidence placed before it by the IGP or an authorized officer and also of any other person acquainted with circumstances relating to the death. The proceedings are not open to the public and only such reports of the proceedings as authorized by the Competent Authority can be published. However, the Court of Appeal is empowered to direct that proceedings or part thereof be open to the public.

At the conclusion of the inquiry, the High Court is required to transmit to the Attorney General the record of evidence together with any other documents and a report of the circumstances under which the death was caused, and the Attorney General is empowered to initiate legal action if he is satisfied that a commission of an offence is disclosed.

Article 155(2) of the Constitution prescribes that 'The power to make emergency regulations…shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution'.

Section7 of the PSO states 'An emergency regulation or any order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any such regulation or any such order or rule shall, whether that provision shall or shall not have been amended, modified or suspended in its operation under section 5 of this Ordinance, to the extent of such inconsistency have no effect so long as such regulation, order or rule shall remain in force'.

Therefore, the legal effect of these provisions is that the above mentioned emergency regulations relating to the disposal of dead bodies of persons who died as a result of action taken by the police or armed services in the course of duty prevail over all other laws including any military law in regard to disposal of dead bodies.

These regulations take on notable significance when considering the death and disposal of the bodies of persons who were allegedly killed while in the process of surrendering to the armed forces at the closing stages of the armed conflict, and the disposal of the dead body of the LTTE leader Velupillai Prabahkaran.

The applicability of these regulations to the disposal of the bodies of persons who were allegedly killed while in the process of surrendering to the armed forces at the closing stages of the armed conflict would depend on the circumstances in which they died. If it was believed that the surrendees had been shot and killed by the LTTE, then the provisions of regulations 54 to 58 would not be applicable, and these dead bodies should have been subjected to an inquest under the procedure prescribed in the Code of Criminal Procedure.[63] It may be also noted that Section 369 of the Code states: 'An inquest of death shall not be held except under the provisions of this Code'.

However, if these persons' deaths were caused as result of action taken by the armed services in the course of duty, then the procedures prescribed in regulations 54 to 58 should have been followed, including those relating to the disposal of dead bodies, which procedures are referred to below when discussing the disposal of the dead body of Velupillai Prabahkaran.

It appears that the death of LTTE leader Velupillai Prabahkaran was caused as result of action taken by the armed services in the course of duty. Therefore, the provisions prescribed in regulations 54 to 58 relating to the disposal of his body were applicable. The dead body of Vellupillai Prabahkaran was found after the armed conflict had come to a final conclusion, and it is clear that the procedures prescribed in the regulations including those relating to a post mortem were not followed.

[63] Code of Criminal Procedure Act, No.15 of 1979.

A proviso to Regulation 56[64] granted discretion to the DIG not to hand over the body to any relations who may claim the body and to order its burial or cremation in the interest of national security or the maintenance or preservation of public order. The provision granting discretion to the DIG not to hand over the body to any relatives only empowered the DIG to 'authorize the taking possession of and effecting the burial or cremation of the dead body in accordance with such steps as he may deem necessary in the circumstances'.

Even if the 'doctrine of necessity' could be invoked to avoid following the procedures laid down in the above mentioned emergency regulations on the basis that large numbers of bodies had to be disposed of, it is extremely doubtful whether this doctrine could be relied upon to justify the disposal of the dead bodies of those who were allegedly killed while in the process of surrendering to the armed forces at the closing stages of the armed conflict, and the disposal of the dead body of Velupillai Prabahkaran after the conflict had ended.

8. Stifling Trade Union Action

Regulation 40 of the EMPPR was the main provision that dealt with essential services. A number of services were listed as essential services in a Schedule to the EMPPR. There was also provision for the President to declare any other service as an essential service. This Regulation together with the Schedule was repealed in October 2005 but reintroduced in August 2006 together with the Schedule. There was strong opposition to the reintroduction, and presumably as a result, the President repealed the Schedule in September 2006 and made other alterations,[65] which had the effect of the essential service regulation coming into operation only on the President declaring any service to be an essential service.

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64 'Provided , however, that the Deputy Inspector-General of Police may in the interest of national security or for the maintenance or preservation of public order, authorize the taking possession of and effecting the burial or cremation of the dead body in accordance with such steps as he may deem necessary in the circumstances'.

65 Amendment to Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, published in the Gazette Extraordinary No. 1464/26 of 29 September 2006.

Once a service was declared an essential service, conduct such as not reporting to work, refusing to work, not working the full period of the normal working day, refusing to work overtime etc became offences. In addition, the workmen lost their employment on the basis of vacation of post.

Where in the opinion of the President, members of any organization are impeding, obstructing etc or impeding, obstructing etc other persons from carrying on an essential service, or aiding and abetting such acts, such organization may be declared by the President as a proscribed organization. In such an event, the regulation states that all members of the proscribed organization become guilty of an offence and those who are in government or public corporation employment lose their employment from the date of the order of proscription. Those who lose their employment are required to vacate any government quarters occupied by them within three days of losing their employment, and failure to do so is an offence.

When a person is convicted of an offence against this regulation, by virtue of the conviction, all movable and immovable property of that person is deemed forfeited to the State. Furthermore, any alienation of such property after the coming into force of the regulation (irrespective of when the offence was committed) is deemed null and void.

Furthermore, when an organization is proscribed, certain provisions of Regulation 71 of the EMPPR applies, and these include the taking over of any printing press of the proscribed organization.

The rights of workers and trade unions in essential services are effectively suppressed by these regulations. It is submitted that the mandatory nature of the punishments and their indiscriminate application irrespective of the nature of the offence or the culpability of the offender amounts to inhuman punishment prohibited by Article 11 of the Constitution.[66]

[66] 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

On 15 November 2009, the President declared services connected with electricity, water, petroleum products, gas, and services, work and labour connected with activities related to ports, as essential services.[67] These services remained essential services as at the end of 2009. The armed conflict with the LTTE was over by 19 May 2009, and resort to emergency powers in mid-November 2009 to criminalize labour and trade union activities in these sectors when the State was not confronted with any extraordinary situation could not be justified.

9. Some Regulations Exerting a Negative Impact on the Holding of Free and Fair Elections

Although a President is elected to serve a term of six years in office, he or she may seek a second term after completing four years of the first term of office.[68] Incumbent President Mahinda Rajapakse sought a second term before completing his full first term, and the Commissioner of Elections announced on 27 November 2009 that the presidential election would be held on 26 January 2010. Nominations for the election were accepted on 17 December 2009.

Holding of elections while emergency laws are in operation is generally looked upon with dismay by opposition parties due to its stifling effect on campaigning activities. Some of the emergency regulations that were in force when the presidential election was announced and which regulations had the potential to exert a negative impact on the holding of a free and fair election are described below. These regulations continued to be in force at the end of 2009.

Regulation 13 of the EMPPR – Empowered the President *inter alia* to prohibit the holding of any procession or meeting in any area if he was of the opinion that such procession or meeting was likely to cause a disturbance of public order or promote disaffection;

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67 Gazette Extraordinary No. 1627/34 of 15 November 2009.

68 Third amendment to the Constitution certified on 27 August 1982.

Regulation 15 of the EMPPR – Empowered the President to appoint a 'Competent Authority' who may, *inter alia*, exercise pre-censorship of publications which might be prejudicial *inter alia* to the preservation of public order; Regulation 18 of the EMPPR – Empowered the Defence Secretary (includes an Additional Defence Secretary) to restrict the movement of a person including confining a person to 'house arrest', to prevent such person *inter alia* from acting in a manner prejudicial to the maintenance of public order; Regulation 19 of the EMPPR – Empowered the Defence Secretary (including an Additional Defence Secretary) to detain a person in executive custody to prevent such person, *inter alia*, from acting in a manner prejudicial to the maintenance of public order; Regulation 20 of the EMPPR – Empowered any public officer, member of the armed forces, or a person authorized by the President, *inter alia*, to arrest any person or search any premises, vehicle etc without a warrant, on suspicion that such person has been concerned in the commission of an offence under any emergency regulation or that such premises vehicle etc has been used in connection with any offence under any emergency regulation; Regulation 27 of the EMPPR – Prohibited the affixing in a public place or distribution among the public, posters, leaflets etc, which are prejudicial to public order; Regulation 28 of the EMPPR – Prohibited communicating false statements likely to cause public alarm or public disorder; Regulation 29 of the EMPPR – Prohibited *inter alia* commenting about any matter likely to directly or indirectly create communal tension; Regulation 67(1)(b) of the EMPPR – Empowered a police officer not below the rank of Sergeant and members of the armed forces not below Corporal in the Army and Air Force, and not below Leading Seaman in the Navy, to order any person or persons on or about any public place to remove himself or themselves from that place.

The Emergency (Colombo High Security Zone),[69] The Emergency (Sri Dalada Maligawa High Security Zone),[70] and The Emergency (Katunayake

[69] The Emergency (Colombo High Security Zone) Regulations No.3 of 2006 published in Gazette Extraordinary No. 1452/28 of 08.07.2006.

[70] The Emergency (Sri Dalada Maligawa High Security Zone) Regulations No.3 of 2007 published in Gazette Extraordinary No. 1504/10 of 04.07.2007.

Airport High Security Zone)[71] prohibited the holding of public meetings, political or otherwise, within the Zones (as described in the regulations), without the prior approval of the Inspector General of Police (included a Deputy Inspector General of Police). **Comment:** This would also prevent the holding of a public meeting in a private building/premises within the Zone.

10. Children who Surrender or are Arrested in Circumstances Related to the Armed Conflict

A new provision relating to children was made in 2008 by inserting a regulation 22A[72] into the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPPR). This regulation is aimed at accommodating and re-integrating children (defined as persons under 18 years of age) who have been subjected to debt bondage, forced labour, forced recruitment as a combatant in an armed conflict etc; or who have committed or are suspected of having committed an offence while in the above circumstances; or who fear threats or reprisals by any party to the armed conflict or fear being subjected to debt bondage, forced labour, forced recruitment etc.

Where a child who falls within an above mentioned category surrenders or is arrested, such child has to be produced before the nearest police station not later than 24 hours, and the Officer in Charge of the police station is required forthwith to inform the parents or guardian of the child, the Probation Officer and the Co-ordinator of the National Child Protection Authority, and produce such child before the relevant Magistrate within 24 hours of surrender or arrest.

Thereupon, the Magistrate is required to interview the child in camera in consultation with the Probation Officer and assisted where necessary by

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71 The Emergency (Katunayake Airport High Security Zone) Regulations No.4 of 2007 published in Gazette Extraordinary No. 1504/11 of 04.07.2007.

72 Published in the Gazette Extraordinary No. 1580/5 of 15.12.2008.

the police etc and where possible the parents of the child; order a medical examination of such child; order the Probation Officer to submit within one month a 'social inquiry report' where the immediate and long term needs of the child are set out, and; return such child to the custody of his/her parents or guardian, or order that the child to be placed in a 'Protective Child Accommodation Centre' for a period of one month monitored by the Provincial Commissioner of Probation and Child Care Services.

Where a child has been placed in a 'Protective Child Accommodation Centre', the Magistrate is required to decide at the end of one month having regard to the above mentioned interview and 'social inquiry report' and with the assistance of the police, (i) whether the child should be returned to the custody of his/her parents, (ii) whether the child should be accommodated in a 'Protective Child Accommodation Centre' for a period not exceeding one year, or (iii) whether the child should be placed in a 'Protective Child Rehabilitation Centre' for a period not exceeding one year. However, where there is evidence that the child had committed an offence during the period he/she was recruited as a combatant, the Magistrate is required to place such child in a 'Protective Child Rehabilitation Centre' for a period not exceeding one year.

The officers in charge of 'Protective Child Accommodation Centres' are required *inter alia* to provide the necessary health care, psychological counseling, educational or vocational training, and facilitate and encourage visits by and contact with the family at least once in every two weeks.

The officers in charge of 'Protective Child Rehabilitation Centres' are also required to provide basically the same facilities as those provided to children in 'Protective Child Accommodation Centres' but facilitation/encouragement of family visits and contact is at least once a month.

The Magistrate is required to review every month the need to accommodate the child in a 'Protective Child Accommodation Centre', and to review every three months the need to keep the child in a 'Protective Child Rehabilitation Centre', and where appropriate, to return the child to the custody of his or her parents or guardian.

The Commissioner-General of Rehabilitation is required to notify through the Gazette the location of the 'Protective Child Accommodation Centres' and the 'Protective Child Rehabilitation Centres'.

11. A Curious Appointment

On 23rd April 2009, Major General G.A. Chandrasiri was appointed as Competent Authority for the Northern Province. [73] The President stated that he was making this appointment under Regulation 5 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, and for the purpose of ensuring essential facilities to persons in the Northern Province who are displaced and for the administration and operations within that province.

However, what Regulation 5 provides for is the appointment of one or more competent authorities 'for the purposes of any regulation'. Such competent authority or authorities can be for the whole of Sri Lanka or any specified area or place.

The President has not named any regulation to which this appointment is referable, and there was no regulation which provided for the provision of essential facilities to persons in the Northern Province who are displaced and for the administration and operations within that province.

In these circumstances, the legal basis of this appointment remains uncertain.

[73] Published in the Gazette Extraordinary No. 1598/17 of 23.04.2009.

12. Regulations, Appointments etc Made in 2008 and 2009

12.1 New Regulations and Appointments etc in 2008 Include:

Appointment of Col. K.G.D. Perera as Competent Authority for the purposes of Emergency (Yala National Park) Regulations, No. 7 of 2007;[74] Appointment of Wasanthatilaka Nanayakkara as Competent Authority for the purposes of Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006;[75] Amendment to Regulations 1, 5, 6, 7(d) and 8 of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006. [76] Although it is stated that Regulations 1, 5, 6, 7(d) and 8 are amended by repeal and substitution of new regulations, there are no substantive differences between the substituted and repealed English text. There were differences between the English and the Sinhala text and changes were effected to the Sinhala text to bring it in line with the English text. When changes are effected to the text of one language of an emergency regulation (or for that matter any law), it makes practical sense to repeal and substitute the corresponding text of other languages, even though no changes are done to those texts. This enables one to refer to any given emergency regulation by reference to one document (Gazette); Amendment to Regulations 19 and 21 in the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005. The amendment to Regulation 19 *inter alia* made Sections 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 [77] inapplicable to persons taken into custody and detained under this regulation, ousted judicial discretion in granting bail to persons in preventive detention, and made provision for the Defence Secretary to extend the maximum period of preventive detention from one year to one and a half years. Regulation 21 was amended by rescinding the previous regulation and substituting a new

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74 Published in the Gazette Extraordinary No. 1543/24 of 02.04.2008.

75 Published in the Gazette Extraordinary No. 1552/10 of 03.06.2008.

76 Published in the Gazette Extraordinary No. 1555/33 of 27.06.2008.

77 These sections *inter alia* require a peace officer to produce a person arrested before a Magistrate within 24 hours of arrest.

one. The new Regulation 21 included authorizing the Defence Secretary to issue a further detention order in respect of persons who had been in preventive detention and subsequently placed in fiscal custody (under the rescinded Regulation 21);[78] Emergency (Colombo (Special) High Security Zone) Regulations No. 01 of 2008;[79] Amendment to Emergency (Muttur (East)/Sampoor High Security Zone) Regulations No. 2 of 2007;[80] Emergency (Galle and Matara High Security Zones) Regulations, No. 02 of 2008;[81] Amendment to Emergency (Restriction on the Procurement of certain Items) Regulations No. 5 of 2007;[82] Amendment to Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005 by insertion of a new Regulation 22A[83] (which has been described earlier in this chapter).

12.2 New Regulations and Appointments etc in 2009 include:

Emergency (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2009, proscribed the Liberation Tigers of Tamil Eelam and prohibited *inter alia* any person from being a member or cadre of, providing leadership, wearing uniform, emblem etc signifying association with the organization or any activity connected to the organization. Empowered the Minister to order any money, securities, and other moveable and immoveable property being used or intended to be used or belonging to the organization to be forfeited to the State. These regulations did not affect international organizations specified by the Defence Secretary and who have entered into agreement with the government of Sri Lanka for rendering of emergency medical treatment, humanitarian assistance including essential services. These regulations also did not affect any person who was authorized by the President to engage in discussions with a view to facilitate the settlement of problems posed

78 Published in the Gazette Extraordinary No. 1561/11 of 05.08.2008.

79 Published in the Gazette Extraordinary No. 1563/24 of 20.08.2008.

80 Published in the Gazette Extraordinary No. 1573/19 of 30.10.2008.

81 Published in the Gazette Extraordinary No. 1573/21 of 31.10.2008.

82 Published in the Gazette Extraordinary No. 1575/13 of 10.11.2008.

83 Published in the Gazette Extraordinary No. 1580/5 of 15.12.2008.

by terrorism in the country**;** [84] Notification of 398 places of detention for the purposes of Regulations 19 and 21 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005. Although there is no legal requirement to notify places of detention vide Regulations 19 and 21, there should have been such a requirement, and thus this notification is welcome. The majority of the places of detention are police stations**;** [85] Appointment of Competent Authority for the Northern Province. Major General G.A. Chandrasiri appointed. The legal basis of this appointment has been discussed above under 'A curious regulation'**;**[86] Amendment to the (Emergency (Proscription of the Liberation Tigers of Tamil Eelam) regulations No. 1 of 2009 by inserting regulation 7A. Prohibited *inter alia* persons or body of persons from collecting funds etc or dealing with or supplying moveable or immoveable property to or for the Liberation Tigers of Tamil Eelam**;** [87] Appointment of Competent Authorities under Regulation 3 of the Emergency (Galle and Matara High Security Zones) Regulations, No. 02 of 2008**;** [88] Emergency (Administration of Local Authorities) Regulation, No. 1 of 2005. Mr. Omar Kamil appointed to administer the affairs and to exercise, perform and discharge the powers, duties and functions of the Colombo Municipal Council**;** [89] Appointment of Commissioner General of Rehabilitation under Regulation 22 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005**;** [90] Appointment of Competent Authority for the Northern Province. The previous appointment of Major General G.A. Chandrasiri rescinded and T/Major General G. Don Harischandra Kamal Gunaratne appointed. The legal basis of the appointment has been discussed above under 'A curious regulation'**;** [91] Order under Regulation 40 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 declaring

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84 Published in the Gazette Extraordinary No. 1583/12 of 07.01.2009.

85 Published in the Gazette Extraordinary No. 1597/2 of 16.04.2009.

86 Published in the Gazette Extraordinary No. 1598/17 of 23.04.2009.

87 Published in the Gazette Extraordinary No. 1606/23 of 18.06.2009.

88 Published in the Gazette Extraordinary No. 1609/26 of 10.07.2009.

89 Published in the Gazette Extraordinary No. 1610/7 of 13.07.2009.

90 Published in the Gazette Extraordinary No. 1611/29 of 24.07.2009.

91 Published in the Gazette Extraordinary No. 1622/32 of 08.10.2009.

services connected with electricity, water, petroleum products, gas, and services, work and labour connected with activities related to ports, as essential services.[92] Regulation 40 has been discussed above under 'Stifling trade union action'.

13. Conclusion

Resort to the regulation making power under the PSO in the year 2005 was on the basis of renewed violence by the Liberation Tigers of Tamil Eelam (LTTE).[93] Although the Sri Lankan security forces succeeded in militarily defeating the LTTE by the 19th of May 2009, none of the regulations that were in force at the time of the crushing of the LTTE were repealed even by the end of that year, and this failure was a matter of grave concern.

Under the prevailing law, only the Proclamation is required to be approved by Parliament and not the regulations themselves. Although Parliament can alter or revoke any emergency regulation, this is not a substitute for requiring parliamentary approval for every regulation made. Such a requirement would have entailed parliamentary scrutiny and perhaps debate of each regulation, and would have in all probability contributed in some measure to a greater protection of the rights of the people.

In a situation where large numbers of persons were detained under executive orders, the absence of a legal requirement to notify the places of detention of persons was matter of great apprehension.

When persons are arrested or detained under emergency regulations, the Human Rights Commission has to be informed within 48 hours.[94] Failure to do so is an offence. It is unclear whether this legal requirement has been complied with.

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92 Published in the Gazette Extraordinary No. 1627/34 of 15.11.2009.

93 An armed separatist organization regarded as a terrorist organization by many countries.

94 Section 28 of the Human Rights Commission Act, No. 21 of 1996.

ANNEX 1

Emergency Regulations made in 2007

1. The Emergency (Fuel Storage High Security Zones) Regulations No. 1 of 2007, published in the Gazette Extraordinary No. 1499/24 of 30 May 2007. Major General Ungamandadige Bernard Lawrance Fernando appointed as Competent Authority for the purposes of these regulations (appointment made in the same gazette).

2. The Emergency (Muttur (East)/Sampoor High Security Zone) Regulations No. 2 of 2007, published in the Gazette Extraordinary No. 1499/25 of 30 May 2007. Major General Parakrama Pannipitiya appointed Competent Authority for the purposes of these regulations (appointment made in the same gazette).

3. The Emergency (Sri Dalada Maligawa High Security Zone) Regulations No. 3 of 2007, published in the Gazette Extraordinary No. 1504/10 of 04 July 2007. Brigadier Vidanage Udaya Bandula Nanayakkara appointed Competent Authority for the purposes of these regulations (appointment made in the same gazette).

4. Emergency (Katunayake Airport High Security Zone) Regulations No. 4 of 2007, published in the Gazette Extraordinary No. 1504/11 of 04 July 2007. Air Commodore Kolitha Aravinda Gunathilaka appointed Competent Authority for the purposes of these regulations (appointment made in the same gazette).

5. Emergency (Restriction on the Procurement of certain Items) Regulations No. 5 of 2007, published in the Gazette Extraordinary No. 1508/8 of 30 July 2007.

6. Amendment to Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006, published in the Gazette Extraordinary No. 1511/9 of 21 August 2007. Although the amendment states that the first proviso to regulation 8 and the

definition of 'terrorism' in Regulation 20 are amended by repeal and substitution of new provisions, there are no substantive differences between the repealed and substituted English text. There were differences between the Sinhala and English text and this amendment brought the Sinhala text in line with the English text.

7. Amendment to Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006, published in the Gazette Extraordinary No. 1511/9 of 21 August 2007. This amendment was published in the Gazette Extraordinary No. 1518/8 of 08 August 2007 and a substantive change to the definition of 'terrorism' was effected.

8. Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No. 6 of 2007, published in the Gazette Extraordinary No. 1521/3 of 29 October 2007.

9. Rescinding of Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations No. 6 of 2007, published in the Gazette Extraordinary No. 1521/25 of 01 November 2007.

10. Emergency (Parliament High Security Zone) Regulations, No. 8 of 2007, published in the Gazette Extraordinary No. 1529/11 of 26 December 2007. Major General Ungamandadige Bernard Lewrance Fernando appointed Competent Authority for the purposes of these regulations (appointment made in the same gazette).

11. Emergency (Yala National Park) Regulations, No. 7 of 2007, published in the Gazette Extraordinary No. 1529/12 of 26 December 2007. Brigadier S. Ranesinghe appointed Competent Authority for the purposes of these regulations (appointment made in the same gazette).

12. Emergency (Proscription of Tamil Rehabilitation Organization) Regulations, No. 9 of 2007, published in the Gazette Extraordinary No. 1529/13 of 26 December 2007. Proscribed the 'Tamil Rehabilitation Organization' and *inter alia* prohibited any person wearing any uniform, emblem etc signifying association with the organization, or engaging in any activity connected or related to the organization. Empowered the Minister to forfeit any money, securities or credits being used or intended to be used for the organization or other moveable or immoveable property of the organization.

V

THE HUMAN RIGHTS OF INTERNALLY DISPLACED PERSONS

Rishani Wijesinghe[1]

1. Introduction

Internally displaced persons (IDPs) are victims of human rights violations. They are victims of a broad range of violations, including violations of political, civil, economic, social and cultural rights. They have been exposed to discrimination, victimization, heinous abuses to human security both during, and after displacement. In Sri Lanka, as in any other conflict-affected country, IDPs have not just faced violations as any other civilian, but also because of their status as displaced people. Yet this does not mean that they do not have rights; they share the same rights and freedoms as every other citizen in the country. They enjoy rights guaranteed to every citizen, including the right to equal protection, the right to freedom of movement, freedom to choose their place of residence and the right to an adequate standard of living. Displaced people have the right to seek safety in another country and have the right to return to their places of origin voluntarily. However, as Sri Lanka has witnessed during its protracted thirty year conflict, IDPs have experienced multiple and protracted displacements – be it due to conflict, natural disasters or development. Although IDPs have specific rights enshrined within national and international frameworks, in Sri Lanka IDPs have limited means of enforcing their human rights.

[1] Formerly with Oxfam, Australia.

This chapter follows the trajectory of displacement in Sri Lanka during the period of January 2008 to December 2009 and focuses both on the displacement of over 300,000 men, women and children in the final 6 months of the conflict as well as over 430,000 IDPs still in displacement (as of January 2010). The two years proved crucial to Sri Lanka's history as it marked the culmination of the armed conflict between the Sri Lankan government (GoSL) and the Liberation Tigers of Tamil Eelam (LTTE). While recognizing the number of vulnerable communities displaced due to natural disasters such as floods, and those displaced due to development drives, this chapter focuses primarily on the unprecedented numbers displaced during the final two years of the island's conflict.

2. Definition and Causes of Displacement in Sri Lanka

Determining who is an IDP is critical when addressing durable solutions for the displaced. It is also vital for their protection. The Guiding Principles on Internal Displacement describes IDPs as *"... internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.[2]"* This is not a definition, but rather a description of a category of persons who are *involuntarily* displaced, and who *remain within one's national borders*. This two-tiered description does not denote a legal status and includes all major causes of internal displacement – armed conflict, violence, human rights violations, natural or human-made disasters. The description includes the term 'in particular' to emphasize that it can also include various other causes[3]. IDPs are often members of an identifiable group – for example, they may be members of a religious or ethnic minority group. (For instance, Tamils and Muslims in Sri Lanka).

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2 Guiding Principles on Internal Displacement – UN (E/CN.4/1998/53/Add.2)

3 Unlike the term 'refugee' (defined in Article 1 of the Convention relating to the Status of Refugees and modified by Article 1 of the Protocol relating to the Status of Refugees) which denotes a legal status.

Apart from the conflict, Sri Lanka has also suffered from natural disasters and development-induced displacement. For example, the National Disaster Management Centre stated on December 1st 2008, that more than 100,000 people had been displaced because of Cyclone *Nisha* that struck the island on the 25th of November.[4] However, the number of conflict displaced people in Sri Lanka is much higher than those displaced by natural disasters or large-scale development projects. The Brookings Institute estimates a figure of over one million IDPs displaced due to the conflict while a further 550,000 was displaced in the 2004 tsunami[5].

3. Overview of Conflict Context and Displacement in Sri Lanka 2008-2009

3.1. Post-2007 and the Termination of the Ceasefire Agreement

After declaring Sri Lanka's Eastern Province as 'liberated' in 2007, the government launched into triumphant claims of peace and progress in its provinces. While geographical control over the LTTE's stronghold in the East symbolized the 'liberation' of the province it did not mean an end to violence. The GoSL then focused its military offensive in the LTTE's remaining stronghold in the north of the island, the Vanni[6]. By January 2008, the GoSL had officially terminated the 2002 Ceasefire Agreement (CFA) and the armed forces launched a multi-pronged attack on LTTE-occupied areas North-West of the island. By August 2008, the forces had advanced and recaptured most of the territory West of the A9 highway, which divides the Northern region. Anticipating mass civilian displacement, the Office of the UN High Commissioner for Refugees (UNHCR) issued a 3-page memo (dated August 29th) setting out conditions it would require to help the GoSL prepare for the inevitable mass displacement. The

[4] Since 2004 and the tsunami which displaced over 500,000 people, Sri Lanka has experienced a number of natural disasters that have caused widespread destruction and displacement – the most recent being the flooding in early 2011 which affected over 1.2 million people.

[5] http://www.brookings.edu/projects/idp/Laws-and-Policies/sri_lanka.aspx

[6] The Vanni comprises the previously LTTE-controlled Northern Province consisting of Kilinochchi, Mulaitivu and parts of Jaffna, Vavuniya and Mannar.

memo stated that the camps should be run by a civilian administration and the displaced should be guaranteed 'full and unhindered freedom of movement'. As of mid-July 2008, the all-island figures for new IDPs had amounted to 195,923 (53,482 families)[7] and hundreds more were expected to flood into government-reclaimed territory.[8]

3.2. The Fall of Kilinochchi and the Unfolding Humanitarian Crisis.

As the offensive grew in momentum and intensity, the LTTE withdrew to positions East of the A9. The military followed, capturing its stronghold Kilinochchi by the beginning of 2009 (the LTTE's *de facto* capital) and forcing the LTTE to retreat to its remaining areas of control – primarily concentrated in the District of Mullaitivu. The battle left in its wake an untold and to this day, unknown number of civilian deaths by both warring factions. Forced to retreat into Mullaitivu, the LTTE forced civilians to retreat with it, prolonging their displacement and denying them access to humanitarian aid and security. The plight of the displaced civilians became critical when in September 2008 the Defence Secretary, Gotabhaya Rajapakse ordered all UN and humanitarian agencies to withdraw from the Vanni, stating that the government could no longer guarantee the security of aid workers in the conflict zone. This effectively prevented any humanitarian aid in terms of food, drinking water, medical aid and assistance and essential items from reaching civilians. This also meant that no humanitarian agency, independent observers, or the media had access to areas of conflict or the civilians that were trapped in them.

As the civilian and LTTE population were concentrated in a small area of territory, the likelihood to fall prey to aerial bombing, shelling and ground-fire by both parties increased. The LTTE had stopped their pass system to civilians wishing to travel out of the Vanni, effectively trapping them.

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7 IASC Sri Lanka North East Humanitarian Situation Report, 17-24 July 2008, #136

8 While the majority of those living in the Vanni had faced displacement multiple times, a 'new IDP' in this context can be defined as those displaced in the final year of the conflict.

By November 2008, displaced civilians who had managed to escape from the war zone in the Vanni, and travel the arduous and immense distances, started to trickle into the Vavuniya District.[9]

3.3. Safe Zones, Mass Displacement and the Problem of Access.

On January 21st 2009, the GoSL unilaterally declared a 7 km long 4m wide 'no fire zone' (NFZ) for civilians covering Suthanthirapuram, Vallipunam and Thevipuram in the Mullaitivu District.[10] The NFZ was a veritable death trap. Both the LTTE and the Sri Lankan military forces continued to fire into and around the 'safe zone.'[11] Trapped civilians were prevented from fleeing by the LTTE who shot and injured civilians trying to escape. The Sri Lankan forces fired indiscriminately into the NFZ in order to annihilate all LTTE targets despite assurances by government officials that no firing will take place.[12] There was no distinction made between civilians and combatants from both warring parties. By January, there had already been indications by the government of mass displacement (albeit nowhere near the actual numbers of civilians that crossed over).[13] The government had requested international donors to help build five camps with indications of keeping the displaced there for up to three years.[14]

By February, the government declared a second new 12 km long coastal strip as a NFZ in Puthumattalanin in the Mullaitivu District. By March 2009, the military captured Puthukkudiyiruppu, one of the last towns under LTTE control – effectively confining the LTTE to the increasingly congested NFZ.[15]

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9 Conversation with local humanitarian worker in the area providing emergency relief to the IDPs.

10 Contrary to Article 14 of the Fourth Geneva Convention, the NFZ – as well as the two that followed – was established unilaterally by the GoSL.

11 http://responsibilitytoprotect.org/index.php/component/content/article/172-asia-pacific/2319-hrwsri-lanka-protect-civilians-in-final-attack

12 Associated Press– '250,000 Tamil Civilians Urged to Flee to Safety' January 2009

13 http://www.slmfa.gov.lk/index.php?option=com_content&task=view&id=1663&Itemid=75

14 http://www.timesonline.co.uk/tol/news/world/asia/article5721635.ece

15 http://www.army.lk/opdetail.php?id=98

3.4. A Question of Numbers

There is limited information available on the numbers and causes of civilian casualties during the start of 2009 up until May 2009 because of the strict restrictions on humanitarian agencies, the media, human rights groups or any independent observers. By April, no UN agency was allowed in the conflict zone and the UN and the International Committee of the Red Cross (ICRC) had limited access to the screening points at Omanthai where they were not permitted to speak to those being screened. The last ICRC medical evacuation was on May 09 2009[16]. Although IDPs were arriving in government run camps, access to IDPs in these camps was curtailed by the security forces from May onwards, thereby hampering protection monitoring and distribution of aid by humanitarian agencies. The remaining civilians were trapped in the final NFZ – a few square kilometers in area. The government officially declared the war 'over' following the death of the LTTE leader Vellupillai Prabhakaran on the 18th[17] thereby regaining control over the entire island. The staggering numbers of civilians that poured into government-controlled territory was an example of the unfolding humanitarian crisis. By the end of hostilities, over 280,000 IDPs were confined to schools and camps in the districts of Vavuniya, Jaffna, Trincomalee and Mannar.[18]

By April 2009, the UN indicated that around 150,000 civilians were trapped inside the rapidly shrinking NFZ[19]. In contrast, government figures maintained that there were less than 20,000 in the area.[20] It was

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16 http://www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-140509.htm

17 No independent assessment team has been allowed into the NFZ since the fighting stopped in May 2009, and as a result independent verification of the status of the NFZ and civilian casualty figures are yet to be ascertained. The UN documents indicated that over 6432 civilians had been killed between January 20th and March 30th and a further 13,946 injured. Investigations carried out by international media groups such as The Times newspaper in the United Kingdom stated that around 20,000 civilians perished between January-June 2009. There are others who place the figure much higher at even 37,000 or 40,000.

18 Movement of Vanni IDPs: Release, Return and Transferred Displacement – November 2009, http://www.sangam.org/2009/11/Movement_IDPs.pdf

19 http://www.trust.org/alertnet/news/what-will-end-game-of-sri-lankas-war-mean-for-civilians/

20 http://www.guardian.co.uk/world/2009/apr/28/sir-lanka-air-attacks-hospital

difficult to accurately gauge the number of IDPs in Sri Lanka at that period due to a variety of reasons, including the lack of an effective monitoring mechanism, the lack of credible numbers offered by both warring parties and the absence of the media, humanitarian actors and independent observers present in the Vanni after September 2008. The overall lack and ambivalence in the existing data suggests that the precise number of displaced – especially during the latter stages of the conflict – is unknown. One can only rely on estimates and secondary information.

By September 2008, the Sri Lankan authorities informed the UN and I/NGOs that plans have been set up to keep up to 200,000 IDPs in camps in the Vavuniya District – in case of a mass influx of IDPs. The UN estimated that up to 230,000 civilians were displaced 'behind the lines of confrontation' in Kilinochchi and Mullaitivu.[21] The government immediately disputed these figures with S. B. Divaratne, then Commissioner-General of Essential Services stating that the population in the two districts did not exceed 120,000. The UNHCR maintains that as of 30 December some 281,698 people were displaced and an additional 300,000 remain displaced, some of whom have been displaced since the 1990s.[22]

3.5. Closed Camps

With a population in excess of 250,000 IDPs, Menik Farm in the Vavuniya District was demarcated into nine zones and was one of 21 closed camps spread across the districts of Vavuniya, Mannar, Jaffna and Trincomalee.[23] It was said to be the largest internment camp in the world during the period[24] and housed up to 80% of the total IDP population. Menik Farm was located in an area which was largely forest land in the remote southern

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21 Press Release by the Office of the UN Resident/Humanitarian Coordinator – 03 November 2008.

22 UN UNOCHA figures.

23 In Jaffna, IDPs were accommodated in eleven IDP sites (Kopay Teachers' Training College, Old Court House Jaffna, Mirusuvil RCTMS Church, Kodikamam GTMS School, Kaithady Hindu Children's Home, Kaithady University Hostel and Kaithady Palmyra Research Institute (sites A and B) Kodikamam Ramavil site, Chava Hindu Ladies' College, and Nelliyady Central College).

24 http://www.irinnews.org/Report.aspx?ReportId=84805

boundary of the Vavuniya District, but with the influx of IDPs, it became the habitat for a population equivalent to that of the third largest city in Sri Lanka in a short period of time with limited resources and infrastructure problems.[25]

When the 1,400 acre camps were initially established in early 2009, the Government faced much criticism that the camps were little more than internment camps surrounded by barbed wire (with an extended boundary of rolls of barbed wire) and permanent, rather than temporary structures, with pathetic living conditions, overcrowding and no freedom of movement. The overriding concern for the lack of freedom of movement in camps was 'security' and the camp was managed and run under military command with civilian authorities playing a secondary role.

Struggling to cope with the conditions in the camps, the government invited local, national and international agencies to assist in aid and service delivery – albeit through stringently controlled procedures and access restrictions. By end June 2009, the number of IDPs from the Vanni had stabilized at around 283,000 and as part of its 180-day plan, the government announced a number of releases and returns of IDPs – yet there were no concrete plans, and the plans made were continuously changed, and actions *ad-hoc*. For example, in early 2009, the GoSL stated that it expected to hold IDPs in the camps for up to three years.[26] However, on 7 May 2009 the Sri Lankan Government announced plans to resettle 80% of the IDPs by the end of 2009[27]. On 10 July Rajapakse stated that it was a *target*, not a promise, to resettle 50-60% of the IDPs by the end of November 2009.[28] However, on 16 July 2009 in a letter of intent to the International Monetary Fund (IMF), the GoSL stated that it *aimed* to resettle 70-80% of

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25 By July 2009, 43,000 shelters and tents were put up, 8,761 latrines and 339 bathing places were constructed, 12 nutrition centers and 132 temporary learning spaces were build in Menik Farm.

26 http://www.guardian.co.uk/world/2009/feb/12/sri-lanka-refugees-welfare-camps

27 http://www.hrw.org/en/news/2009/10/19/sri-lanka-government-breaks-promises-displaced-can-go-home

28 http://www.time.com/time/world/article/0,8599,1910095,00.html

the IDPs by the end of 2009.[29] By early October the resettlement target had been reduced even further. On 6 October 2009 then Deputy Finance Minister, Sarath Amunugama issued a statement saying the government *hoped* to resettle 100,000 (35%) of the IDPs by the end of 2009.[30] On 30 December 2009, the GoSL stated that there was no deadline for the resettlement of the IDPs, contradicting previous assurances.[31]

By June 2009, there were 261,000 IDPs accommodated in 19 emergency sites in Vavuniya, 11,000 in 9 emergency sites in Jaffna, some 6,700 in Trincomalee, and some 500 in two sites in Mannar[32]. A further 4,300 IDPs were in hospitals across the country.[33] In addition to the IDPs residing in camps and schools, there were a number of campsites and centres where surrendees were placed[34]. In addition, more than 11,000 individuals who were suspected to be former LTTE cadres or believed to have had links with the LTTE were sent for 'rehabilitation.'[35]

3.6. Release and Return

By mid-2009, the resettlement of IDPs began taking place within a complex political context. In August 2009, Sri Lanka saw the first post-conflict elections held in the North with the ruling United People's Freedom Alliance (UPFA) regaining and maintaining much of its control.

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29 http://www.imf.org/external/np/loi/2009/lka/071609.pdf

30 http://www.imf.org/external/am/2009/speeches/pr45e.pdf

31 http://www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=72114

32 UN UNOCHA figures.

33 UN UNOCHA figures.

34 By May 2009, in Vavuniya district alone, surrendees were housed in Pampamadhu Hostel, Punnthotham Primary School, Nullikulam Technical College, Tamil Maha Vidyalayam – Vavuniya Primary, Poovarasankulam Maha Vidyalayam, Muthaliyarkulam Maha Vidyalayam and Ramakulam Convent – with limited access given only to the ICRC.

35 Any association with the LTTE appears to have been grounds for arrest. During the screening process, some 11,000 suspected LTTE cadres (termed surrendees or separatees) were held in separate rehabilitation sites to which international humanitarian agencies including the ICRC did not have access to.

Amidst much international criticism and public outcry, coupled with approaching elections, October 2009 saw the government accelerate the return and releases of IDPs out of Vavuniya camps. According to the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) and UNHCR figures, 103,000 IDPs returned to their places of origin from the closed camps in the North and East.[36] Under international pressure, Senior Presidential Adviser, Basil Rajapakse announced a pass system allowing 'freedom of movement' to the remaining IDPs in camps in Vavuniya as of 1 December 2009.[37] The pass system allowed IDPs to move out of camps for a period of up to 15 days after which they were required to return. By 06 December, 129,196 IDPs had returned to their places of origin and releases to host families continued with over 29,000 IDP releases by end November 2009[38]. Returnee areas for this group of IDPs ranged from Jaffna, Kilinochchi, Mannar, Vavuniya and Mullaitivu districts in the North, to Trincomalee, Batticaloa and Ampara in the East as well as Polonaruwa and Kandy.

4. Types of Displacement in Sri Lanka

There are several issues pertaining to IDPs in Sri Lanka that needs to be noted. A significant number of IDPs have faced multiple displacements such as the 2004 tsunami as well as the protracted conflict. Further, the IDPs sometimes are displaced multiple times within a short period such as those who fled the heavy armed fighting in 2008 and early 2009. Some IDPs are returnees from other countries (e.g. India)[39] or occasionally repatriated asylum seekers from the West, meaning that they are displaced upon returning to Sri Lanka and live in camps.

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36 Movement of Vanni IDPs: Release, Return and Transferred Displacement – November 2009.

37 http://www.lankanewspapers.com/news/2009/11/50410_space.html

38 UN UNOCHA figures – December 2009.

39 For example, Kalimoddai camp in Mannar District housed a number of returnees from Tamil Nadu.

While focus has been on the approximately 280,000 'new IDPs' in closed camps since May 2009[40], little information is forthcoming on the 'old caseload' – an estimated 190,000 to 300,000 IDPs who have been displaced since the 1980s. The old caseloads fall chiefly (and are not limited to) three main groups and are generally classified as those displaced prior to 2008:

- The approximately 60,000 Muslims who were expelled from the North by the LTTE some two decades ago. The majority live in protracted displacement in Puttalum welfare centers, and others with host families in Anuradhapura, Polonnaruwa, Colombo and Negombo.

- Around 70,000 IDPs in Jaffna[41] and more than 10,000 in Trincomalee have been denied access to their land, property and homes due to the establishment of High Security Zones (HSZ) and Special Economic Zones (SEZ)[42]. The Jaffna HSZs take up 1/3rd of the arable land and a good portion of the fishing coastline of the peninsula.

- Approximately 150,000 refugees living abroad. In India alone, it is estimated that there are up to 120,000 refugees from Sri Lanka[43].

5. Discrepancies in Statistics and Figures of IDPs

In order to effectively respond to the needs of the IDPs, accurate figures and age and gender disaggregated data is needed. It has been difficult to accurately gauge the number of IDPs in Sri Lanka due the lack of

40 Movement of Vanni IDPs: Release, Return and Transferred Displacement – November 2009

41 Estimates of those displaced due to the Jaffna HSZs vary. A report/survey implemented by The Centre for Housing Rights and Evictions (COHRE) in April 2009 quotes the Jaffna District Secretariat figures of approx. 9000 people living in camps in November 2005 and that there is thought to be a further 60,000 people living with host families which total to just under 70,000 people who were displaced in Jaffna.

42 http://www.crisisgroup.org/~/media/Files/asia/south-asia/sri-lanka/159_sri_lanka_s_eastern_province___land__development__conflict.ashx

43 UNHCR figures.

an effective monitoring mechanism, the lack of credible numbers given by both warring parties, the absence of the media, humanitarian actors and independent observers after September 2008 in the Vanni. Further, the respective government agent offices (GAs) compile statistics based on only those who receive material assistance. Provided below is an attempt to document some of the crucial statistics of displacement that is narrated elsewhere in the chapter and demonstrates that exact figures of IDPs have been a challenge during the conflict period.

- Kalimoddai Camp in Mannar District was opened in March 2008 and served and housed 461 persons by December 15 2008. It was one of the first camps to be opened in the Northern Province after the Eastern 'liberation'. Many of the detained in the camp were young single men who fled the Vanni to avoid recruitment and who were subsequently detained on suspicion of LTTE involvement, families who fled to avoid their children being recruited, and also a number of Tamil refuges seeking to return.

- Sirulkandal camp also in Mannar District opened in July 2008 and by December 15th 2008, housed 345 persons.

- Despite humanitarian agencies, the media and even government officials trapped in the Vanni stated that there were more than 230,000 persons remaining in the Vanni[44] in January 2009, the Government officially insisted that the number was hugely inflated and that really there were only 70,000 people still in the conflict zone.[45] This deliberate underestimation of the numbers of displaced had serious implications for humanitarian assistance and for the protection of civilians in the Vanni.

- Heightened hostilities produced a new wave of IDPs totaling 211,850 as of July 2008.[46] The fighting caused displacement of some 12,000

44 http://www.guardian.co.uk/world/2009/feb/23/sri-lanka-ceasefire-tamil-tigers

45 http://www.guardian.co.uk/world/2009/mar/17/sri-lanka-ceasefire-eu

46 UNHCR Global Appeal 2009.

families in Mannar and Kilinochchi's Mulankavil area during the month of July alone[47] and ICRC facilitated the passage of nearly 44,000 civilians at Omanthai during the same month[48].

- By September 2008, the Sri Lankan authorities informed UN and I/NGOs that plans have been set up to keep up to 200,000 IDPs in camps in the Vavuniya district – in case of a mass influx of IDPs. In February 2009, the government indicated that it only expected over 30,000 families to come from the Vanni. It clearly was not prepared for the population to rise as it did to over 230,000 IDPs.[49] A year later, Menik Farm comprised 9 zones and held up to 220,914 IDPs. UN estimated that the total number of displaced in the Vanni was estimated to be 230,000 to 300,000, while some government officials suggested there were as few as 100,000.[50] The UNHCR maintains that some 280,000 people were displaced and an additional 300,000 remain displaced – some of whom have been displaced since the 1990s[51]

- Cyclone Nisha which struck the island on the 25th of November affected the lives of 59,943 families in total. In Jaffna, a total of 9,146 families (33,553 individuals) were displaced, in Mannar, 5136 families (23,104 individuals) and in Trincomalee, 406 families (1413 individuals) were displaced. In Mullaitivu, a total of 2,036 families (8,080 individuals) were internally displaced[52].

6. Key Issues Regarding the Human Rights of the Internally Displaced

With the heightened intensity of fighting in the North, communities were driven out of their homes, families were fractured and livelihoods lost.

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47 UNHCR Global Report 2008.

48 http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/sri-lanka-update-140808?opendocument.

49 http://www.reliefweb.int/rw/rwb.nsf/db900SID/LSGZ-7PMHZW?OpenDocument.

50 According to Foreign Secretary, Palitha Kohona: B. Muralidhar Reddy, "Aid Distribution: Red Cross, India differ with Sri Lanka," *The Hindu*, November 21, 2008.

51 UNHCR Global Appeal 2010-2011.

52 Disaster Management Centre – 27th November 2008.

Those who fled into government-controlled territory were compelled to live in camps under appalling conditions which were a violation of the basic tenets of human rights and humanitarian law.

The sheer scale of the crisis was misjudged and misrepresented by both the government and the UN. No one was adequately prepared to meet the shelter, food and water needs of the tens of thousands of displaced civilians. The situation was exacerbated by the restricted access permitted to UN and I/NGOs able to assist.

While conditions in camps scattered across Sri Lanka varied from camp to camp, the worst situation was witnessed in Menik Farm which accommodated the majority of IDPs. Menik Farm's severe overcrowding, a lack of preparedness and coordination, and restrictions on freedom of movement created conditions of unnecessary and unimaginable suffering for women, men and children.

The unprecedented number of IDP arrivals meant that government authorities and agencies simply could not cope and were clearly overwhelmed with the coordination and enormous volume of relief and assistance that needed to be provided. Further, the conservative estimates provided by the government also meant agencies could not adequately prepare or raise funds to cater to the higher numbers of displaced people flooding in.

6.1. Shelter

Access to adequate shelter is a basic human right. In situations of displacement, it becomes an essential protection priority and specific principles are enshrined in the Guiding Principles and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons – also known as the Pinheiro Principles. Principle 18 provides that "all internally displaced persons have the right to an adequate standard of living" and that" At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally

displaced persons with and ensure safe access to basic shelter and housing." Principles 2 and 8 of the Pinheiro Principles emphasize the right to adequate housing and the responsibility of the State to take positive measures to alleviate IDPs and refugees living in inadequate shelters.

In Menik Farm, the overcrowding, the appalling living conditions and inadequate shelter options led to an increasing number of protection problems. Specific groups like women-headed families, single mothers, families with young children, young mothers were exposed to unnecessary risks and were increasingly vulnerable to exploitation. Further, displaced people have the right to be consulted regarding decisions relating to their shelter needs, including the location of their shelter. A significant number of civilians who were displaced in Menik Farm had host family option elsewhere in Vavuniya[53] and voiced their preferences to stay with relatives elsewhere, yet they were confined to Menik Farm and other surrounding camps and welfare centres with no option but to agree to the accommodation facilities they were given.

The UN and other humanitarian agencies estimated that for Menik Farm to meet prescribed Sphere Standards, it could accommodate no more than 160,000 IDPs.[54] By June 2009, the camp was housing over 220,000 women, children and men[55] with Sphere Standards being severely undermined. Shelter agencies, burdened with the immediate pressure of setting up accommodation for the displaced could not do so until areas were cleared, leveled and basic drainage systems were established. Zones in Menik Farm accommodated more than its capacity. Zone 2 for example, held close to

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53 'Banking on Solutions – A Real-Time Evaluation of UNHCR's Shelter Grant Programme for Returning Displaced People in Northern Sri Lanka – UNHCR' – Crisp, J., Graf, A., Tennant, V. - March 2010 - PDES/2010/04

54 The Sphere Standards are a set of prescribed standards and best practices designed to improve the quality of disaster response. It outlines such practices and standards in food aid, nutrition, health, water and sanitation and emergency shelter provision.

55 Sri Lanka: Continuing Humanitarian Concerns and Obstacles to Durable Solutions for Recent and Longer-Term IDPs, IDMC, 10 November 2009.

55,000 people, almost double its capacity[56]. The camps that housed IDPs in Vavuniya were severely overcrowded – 10x12 tents housed up to 15 people at one time. The emergency shelters were only meant to last six months and by June, were already tattered and falling apart. The emergency tin and tarpaulin shelters were not built to withstand the sweltering heat or heavy winds and torrential rains that were common in the North – as the monsoon rains and Cyclone Nisha in 2008 proved (see 7.1.6. below).

6.2. Coordination

Organizing the distribution of food, non-food relief items (NFRIs), water and shelter was a logistical nightmare for agencies. Vehicle access to Menik Farm for NFRIs was restricted and the numerous checkpoints added to delays in delivery. Delays in obtaining MoD clearance in Madawachchiya checkpoint meant that food and NFRI trucks, convoys and water bowsers were often delayed. For example, UNHCR was unable to conduct its operations for three full days in April, resulting in a total of 47,000 newly arrived IDPs in Zones 2 and 4 having to wait for much-needed NFRIs.

6.3. Food

Those who were trapped in the Vanni were completely dependent on external assistance. The restrictions on access placed on UN and humanitarian agencies, as well as on the media and local non-governmental organizations effectively denied much-needed assistance to trapped civilians and prevented the flow of information. As a result, no one could adequately prepare for the humanitarian catastrophe that was to unfold. The last food convoy that was allowed into the conflict zone before February 2009 was on 16th of January, which WFP claimed would have only been enough to sustain the people trapped in the Vanni for only a week.[57]

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[56] Sri Lanka: Continuing Humanitarian Concerns and Obstacles to Durable Solutions for Recent and Longer-Term IDPs, IDMC, 10 November 2009.

[57] http://www.wfp.org/content/first-food-aid-convoy-reaches-thousands-displaced-northern-sri-lanka.

In March, the UNICEF claimed that there were approximately 500 displaced pregnant women trapped in the NFZ, and due to the denial of humanitarian access and care, the welfare of these women were of critical concern.[58]

Underestimating the numbers of IDPs trapped in the NFZ had terrible consequences for those inside. The deliberate quoting of lower quantities meant that what was actually needed was woefully inadequate. The relief convoys that were allowed in with food, shelter kits, NFRIs, water and other life saving essentials were simply not enough to cater to the actual numbers of trapped IDPs. Further, the available sea routes were deemed unsafe due to indiscriminate bombing by both warring factions. Ships carrying much needed food, medicines and other essential items could not reach the starving civilians. The failure by both the government and the LTTE to respect the sanctity of a no-fire zone – let alone the laws of war resulted in devastating numbers of preventable deaths of men, women and children, both directly due to hostilities and through the narrowing of humanitarian space and blatant disregard of humanitarian corridors used to deliver much-needed aid.

In April and May 2009, with the number of arrivals to Menik Farm, (many of whom where already malnourished and had not eaten for days before arriving at Menik Farm) increasing daily, the government and aid agencies could not cope with the sheer quantity of food and the coordination required to feed the tens of thousands of displaced civilians.

Due to the extreme overcrowding, inadequate planning and coordination, in Menik Farm, the provision of food remained woefully inadequate. The provision of food was intended to meet the minimum calorie requirement,[59] yet the scarcity of food in the camps meant that the most vulnerable often went hungry.

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58 http://www.unicef.org/infobycountry/sri_lanka_48791.html

59 2,100 kcals per person per day.

Further, those with injuries, disabilities, chronic illness, those pregnant or with infants, single mothers and the elderly had reduced access to food as they could not queue up for as long in the queues due to physical difficulties and the need to watch over their dependents. Unhygienic conditions in communal food preparation resulted in a high number of IDPs experiencing stomach problems and diarrhoea.

6.4. Water and Sanitation

Water and sanitation facilities were woefully inadequate as the government's National Water Board and aid agencies struggled to cope with the unprecedented number of IDPs. Toilets were constructed for emergency purposes and not designed for long-term use. A single latrine catered up to 80 people while Sphere Minimum Standards called for 20. By June 2009, at least 11,500 latrines were required in order to comply with minimum standards and at least 2,500 latrines were urgently needed in order to prevent a health crisis ahead of the coming monsoon rains.[60] However, with little and limited assistance delivered to provide adequate sanitation facilities, conditions in the camps deteriorated even further. In June alone, health officials recorded an increase in cases of diarrhoea, hepatitis, dysentery and chickenpox.[61] Poor drainage systems, irregular disposal of human excreta, gully sucking and solid waste disposal resulted in poor hygiene conditions and an increase in communicable diseases.[62]

6.5. Health Care in IDP Camps

A significant number of those who arrived at the camps were malnourished, sick or injured. At least 15,000 to 20,000 civilians, including children were reported injured, including at least 2000 amputees. *Médecins Sans Frontières* (MSF) had performed more than 5000 surgeries since March

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60 http://www.irinnews.org/Report.aspx?ReportId=84805.

61 Sri Lanka: Continuing Humanitarian Concerns and Obstacles to Durable Solutions for Recent and Longer-Term IDPs, IDMC, 10 November 2009.

62 WHO, Health Cluster Situation Report: 25 June 2009.

2009 and since it opened an emergency health facility across from Menik Farm later in May, over 600 patients had been hospitalized.[63] While a concerted collaboration was provided by the Ministry of Health together with assistance from foreign governments, UN agencies and local and international humanitarian agencies, critical gaps in resources and facilities were identified. Hospitals closest to Menik Farm were overwhelmed with patients and a lack of medical staff, beds and supplies. A 450-bed capacity hospital in Vavuniya for example, housed approximately 1200 patients in early 2009.[64] There were a limited number of doctors, nurses and midwives to staff the hospitals as well as to provide services within the camps. Access to treatment was limited and language proved a barrier with medical personnel – a number of who were on rotation work from around the country and could not speak Tamil. By August 2009, only patients with severe injuries were transferred to Vavuniya and Chetikulam Hospitals. Before the IDPs could be transferred, they had to get permission from their camp doctor and subsequently from the local *Grama Sevaka* and the military. Further, after permission had been granted, the military doctor at the checkpoint would then check the vehicle transporting the patient.[65]

Further, the lack of food and water and the inadequate sanitation facilities in camps had dangerous ramifications for the displaced. The appalling conditions in camps and the severe overcrowding left all IDPs exposed to a number of health risks. For example, the World Health Organization (WHO) reported that as of 12 June 2009, the number of communicable diseases diagnosed was as follows:[66]

- Between 1 June and 8 June alone 812 cases of dysentery and 1007 cases of diarrhoea were reported,
- 2,139 cases of hepatitis were diagnosed,

63 http://www.doctorswithoutborders.org/news/article.cfm?id=3711&cat=field-news

64 *Ibid.*

65 Discussion with a humanitarian worker - 2010.

66 Health Cluster Situation Report: 25 June 2009 (WHO).

- Over 12,195 cases of chickenpox. 128 cases of chickenpox were also reported in an IDP camp in Trincomalee.[67]

- A significant number of IDPs in Menik Farm had received treatment for acute respiratory tract infection and skin infections.

- In Menik Farm, more that 35% of children under five suffered from wasting or acute malnutrition.[68]

- Reports from a health worker claim that as the displaced civilians poured into Vavuniya camps, there were approximately 20-25 deaths per day.[69]

A humanitarian worker who had been displaced herself recalls the conditions in the camps. Her 60- year- old neighbour in Zone 3 was a heart patient and despite repeated requests, he never received permission to leave the camp to receive medical care. In June 2009, a 22-year- old woman who had been suffering from a stomach-ache died due to lack of timely treatment as the authorities in the camp did not allow her to leave in order to seek proper medical care. She was finally permitted to be taken to hospital on the third day by ambulance, but eventually died in hospital. While immediate medical attention was provided, post-operative care was urgently needed for those severely injured with fractures, amputations and spinal cord injuries. No assessments were made to prioritize those with injuries in order to meet their special needs. While mobile clinics operated in the zones in Menik Farm, patients queued up with their token from as early as 2:00/3:00 a.m. for a doctor who arrived at 10:00 a.m, with many failing to see the doctor on several occasions.

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67 UNOCHA Situation Report – June 2009.

68 According to a government presentation – June 03 2009.

69 According to a doctor attached to an NGO – 20/07/2009.

6.6. Heavy Rains and Flooding

The heavy rains during the 14th - 17th of August resulted in severe flooding in four zones in Menik Farm. The rains and heavy winds not only caused the hastily build tarpaulin and tin roofed shelters to collapse; but also flooded the latrines, which resulted in the overflow of sewage and human waste.[70] Camp authorities estimate that approximately 450 toilets in Zone 1, 80 toilets in Zone 3 and 200 toilets in Zone 4 were affected. The rains also made cooking impossible during these days, access roads becoming impassable, and relief items like drinking water and cooked food packets were impossible to deliver. Garbage and solid waste disposal also had to be suspended during the immediate aftermath of the rains. The camps were not equipped to deal with heavy rains and the lack of any alternative arrangement resulted in even more suffering and threats to IDPs' safety and health.[71]

In late November 2008, Cyclone Nisha led to severe flooding in the North and East, particularly impacting conflict-affected populations and IDPs in Jaffna, Kilinochchi, Mullaitivu, Mannar, Vavuniya, and Trincomalee districts. The Disaster Management Center (DMC) reported that flooding had affected an estimated 360,000 people, displaced more than 100,000 individuals, and killed at least 11 others, (as of December 1). In Jaffna District alone, the Inter-Agency Standing Committee in Sri Lanka reported that flooding damaged or destroyed more than 40,000 houses and affected approximately 330,000 people, including an estimated 62,316 individuals displaced to camps and temporary shelters.

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70 On the 15th of August, the Minister of Resettlement and Disaster Management, Rishad Bathiudeen, told the Sri Lankan *Daily Mirror* that he held UN agencies responsible for the flooding in the camps, saying, "[T]he Government cannot be blamed for the poor condition of the drainage systems which burst and failed."

71 In late July 2009 a Technical Working Group was set up to formulate contingency plans in the event of floods in the camps. The group recognized the need to complete the camps' drainage systems and strengthen the existing temporary shelters. However, limited improvements were done before the heavy rains set in, in August which caused severe flooding in Menik Farm.

6.7. Protection

National authorities have the primary responsibility to provide protection and humanitarian assistance to IDPs. The right to life is a fundamental right of all IDPs, affirmed in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Further, during armed conflict, Common Article 3 of the 1949 Geneva Conventions and Articles 51 and 75 of Protocol I protects the life and human security of IDPs.[72] This is also reinforced by Article 5 of the Universal Declaration of Human Rights (UDHR). Although the right to life is not expressly recognized in the Sri Lankan Constitution, it is recognized in some provisions of the fundamental rights chapter – namely, Article 11 and 13(4).[73] The IDPs in the North and East were continuously at risk of threats to their security and human rights violations, before and after they reached the camps. Their vulnerability was exacerbated because of their displacement from their communities and homes and also, because they were identified as belonging to a particular group – (i.e. Tamils and Muslims) and thus were vulnerable to acts of marginalization, discrimination and stigmatization, which further increased their protection risks.

The presence of armed personnel, army intelligence officers in civilian clothes, paramilitary groups in camps increased the vulnerability of IDPs whose insecurity and isolation was a critical concern. The risks were exacerbated by the disappearances and arrests of men, women and children when detained for questioning. In October 2009, reports indicated that IDPs in camps in Vavuniya voiced their concerns over the presence of paramilitary groups and plain clothed CID officers operating inside the camps. Further, while civil authorities were involved in the day to day

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[72] Common Article 3 provides that all persons taking no active part in hostilities (including the surrendered, sick, wounded or detained) shall be treated humanely. Article 75 prohibits violence to life, health, physical and mental well-being, while Article 51 states that no civilian population should be subject to attack, violence or threats whose purpose it is to spread terror amongst the civilian population'.

[73] Article 11 prohibits torture, cruel, inhuman or degrading treatment or punishment and Article 13(4) explicitly states that no person should be punished with death or imprisonment without due process by an established court of law.

administration of the camps, all decision-making processes remained with the security forces or the Competent Authority (CA).[74] Camp residents had no way of speaking out on sensitive issues, particularly regarding sexual and gender-based violence (SGBV), harassment and intimidation, paramilitary presence in camps and various other human rights concerns. Several activities were impossible to implement due to restrictions on talking to IDPs in a confidential manner, holding meetings with them, identifying people with specific needs and carrying out surveys on protection standards. Fear of repercussion and limited humanitarian presence also meant that reports were difficult to confirm or verify. Even the most grievous of violations could not be accounted for or investigated. For example, around early June 2009, three women were found dead near Malwathu Oya, a river usually used for bathing. To date, their deaths remain a mystery as camp authorities claim their deaths were due to snake bites while residents claim their bodies had several injuries. The pressure of delivering tangible services from the Government, avoiding controversies, and the resultant issues such as difficulties securing visas for expatriate staff, clearance for carrying out work inside the camps and eventually in the Vanni and the camps has also meant that protection was not prioritized.

Since 2007, the increasing militarization in the 'liberated' East and North, the various displacement camps, and the resettled areas have had a detrimental impact on the protection of the displaced as well as on the newly resettled families. The last two years of active hostilities have seen the increased presence of armed government forces controlling and coordinating most affairs that fall under the ambit of civil administration.[75] Key positions

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[74] The government-appointed Competent Authority would coordinate the administration and implementation of all relief work in relation to displaced civilians. The CA in the north in 2009 was a retired military commander – Major General C.A. Chandrasiri who, was also in July 2009 appointed Governor of the Northern Province but had little past experience in civil administration.

[75] In Menik Farm for example, the armed forces guarded the camps, the presence of plain clothes military intelligence and paramilitary groups were becoming a common sight – as were machine gun posts and look out points – and interrogations were conducted by the military and the CID in the name of security.

of control in camps were held by military persons or retired military officers who were actively involved in key decisions involving the lives of IDPs. In camps in Vavuniya and Mannar, armed military personnel were stationed inside the camps and nightly patrols were a common occurrence. Their presence did provide the residents with a feeling of security but simultaneously, posed a protection risk to vulnerable groups.

6.7.1. Women

In the camps across the North and East, displaced women faced higher vulnerability to gender-specific problems such as gender-based violence (GBV) and protection risks due to the appalling conditions such as overcrowding and lack of sanitation facilities and the lack of proper protection services. The overcrowding in camps denied women and girls privacy, and increased potential for abuse. From August to December 2009 in Menik Farm alone, there were 15 reported cases of rape, 3 reported cases of sexual assault, 58 reported cases of physical assault, 9 reported cases of other forms of gender-based violence and 34 cases of psychological and emotional abuse.[76]

Gender assessments conducted in May and June 2009 in Menik Farm revealed the overarching issues of protection, access, disempowerment and participation. In November 2009 for example, agencies reported that domestic violence continued to be a problem in camps and the sale and consumption of illegal alcohol continues unchallenged and that this was a reason for domestic violence.

Among the displaced was a significant number of women-headed households, single mothers, young mothers and young widows. While culturally, men are looked upon as providers of food and protection, their absence in camps resulted in significant levels of anxiety among women. In this environment, agencies have reported that some women were reportedly resorting to exchanging sexual favors for supplementary food

[76] Discussions with humanitarian workers In Vavuniya.

items like milk for their children or, before the pass system was in place, to obtain passage out of the camps.[77] In camps as big as Menik Farm, there was also a greater need for essential services such as health care and reproductive health services. Single mothers, single women, pregnant and lactating mothers faced specific challenges as the long queues, lack of privacy, limited services, rations, sanitation and lack of monitoring left them even more vulnerable and exposed to risk.

6.7.2. Children

Displaced children who were trapped in the Vanni and the NFZ were forced to face one of the gravest of human rights violations – that of forced recruitment. While the use of combatants has been associated with Sri Lanka's conflict, the final months of battle saw a shocking increase in the LTTE recruitment drive. Most able-bodied men and children were taken to the frontlines without training, some being as young as 14. Local sources maintain that the LTTE had increased its recruitment quota of one child per family to two children for larger families.[78]

After September 2008, access to verified information and the documenting of violations was near impossible and the full scale of child rights violations will never be known. Children displaced by the conflict faced grave threats to their physical security and the restrictive procedures imposed by the government for the transportation of essential goods into the Vanni, including medical supplies, food to combat malnourishment and shelter materials were against the basic principles of humanitarian and human rights law.[79]

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77 UN SGBV Report - 2010.

78 'Sri Lanka – Issues Concerning Protection of Children, Post-Armed Conflict' July 2009 – Coalition to Stop the Use of Child Soldiers.

79 Article 37(c) of the Convention on the Rights of the Child maintains that 'Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.

In the camps, children continued to suffer. Many bear the psychological scars from experiencing the horrors of the conflict. Many have been unable to continue with their education due to displacement, a lack of access to schools and the use of schools as welfare sites. The conditions of the camps, coupled with the lack of freedom of movement, the resultant overcrowding, the tense security situation, the period of droughts and flooding, the lack of access to essential supplies and services only exacerbated their plight. Infants were especially vulnerable and in Menik Farm, because of the sheer numbers, could not receive the special care they needed. In April 2009, it was reported that a six-month- old baby died because of contaminated water in his milk. In June 2009, UNICEF identified 1,400 children separated due to the recent conflict, 49 unaccompanied minors, 366 orphans and 350 children in hospitals (includes some who are not patients). Yet government figures and other sources tended to vary and no in-depth assessments were made to quantify the numbers of children needing special care, assistance and protection.

6.7.3. The Elderly

The elderly were also exposed to great vulnerability and threat of human rights abuses. Their access to food, water and other aid was limited and they were more vulnerable to illness and communicable diseases. There was a lack of alternative living arrangements outside the camps which left those with special needs even more vulnerable. Vavuniya District Justice A.K. Alexraja confirmed on 27th April 2009 of at least 30 cases where senior citizens had passed away due to starvation and malnutrition, while others suffered without special care. He ordered all those senior citizens above the age of 60, without relations and in need of special care to be accommodated in elders' homes.[80] By October 2009, it was reported that around 16,490 IDPs over 60 years, unaccompanied children, pregnant and lactating mothers were released from the camps to stay with relatives or in institutions such as homes for the elderly. By the beginning of November, officials announced that the elderly and others with special needs were

[80] District Magistrate's Court Vavuniya – Case No B/827/9 (April 27 2009)

to be released from the closed camps. By mid-November, the figure had increased to 25,000 from camps in Vavuniya, Mannar and Trincomalee.

However, the process of release in the Vavuniya camps and Pulmmoddai were rife with problems. No alternative arrangements were provided to those without appropriate caretakers, and the lack of transportation assistance, delays in receiving the proper release documents raised serious concerns. The homes and transfer sites which were to house the elderly lacked capacity.

Inside Menik Farm, designated elderly 'areas' were established (as were disability focal points). However, the volunteers assigned to look after them were not adequately trained in caring for those with special needs and several preventable deaths were reported in which the elderly in these designated areas had become very sick and had no access to medical care. A number of elderly persons in homes in Mannar (Pattim, Pesalai, Vankalai and Keeri) were released to join relatives. While agencies advocated for prioritizing the needs of the elderly and disabled persons, it still was not clear why all those who clearly did not pose a danger to national security were denied their right to freedom of movement.

6.7.4. Disabled People

IDPs with disabilities have unique needs and face heightened protection risks. Disabled people living in camps faced undue hardships such as queuing for food, drinking water and toilets and the lack of access to medical attention and facilities. They were also more susceptible to specific protection risks, which included the curtailing of their liberty and movement, the inability to access help in an emergency as well as threats to their life, safety and security if they had been lost or separated from their family caretaker or had no documentation to prove their identity (e.g. National Identity Cards (N.I.C.s)) or their disability (Disability Identification Card from the Department of Social Services).[81] A humanitarian worker recalls how at the Omanthai checkpoint, IDPs who

[81] K. Lentz, *Assessment of Internally Displaced Persons with Disabilities in Sri Lanka* – December 2008.

had sensory impairments (i.e. cannot hear or speak) were subjected to added scrutiny and at times, intimidation and harassment. Despite their return to their homes or relatives, disabled people still have specific needs which need to be prioritized and above all, are entitled to the same human rights enjoyed by all.[82] Insufficient or the lack of updated statistics on disabled IDPs leave this group even more vulnerable and even more exposed to human rights abuses.

6.7.5. Mine Risks

The location of the camps themselves posed severe risks to IDPs and humanitarian workers. IDPs were vulnerable to risk of injury or death from landmines and unexploded ordinances (UXOs) whilst in the Vanni.[83] This risk was not abated when they crossed over. Mine assessments were not made in time , especially in camps in Jaffna. In August 2009, one UXO was found in Menik Farm Zone 3 during the construction of the housing blocks.[84] Serious concerns remained for those who were released to their homes or places of origin (see Resettlement, Return and Restitution).

There have been at least 79 recorded mine/explosive remnants of war (ERW) casualties in Sri Lanka in 2008 comprising 11 killed and 68 injured. The casualties included 69 security forces personnel, seven civilians including two deminers, and three of unknown civil status. The UNDP recorded six civilian casualties, including one deminer: one person killed

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82 A body of international documents stress to importance of the rights of the disabled – including the Universal Declaration of Human Rights (UDHR), the UN Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment and the Convention on the Rights of the Child (CRC). In Sri Lanka, the rights of the disabled are protected under the Protection of the Rights of Persons with Disabilities Act No. 1996 and 2006. While it provides redress against discrimination, it does not provide specific penalties for non-compliance.

83 International law governing the use of land mines is contained in the landmines Protocol, which is annexed to the UN Convention on Prohibitions or Restrictions of Use of Certain Conventional Weapons.

84 Discussion with a humanitarian worker – 2010.

and five injured in four incidents. The rest of the casualties were identified through media reports. Of all the casualties identified in 2008, 77 were males (73 men, three boys, and one of unknown age) and one girl. The age and gender of one person was not reported.[85]

6.8. The Denial of Humanitarian Access and Aid

The denial of humanitarian access has been witnessed throughout the history of Sri Lanka's ethnic conflict. In 2008, humanitarian agencies were denied access to Kalimoddai and Sirulkandal camps and after September 2008, a government directive ordered the withdrawal of humanitarian agencies from the Vanni[86] citing the serious security situation as a reason. UN and I/NGOs with the exception of Caritas and the ICRC were forced to relocate further south in Vavuniya, effectively hampering the preparation and timely delivery of humanitarian aid and assistance to civilians displaced within the Vanni. This also meant that humanitarian agencies had no protective or independent monitoring presence on the ground as expatriates and NGO staff were not allowed beyond the Omanthai checkpoint[87] and humanitarian corridors in the conflict zones also ceased to function, making the transport and delivery of aid impossible.

Principle 25 of the Guiding Principles on Internal Displacement directly emphasizes the need for unimpeded access to humanitarian assistance. While it acknowledges that the primary duty lies with the government for providing humanitarian assistance, '(I)nternational humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced'. The Principles also reassert that the government must 'grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access' to IDPs.[88]

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85 Land-mines and Cluster Munitions Monitor: www.the-monitor.org

86 http://www.ngosecretariat.gov.lk/web/index.php?option=com_content&view=article&id=56%3Angosec&catid=40%3Anews-a-events&Itemid=37&lang=si

87 Even five months after the end of hostilities, agencies were still denied access beyond the Omanthai checkpoint.

88 Guiding Principles on Internal Displacement – UN (E/CN.4/1998/53/Add.2)

While access into camps was also restricted to media, human rights activists and a number of local and international agencies, by mid-2009 access to camps in Vavuniya was granted on an *ad hoc* basis to NGOs, ICRC and UNHCR following enormous pressure from the international community and media. While food and essential items were allowed to be delivered, protection monitoring in camps was virtually impossible, further jeopardizing IDPs' human rights and right to protection. In Vavuniya, all actors were subject to various security checks at numerous checkpoints. Procedures to gain access were unclear and subject to constant changes from either the Ministry of Defence (MoD) in Colombo or to the whims of military personnel or camp commanders. It became increasingly difficult to speak to the displaced without being watched by camp authorities, military personnel or informants, making needs assessments, psychosocial work and security monitoring impossible. By August 2009, Sri Lanka's Human Rights Commission still had no access to the IDP camps housing the recently displaced.

6.9. Forced Movement in the Vanni

As the LTTE lost more and more control during the military offensive, displaced communities were forced to retreat with the LTTE who believed in the strategy that being surrounded by civilians would make it more difficult for the government forces to fire indiscriminately. There have been a number of reports on the use of civilians as human shields by both the military and the LTTE, which visibly increased with the boxing in of displaced families in the NFZ during the last stages of conflict.[89] This created an outcry from key voices of the international community. UN Secretary General, Ban Ki moon appealed to the LTTE that children should not be held hostage, recruited as child soldiers or put in harm's way.[90] On May 13, 2009 the UN Security Council condemned the LTTE and denounced its use of civilians as human shields and urged them to

[89] HRW: Let Civilians Leave Sri Lanka's War Zone.

[90] Sri Lanka: Children should not be held Hostage, Recruited as Soldiers and put in Harms Way, UN 2009-05-12

lay down their arms and allow the tens of thousands of civilians to leave the conflict zone.[91] On May 14, 2009, the UN acting representative for Sri Lanka, Amin Awad, said that 6,000 civilians had fled or were trying to flee, but that LTTE was firing at them to prevent them from escaping.[92]

6.10. Restrictions on Freedom of Movement

A central issue facing the displaced was the denial of freedom of movement. Under the LTTE, Tamil civilians were subjected to limited movement under its pass system (which was later stopped by the LTTE to prevent civilians from leaving). As the fighting escalated, only a few thousand IDPs trickled into government controlled territory. The LTTE restrictions on movement to areas outside its control, and its policy that at least one family member must remain in the Vanni while others leave the area, prevented people from seeking safety in government-controlled areas. Overland travel out of the Vanni was extremely difficult. The displaced risked being caught in the crossfire, reprisals if caught by the LTTE, and an unknown number of landmines laid by the warring factions.

The IDPs in camps faced similar, if not harsher restrictions on their freedom of movement. Being detained indefinitely without charge or trial violates the basic principles of the UDHR (Article 13(1) and the Guiding Principles.[93] It was also in direct contravention of international law, in particular to Articles 9 and 12 of the ICCPR to which Sri Lanka is a party[94] and the Constitution of Sri Lanka.[95] In other words, confining IDPs to

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91 UNSC Press Statement – SC/9659

92 http://www.nytimes.com/2009/05/15/world/asia/15lanka.html?_r=1

93 Namely, GP 12 – IDPs have a right to liberty and security and should not be interned or confined in camps and should be protected from discriminatory arrest and detention. GP 14 maintains that IDPs are free to choose his or her residence and have a right to move freely in and out of camps and settlements. Further, GP 17 (4) states that displaced families who have been interned or confined still have the right to remain together.

94 http://www.hrw.org/en/news/2009/06/11/sri-lanka-end-illegal-detention-displaced-population

95 As per Article 14 (1) of the Constitution, restrictions on freedom of movement and place of residence must be 'permissible restriction' as per the Constitution.

camps without the ability to exercise their right to freedom of movement is illegal. The restriction also affects their rights to basic survival – healthcare, education and livelihoods.[96]

In Kalimoddai and Sirulkandal, IDPs were denied freedom of movement, a significant number were kept against their will. The camps were completely surrounded by barbed wire and guarded by military personnel.[97] A pass system was eventually put in place allowing a limited number of IDPs to leave the camps during the day. The passes available were limited to 30 IDPs per day with one family member staying back as a 'guarantee' of return. Single persons in the camps were at a disadvantage, and could only leave the camp with a military escort or in critical emergencies. The pass only permitted movement to certain areas, further restricting IDPs' choice of healthcare and schooling options. A year after their establishment, camp residents were still denied full freedom of movement with officials claiming that 'screening' of IDPs was still ongoing. Reports in August 2009 indicated that the navy had confiscated the N.I.C.s of a number of IDPs in Kalimoddai and Sirulkandal camps, which restricted their right to travel, their right to seek employment and any ability to regain their lost civil documents or land titles. The lack of documentation also meant that their right to freedom of movement was further limited.

Living with host families has always been the preferred option for IDPs[98] and while this has been encouraged in the past (2007/08 displacements in the East), the IDPs in Mannar were denied this option. A UNHCR survey conducted in April 2008 found that 100 out of the 115 families in Kalimoddai wished to leave the camp and stay with host families. These host families had already provided camp authorities with proof and

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96 The right to healthcare, education and livelihoods are enshrined under Articles 12 and 17(1) of the ICESCR, Article 23 of the UDHR and Article 13 of the ICESCR. Note however, that the human right to freedom is subject to certain limitations in times of conflict – Chapter 15 of the Sri Lankan Constitution and Article 13 of the ICCPR for example address restrictions which are necessary for the protection of national security, public order etc.

97 A limited number of passes were handed out by the forces but the IDPs had to return by evening and restrictions were placed on where they could go.

98 Handbook for the Protection of Internally Displaced Persons.

financial capacity to assist the IDPs. The IDPs also expressed a willingness to receive some short term assistance while they were waiting to leave, in particular, supplementary food and clothing. Their freedom of movement continued to be denied. A total of only 96 individuals have officially been released from the two camps. As of end June 2009, there were 333 families (961 individuals) in these camps (167 individuals were transferred from Vavuniya in June).

Similar to the Mannar camps, Menik Farm was surrounded by barbed wire, reinforced with sandbags and manned by armed forces. The government could not articulate a legal basis as to why these IDPs were interned, citing security threats and protection concerns as a defense. Some officials implied that among the displaced were LTTE suspects and they needed to be sifted out from the civilian population, detained, questioned and handled accordingly.[99] After the government permitted anyone above the age of 60, pregnant and lactating mothers to live with host families, the remaining IDPs were still not allowed to leave the camps. They could not resume their daily lives nor take part in regular activities such as work, purchase essential items, visit relatives, obtain civil documents to attend school or trace their missing relatives. The displaced were at times allowed visits, but these were restricted. Family and relatives had to queue for hours to see the interned, but the visits lasted for just a few minutes at any given time. IDPs were not allowed food, gifts and money from friends or relatives.[100]The infamous confinement of the thousands of IDPs caused an outcry from humanitarian agencies, activists and the international community. In September 2009, United Nations' High Commissioner for Human Rights, Navi Pillay described the camps as 'internment' camps. Walter Kälin, the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons, after his visit in late September, expressed a similar concern stating that the "Restoration of freedom of movement for more than 250,000 internally displaced

99 http://www.timesonline.co.uk/tol/news/world/asia/article5721635.ece

100 Humanitarian actors note however, that in some instances, residents in camps in Mannar were allowed to receive gifts and food from relatives.

persons held in closed camps in Northern Sri Lanka is becoming a matter of urgency."[101] Sir John Holmes, UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordination also voiced his concerns for the displaced and the conditions in Menik Farm.[102]

Frustrated by the continuous infringement of their rights, the IDPs in Menik Farm protested against their lack of freedom of movement on the 28th of June 2009, which resulted in an altercation with the security forces. On September 26th, security forces reportedly attempted to stop a group of IDPs from moving between zones. Angered by this, the group subsequently attacked the sentries resulting in the guards opening fire at the IDPs. According to UNHCR, several people were injured, including a child.[103] However, the protest did result in an easing of restrictions for a while and in time IDPs were eventually allowed to move between zones after security checks. In August 2009, public phones were set up, a mail system was established and visitor areas were constructed in Vavuniya. By August, some children in Jaffna and children living in the camps in Mannar were finally able to attend local schools. Yet their right to complete freedom of movement continued to be denied.

Since December 1 2009, a pass system was put in place in the IDP camps, which was considered a positive step towards full freedom of movement. However, there was a general concern in the implementation of the pass system as there were inconsistencies in the application of the system, procedural delays, inadequate information on how to apply for the system and notification of departure convoys as well as limits to how many family members could go at a given time, and how much luggage they could take with them. The amount of paperwork and permission required also meant procedural delays with IDPs having to pay for services such as photocopies

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101 http://www.unhchr.ch/huricane/huricane.nsf/view01/159F1F74192D219CC12576400036FFD9?opendocument

102 http://www.internaldisplacement.org/8025708F004CE90B/(httpDocuments)/DD377CE8B85E65C2C125759500678AF0/$file/ERC+briefing+to+SEC+CO+on+Sri+Lanka,+27+Feb%5B1%5D.pdf

103 UNHCR Press Release, 29 September 2009.

of relevant documents. Those without identity documentation were denied a pass.

6.11. Registration

While registration of IDPs should not be linked to the guarantee of assistance, it remains an important marker of entitlement to protection and in realizing a durable solution to their return. Registration is also an essential requirement in planning and delivering assistance. In Menik Farm, agencies were operating with inadequate information and overall planning was seriously impaired. Without proper and transparent registration and assessment processes, it was very difficult to identify the different vulnerable groups, trace the missing and protect the vulnerable.

There appeared to be varying registration standards applied for different people in different zones in Menik Farm and other areas, including those who had surrendered, those staying with host families and those who had none or some of their documentation. IDPs who have been displaced multiple times face difficulties in registering in a new location as they are unable to fulfill the 'de-registration requirement' at the previous place of displacement.

Identifying and registering people with specific needs became a priority in highly populated camps like Menik Farm. Delays in registering people taken to hospital resulted in delays in making assessments, identifying and prioritizing those needing immediate medical attention and post-operative care.

6.12. Screening and Detention

The displaced were also vulnerable to arbitrary arrest and detention as everybody was regarded as a potential LTTE threat. Article 9 of the UDHR and the ICCPR prohibits arbitrary arrest or detention "except on such grounds and in accordance with procedures established by

law." Similar rights are also guaranteed by Article 13 of the Sri Lankan Constitution.[104]

In search of escaping cadres, security forces subjected anyone coming from the LTTE areas to several stages of 'screening'. Concern has been raised by civil society on the *ad hoc* 'screening' process including what benchmarks and standards were used, the legal framework involving the 'screening' process and the plight of those who were separated after 'screening'. At first point of contact, immediate relief of food and water was provided in the Kilinochchi District. IDPs were screened in Kilinochchi hospital and then later with the military forces at Omanthai. As IDPs reached Omanthai, loudspeaker announcements welcomed them to a 'free' Sri Lanka and then almost immediately IDPs were asked to separate into different groups – such as by gender, or by occupation (civil servants or ex-combatants etc). This led to families being separated.[105] The displaced were then subject to several other screening processes, including body searches, interrogations by the CID and three different registrations conducted by the CID, military and the army. Photographs were taken of all family members and all money and jewellery were counted and recorded. Many had their LTTE-issued bank books and passes were confiscated as soon as they arrived.[106]

The lack of access of independent observers such as the ICRC and UNHCR to these sites meant that there was no transparent process in screening in sites including Kilinochchi, Omanthai, Pulmmoddai or Padaviya. Without any assurances by the Government that human rights

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104 Note here that Sri Lanka having acceded to the ICCPR in 1980 is obliged in terms of Article 40 to report on the measures taken to give effect to the rights recognized in the Covenant. Since there were complaints of non compliance, the ICCPR Act No. 56 of 2007 was enacted by Parliament to give effect to certain Articles of the ICCPR. Thereafter, an opinion was sought by Mahinda Rajapakse from the Supreme Court as to compliance by Sri Lanka and a positive opinion given was submitted to the European Union to avert a suspension of the GSP+ facility in 2008

105 Discussion with a humanitarian worker who witnessed the separations at Omanthai.

106 Discussions with a previously displaced person who crossed over to government controlled territory at Omanthai in December 2008.

standards would be respected, there were fears that arbitrary and *ad hoc* measures maybe used by the security forces. This became evident once the displaced were transferred to camps. 'Hooded informants' helped in identifying suspected LTTE combatants that had managed to pass the rigorous screening procedures.[107] Camp residents were subject to cordon and search operations often by armed personnel and often at night while a number of others were separated from their families, arrested or disappeared. Children were candidly asked what their parents had done for a living or what kind of uniform his/her father wore in order to identify possible suspects.[108] Announcements through loudspeakers asking all those who belonged to the LTTE to come forward and surrender became commonplace in the camps.

The Presidential Directive on Arrests and Detentions was not adhered to and neither was the HRC (re)activated to ensure that arrests and detentions were placed on record. Those separated, detained, arrested or those who surrendered had no access to legal aid and families were not given arrest slips or information on how and where to trace relatives, what visitation procedures were in place and what documentation was needed to start the release process, if any.

6.13. Family Separations and Reunification

International human rights law recognizes the importance of family reunification in protecting IDPs. Article 74 of Protocol I of the Geneva Conventions requires each party of a conflict to facilitate family reunifications. This is also reinforced under Articles 9, 10 and 22 of the CRC. Similarly, the Guiding Principles (Principle 17 (3) also reassert the rights of families separated due to displacement – that they should be 'reunited as quickly as possible' and that all appropriate steps should be taken to expedite the reunion of separated families.

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107 http://www.bbc.co.uk/sinhala/news/story/2009/06/090615_sunila_hooded.shtml

108 Discussions with a humanitarian worker – 2010.

As hundred of IDPs began the arduous journey of crossing over to government-held territory, families became separated. In the ensuing chaos and confusion at the checkpoints, family members were transported to different camp sites from Omanthai. Families assumed they would end up in the same camps, but on arrival, found that they had no way to leave the camps or call anyone in order to begin tracing their missing relatives.[109] Being separated also meant that families had no way of knowing if their relatives had survived or been arrested or if those injured were taken to hospital, and to which one. There were no lists in the camps, no access to public hospital records and patient transfer records. While procedures for tracing remained unclear to the displaced population, the situation was further compounded by the fact that government authorities, UN agencies or the ICRC did not know just how many were missing, injured, dead or separated. This led to an increased sense of insecurity, especially among women whose children, husbands and parents could not be traced. Further, inter-district family reunification proved problematic. In Trincomalee for example, while the authorities agreed to reunify family members living in other sites, by June 2009, there was no functioning mechanism to facilitate this.

There remain a number of unaccounted and orphaned children. The exact number of missing children is unknown. Another factor observed in hospitals was the number of injured and disabled children who had either lost their families or had been separated during the conflict. After the Ministry of Social Services and Social Welfare was assigned in June 2009 to coordinate the family reunification process, some progress was noted, particularly for children in hospitals. Further, Child Probation Officers and the Magistrate in Vavuniya had taken steps to reunite children with their families, but this process was hampered by the restrictions imposed by the army and camp officials to allow humanitarian agencies with capacity and experience in family reunification procedures to help.

109 Discussions with a humanitarian worker - 2010.

6.14. Documentation

The need for documentation is crucial in the process of recognition of IDP status, the delivery of aid and basic human rights, such as freedom of movement and the eventual sustainability of their return. Article 16 of the ICCPR declares that 'everyone shall have the right to recognition everywhere as a person before the law.' This is also reflected in Principle 20 of the Guiding Principles which reaffirms that every IDP has a right to be recognized as a person before the law and accordingly, it is the duty of the authorities concerned to issue to them 'all documents necessary for the enjoyment and exercise of their legal rights.' Communities trapped by the fighting in the Vanni have often been displaced for months and years and many have lost their legal documentation. They may have been forced to flee leaving their birth, death marriage certificates, N.I.C.s, and land titles behind. Further, the IDPs while on the move had no access to government or official documentation services and the *ad hoc* registration process in camps resulted in delays or denials of legal documents. In addition, the increase in early marriages, the number of unknown births and deaths that occurred during displacement has compounded matters. International law emphasizes the right of people to be recognized as legal entities.

7. Resettlement, Return and Restitution

All returns should take place in line with the Guiding Principles on Internal Displacement. They should be voluntary, informed and take place in safety and dignity**.** Compared to the forced, involuntary returns during 2007 and 2008 in the Eastern province, the situation has somewhat improved in 2008/9. In Batticaloa for example, security personnel and camp authorities agreed to put in place some minimum standards, which ensure that returns will be voluntary, go-and-see visits will take place, Land Release Certification (LRCs) for demining will be issued for return areas and IDPs will receive information prior to their return. However, the resettlement and return process of IDPs in the North, have highlighted that a number of these minimum standards were not been adhered to.

After the local elections in August, the beginning of December 2009 witnessed the Presidential Election campaign in full swing which proved favorable for IDPs in the North. De-mining and resettlement processes were accelerated but remained *ad hoc,* with little information and notice given to IDPs. Infrastructure reconstruction was expedited and special attention was given to the resettlement process. Despite all this, the sustainability of resettlement proved to be meaningless as access to return areas was denied to humanitarian and development organizations that could provide relief, aid and services to resettled communities. Normalcy cannot return if there is undue restriction on access and mobility. While the security imperative did warrant some protection procedures to be put in place, what prevailed in the North was beyond reason. The PTF instead of enabling the humanitarian agencies to assist the people became a stumbling block and contributed to the lagged response in aid and service delivery. IDPs were returning or being relocated to areas where agencies were still denied access which hampered effective humanitarian responses and made protection monitoring virtually non-existent.

Early resettlement of civilians in their place of origin must remain the principal objective. However, there is a fine line between ensuring speedy resettlement and sustainable returns. In 2009, the government's haste to stick to its 180-day deadline (of December and later extended to January and then 21 May), meant that returns took place even before areas were suitable for habitation. By mid-2009, IDPs where transferred from camps in Jaffna (3550 families), Vavuniya (1450) and Mannar (100) to the East and to Jaffna. A significant number of returnees' homes had been destroyed, in HSZs or were in areas yet to be demined (for example, the return of IDPs to Pooneryn in Kilinochchi in early November 2009 had taken place before agencies were informed or able to assist and ensure that the areas were issued their mine clearance certificates). This meant that a significant number of so-called 'returns' were to either host families, other camps or welfare and transit centres. Under the guise of 'resettlement' a number of IDPs were simply shifted from one closed camp to closed transit camps in their home districts. In late September 2009, the UNHCR publicly voiced its concerns of approximately 3,300 IDPs languishing in closed transit

sites.[110] The usual duration of stay in these sites range from two days to two weeks – the majority of IDPs not being told why they were being kept there and having no access to assistance.

Resettled communities must have unhindered freedom of movement within the country. The fundamental rights to freedom of movement, as well as the freedom to choose a place of residence are enshrined in the Constitution,[111] international human rights treaties and in the Guiding Principles. In the East, in areas such as Koralai Pattu South (Kiran) and Eravur Pattu (Chenkalady) DS Divisions in Batticaloa district, in Mutur in Trincomalee and in Mannar District in the North, movements were still restricted in July 2008 due to security concerns cited by the STF and despite sporadic resettlement taking place in the area. Furthermore, access restrictions for humanitarian actors in these isolated rural areas left communities even more vulnerable. When returns commenced in 2009 in the Vanni, the movement of the people in the North to any other part of the country was restricted or limited due to the necessity to obtain security clearance to travel to and from their villages, curfews, the restrictions in vehicle movement, fishing restrictions, residual threats of land mines, the imposition of HSZs and increasing militarization.[112]

Prior to return or relocation, all measures must be taken to ensure the communities return to a stable environment where the necessary infrastructure facilities such as roads, public transport, safe and clean water sources, accessible and running schools and hospitals, functioning societies like the Multi-Purpose Cooperative Societies (MPCS) and fisheries societies are in place. In many areas of return in the North, schools were used to house IDPs, or used as transit sites or housed detainees, thus it could not be

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110 UNHCR Press Release, 29th September 2009

111 Freedom of movement is protected by the Constitution of 1978 as a fundamental right – Article 14 (1) (h) and (i).

112 Article 15 of the Sri Lankan Constitution stipulates conditions under which restrictions on fundamental rights may be made in the interests of national security and the national economy. Similar limitations are laid down in the ICCPR Article 12(3) and the Geneva Conventions IV Art. 49 (283). However, the limitation clauses of 'national security' imperative military reasons' have to satisfy the principle of proportionality and necessity – Human Rights Committee.

used for its principal purpose. Priorities also include the re-establishment and support of livelihoods back in their original communities. The need to return vast tracts of agricultural and paddy land in the Vanni to productive use was particularly pertinent. Returning communities in cleared areas in the North were unable to restart their livelihoods as their lands were overgrown and neglected and the presence of mines and UXOs were a real concern. For example, by early December 2009, a landmine was reportedly found in Paranaddakal in the Vavuniya District, a village that was declared cleared and the certification issued. While the government accepted Mine risk education (MRE) as a 'life saving' activity permitted in return areas, the worrying fact is that communities themselves must be relied on to provide information on citing of mines and UXOs. In the first six months of 2009, 150 explosives were reported this way. Access restrictions to paddy land and fields were also a problem.

Resettlement requires a safe environment. There was a need for the government to take pro-active steps to ensure resettled men, women and children have a secure environment without any threats to their human security. Women-headed families and single-headed households with dependants faced immense difficulties in both restarting and resuming their livelihoods. Security was a serious concern and mothers could not leave their children alone in order to cultivate their lands or take on day-labour jobs. Money was an immediate need and training in a new vocation or learning a new livelihood was not a priority. Further, the reconstruction of community infrastructure, long-term employment opportunities, building on the capacity and experience of people living in the returnee areas and ensuring their consultation and participation in every stage of the return process is essential. People should be able to resume their lives with the minimum of difficulty.

Resettlement processes in Sri Lanka have repeatedly been undermined by grave protection concerns and human rights violations. Since early 2008, in Batticaloa, the sustainability of resettlement has been marred by increased militarization, paramilitary presence, and spates of abductions, disappearances, killings and physical assaults. Resettled communities in

the Vanni view the military presence as a ' Sinhala military' and an overall sense of fear, disillusionment and isolation is evident.[113] While there have been less severe protection related complaints by the resettled in the Vanni, the tendency by the government to concentrate on the hardware of resettlement at the expense of community mobilization, rights awareness and community-based support and protection mechanisms fosters a climate of fear and insecurity. It is incumbent on the government to bring protection to the top of its resettlement agenda in the North.

8. Planning, Consultation and Information Sharing – during Displacement and Resettlement.

The displaced have a right to participate in all decision-making processes that concern their lives. Sharing information with IDPs on issues related to their displacement, available services, resettlement and anything else that impacts their lives is imperative. There was insufficient information available to IDPs in relation to their situation. Reports indicate that IDPs were consistently asking for more information on processes to trace missing relatives, processes to obtain medical referrals and services, processes to organize transfers to other zones, the duration of their stay in camps and return plans. The absence of information sharing and consultation resulted in mounting anxiety and unnecessary confusion. For example, in Menik Farm, on the 23rd of June 2009, one group of around 100 elderly IDPs had to wait for hours under a tree with their belongings only to be told they would not be leaving that day. Further, the absence of a transparent screening process and lack of information sharing about people being arrested and taken away, created high levels of fear and anxiety among the IDPs.

Phone and mail services to resume/maintain contact with friends and relatives outside camps were urgently needed – a simple step towards allowing IDPs to exercise their right to freedom of speech and expression in relation to decisions regarding their lives. The overall resettlement plan was not shared with the IDPs. IDPs did not have a clear idea on what the

[113] Conversation with a humanitarian worker attached to local agency in north - 2010

future held for them and did not know what their entitlements were. To add to the problem, access restrictions to INGOs impeded the capacity of agencies to help the IDPs.

All IDPs have the right to full participation, consultation and non-discrimination of returnee men, women, boys and girls prior to their return. This is not just up to the government, but all actors working on providing assistance to the displaced and resettled. Transparency and accountability is a priority and communities must be given the opportunity to voice their concerns and grievances without fear of repercussion. The lack of consultation has been a chief grievance with IDPs and resettled families in the East and the North. Information on resettlement plans has not been conveyed to the displaced, and in some instances have only been received a few days ahead of returns. No official complaint mechanisms exist for voicing their concerns. This impairs IDPs from making voluntary, informed choices concerning when, how and if they want to return or relocate. In 2008, in Batticaloa, agencies noted that on average, they only received between one and four days advance notice of their return. IDPs were neither consulted nor informed of decisions that affected their lives. The government must ensure that IDPs have access to information relating to their resettlement – be it through leaflet distribution or go-and-see visits. This must also be done in time to allow displaced families to claim their rights or seek legal advice/legal aid.

Unmet protection and assistance needs remain, and the resettlement process is not delivering adequate security and equal distribution of support, particularly to vulnerable groups. The conflict has exacerbated vulnerabilities of women, creating widows, single mothers and female headed households; exposing women to greater violence; increasing their care-giving responsibilities while stifling their livelihood options and income levels. Stigmatisation and economic marginalization of widows and other women without husbands is widespread. Reproductive health services are often lacking and, particularly in the resettled areas, women's and children's nutritional intake is threatened by a shortage of income and increases in staple food prices. There is a need to carefully ensure that vulnerable groups including women "headed households," widows,

unaccompanied children, orphans, people with disabilities and injuries, are not left out in aid distribution.

9. Housing, Land and Property

Land has been intrinsically linked with Sri Lanka's conflict. It is the most significant resource an individual may hold and it is the strongest means by which people can be assured of economic opportunities, security and a sense of identity. Housing, land and property (HLP) rights also safeguard IDPs from various other human rights abuses such as gender-based violence, discrimination, restrictions on freedom of movement, lack of water and sanitation etc.[114] In a conflict context, housing, land and property and equitable restitution is vital in ending displacement, in ensuring sustainable resettlement and in the long term, in propagating peace. In Sri Lanka however, HLP rights have often taken a backseat while government and aid agencies tend to prioritize immediate humanitarian needs. Ongoing barriers of access to original lands such as the secondary occupation by military, the LTTE and other actors, the establishment of HSZs and special economic zones (SEZs) (namely, in Jaffna and Trincomalee), the loss of title and other documents needed to prove identity and ownership, the physical destruction of housing and property, a weak policy framework governing inheritance and women, mine risks and various other obstacles have adversely affected IDPs' human rights to adequate housing, return and restitution.

The government has the primary duty to ensure the security and welfare of IDPs and this includes ensuring their right to adequate housing. Sri Lanka has ratified numerous international laws and instruments which specifically protect HLP rights.[115] The non-binding Guiding Principles and the Pinheiro Principles reinforces the right to return and the right to housing and property restitution of IDPs. Restitution includes just and

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114 'Protecting Housing Rights for IDPs in Sri Lanka,' Todd Wassel, *Forced Migration Review* , No. 33, 2009

115 Including, the ICESCR, ICCPR, the International Convention on the Elimination of all forms of Discrimination (ICERD) – Art 5 (e) (iii); CEDAW – Art 14 (2) (h); CRC – Art 27(3)

equitable compensation in order to rebuild or reconstruct damaged or destroyed homes, restore livelihoods. IDPs should be given the assistance and means necessary to re-establish as much as possible their original pre-loss position. Resettlement is never sustainable without restitution and is a necessary component in ensuring sustainable returns. If restitution is not possible, IDPs must be adequately compensated.

10. Conclusion

Over two years have passed since the conclusion of the war, but no significant moves have been noticed from the government of Sri Lanka to ease the situation and to bring peace. Steps must be taken by the government to normalize life in the conflict-affected areas of the island. Re-establishing civil administrative mechanisms should be prioritized over the military, and a meaningful process of consultation with Sinhala, Tamil and Muslim communities on rehabilitation and resettlement plans in post conflict areas must be in place. Military victory is not enough to bring peace until and unless the grievances of Tamils and Muslims are addressed. Meaningful steps should be taken to re-establish the rule of law for all Sri Lankans. Particular measures would include ending emergency rule and abolishing the Prevention of Terrorism Act, establishing independent commissions (especially for human rights) and depoliticizing the judiciary – to name a few.

Sadly, Sri Lankan IDPs still carry the burden of the war – a significant number of them have faced multiple displacements and have experienced or witnessed unimaginable suffering, and a number of them will remain vulnerable and exposed to violations of their rights, threats to their human security and livelihoods. A three decade long violent conflict and the continuous polarization of society along ethno-political lines have provided multiple, fluid and hidden forms of displacement. To achieve a durable solution for IDPs in the country's Northern and Eastern provinces has been, and will always be politically contingent. In other words, the challenge to resettle and return the thousands of displaced individuals is also deeply connected with the political problems that underpinned the conflict in the first place.

VI

RIGHT AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

Ashwita Ambast[1]

1. Introduction

Conceptually and jurisprudentially, preserving the freedoms of people is an important consideration in assessing the merits of state action. In his work on jurisprudence and the theory of law, Emmanuel Kant propounded that the sole and predominant object of value for all human beings is the complete freedom of human choice and action.

It is therefore a fundamental principle that each individual is obliged to "*preserve and promote the freedom of each to the maximum extent compatible with a like freedom for all.*"[2] This naturally implies a minimalist conception of the state wherein political organizations under public law only intervene using collective threat or coercion in order to, "*enforce the preservation and promotion of freedom within the limits of a like freedom of all.*"[3] This view echoes the famous words of John Stuart Mill who stated that, "*the sole end for*

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1 The author is a researcher at the Civil and Political Rights Programme, Law & Society Trust. She is grateful to Navaneeth Nair for the resource support undertaken by him in the writing of this chapter.

2 P. Guyer, *Kant on Freedom, Law and Happiness*, (2000), p. 287 [Thereafter, "Guyer"].

3 Guyer, p. 287.

which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self protection".[4] Today, the developmental process itself is viewed by thinkers such as Amartya Sen as being a process of progressive expansion of human freedoms.[5] However, alongside the growing rhetoric associated with expanding freedoms and liberties, particularly by international organizations such as the United Nations, be it through declarations or international covenants, government agencies still arrogate to themselves the power to unreasonably detain and perpetrate unthinkable crimes against innocent civilians on a regular basis.

No doubt, the law relating to the prevention of torture and inhuman treatment in Sri Lanka is based on fostering a sound culture of human rights. The Sri Lankan state has manifested this commitment, subject to no restriction, in Article 11 of the Constitution of Sri Lanka.[6] Sri Lanka has also subscribed to a number of international instruments including the International Covenant on Civil and Political Rights and the Convention against Torture; in fact, while some nations still grapple with drafting an efficacious domestic legislation controlling the perpetration of inhuman activities by state agencies like the police, Sri Lanka already has in place the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, enforced in 1994. This legislation attempts to substantially incorporate the standards prescribed by the United Nations Convention against Torture (UNCAT).

However, despite the apparently promising legal framework that exists, some questions perennially arise: Is the legislative framework of Sri Lanka powerful enough? Have enforcement agencies carried out the mandate of these instruments? Has the Sri Lankan state been able to discourage the incidence of violence against innocent civilians, or, in any event, provide meaningful remedies to those who are currently subject to this violence?

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4 Guyer, p. 285.

5 Amartya Sen, *Development as Freedom* (1999), p. 3.

6 Article 11, The Constitution of Sri Lanka, 1978.

This chapter will undertake a study of the developments that have taken place in Sri Lanka with respect to the right against torture and cruel, inhuman or degrading treatment in 2008-9, with specific reference to domestic activism, documentation and case law. While exposing the prevalence of blatant contraventions of legal standards, a further analysis will be made of the character of the inhuman treatment carried out by the police in this period: what was its nature and extent, which people were most often subject to such violence, what was the dominant attitude of state agencies to complaints by victims and whether victims had adequate access to justice, *inter alia*. The chapter will also briefly look at parallel developments in countries like India and Nepal which are also deliberating upon legislation to cover this field. In this light, through this chapter, an analysis will be conducted of the incidence of torture and other cruel, inhuman or degrading treatment in Sri Lanka, in the years 2008-2009. In doing so, the following enquiries will be conducted:

a) What is the legal regime and international obligations governing the right against torture in Sri Lanka?

b) What are the attributes of the incidences of torture in Sri Lanka between 2008-2009? What failures of the state machinery do these indicate?

c) What specific reforms can remedy the problem being faced by Sri Lanka?

2. The Constitution, Law and International Obligations: The Existing Framework in Sri Lanka

The effort of state agencies to battle against cruel and inhuman treatment must begin with and be based on a strong legal framework. It is therefore instructive to enquire into the framework of the law establishing the right against torture in Sri Lanka: in the Constitution, in domestic legislation as well as in international instruments that the Sri Lankan state is currently party to. On an analysis of the said

framework, Sri Lanka, *prima facie*, appears to embody a strong legal regime that militates against torture, which is manifest in a number of instruments.

2.1 The Constitution of Sri Lanka

Hans Kelsen, the renowned philosopher in formulating what is popularly known as the Pure Theory of Law,[7] established the notion of a "*grundnorm,*" the basic norm on which civil society is predicated and from which all other norms in a nation can be said to emanate.[8] Therefore, it is only logical that any enquiry into the protection of human rights in Sri Lanka must begin with understanding the grundnorm of the nation. The grundnorm, so to speak, in Sri Lanka is the Constitution of the country within which are enshrined a number of principles which are central to the governance in Sri Lanka. Article 11 of the Sri Lankan Constitution states: "*No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"[9] Therefore, the grundnorm of Sri Lanka itself contains a categorical guarantee and protection, to criminals and non-criminals alike, against torture of any kind.

2.2 International Obligations

The first important international instrument that Sri Lanka is a party to which contains guarantees against state excesses, is the International Covenant on Civil and Political Rights [ICCPR]. The stated object and purpose of the ICCPR is to protect the universally recognized civil and political rights of the citizenry. Under Article 7, the ICCPR explicitly states that: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free*

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7 http://plato.stanford.edu/entries/lawphil-theory/

8 *Ibid.*

9 Article 11, The Constitution of Sri Lanka, 1978. This is a non-derogable provision and is entrenched.

consent to medical or scientific experimentation."[10] This corresponds almost directly with Article 3 of the Universal Declaration of Human Rights [UDHR] which states that, "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"[11]

Relevantly, the ICCPR also provides an extensive and comprehensive guarantee of right to life and liberty, under Articles 6 and 9. Article 6 states *inter alia* that "*Every human being has the inherent right to life. This right shall be protected by law*"[12] while Article 9, paragraph 1 stipulates that "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*"[13] Various authoritative bodies, such as the Human Rights Committee have confirmed, on occasion that the import of these Articles is wide and therefore they must necessarily be understood in the widest possible sense.

The second important instrument to which reference must be made in this context is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), whose stated object it is to

> "*make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.*"[14]

Sri Lanka signed this treaty in 1984. The UNCAT contains a number of important guarantees against torture, both substantive and procedural in nature. To illustrate, Article 2, paragraph 1 states that: "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts*

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10 Article 7, ICCPR.

11 Article 5, UDHR.

12 Article 6, ICCPR.

13 Article 9(1), ICCPR.

14 Preamble, UNCAT.

of torture in any territory under its jurisdiction."[15] Further, Article 4, paragraph 1 states that, "*Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*"[16] Additionally, it has been provided under Article 14, paragraph 1 that, "*Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.*"[17] An important aspect of the UNCAT is that it also provides a comprehensive definition of the term "torture" for the purposes of the Convention. This is enshrined in Article 1 itself, which provides as follows:

> *"For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"[18]

It is further stated in Article 1, paragraph 2 that: "*This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*"[19] Therefore, state parties are free to establish a more comprehensive definition of torture for the purposes of their own national legislation.

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15 Article 2(1), UNCAT.

16 Article 4(1), UNCAT.

17 Article 14(1), UNCAT.

18 Article 1(1), UNCAT.

19 Article 1(2), UNCAT.

2.3 Statutory and Regulatory Framework

In briefly discussing Sri Lanka's relevant statutory framework, it is important to note that Sri Lanka is a dualist country.[20] Municipal law and international law obligations are distinct. In order to enforce an international obligation in the domestic context, it is necessary for a special law to be enacted in Sri Lanka by the national legislature. In this light, and apart from general statutes such as the Penal Code, the obligation to protect its people from torture has been specifically undertaken by the Sri Lankan State under domestic law through the enactment of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 which was certified on 20th December, 1994. According to the Act, its object and purpose is:

> "*To give effect to the Convention against torture and other cruel, inhuman or degrading treatment or punishment; and for matters connected therewith or incidental thereto.*"[21]

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[20] In *Nallaratnam Singarasa* v. *Sri Lanka* CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004, the detainee approached the Human Rights Committee after the exhaustion of all domestic remedies against a confession obtained from him by a police officer under the Prevention of Terrorism (Temporary Provisions) Act, 1978 leading to a conviction. The petitioner's claim was that he had been forced to sign the confession involuntarily. The Committee accepted the argument of the petitioner and recommended that he be awarded relief and also recommended that Sri Lanka revise its statutory provisions relating to the admittance of such confessions and the relevant burden of proof. In the wake of this recommendation not being implemented domestically, a review petition was filed in the Sri Lankan Supreme Court but was dismissed by the Court presided over by Chief Justice Sarath Silva who (rightly) ruled that as Sri Lanka had a dualist system in the context of which specific domestic legislation had to give effect to international norms but (wrongly) went on from there to hold that Sri Lanka's very accession to the ICCPR First Optional Protocol was unconstitutional, see *Nallaratnam Sinharasa v Attorney General and Others*, S.C. SpL (LA) No. 182/99, SC Minutes 15.09.2006.

[21] Preamble, *The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act,* No. 22 of 1994.

In its Concluding Observations in 2005[22] in response to periodic reporting obligations under UNCAT,[23] the Committee against Torture observed that there are a number of positive aspects relating to the legal regime against torture in Sri Lanka. The abolition of corporal punishment by the state, the establishment of the human rights directorates in the army, navy and air force as well as the creation of the National Police Commission by the amendment to the Constitution in 2001 were cited as positive steps.[24] However, the Committee also pointed to several flaws in the legal regime including the lack of an effective witness protection programme and also made negative observations regarding the ineffectiveness of the National Human Rights Commission.[25]

3. Comparative Legal Framework: India and Nepal

The law is still at its formative stages in both India and Nepal and some comment on these comparative developments may be useful at this point of time.

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22 CAT/C/LKA/CO/2 (2005).

23 Article 19, UNCAT states: 1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this Article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

24 *Ibid.*

25 *Ibid.*

3.1 India

India signed the UNCAT on 14th October 1997 and on May 6th, 2010, the Lok Sabha (or lower house of Parliament) approved The Prevention of Torture Bill, 2010. It is currently before a Rajya Sabha Standing Committee and has yet to be enacted as a law. Much like the Sri Lankan state, the Indian state is dualist and requires enabling legislation to make the Convention applicable in the Indian territory. This has been recognized in the Statement of Objects and Reasons of the Prevention of Torture Bill itself, which states: "*Ratification of the Convention requires enabling legislation to reflect the definition and punishment for "torture". Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define "torture" as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation.*"[26] The object and purpose of the Bill is:

> "*to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto*".[27]

However, it is also important to note that unlike its Sri Lankan equivalent, the Indian Prevention of Torture Bill makes some significant changes to the substantive provisions of the CAT. These are significant in number. For one, the definition of torture as provided in the Indian Act is different from the UNCAT. Clause 3 of the Torture Bill stipulates:

> "*Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,—*

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26 Statement of Objects and Reasons, Prevention of Torture Bill, 2010.

27 Preamble, The Prevention of Torture Bill, 2010.

(i) grievous hurt to any person; or
(ii) danger to life, limb or health (whether mental or physical) of any person, is said to inflict torture"[28]

This definition has been severely criticised as it whittles down the import of the UNCAT and narrows down the scope of the term "torture" and limits it to "acts of discrimination" performed by "public servants." Second, the Indian Act, by stating in Clause 3 that the act must be done "*intentionally…to obtain…such information…*"[29] imports the requirement of proving that the act of torture was done with the intention to *both* extort information and as an act of discrimination. This is of course a much higher threshold of proof than is envisaged under the UNCAT. Third, under Clause 5 of the Indian draft, it is stipulated that, "*no court shall take cognizance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed.*[30] It has been argued that such a short period of time for submitting complaints may prejudice victims of torture and hamper their access to justice. A longer period would allow the requisite flexibility to the victim. These are only a few of the criticisms that have been levied against the bill.

3.2 Nepal

In Nepal, developments relating to a law against torture have been very different. Nepal signed the UNCAT in 1991, much before India but Nepal is yet to pass legislation effectuating the Convention. This is problematic in the existing paradigm as torture has been rife as a result of Nepal's persistent political instability. Several non-governmental organizations have reported this fact and have described the inability of the government mechanisms to deal with the ongoing human rights violations.[31]

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28 Clause.3, The Prevention of Torture Bill, 2010.

29 *Ibid.*

30 Clause 5, The Prevention of Torture Bill, 2010.

31 http://www.advocacyforum.org/downloads/pdf/publications/criminalize-torture-june26-report-english-final.pdf

In the past, an attempt was made to enforce the principles of the UNCAT through the Torture Compensation Act, 1996. However, this law was unable to fulfil its objective because it has a limitation period of 35 days, making the legislation inaccessible to many victims who are unable to make their complaints to the authorities promptly. Further, the ceiling value of compensation is fixed at a very low rate and there is no comprehensive system for the rehabilitation of victims of torture, so as to encourage their rehabilitation into society. Currently, while the Interim Constitution of 2007 does make torture unlawful, in practice, torture has not taken the colour of a criminal offence. Article 26, paragraph 1 and 2 of the Interim Constitution states that:

> *"No person who is detained during investigation, or for trial or any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment."* and
> *"Any such action pursuant to clause (1) shall be punishable by law, and any person so treated shall be compensated in a manner as determined by the law"*[32]

Yet even these remedies are not effective as the victims of torture are unaware of the existing avenues for redressal. The 1993 plea by the Committee against Torture when Nepal first signed the Convention, as well as by the Special Rapporteur on Torture,[33] that Nepal effectuate the Convention thus was a more complex task than envisaged.

In response, recently, with the creation of the new government in Nepal, citizens have made an effort to create effective legislation to govern the prevention of torture. This is based on the principles of accountability, human dignity and state responsibility. This move has been supported by a number of significant organizations such as Advocacy Forum, NHRC and the Centre for Victims of Torture, *inter alia*. The draft comprises a number of important aspects. First, the draft recognizes the importance of the definition of torture in the legislation; that it will determine the scope of

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32 Article 26, Interim Constitution of Nepal, 2007.

33 http://www.advocacyforum.org/downloads/pdf/publications/criminalize-torture-june26-report-english-final.pdf

protection provided and hence how comprehensive the legislation is. It also notes the importance of accounting for the psychological impact of torture which is not read into the definitions of generic offences such as assault and battery within the domestic criminal codes. Therefore, Clause 2(11) which defines "torture" was formulated as follows:

> *"Torture" shall denote any act through which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person detained or controlled in any way by public official or officials, or by any other person acting in official capacity or a person with whom a public official knowingly collaborates or acquiesces, with the purpose of obtaining a confession or information from the victim or a third person, punishing the victim for an act committed or suspected of having been committed by the victim or third person, or intimidating or coercing the victim or a third person for any reason based on discrimination of any kind."*[34]

The proposed legislation further elaborates the necessary understanding of both physical and mental torture under Clause 2, paragraph 12 and, paragraph 13, respectively.[35] Acts of physical torture include rape, electric shocks, amputations of body parts, the extraction of teeth, suffocation, deprivation of food or water, amongst other acts.[36] Similarly, the scope of the term mental torture extends to prolonged blindfolding, extended solitary confinement, prolonged interrogations and unscheduled and arbitrary transfers, to mention a few.[37] The draft also looks to expand the meaning of the term "victim" as well as the term "other forms of cruel, inhuman or degrading treatment or punishment".

Secondly, the draft Bill tries to specifically move the regime in Nepal from being based in civil responsibility to being couched in individual criminal liability. There is also an effort to ensure that the defence of superior command cannot be entertained by the courts in determining whether a particular officer is responsible; the entire line of responsibility can be held guilty under such circumstances.

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34 Section. 2(11), Torture Bill, 2009.

35 Section. 2, Torture Bill, 2009.

36 Section 2(12), Torture Bill, 2009.

37 Section 2(13), Torture Bill, 2009.

Thirdly, the citizens' Bill looks at ensuring that the detainees have regular medical check-ups so as to ensure that no harm is being caused to them in the duration of their detention. These are to be provided free of charge and can also be conducted once again by a second medical practitioner of the detainees' choice if circumstances so demand.

Fourthly, the draft Bill ensures access to justice for the victims of torture by the government officers or by the complicity of government officers by making the procedural aspects of the law more favourable. Not only is the limitation period on making complaints against torture increased, there has also been a recommendation to establish a functional and effective investigative authority with the power to look into these cases. In the course of these proceedings, the victim shall have protection as granted by the state.

There are a number of other recommendations that have been made to improve the legal regime governing torture in Nepal. However, in the present context, with respect to Nepal, one must note that these recommendations only exist in theory and have not been adopted by the government. The alterations and additions to the regime are at their formative stages and it may take years before they are implemented in reality. In the context of the Indian law, there is more progress in that a Bill has already been tabled and has also been approved by the lower house. A Special Standing Committee has also been constituted to look into the defects and deficiencies of the legislation. However, as has been pointed out at length, there are a number of problems with the Prevention of Torture Bill, 2010 in India. Such loopholes could potentially make the legislation defunct and seriously hamper the Indian effort.

4. The Right against Torture: Sri Lanka in 2008-2009 – An Analysis of the Practical Situation and Legal Response

Sri Lanka, by adopting the UNCAT in substantive respects, appears, (theoretically), to be in a much better place than a number of its regional neighbours in abolishing torture within its territories. Yet questions

concerning the gap between theory and practice remain. According to a recent study by an activist organisation, it has been observed, specifically about the years 2008-9, as follows:

> "*Until about 2008 there were some investigations conducted due to international pressure. However, this practice has been officially abandoned since then. From 2009 there has not been a single case investigated or prosecuted under Act No. 22 of 1994 despite of the complaints related to torture being received almost on a daily basis from almost every police station in the country. The decision not to conduct investigations or prosecute under this Act was the government's response to the resistance developed by some sections of the police against such investigations and prosecution.*" [Emphasis Supplied][38]

Could this observation be substantiated and corroborated by the practice of the officials in Sri Lanka? Specifically, how true is this in the period 2008-2009? The next segment of this paper will undertake a study of the cases of torture that have taken place in this period. It will primarily analyse the kind of torture that the individuals concerned have undergone, whether the victims were able to access mechanisms of redress afterwards, in order to see if the legal remedies are working as well in reality as they are in theory, or whether these remain proverbial paper tigers.

Previously we had discussed the statutory and constitutional provisions relevant to the right against torture in theory. Through this section, an analysis will be made of cases where individuals had been subjected to state atrocities, specifically in the year 2008-2009, by an analysis of complaints made by citizens and the decisions of Sri Lanka's High Courts and the Supreme Court. In addition, some references will be made to Individual Views handed down by the United Nations Human Rights Committee in the exercise of its authority to handle individual communications under the First Optional Protocol to the ICCPR.

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[38] http://www.humanrights.asia/countries/sri-lanka/countries/sri-lanka/resources/special-reports/AHRC-SPR-001-2011-SriLanka.pdf

4.1 Activist Documentation of Torture during 2008-2009

This section will proceed as follows: *First*, an overview will be conducted of the grounds that have been taken for arresting individuals that are tortured. Are victims and their families given a reason for detention? Are the reasons adequate? *Second*, an analysis will be conducted of members of minority communities who have been targets of violence by the state as well as the situation following the ending of armed conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam in May 2009. *Third*, torture against women will be looked at. *Fourth* the nature of the torture that individuals are subjected to will be analysed: the degree and character of physical and mental torture and the denial of medical treatment. *Fifth*, a study will be conducted of the efficacy of the mechanisms of redress available to the victims of torture, as have been prescribed in the legal instruments discussed in detail above. In this process, the lodging of complaints, court processes and the procedure of investigation will be looked into. *Sixth*, this paper will look into the life of the victim after he or she has been released and a complaint has been lodged. Are the victims sufficiently sheltered by the state machinery so as to effectively initiate proceedings against the police officials? Does the influence of the police persist even after the period of detention?

4.1.1 Grounds of Arrest

In this segment, an enquiry will be made into whether individuals who are detained are informed about the reasons for their detention and whether the reasons provided are sufficient. Generally, no adequate grounds were provided to the individuals or their families as to why they are being arrested or detained. In the 2008 case of Mr. Rengaswami Chithrakumar,[39] it was recorded that the victim was reported missing after not returning from his place of work for a number of days. His wife lodged complaints at two different police stations; however these were of no avail. As per the latest updates on this case, Rengaswamy Chithrakumar was presented

[39] Urgent Appeal Case: AHRC-UAC-035-2009

before the Teldeniya Magistrate court in Kandy twice a month, however the grounds for his detention are still hazy as the charge sheets are yet to be presented.

Further, it may also be seen that in cases where grounds for arrest have been substantiated, they were flimsy and related to petty offences. In the case of Mr. Anil Chandana Kumara (2009),[40] a young man aged 19 was lifted by the police in the absence of any stated grounds and tortured relentlessly for a number of days. It was only when he was produced before the Magistrate that he discovered he was charged with the offence of attempting to steal a chain. An example of a false and incorrect charge was seen in Mr. Seneka Ekanayake's Case (2008)[41] where the victim, an editor of a local newspaper was arbitrarily stopped at a checkpoint by police officials who were under the influence of alcohol. He was detained for a number of days during which he was subjected to various degrees of mental and physical torture: he was hosed down with cold water, his belongings were arbitrarily confiscated, he was handcuffed and beaten for an extended period and he was threatened with a gun.

> "*According to Senaka Ekanayake, while he was in the police cell, he overheard that Lakshman Ranwalarachchi the OIC Kalpitiya police station had tried to collect information from various sources to prove that he is a rebel, a terrorist and had spoken against the President and the defense Secretary in order to fabricate a case against him.*"[42]

Further, false charges were made against Ven. Dodangoda Ariyadamma (2008)[43] when he refused to pay a bribe to the police. After this, the police compelled him to sign a document, pertaining to an act which he was not part of.

Given the circumstances in which some of the arrests have taken place, it is only natural to think that in many such cases, the authorities had

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40 Urgent Appeal Case: AHRC-UAC-021-2009

41 Urgent Appeals Case: AHRC-UAC-007-2008

42 *Ibid.*

43 Urgent Appeal Case: AHRC-UAC-015-2008

ulterior motives for conducting the arrest and consequent torture. In many instances, these reasons did not go beyond pure personal pique of a particular police officer at being refused special treatment or due to the perceived insolence of an ordinary person.

In the case of Mr. Govindraj (2009),[44] the victim was arrested on the ground that he was involved in the murder of a wealthy businessman. Mr. Govindraj, on arrest, was severely tortured as the police wanted to extract the names of the other conspirators in the murder. However, the detention had been made on faulty grounds, "*in order to satisfy the minister Mr. Mahindananda Aluthgamage who was supported by the late Bandula Ariyapala*" (the deceased in the present case).[45] In Mr. Sunil Shantha's case (2009),[46] the victim had allegedly helped the police raid a number of gambling dens and was later attacked by the owners of the den as revenge for his complicity with the police. When he later attempted to settle the matter with the police, fearing for his personal safety, the police were dissatisfied with the consideration he offered them. It was his firm belief that his subsequent detention and the ensuing torture by the officials is an act of revenge by the police.

In Mr. Poddala Jayantha's case (2009)[47] the General Secretary of the Sri Lanka Working Journalists Association was abducted by an unknown group late afternoon in 2009 and later was found mercilessly beaten and left on the road side. The assault occurred in the backdrop of a scandal involving a prominent Government Minister whose assault of a news manager resulted in public outrage and expressions of protest from the media industry in Sri Lanka.

In Mr. Ruwan's case (2009)[48] the victim was a member of the armed forces and had been shot on the front lines in 2008. He was admitted to a

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44 Urgent Appeal Case: AHRC-UAC-034-2009

45 *Ibid.*

46 Urgent Appeal Case: AHRC-UAC-026-2009

47 AHRC forwarded statement by *Reporters Sans Frontiers*, June 3, 2009

48 Urgent Appeal Case: AHRC-UAC-015-2009

hospital; however, the doctors postponed the removal of the bullets from his body to a later date. In a few months, he was called back to serve in the front lines of the army, but he did not return to the military as he was apprehensive about his health. Soon after, Mr. Ruwan was arrested for being a deserter and was confined in a prison wherein he was subjected to violence which finally resulted in his death.

Often, the victims of torture by state agencies belonged to the weaker groups in society. A good example of this was seen during this period in the case of an underprivileged minority member of the Veddha aboriginal community, Mr. Tennakoon Mudiyanselage Wijeratne (2009).[49] The victim was caught by the police for stealing a wire from the local temple. Although the victim had only found the wire incidentally on the road, he was accused of regularly cutting lengths of wire from the temple premises and utilizing them for his personal profit. The police not only kicked him in front of a large group of people, but also encouraged his assault by the public at large. He was later illegally detained and was not given either water or food for extended periods of time.

4.1.2 Violations against Minorities in the Aftermath of the Ending of Conflict in May 2009

Members of the Tamil minority community were frequent targets of random violations, as well evidenced in the case of Mr. Suresh Kumar Dias (2009).[50] Mr. Dias, of Tamil ethnicity had, along with his family, settled in Colombo many years ago. On account of his ethnicity, he had frequently faced trouble at traffic points and was often harassed by officers for information on the activities of Tamils. He therefore had to change his name to a Sinhala name. When randomly questioned, suspicion attached as to why he had changed his name. He was arrested thereafter. It was believed that his change of name was what led to his arrest. In 2009, Muthukumar Ravikumar and his wife Stella Rani were

[49] Urgent Appeal Case: AHRC-UAC-176-2009

[50] Urgent Appeal Case: AHRC-UAC-114-2009

arbitrarily detained by the police.[51] Mr. Ravikumar believed that he and his wife were targeted because they had refused to give money to the Karuna group, a breakaway group of the Liberation Tigers of Tamil Eelam and information about them had been given to the police.

"(the police)placed a book on his head and hammered his head with a cricket stump while rolls of paper were inserted in his ears They also beat his feet and injected petrol into his feet until they were numb. They reportedly drove a ball point pen into his ears. His ears bled for several days."[52]

Mr. Lectchchaman Punyamoorthi (2009)[53] was reportedly "*forced to remove his clothes and his legs were beaten; he was pushed face down on a bench and had his back beaten with a pole; his head was submerged repeatedly in cold water.*"[54]

These incidents and occurrences were particularly relevant after the Government of Sri Lanka defeated the Liberation Tigers of Tamil Eelam in May 2009.

> *"...former detainees of the Terrorist Investigation Division (TID) at Boosa Prison in Galle confirmed reports of torture methods used there. These included beatings, often with cricket bats, iron bars, or rubber hoses filled with sand; electric shock; suspending individuals by the wrists or feet in contorted positions; abrading knees across rough cement; burning with metal objects and cigarettes; genital abuse; blows to the ears; asphyxiation with plastic bags containing chilli pepper mixed with gasoline; and near-drowning. Detainees reported broken bones and other serious injuries as a result of their mistreatment.*
>
> *In the east and the north, military intelligence and other security personnel, sometimes working with armed paramilitaries, carried out documented and undocumented detentions of civilians suspected of LTTE connections. The detentions reportedly were followed by interrogations that frequently included*

51 Urgent Appeal Case: AHRC-UAC-042-2009

52 Urgent Appeal Case: AHRC-UAC-042-2009

53 Urgent Appeal Case: UAC-078-2009

54 *Ibid.*

> *torture. There were reported cases of detainees being released with a warning not to reveal information about their arrests under the threat of re-arrest or death if they divulged information about their detention. There were also previous reports of secret government facilities where suspected LTTE sympathizers were taken, tortured, and often killed..."*[55]

There were concerns that ex-combatants arrested following the May 2009 military operations would have been systematically tortured given limited access of independent monitors and the lack of a formal legal framework for the detention. However, independent observers who met with those released saw no evidence of systematic torture or abuse.'[56]

4.1.3 Torture of Women

Women were particular targets. A recent example of torture against women was Ms. Nirosha Virajini's case (2008).[57] In this case, a young girl aged 13 was detained by her school teachers and accused of having an affair with a boy they had seen her with. In the course of an extended interrogation, they compelled her to write a statement saying that she was having an affair with the young boy and that she had been raped by him. She was then removed from the school. When her mother approached the authorities questioning her daughter's arbitrary dismissal, she was also confined and compelled by the teachers to sign a statement written in a book without reading its contents. When the two tried to approach the school later to reinstate Ms. Nirosha, they were driven away. Finally, Ms. Nirosha's father lodged a complaint with the Human Rights Commission of Sri Lanka in order to enforce his daughter's rights. There was no doubt that this entire ordeal had been traumatic and had taken a severe toll on the victim's education as up to date, Ms. Nirosha had not been admitted into any school.

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55 United States Department of State, *Human Rights Report, Sri Lanka*, 2010

56 *Ibid.*

57 Urgent Appeal Case: AHRC-UAC-021-2008

This trend was also evinced in the case of Ms. Stella Rani, who had been arbitrarily detained by the police in 2007.[58] In her complaint she had noted that she had been transferred to police headquarters by four male police officers where she was allegedly subjected to sexual harassment and beaten with a wire. In Mrs. X's case (2008),[59] a woman was raped by an official in the course of her illegal detention:

> "*the officer suddenly caught her in his arms. Surprised, she tried to get away but he held her tightly and kicked the bedroom door shut. She struggled to get away from him but he then hit her spine hard with his hand and threatened her not to make a noise. He then threw her onto the bed. She tried to get up and escape by pushing the officer away from her. However, the officer forcibly raped her and she lost consciousness.*"[60]

4.1.4 The Nature of the Torture

In this section, a study will be conducted of the manner in which the police officials torture the individuals they detain. The study is divided into three parts:

(a) Physical Torture
(b) Mental Torture, and
(c) Denial of Medical Treatment.

(a) Physical torture

A general observation made from the cases documented by activists was that the nature of the physical torture remained heightened and severe. Several examples of this existed between 2008 and 2009. In the case of Mr. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara (2009)[61] the victim was tortured in a manner known as "Palestinian Hanging".

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58 Urgent Appeal Case: AHRC-UAC-042-2009

59 Urgent Appeal Case: AHRC-UAC-095-2008

60 *Ibid.*

61 Urgent Appeal Case: AHRC-UAC-166-2009

> "*Nilantha's shirt was removed and his lower arms were wrapped with cloth, his hands were forced behind his back and tied with a cloth rope which was attached to a nylon rope that hung from a ceiling beam; its other end was secured to a steel bed. Two police officers held the bed in place. Nilantha was then told to stand on one of the boxes, the rope was pulled tight and the wooden box was kicked from under his feet leaving him suspended from his hands in the air.*"[62]

He was later also subjected to a popular form of torture known as the "Dharma Chakra", or the "Wheel of Enlightenment";

> "*He was forced to squat down and wrap his hands over his knees, a metal pipe was put through the crooks of his knees and elbows, and the bar was suspended and balanced on two tables. Then with his head hanging close to the floor, Nilantha was subjected to a bottle of petrol being poured into his anus. Water was also intermittently used to relax the muscles. He says that he was in extreme pain from the intense burning both inside and outside of his body.*" [63]

The fact that violence has acquired its own special terminology indicates the extent to which it has been entrenched in the system. The employment of specific terms is also telling of the habitual nature of its use. Numerous other cases report inhuman modes of physical torture.

In Mr. T. Jayantha's case (2009)[64] the victim informed his mother that in the course of his detention, "(he was) *stripped naked, tied to a door and kicked by officers wearing boots, as well as being hung, beaten and slapped. His fingers and toes had bled, and Sunethra* (his mother) *reports that his lips were split and swollen.*" [65]

Also, in a recent 2009 case of Mr. Chaminda Sampath Kumara Wickramapathirana,[66] "*one of the officers put about ten Kochchi chillies (which are particularly potent) into his mouth and he was forced to eat them. He was then told to sit on the floor and his hands were tied behind him with a strip of cloth, his ankles*

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62 *Ibid.*

63 *Ibid.*

64 Urgent Appeal Case: AHRC-UAC-088-2009

65 *Ibid.*

66 Urgent Appeal Case: AHRC-UAC-070-2009

were bound and his head forced back by constable Manoj, who had sat behind him with head between his knees. Kochchi juice was squeezed into Chaminda's upturned eyes and nostrils."[67]

On many occasions, physical violence had even led to permanent disablement of the individual in question. For instance, in the course of his illegal detention, Mr. Christopher Pakiam (2009)[68] was tied to a bed and kept unconscious for long periods of time resulting in being totally paralysed below the waist despite being of good health at the time of his detention.

Often, along with the individuals, the police also, without any authority physically harmed and harassed the family of the victim. This was seen for example, in the case of Mr. Anuradha Buddhika[69] (2009) wherein the victim was suspected of stealing some articles of jewellery but was unavailable to the police as he had gone missing. As a result, in order to locate Mr. Buddhika, the police illegally detained his father and kept him handcuffed to a bed in the police station for over 6 hours. The police also "*hit the father on his neck, ears and head asking about the whereabouts of his son Anuradha.*"[70]

In Mr. Ajith Kumara's case (2008)[71] the victim was being dragged out of his home by officers when his mother "*came forward to stop the police officers assaulting him. However, his mother was also assaulted and fainted...In the ensuing confusion Ajith Kumara ran from the premises. The police then also left leaving behind the mother, unconscious on the floor.*"[72] In the case of Mr. Sureen Kinson (2008),[73] the victim was wounded on his head, back, right arm, left hand side, eye brows, and on the forehead. The cause of death was noted as

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67 *Ibid.*

68 Urgent Appeal Case: AHRC-UAC-164-2009

69 Urgent Appeal Case: AHRC-UAC-030-2009

70 *Ibid.*

71 Urgent Appeal Case: AHRC-UAC-038-2008

72 *Ibid.*

73 Urgent Appeal Case: AHRC-UAC-110-2008

suicide, as marks of a wire were visible across the neck of the victim. However, the medical officer did not confirm that this necessarily implied that the victim had committed suicide.[74] It was very likely that the violence of the police led to the death of the victim.

(b) Mental torture

While assault and battery may cause lasting physical harm to the individual, the complex psychological consequences of such acts must also be accounted for. These are harder to detect, classify and conclusively prove than physical harm, but can more often than not, be as damaging to the victim. This is seen clearly in the fact that there have been instances wherein victims of torture have attempted suicide due to the humiliation that they had to incur in being tortured.

The 2008 case of Mr. Maddumage Dharmadasa was a case in point[75] Here, the victim was approached by the police late at night and was asked whether he had received any money in relation to some illegal matter. The victim vehemently denied any such connection but was arrested by the police anyway. In the period of his detention, the police had reportedly, "*stripped off his clothes, hung him from the ceiling by his toes and had then beaten him with batons and rubber pipes all over his body. He further stated that they assaulted him twice in the same manner during the night.*" [76] The victim engaged the services of a number of hospitals to treat him for the consequent injuries on his body, but "*With the fear and shame Dharmadasa had suffered following the incident, he took poison in an attempt to commit suicide.*"[77]

Mr. Nanda's case in 2008[78] involved a man who, in his period of detention was stripped of his clothes and hung from a ceiling after his legs were bound with string. While he was hanging upside down, the police had him beaten

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74 *Ibid.*

75 Urgent Appeal Case: AHRC-UAC-122-2008

76 *Ibid.*

77 *Ibid.*

78 Urgent Appeal Case: AHRC-UAC-125-2008

all over his body for an hour while questioning him. As a result, according to officers, Mr. Nanda began "*showing signs of a psychological disorder, stomach problems and fever. They also said that he often lost consciousness and is displaying strange behaviour; for instance, sleeping naked; and could no longer remember what he was doing while in police custody.*"[79] The stories of Mr. Dharmadasa and Mr. Nanda evince the degree of psychological trauma that is associated with being tortured by the police which is often overlooked.

During the years 2008-2009, the incidence of mental torture inflicted by the authorities on victims continued unabated. Numerous instances of the same may be outlined. A classic example of severe mental torture was seen in cases where the police verbally abused or threatened victims, specifically in front of others.

In Ramanayakage Nishantha Perera's case (2009),[80] the police officials detained the victim in relation to a land dispute, in which the victim was the complainant. In the course of his detention, the policeman proceeded to state that he could not be bothered with such matters and that it was clear that the land did not belong to the complainants. He then threatened the victim by saying that if he did not give up the land, then he would beat the victim and the victim's family until "*the milk you drank from your mother comes out of your mouth.*"[81] He was then assaulted in front of all his family members. Finally, the officer forced the victim to sign over the disputed land to his neighbours and then "*kneel on the ground facing his neighbours with his hands clasped in a beseeching manner.*"[82] Mr. Perera was later detained and deliberately humiliated by being asked to strip naked purportedly in order to check for birthmarks though the justification of this action and its relevance to a legitimate police investigation is unclear.

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79 *Ibid.*

80 Urgent Appeal Case: AHRC-UAC-055-2009

81 *Ibid.*

82 *Ibid.*

(c) Denial of medical treatment

Yet another form of torture is where individuals are intentionally denied basic needs, such as urgent medical treatment. The extreme negligence of state officials in referring victims of torture to medical help was seen in a plethora of cases. In the case of Mr. Tammage Sampath Perera (2009),[83] the victim was illegally detained on fabricated grounds of robbery. In the course of his detention, he was severely beaten by an officer and sustained many grave injuries. Although he was in urgent need of medical help, he was intentionally denied medical treatment by officers for over 24 hours, resulting in almost certain nerve damage. According to doctors, this damage is definitely a result of delay in receiving medical attention. In Mr. Solomon's case (2009),[84] the victim, after being severely assaulted by the police was in urgent need of medical attention but was not provided the same.

An even more unfortunate case involved a young boy of 16 years of age in Mr. Umesh Chaturanga's case.[85] In this case, the victim was being interrogated as he had allegedly broken the door of the home science room. He was subjected to violence, both mental and physical by the police as well as teachers from his school. Although he consistently denied involvement in the crime, he was still commanded to "*tell the truth*"[86] and repeatedly hit by the officials. Moreover, "*even though he was in severe pain due to the torture, the police did not provide any medical treatment.*" [87] The victim finally confessed to a crime in which he had played no part.

4.1.5 Mechanisms for Redressal

Through this section, it will be considered as to whether the legal recourse for the violation of the right against torture as specified in legal instruments

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83 Urgent Appeal Case: AHRC-UAC-151-2009

84 Urgent Appeal Case: AHRC-UAC-046-2009

85 Urgent Appeal Case: AHRC-UAC-030-2008

86 *Ibid*

87 *Ibid.*

are actually available to the victims, and in any event, the nature and manner of the gap between the reality and theory.

(a) Lodging Complaints

The patterns of behaviour of law enforcement officers during this period clearly showed that cognizance of a complaint regarding torture and its recording had become a discretionary matter. Often, the Officers in Charge and Hospital Officers did not take the time to note the complaints that are placed before them. To illustrate, the case of Mr. Wijeratne (2009)[88] is relevant. When Mr. Wijeratne wished to notify the authorities of the manner in which he had been publicly assaulted, the Officer in Charge did not note down the complaint. This attitude did not change even after the victim showed the officer the marks on his body. Further, when he was finally called to the police station to make a statement about his complaint, "*A police officer recorded their* (two witnesses of the public torture) *evidence and asked the two to leave, at which point Wijeratne was told that he would have to personally identify the scene of the crime and was taken back to the police post at the temple. He was made to wait there for three hours, and when the officers returned they simply told him that the head priest had denied the charges. He was asked to go home; no statement was recorded from him nor any other records made.*" [89]

In the case of Mr. Christopher Pakiam (2009)[90] when the case was reported, despite the obvious nature of the torture by the police and the marks which were left by the assault on the body of the victim, no proceedings were initiated by the officials.

> "*Under domestic law, if a person is arrested in good health and released with a severe condition, the responsibility for explaining it falls to those in charge of his or her detention. The Office in Charge of the Gampola Kuruduwatte police station and the Kandy prison authorities must be held accountable. In the absence of a credible explanation, it is their duty to launch an investigation and to keep*

88 Urgent Appeal Case: AHRC-UAC-176-2009

89 *Ibid.*

90 Urgent Appeal Case: AHRC-UAC-164-2009

> *the family of the victim informed of their findings, along with the necessary legal steps.*" [91]

In Mr. Keerthi Padmakumara's case (2008),[92] the victim ran a hair salon in his village. The police, accusing him of theft, illegally detained him and proceeded to assault him with a stick and also slap him on his cheek. When the victim's family later sought to make a complaint about the behaviour of the police to the Officer in Charge: "*On the same day Keerthi Padmakumara and his parents went to the Godakawela police station and met the OIC, and told him what the ASP had said. However, the OIC did not show any interest and said he could tell his story in court when the case is called.*" [93] In fact, in the 2008 case of Ms. Vimalawathi,[94] "*an officer refused to accept the complaint stating, "it is strange that they (the police) had only put one case against you. The police can even break a chair and say that you broke it." The officer further said, "in this instance, the police have the right to hit you."* [95] This is another instance of the Officer in Charge not taking cognizance of a complaint that he was legally bound to, based on his own discretion.

The reason for the reluctance of the police to register such cases may be attributed to the fact that officers are often reluctant to lodge complaints against other officers. In Mr. Chaminda Sampath Kumara Wickramapathirana's case (2009),[96] the victim was subjected to extensive torture but was finally brought for a proper medical examination. However, as per reports, "*He told the doctors about the torture and was treated for two days. Though he says the hospital police visited him to take down a statement, when they discovered who the perpetrators were they refused to continue because it was they said a case against the police.*" A similar instance is that of Mr. Solomon (2009)[97] who was assaulted severely by the police. When he was taken before the

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91 *Ibid.*

92 Urgent Appeal Case: AHRC-UAC-054-2008

93 *Ibid.*

94 Urgent Appeal Case: AHRC-UAC-115-2008

95 *Ibid.*

96 Urgent Appeal Case: AHRC-UAC-070-2009

97 Urgent Appeal Case: AHRC-UAC-046-2009

District Medical Officer for a medical examination, and asked about how he had sustained such injuries, "*the DMO did not believe him and said that the police do not assault people in such a brutal manner. Solomon continued to explain how he was assaulted and showed the doctor the places of his body that had sustained injuries due to the assault. But the doctor did not take notice of his statement and did not examine him further.*" [98]

At a further level, the Officers in Charge had refused to take cognizance of some complaints based on flimsy reasons. In the case of Mr. Rankoth Pedige Wikrama Nimalsiri (2009),[99] the victim was arrested on his way to work on the ground that he had purchased some stolen property. The police was very aggressive and repeatedly demanded information from him about the theft itself. When his family complained that Mr. Nimalsiri was missing, they received a disappointing response from the Officer in Charge.

> "*When Chandrika, his daughter, traced him there and met with the Officer-in-Charge (OIC) at Nikaweratiya, the OIC claimed that he was unable to keep track of who was being kept where, but instructed an officer to take them to the victim*" (Emphasis Supplied).[100]

This clearly indicates that the existing system is very poorly organized and is apathetic to the needs of the torture victims and their families.

(b) Court Processes

Although courts are intended to be the repositories of justice for all the citizens of a country, individuals who have been subjected to torture often falter in their search. In the case of Mr. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara,[101] "*Nilantha and Ruwan Ranjith were then taken to the Magistrate's Court in Galgamuwa without being given the opportunity to contact*

98 *Ibid.*

99 Urgent Appeal Case: AHRC-UAC-090-2009

100 *Ibid.*

101 Urgent Appeal Case: AHRC-UAC-166-2009

the next of kin or arrange for legal representation. Nilantha heard the magistrate say that he was to be remanded till the 6 November, but he was denied his legal right to speak with the magistrate; he was neither addressed nor questioned." [102] In a single action, we see the demise of the right to legal representation as well as the right to a fair trial. These two entitlements form the basis of an effective criminal prosecution. In fact, in Mr. T. Jayantha's case (2009), the victim was cited to have professed no confidence in the lawyer that the court had appointed for him as he had worked very closely with government officials in the past. The prospect of delivery of justice in the courts is very bleak under such circumstances.

The case of Mr. Shantha (2009)[103] is a classic example of how even legitimate court processes do not result in fruitful consequences for the victim. In this case, Mr. Shantha was illegally detained and tortured by one SI Senaviratne in a case relating to theft. After being made to spend the night in jail and being severely assaulted by the officer, Mr. Shantha related the whole incident to the Magistrate at the hospital at which he was later admitted. However, instead of meting out the stipulated punishment to the officer, the Magistrate appeared satisfied with an apology issued by SI Senaviratne to the victim and no legal or disciplinary actions were initiated. Today, Mr. Shantha is permanently disabled and cannot carry on any work and is eager for justice to be delivered in his case. [104]

Given the manner in which cases are presented and delivered before the court, it is not surprising that court orders are no longer taken seriously by the Officers in Charge while looking into cases of torture.

> "*The OIC's complete dismissal of a court order shows the breakdown of authority...The stalking and abuse of complainants—in this case women and minors--at home is a particular low point. This case is a good example of what happens when checks and balances are abandoned, and unrestricted power is allowed to corrupt figures of authority.*"[105]

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102 *Ibid.*

103 Urgent Appeal Case: AHRC-UAC-028-2009

104 *Ibid.*

105 Urgent Appeal Case: AHRC-UAC-055-2009

(c) Investigation

Often, victims are compelled to sign documents that they do not understand the content of in the course of their detention. In addition to being a sophisticated form of mental torture, this is also a method by which police can extort confessions that are prejudicial to the victims of torture. In the case of Mr. Janaka (2009),[106] the victim was picked up from the road by two police officers for possessing a bullet which the officers claimed was from a gun that was being illegally held. Mr. Janaka was taken to the police station and severely assaulted. The police officers punched him with their fists and kicked him repeatedly. They later also confined him in a cell and trampled him continuously. As a result, out of desperation, the victim was ready to sign a document which he was not allowed to read and which he did not know the contents of. He was also compelled to give his fingerprints to the police in this connection.

On his release, Mr. Janaka made a complaint about the manner in which he was tortured by the police in the period of his illegal confinement. However, he is still unaware of the contents of the document he had signed.

This is also seen in Mr. Senaka Ekanayake's case (2008)[107] where, after being subjected to inhumane conditions and violence by the authorities, it has been reported that the victim was told: "*he would be given police bail if he signed the statement in the complaint book, which he refused. Then, SI Arawin took a pistol and pointed it at his head, threatening to kill him if he did not comply. He then asked to be allowed to read the statement but this was denied. Finally, he was forced to sign the unread statement and again put into the cell.*" [108]

Alternatively, police officers harass detainees in order to elicit confessions. In the case of Mr. Upul Palitha Mawalag (2009),[109] the victim was a taxi driver

106 Urgent Appeal Case: AHRC-UAC-024-2009

107 Urgent Appeal Case: AHRC-UAC-007-2008

108 *Ibid.*

109 Urgent Appeal Case: AHRC-UAC-093-2009

who was arrested by the police to elicit information about his passengers who were carrying drugs. According to the victim, the police stripped him naked, beat him up and then forced him to sign a confession. Obviously, the use of such evidence can skew the results of the investigation.

4.1.6 Protection of the Victims

Often complaints cannot be filed in the first place, or in any case filed properly, since victims of state atrocities are not adequately protected once they are released from the detention facilities. They are subjected to threats from the police who wish to protect their reputations and avoid such litigation.

In the case involving Mr. Shiraz Buhran (2008)[110] the victim was falsely charged of robbery and was detained in prison by six officers. He was later handcuffed and repeatedly assaulted and asked "where are the goods" although he pleaded that he was not involved in the crime. He was also prevented from informing his mother about the assault by the officers.

> "*When he was leaving the police station, the OIC threatened him that he had heard that his mother had consulted human rights activists and if he tried to continue such steps they would fabricate a charge and send him to prison.*"[111]

However, Mr. Buhran nevertheless proceeded to report this incident by written complaint to the Human Rights Commission of Sri Lanka as well as the National Police Commission.

Mr. Wanni Athapaththu Mudiyanselage Nilantha Saman Kumara (2009)[112] was detained illegally and tortured to the extent of permanent disablement. On his release, he chose to file an official complaint against the perpetrators of this violence:

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110 Urgent Appeal Case: AHRC-UAC-028-2008

111 *Ibid.*

112 Urgent Appeal Case: AHRC-UAC-166-2009

> "*On 17 November we are told that one of the alleged torturers, Constable Wijeratne, visited the victim's home to find out what steps he was planning to take. On 19 November Nilantha submitted a written complaint to the Human Rights Commission of Sri Lanka, the Inspector General of Police, National Police Commission and the Attorney General. However he remains scared of harassment or further harm from the perpetrators.*"[113]

The threats and fear of the police after the victim is released and the complaint is made seriously hamper acquisition of legal representation. In 2009, Mr. Sunil Shantha[114] was arrested without any grounds being provided to him by the police and severely tortured in his place of detention. He was tied with a rope, assaulted in a place on his neck where he had recently undergone surgery, and was manacled to a table for extended periods of time. When he was taken to the hospital and he complained about the way in which the police treated him, he was denied treatment and taken back to the police premises once again, only to be tortured further by the authorities. Unfortunately, when he later filed a complaint and his case was taken before the court, his lawyer did not appear on his behalf as he was receiving threats from the police and feared for her own personal safety while fighting the victim's case. Such incidents comprise serious hurdles to the victim's access to justice as well as to the safety of the victim who chooses to lodge a complaint about any violation of his or her rights.

4.2. Relevant Jurisprudence

Examination of the judicial response during the period in question, that is Article 11 of the Constitution at the level of the Supreme Court as well as at the level of the High Court in terms of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994 (CAT Act) offers an insight into the stance and posture of the legal framework on torture in Sri Lanka.

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113 *Ibid.*

114 Urgent Appeal Case: AHRC-UAC-026-2009

4.2.1 The Supreme Court under Article 11

The Supreme Court had often been frequently moved *vide* its powers in respect to Fundamental Rights violations under Article 11 of the Constitution during past decades. Many examples of strong jurisprudence may be cited in this regard but a few will be selected to illustrate well developed precedents. In *Shaul Mohammad Nilam and Others v. K Udugampola and Others*[115] the petitioners were members of the Sri Lankan Military Intelligence Patrol who were arrested and detained in inhuman conditions after the police raided the intelligence safe house. The Court held that there was no valid basis for the arrest as there was no credible information available to the police at the time.[116] In finding a violation of Articles 11, 13(1) and 13(2), the Court awarded the petitioners with Rs. 80,000 each as compensation.[117] This case was significant because it recognized and criminalised mental torture. It was held that there was a violation of the freedom against torture and that pain of mind of a sufficiently high degree can amount to a rights violation for the purposes of the Constitution.[118]

In *Sriyani Silva v. Iddamalgoda*[119], the Supreme Court clearly read the right to life (in a limited context) as flowing from the prohibition of punishment by death or imprisonment 'except by order of a competent court made in accordance with procedure established by law'.[120] The right to life as so implied was confined to the physical right to life rather than its positive affirmation.[121] This development (albeit limited) was crucial as it secured the right of dependants, next-of-kin and intestate heirs to approach the Court with a petition where a family member was killed due to an act of torture. This case is considered as epochal as it is said that as a result

115 SC (FR) Applications Nos 68/2002, 73/202, 74/2002, 75/2002, 76/2002, SCM 29.01.2004.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Sriyani Silva v. Iddamalgoda* [2003] 2 Sri L.R. 63.

120 *Ibid*

121 *Ibid.*

of upholding the petitioner's right to sue, the law 'was brought into conformity with international obligations and standards. [122]

The Supreme Court's jurisprudence followed the *cursus curiae* of the Sri Lankan courts under the ordinary criminal procedure law which stipulated rigorous safeguards for an accused person. One of the seminal decisions in this respect was *Muttusamy v. Kannangara*[123] where the Court circumscribed the power of the state to arrest a citizen. Upholding *Christie v. Lachinsky*[124] it was held that in order for arrest to be legitimate, the individual must have been involved in a cognizable offence and a complaint must be made based on credible information. An arrest cannot result from a vague suspicion in the mind of the officer, in the anticipation that evidence may be collected after the arrest is made. However, traditionally the greatest challenge in this regard had been, as mentioned earlier, the non-implementation of the rulings of the Court.

The section below will examine the manner in which the Supreme Court responded to Fundamental Rights applications under Article 11 specifically during the period under review,

4.2.1.1 *Anthony Michael Emmanuel Fernando v. The Superintendent of Welikada Prison and Others*[125]

The petitioner who had been committed to prison by the Supreme Court for contempt of court had developed a serious bronchial asthmatic condition while in custody and was taken to the National Hospital in Colombo. After being admitted to the ward, he was submitted to inhumane treatment with his leg being shackled to the bed. Subsequently he started experiencing pain all over his body but was not given any form of medical attention.

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122 Kishali Pinto-Jayawardena, *'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) Denmark, 2009

123 (1951) 52 NLR, 324

124 [1947] AC 573.

125 SC (FR) Application No. 128/2003, SC Minutes 14.05.2008.

Later upon discharge from the hospital, even though his condition had not improved, he was dragged into the prison bus and his shoulder was violently shaken when he protested. He was also threatened not to reveal the details of his mistreatment and was threatened with dire consequences including death. Further, in the bus he was kicked on the stomach, back and spine when he was complaining about severe physical pain. As a result of this assault, the petitioner started vomiting blood. On these grounds he claimed that he had suffered mental agony as a result of the 'cruel, inhuman and degrading treatment' meted out to him and hence the prison guards had violated his Fundamental Rights guaranteed under Article 11 of the Constitution.

The medical records presented before the Supreme Court clearly indicated that there were no recorded injuries on the petitioner's body while he was admitted to the National Hospital. The respondents, the prison guard, by affidavit stated before the court that the injuries sustained by the petitioner were not due to physical assault, as claimed by the petitioner, but was due to a fall suffered by him while being transported by bus from the National Hospital to the Prison. Here, the Court referred to the decision in the case of *Pitakandalage Gamini Jayasinghe* v. *P.C. Samarawickrama and Others*[126] where the Court had opined that in case of an allegation of assault, while in custody, a mere denial by the respondents would be insufficient and that the onus of proving that there was no physical assault shifted upon the respondents as soon as a *ex facie* case of assault in custody was made out by the petitioner.

Relying on the above precedent, the Court in this case also held that it would have to rely on medical evidence when there is 'only silence' on the part of the respondents in respect to the cause of the injuries sustained by the petitioner. The Court looked into affidavits filed by people who had come in contact with the petitioner during his stay at the National Hospital and who suggested that the prisoner had been treated in a degrading manner by keeping his legs shackled to the bed and by keeping

[126] SC (FR) Application No. 157/91, SC Minutes 12.01.1994.

him without clothes. It was opined that such inhuman and degrading form of treatment while under police custody should be considered as a grave form of ill-treatment in light of the decision in the case of *Wewalage Rani Fernando and Others* v. *OIC, Seeduwa and Others.*[127]

The Court then moved on to examine the responsibilities of the Prison Guards under Section 132 of the Prisons Ordinance which clearly states that:

> *"It shall be the duty of all Prison Officers, without exception, to treat the prisoners with kindness and humanity, to inform the Jailor at his next visit of any Prisoner who desires to see him."*[128]

This above Section, the Court observed, was based upon internationally accepted legal doctrines like the General Assembly Resolution No. 43/173 of 9.12.1998 that had adopted the UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment and also the UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Standard Minimum Rules for the treatment of prisoners adopted at Geneva on 30.08.1955. Specific judicial mention was made of the acceptable instruments of restraint laid down in Rule 33 of the Rules. It was concluded that the use of shackles and chaining to the bed violated basic internationally accepted principles of treating hospitalized prisoners. Article 7 of the ICCPR and the CAT were referred to by the Court which pointed out that a prisoner, who is deprived of his liberty by law, is not to be deprived of the constitutionally safeguarded Fundamental Rights. The deprivation of liberty does in no way, remove the right of the prisoner against being subjected to torture and cruel, inhuman and degrading treatment. Thus, every prisoner had the right to be treated with kindness and humanity. The court at this juncture also made a reference to the case of *Senthilnayagam* v. *Seneviratne*[129] where the Supreme Court had made it amply clear that

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127 SC (FR) Application No. 700/2002, SC Minutes 27.07.2004.

128 S. 132, Prisons Ordinance.

129 [1981] 2 Sri L.R. 187.

the constitutional guarantee of personal liberty should be enjoyed by all persons on an equal basis.

Furthermore, in respect to the argument by the respondents that the petitioner was not a person of upright character, the Court made reference to the case of *Rani Fernando*[130] and held that the Fundamental Rights guaranteed in terms of Article 11 should not be adjudicated by considering the petitioner's standing in society. Instead, the adjudication should be made in an unbiased manner, taking into account only the facts and circumstances of the case at hand.

In reflection, this case lays down the jurisprudence on the question of 'cruel, inhuman and degrading' treatment of prisoners very clearly by stating that the medical evidence would be the most relevant piece of evidence in deciding upon whether there was an actual Article 11 rights violation, irrespective of silence or denial on the part of the respondents. Further, the case also held that the prison guards were in law, with reference to customary international law, duty bound to treat a prisoner with kindness and humanity and that every prisoner was entitled to some basic levels of personal dignity and liberty even in custody. Finally, the Court also set aside all arguments on the character of the petitioner by upholding the settled law on the point that a Fundamental Right is a right that cannot be circumscribed by such considerations and was to be tested only upon the facts relevant to the case.

4.2.1.2. ***Bandula Samarasekera v. OIC,Ginigathhena Police Station and Others.***[131]

In this case the petitioner's son was involved in a live-in relationship with a married woman. The petitioner in order to discourage his son from the relationship had decided to engage the local exorcist who was conducting the rituals at the petitioner's house on the date of the incident. After the ritual, the petitioner scattered the ashes from the ritual at his son's house

130 SC (FR) Application No. 700/2002, SC Minutes 27.07.2004.

131 SC (FR) Application No. 107/2007, SCM 14.09.2009.

and was stopped on his way back by a vehicle. The persons in the vehicle, including the first respondent (a private person) had assaulted the petitioner and confiscated the articles used for the ritual. Then the petitioner, who was bleeding from his nose and right eye due to the assault, was taken to the Kandy Police Station and an arrest was recorded by the police. At this juncture, the petitioner realised that his gold bracelet and chain were missing.

Later the Attorney-at-law on behalf of the petitioner arrived at the station and the petitioner was taken to the Judicial Medical Officer, who did not treat the injuries of the petitioner. Three days later, the petitioner was again taken to a Judicial Medical Officer, after the police recorded his statement, who sent him to an ENT clinic for necessary check-ups. After this incident the petitioner made complaints to the National Police Commission and the Human Rights Commission of Sri Lanka on the grounds that he was still undergoing treatment for the injuries being suffered and for the severe mental agony suffered by him.

The first respondent contended that there was a commotion following which the villagers had surrounded the petitioner and had assaulted the petitioner and that he had no role to play in the injuries that were sustained by the petitioner. The first respondent claimed that he arrested the petitioner, as provided for under the law on suspicion that the petitioner was a suspected treasure hunter and had arrested him to prevent a further assault on him by the villagers. However, the Court set aside this contention on the grounds that the first respondent could in no way produce evidence that suggested that the petitioner was involved in any kind of treasure hunting or that there were any archeologically valuable articles in the possession of the petitioner or near the site of the assault.

Thus, in light of the facts adduced, the Court found the arrest of the petitioner to be unlawful. Further, it was pointed out that if the arrest was made on grounds of protecting the petitioner, then there would have been no reason to detain him for a three day period. Thus the action of the police and the first respondent were clearly contradictory suggesting

that the version of the first respondent was fabricated. This extended dentition of the petitioner by the police before presenting him in front of a Magistrate was also in violation of the law. Thus the Court held that there was an unequivocal violation of Article 13(2) of the Constitution.

In respect to the Article 11 violation, the Court made a reference to the case of *Ansalin Fernando* v. *Sarath Perera and Others*[132] where it was held that when there is a complaint against a police officer for assaulting a suspect, a mere denial of such allegation or the inability of the petitioner to produce medical evidence of such assault cannot exonerate the police official. Here too, the Court observed that medical evidence would be the best evidence to take the case of the petitioner forward. The Court in this case then made a reference to the report of the second Judicial Medical Officer which clearly indicated that there had been an assault amounting to torture on the petitioner. The question before the Court was as to who was responsible for the assault?

Upon a study of the facts of the case, the Court concluded that the first respondent was unable to prove his non-involvement in the assault. The medical examination report corroborated the petitioner's version of the incident and hence the first respondent was found guilty. Furthermore, the failure on the part of the OIC of the police station to give necessary medical attention and the failure of the police to discharge its responsibility in preventing such instances makes the police a responsible party for violating Article 11. A reference was made by the Court to the case of *Amal Sudath Silva* v. *Kodituwakku*[133]where the relevant moral and ethical responsibility of the police was laid down.

The significance of this case lies in the fact that the moral and ethical responsibility of the police force in preventing Article 11 violations was restated by the Court.

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132 [1992] 1 Sri L.R. 411.

133 [1987] 2 Sri L.R. 119.

4.2.1.3 *Romesh Cooray v. Sub-Inspector of Police, Crimes Division and Others*[134]

The case involved a search on the petitioner's house conducted by police officials in plainclothes in which respect, no incriminatory material was found against the petitioner. The petitioner was then arrested, blindfolded and taken to the premise of a restaurant owned by his business rival, the sixth respondent. He was assaulted with fists, wooden clubs and a hose pipe and was questioned about a house breaking of the residence of the sixth respondent. When he denied his involvement in the break-in, he was kicked repeatedly on his stomach and head. Later he was dragged to a van, as he was in no condition to walk, and taken to the Panadura beach where he was made to inhale petrol fumes. The petitioner was then taken to the Special Crimes Division at Panadura and was assaulted again and thrown under a shower and was then kept locked till the next day. He was thereafter taken to a Government Medical Officer and was produced before the Magistrate, Panadura, and released on bail.

After the release, the petitioner got himself admitted to the General Hospital at Kalubowila. On the report filed by the police, the Magistrate's Court found no evidence against the petitioner and discharged him. The petitioner then filed a complaint to the Human Rights Commission of Sri Lanka and then subsequently approached the Court under Article 126 for the violation of his Fundamental Rights. In respect to the Article 126 application, the sixth respondent argued that the petition was time-barred as it was made more than one month after the incident. This submission did not form a part of the initial written statement of the sixth respondent but was taken as an objection once the proceedings started. The Court found this objection to be belated and held that Rule 30(4) of the Supreme Court Rules of 1990 clearly provided that written submissions of the respondent should contain:

134 SC (FR)Application No. 663/2003, SC Minutes 2.07.2008.

> *"(a) a statement, in reply to the appellant's statement of facts, confining whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of the other relevant facts, referring to the evidence, both oral and documentary..."*[135]

Furthermore, the Court made a reference to Section 13(1) of the Human Rights Commission of Sri Lanka Act, 1996, that deals with the computation of time for the purpose of Article 126 of the Constitution:

> *"Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."*[136]

The Court, considering this provision and the fact that the petitioner had filed an application before the Commission, held that the petition before it under Article 126 was not time-barred.

In respect to the question of Article 11 violation, the Court looked into the examination report of the Government Medical Officer and also the report filed by the Assistant Judicial Medical Officer of the Teaching Hospital, Colombo-South, that outlined several injuries found on the petitioner which had a clear nexus between the story narrated by the petitioner. Thus, it was found that an Article 11 violation had been made out by the petitioner. Upon examining the argument by the respondents that an act of torture under the Article would only be constituted by an act that is 'qualitatively of a specially reprehensible type' the Court made a reference to the case of *Kumarasena* v. *Sub-Inspector Sriyantha and Others*[137] where it had been judicially observed that torture, cruel, inhuman and degrading treatment could include many forms, viz., psychological and/or

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135 Rule 30(4)(a), Supreme Court Rules, 1990.

136 Section 13(1), Human Rights Commission of Sri Lanka Act, 1996 (No. 21 of 1996).

137 SC (FR) Application No. 257/93, SCM 23.05.1994.

physical and the case had to be decided on the facts and circumstances of the case. Thus the Court in this case sought to balance the need to have a 'qualitatively of a specially reprehensible type' act and the requirement under Article 12 of the CAT Act and concluded that in considering the circumstances in totality, there was a clear violation of Article 11.

The success of this case lies in the fact that it clearly provides a limitation of the use of a time-bar preliminary objection against Article 126 applications and provides that the procedure for such rejection of a fundamental rights application should meet the high standards of procedural non-compliance. Similarly, the case also seeks to keep the field open as to what can constitute a 'qualitatively of a specially reprehensible type' of act that amounts to torture thereby providing the much necessary leeway that would be necessary for the High Courts in deciding upon CAT Act applications and effectively ensuring a liberal approach to torture law jurisprudence.

4.2.1.4 *Uduwa Athukoralage Chandrasena v. OIC, Baduraliya Police Station and Others*[138]

Here, the petitioner was approached by a group of two villagers and four unidentified persons who questioned him about illicit liquor. The petitioner denied having any knowledge of the same and he was taken to a volleyball court by the group. The unidentified persons claimed to be from the police and started assaulting the petitioner with clubs causing injury to the petitioner's legs, thighs and head and the petitioner fainted. The petitioner then asked the group to take him to a hospital and was asked to find a hospital himself. The petitioner was then taken to the police station and was assaulted further and no food or medicine was offered. The petitioner was released on bail the next day and he did not admit himself to a hospital due to a threat of severe action by the police. Afterwards, the petitioner was released by the Magistrate's Court, Matugama, on a personal bond and the petitioner got himself admitted to the Kalutara- North Hospital as his

[138] SC (FR) Application No. 258/2007, SCM 13.05.2009.

condition deteriorated. There he was examined by the Consultant Judicial Medical Officer of the Karapitya Teaching Hospital.

The second respondent in the case, the OIC Police station, applied to be discharged from the case as he claimed that he was in no way involved in the assault on the petitioner as he was on leave on the days of the event. The Court, after examining the evidence in this respect, found that the second respondent was not present at the police station and was hence not responsible for the Article 11 violation.

The Court then referred to the submission of the respondents that the petitioner was never assaulted and that there were no visible injuries at the time of the arrest. However, the medical evidence from the General Hospital and the medical report of the Judicial Medical Officer did indicate that there was a brutal assault on the petitioner that led to his medical condition. The Court here made a reference to the case of *Pitakandalage*[139] where it was held that in case the respondents deny or are unable to produce sufficient evidence as to the cause of the medical condition of the petitioner, the judges would have to rely on expert medical evidence and the conclusions thereof to decide on whether there was an actual case of torture. Thus, the Court in this case upon an examination of the medical evidence adduced, concluded that the respondents had violated the Article 11 rights of the petitioner.

The most significant part of this judgement was the suggestion made by the Court that in the event there is a difficulty in identifying the officers who were involved in a particular rights violation, the police should take necessary steps to conduct an inquiry into the matter and should, if the need be, conduct an identification parade in terms of the Code of Criminal Procedure to clearly identify the perpetrators of the violation. Further, even if the liability of the officials cannot be clearly arrived at, the responsibility of the state to protect the right cannot be ignored as held in the case of *Ratnasiri and Another* v. *Devasurendran and Others.*[140]

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139 SC (FR) Application No. 157/91, SC Minutes 12.01.1994.

140 [1994] 3 Sri L.R. 127.

4.2.1.5 M.D. Nandapala v. Sergeant Sunil and Others.[141]

In this case the petitioner's van was stopped at the Godagama checkpoint by members of the police and the army to conduct a search of the vehicle. The petitioner and the other vehicle occupants were all taken into police custody and brought to the Homagama Police Station. After being brought to the station, the petitioner was brutally assaulted with repeated blows from a hose pipe and club delivered to his back, lower abdomen and buttocks.

The respondents claimed that one of the reasons for the arrest was the possession of a knife by the petitioner. The petitioner stated that the knife was never hidden in his waist but was kept in the cubby-hole of the van, and was used for cutting polythene sheets that cover the steel furniture he is in the business of selling.

The petitioner was then admitted to the Panadura Base Hospital due to severe body pain and immobility due to the severe ache in his lower abdomen and was examined by the Hospital's Judicial-Medical Officer who reported an existence of a *"a soft tissue injury all over the body"* and injuries over the abdomen, both buttocks and left forearm, all injuries consistent with the claim of the petitioner as to the manner of the assault and the areas of his body which had been affected by the several blows that were dealt to him.

Aggrieved by the alleged conduct of the law enforcement officers, the petitioner lodged a complaint regarding the aforesaid arrest and the subsequent incidents of impropriety with the SSP of Nugegoda who in turn referred the matter to the Superintendent of Police of the Homagama Police Station. In response to the complaint, Mr Perera held a preliminary fact-finding investigation through an inquiry. The inquiry by the SP of Homagama clearly found the respondents culpable of violating the rights of the petitioner and concluded that:

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141 SC (FR) Application No 224/2006, SC Minutes 27.04.2009.

> *"On the 24th of May 2006, the 1st Respondent (a) unlawfully arrested the Petitioner and his companions, (b) unduly assaulted the Petitioner and (c) improperly treated the Petitioner and his companions by retaining them at the checkpoint from 19.30 p.m. to 24.00 a.m."*

And;

> *"Given the fact that it has been proved by the recorded evidence that the knife discovered at the time of arrest was used by the Petitioner as a tool of trade, it is clear that the allegations made by the 1st Respondent regarding the knife were part of a ruse to cover up the improper conduct of the accused police officers."*

Adjudicating on this matter, the Court referred to the case of *Amal Sudath Silva*[142] where it was held that the only reasonable inference of the source of injuries caused while the petitioner was in the custody of the officers, was that they had been caused by such officers. On the basis of the facts of the case, the Court held that there was a Article 11 violation and also made stinging adverse observations as to the manner in which political protection had been afforded to the offender as a result of which negative reports by his seniors had been disregarded and the National Police Commission had also been helpless in this regard.

Significant recommendations were made by the Supreme Court as follows:

1. Establish an independent inquiring office of the National Police Commission in accordance with the Departmental Police Orders as such an inquiry is as important in establishing the culpability of the offenders as it is in exonerating superior officers who may currently be clouded by perceptions of impropriety regarding this matter.

2. In recognition of 'the lack of effective self-governance with respect to superior officers as evidenced', the National Police Commission should "publicly set forth effective, practical procedures that provide" for supervision of police officers of *all* ranks.

142 [1987] 2 Sri L.R. 119.

3. Further, the National Police Commission should amend the existing scheme for promotions to explicitly counter political and financial influence, through the issuance of a set of specific, determined, pre-specified rules which specifically disallow the consideration of recommendations given by those not within the police force, or which have not been earned through specific duties of excellence as assessed by their superiors, in the police force and with a provision to appeal against any partiality of superior officers.

4. The National Police Commission should engage in awareness creation and training programs that would sensitize officers as to the importance of their duties.

Finally, the Court suggested the National Police Commission set up an "internal affairs" division within the Police Force to investigate and speedily review suspicions of professional misconduct by members of *any* rank of the Police Force.

4.2.1.6 Meegasdeniya Kankanamge Gunathilake v.Sub-Inspector of Police, Tangalle Police Station and Others[143]

The petitioner in this case was a close relative and was financially in debt to one Mr. Ekanayake who was killed by unidentified gunmen. The police called the petitioner to their jeep and asked him to go with them to the police station to record a statement. At the police station he was taken to the backyard and was tortured. Then the petitioner was bound by a rope and taken to Ekanayake's house and was beaten up there before the deceased's wife who was informed by the police that the petitioner was responsible for her husband's death. This assault resulted in the petitioner bleeding from the nose and ears. He was then taken to Beliatta and was once again assaulted. The next day the petitioner was admitted to the Base Hospital at Tangalle where the doctors found him to be in a very bad medical condition. This led to the petitioner filing an application for an Article 11 violation under Article 126 to the Supreme Court.

[143] SC (FR) Application No. 123/2004, SCM 27.05.2008.

The respondents claimed that the petitioner had sustained injuries while attempting to escape from police custody, however, no evidence to the same could be adduced by the respondents. Further, the medical examination at the Base Hospital suggested that the injuries sustained by the petitioner could not have been received by the petitioner if he undertook an escape attempt, but was clearly collaborating his version, that he had been continuously assaulted.

Counsel for the respondent further argued that the petitioner was not a person of an unblemished character and should not be afforded the protection of Article 11. In this regard the Court referred to the case of *Senthilnayagam*[144] and observed that such limitations cannot be imposed on the Fundamental Rights of citizens and that they were available to one and all irrespective of the behavioural traits of the individual in question.

4.2.2. High Court Jurisprudence under the CAT Act

Prosecutions under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 (CAT Act) takes place before the Provincial High Courts in Sri Lanka. However, the record of convictions under the CAT Act is disappointing as there have been only three convictions, some nineteen acquittals and a vast number of pending prosecutions.

4.2.2.1 State v. Makavitage Suresh Gunasena and Others[145]

This case also known as the Gerard Perera's torture case was arguably the most controversial acquittal delivered under the CAT Act. The question before the Court was whether the actions of the six accused police officers on the petitioner amounted to an offence under Section 2(4) of the CAT Act. The petitioner was killed by unidentified persons, days before he was due to give evidence in regard to the culpability of the accused police officials. In a judgment leading to the acquittal of the accused, the High

144 [1981] 2 Sri L.R. 187.

145 HC Case No. 326/2003, Negombo High Court, HC Minutes 02.04.2008.

Court held that in the absence of any direct eye-witnesses to the torture, the criminal responsibility under Section 2(4) of the CAT Act could not be proved beyond reasonable doubt.

The acquittal took place despite a number of factors which indicated that Perera was indeed tortured. One such factor was the extensive evidence given by the wife of Perera who not only identified the first accused as being the person who took her husband into custody, but also identified the second, fifth and sixth accused as those who put their arms round Perera's shoulders when Perera alighted from his vehicle. Further, it was accepted by the Court that Perera was in good health when he was taken into custody and that one day later, according to his wife, "his *hands were hanging and his cheeks were swollen and his eyes were red.*" Further, "*his lower abdomen was painful and he could not raise his two hands*". On his release, the doctor observed six injuries.

The major and most significant obstacle to finding the respondents culpable was the insufficiency of the medical evidence. In this case, the medical examination of the petitioner that was undertaken by the Assistant Judicial Medical Officer was held to be not conclusive as to the nature of the injuries on the petitioner mainly because the examination was not conducted on the day the petitioner was admitted to the hospital and the High Court commented that such delay in examination takes away the credibility of the medical evidence.

The Court further relied on the evidence of the police O.I.C., Mr. Suraweera, who had inspected the cell of Perera and stated that Perera was not tortured in the course of his detention. It is unfortunate that this reliance was evidenced despite an earlier judgment of the Supreme Court castigating this very same officer for allowing the torture to have taken place. In the High Court, it was further observed that since the Criminal Investigation Department did not conduct inquiries as to what happened to Perera after he was handed over to the Reserve, there was a vacuum as to what happened between when he was handed over to the reserve and when he was set free. The accused was acquitted. The Attorney-General

also failed to appeal against this decision even after significant public appeals made by civil society in the interest of justice.

4.2.2.2. Sundara Arachige Lalith Rajapakse v. State[146]

On 18th April, 2002, four officers had come to the petitioner's village looking for an individual named Lalith. Without any substantial material supporting their action, the officers detained the petitioner, merely on the basis that the petitioner's name was also Lalith. In the course of his overnight detention, the petitioner was subjected to intense physical and mental torture. He was hung by his hands from the ceiling and assaulted, and also immersed in very cold water. When he was visited by his grandfather the next day, he was seen lying in his police cell, severely battered. Although the petitioner was later remanded after the Magistrate's Court of Wattala acquitted him of the false charges, he was still unconscious. When taken to the Ragama Hospital, the doctors refused to admit him. He was finally taken to Colombo National Hospital. The petitioner was in a coma for 16 days after this treatment.

The High Court of Negombo, in adjudicating this matter, acquitted the accused on the basis that the brain injury of the petitioner had been caused by the petitioner catching encephalitis and not because of police assault during his detention. This decision of the judge can be questioned on many levels. For one, the ruling is contrary to the medical evidence of three medical doctors who were clear that the injuries were caused by a blunt instrument.[147] The Court also ruled that the absence of any injury on the soles of the petitioner's feet negated the possibility of torture. However, the medical evidence was clear in regard to the existence of wounds on the soles of the petitioner's feet.[148] Secondly, the judge in the present matter failed to state why the submissions of the petitioner were incorrect and relied solely on the arguments of the defence.[149]

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146 High Court Case No. 259/2003, Negombo High Court HC Minutes 09.10.2008 and Case No SC (FR) Application No. 267/2002.

147 http://newsletters.ahrchk.net/js/mainfile.php/0741/2358/

148 http://www.humanrights.asia/resources/books/documents-regarding-the-judgement-of-the-high-court-of-negombo-sri-lanka-in-case-no.-259-2003-regarding-the-torture-of-lalith-rajapakse

149 http://newsletters.ahrchk.net/js/mainfile.php/0741/2358/

4.3 Individual Communications before the United Nations Human Rights Committee During the Period

Invocation of this remedy had become common by the year 2008. For example, in the above case discussed previously, Rajapakse had approached the Human Rights Committee on 28th January 2003, in terms of the individual communications procedure under the First Optional Protocol to the ICCPR.[150]

It was submitted before the HRC that the fundamental rights matter before the Supreme Court was being unreasonably and unlawfully delayed by constant adjournment and that the witness protection programme in Sri Lanka was ineffective. In considering these submissions, the UNHRC noted that the matters at the time were pending before the High Court and the Supreme Court for over three years and that Sri Lanka had not provided any reasons for this delay. It was therefore opined by the UNHRC that the actions of Sri Lanka were in violation of the Optional Protocol and of relevant provisions of the ICCPR. The UNHRC ordered *inter alia* that (i) Sri Lanka submit within six months explanations clarifying the present matter and what action it has taken, and (ii) Within six weeks of such transmission, the HRC will communicate the response of the state to the authors and seek their responses.

Throughout, a notable feature of this case was in regard to the neglect of the victim's physical and mental rehabilitation by the state[151] Rajapakse regularly faced threats to his life by the police and his appeals for redress went unanswered.[152]

On 08.07.2008, the UNHRC handed down an Individual Communication of Views in *Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka*[153] which concerned the application of parents of a suspect who had allegedly been tortured while in police custody, leading to his death. The UNHRC opined

150 CCPR/C/83/D/1250/2004, adoption of views 14-7-2006.

151 http://www.omct.org/urgent-campaigns/urgent-interventions/sri-lanka/2003/10/d16504/

152 http://www.humanrights.asia/news/urgent-appeals/UP-77-2004

153 CCPR/C/93/D/1436/2005, adoption of views 8-7-2008

that according to the uncontested material the victim was in normal health before being taken into police custody, where he was shortly thereafter seen by eyewitnesses suffering substantial and severe injuries.

The Committee dismissed the response of the state that he had died during an LTTE attack, have been dismissed by the State party's own judicial and executive authorities. It gave due weight to the presumption that injury and, *a fortiori*, death - suffered in custody must be held to be attributable to the State party itself. The State party was held responsible for arbitrary deprivation of the victim's life, in breach of Article 6 of the ICCPR. Further ICCPR Articles found violated was Article 7 of the Covenant and importantly Articles 6 and 7 on the basis that the State party had failed in its procedural obligation to properly investigate the victim's death and incidents of torture, and to take appropriate investigative and remedial measures. Particularly it was opined that the Attorney-General's decision not to initiate criminal proceedings in favour of disciplinary proceedings was clearly arbitrary and amounted to a denial of justice.[154]

5. Facilitation of Torture Due to Lapses in the Democratic Environment

5.1 Emergency Laws

An important factor which continued to compromise the effective rule of law in Sri Lanka during the period under review was the prevalence of Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005 and The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006 along with the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA).

Emergency law in Sri Lanka may be critiqued at many levels for not protecting citizens against the arbitrary exercise of state power. Regulation 19 of the Emergency Regulations, 2006, provides complete legal immunity

154 *Ibid.*

to the state for actions when Emergency has been declared: "*No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.*"[155] This is in complete contravention of international standards which provide for the prosecution of such officers for violence in the course of Emergency. Further, the definitions in the laws sanctioning Emergency were vague, providing officers with sweeping powers. An example of this was the criminalization of 'terrorism' under the Emergency Regulations, 2006, wherein the term is not defined in a sufficiently concrete manner.[156]

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155 S. 19, Emergency Regulations, 2006.

156 Regulations 2 -5, Emergency Regulations*, 2006*:

2. No person or groups of persons either incorporated or unincorporated including an organization, shall either individually or as a group or groups or through other persons engage in

(a) terrorism or,

(b) any specified terrorist activity, or

(c) any other activity in furtherance of any act of terrorism or specified terrorist activity committed by any person, group or groups of persons.

3. No person shall:

(i) wear, display, hoist or possess the uniform, dress, symbol, emblem, or flag of,

(ii) summon, convene, conduct or take part in a meeting of,

(iii) obtain membership or join,

(iv) harbour, conceal, assist a member, cadre or any other associate of,

(v) promote, encourage, support, advice, assist, act on behalf of, or

(vi) organize or take part in any activity or event of, any person, group, groups of persons or an organization which acts in contravention of Regulation 2 of these Regulations.

4. No person shall engage in any transaction in any manner whatsoever, including contributing, providing, donating, selling, buying, hiring, leasing, receiving, making available, funding, distributing or lending materially or otherwise, to any person, group or groups of persons either incorporated or unincorporated, or with a member, cadre or associate of such a person, group or groups of persons, which acts in contravention of Regulations 2 and 3 of these Regulations. Provided however, for the purposes of facilitation the development of a peaceful political solution, termination of terrorism or specified terrorist activity maintenance of supplies and services essential to the life of the community, conducting development activities, or for any other lawful purpose, it shall be lawful for any person including a national or international governmental or non governmental organization, to in good faith and with the written approval of the Competent Authority appointed in terms of these Regulation, engage in any approved transaction, with a person or group or groups of persons who are acting in contravention of Regulations 2 or 3 hereof. Provided further, it shall not be necessary to obtain such approval of the Competent Authority in order to provide emergency medical treatment or medical assistance to any person who may be acting in contravention of Regulations 2 and 3 hereof.

It was therefore difficult for citizens to know precisely which acts entailed detention and which acts did not.

5.2 The Failure of the 17th Amendment

The decline of the rule of law in Sri Lanka has been considered by many[157] to be one of the key factors leading to the lax control exercised by important oversight monitors such as the National Police Commission and the National Human Rights Commission during the period under review. This, in turn, led to a sense of impunity among officials who indulged in acts of torture. The environment that allowed for the executive to ignore the 17th Amendment to the Constitution and proceed with appointments to the independent commissions outside its framework also suggested a lack of political and democratic will in the country to challenge *ex facie* violations of the Constitution. This situation clearly meant that there was also extreme apathy in the establishment, including the police and the armed forces, to conform to convention and procedure resulting in the sacrifice of the rule of law at the altar of expediency.

The situation is best understood on an examination of several reports in relation to the National Police Commission's failure to implement Supreme Court judgements in respect to torture and other violation of Fundamental Rights.[158] A primary reason for such inaction may be attributed to the fact that it was the governmental agencies, that is employees of such agencies, who indulged in acts of torture and in the absence of an independent commission to oversee and uphold the rule of law, the officials often acted with impunity. Thus, a weakened independent National Police Commission (NPC) resulted in the lack of effective monitoring of human rights violations by law enforcement officers and consequently constituted a primary cause for acts of torture being

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157 Transparency International Sri Lanka, "The Forgotten Constitutional Council: An analysis of consequences of the non-implementation of the 17th Amendment" at http://tisrilanka.org/Position_Paper/10.htm .

158 Kishali-Pinto Jayawardena and Lisa Kois, *Sri Lanka: The Right not to be Tortured* (Colombo: Law and Society Trust, 2008), p. 53-54.

perpetrated. Further, the NPC's Procedure for Public Complaints did not have its desired impact[159] and the constitutionality of the appointment of NPC members remained in question.[160]

6. Analysing the Predicament: Suggestions for Reform

Looking at the current situation in Sri Lanka, regarding the right against torture and other cruel, inhuman and degrading punishment, specifically in the years 2008-2009, a number of recommendations can be made. These are to be made at different levels, but are all equally essential. The recommendations may be divided into several categories. These categories are as follows:

a) Recognizing torture as a criminal offence
b) Securing adequate pay for the police officers
c) Creating a system of adequate compensation and rehabilitation
e) Providing protection to the complainant
f) Ensuring proper legal representation
g) Affording a right to independent medical examination to victims
h) Creating an 'internal affairs' wing under the National Police Commission
i) Inclusion of the term 'suffering' in Section 12 of the CAT Act
j) Enactment of a non-refoulement Section 12 in the CAT Act
k) Amendment to the PTA to prohibit admission of evidence obtained by torture and consequential amendment of the CAT Act
l) Better reporting of court decisions
m) Inclusion of 'command responsibility' in the CAT Act
n) Relaxation of time bar under Article 126 for Article 11 applications
o) Follow-up mechanism

159 *Ibid.*, at 17.
160 *Ibid.*, at 26.

p) Clarifying and removing ambiguities in statutes
q) Irregular places of detention
r) Search and Seizure provisions

6.1. Recognizing Torture as a Criminal Offence

One of the primary reasons as to why torture continues to be rampant in Sri Lanka is because torture is still acceptable and is not considered to be a violation of an individual's basic human rights. Torture is still seen as an extension of violence, not as an individual criminal act. However, seeing torture merely as an aggravated form of aggression hampers its criminalization and makes it difficult for the law to stigmatize it. Therefore it is suggested that the Sri Lankan state take steps to make citizens aware of torture as a separate offence and attribute it with the symbolism that it deserves. Associated with this is the idea that the public officials in particular must be educated about what kind of conduct with detainees is unacceptable and illegal. If an officer is not aware that certain behaviour is against the law, he is likely to repeat his actions.

6.2. Securing Adequate Pay for the Police Officers

One reason why police officers tend to act unlawfully is because they are driven by monetary incentives outside the system. These incentives are in the form of bribes by influential individuals who either want to frame enemies or want their cases wrapped up swiftly. In order to prevent officers from being swayed by such motivations, it is necessary for them to have adequate pay commensurate to their seniority and requisite security in office. Adequate legislation must be passed in this regard to secure such remuneration for officers.

6.3. Creating a System of Adequate Compensation and Rehabilitation

A significant flaw in the current regime as it stands is that even once the complaints are filed by the victims of torture, there is very little monetary relief available to victims. Although a meagre amount may be claimed as compensation, there is an urgent necessity to enhance this amount and make it available in a wider set of circumstances. Also, given the trauma they have undergone, torture victims find it difficult to rejoin society. Sometimes, victims are psychologically affected and are unable to conduct normal social activities. Some victims are also unable to obtain gainful employment as they are physically debilitated and carry the stigma of being in the hands of the police. A welcome change will therefore be the institution of a well thought out scheme for the rehabilitation of torture victims, borrowing from comparative examples in this regard. This will enable them to slowly reintegrate themselves into society, both psychologically and physically.

6.4. Providing Protection to the Complainant

Clearly, if the right against torture is to be protected, it is imperative that victims are able to lodge their complaints effectively. Currently, as has been elaborated in this chapter, victims as well as their families and legal representatives are often threatened to complete silence by the police officials. Given the unequal bargaining power between the victims and the offenders, effective protection must be granted to them and their legal representatives from the perpetrators of the crime. This can be done by instituting state sponsored victim protection programme for the course of the trial.

6.5. Ensuring Proper Legal Representation to Suspects

In the analysis conducted in this paper, it was observed that one problem faced by the victims who complain against state excesses is that their lawyers are not competent or are swayed by the influence of the police.

Current systems of legal aid are inadequate and moreover, where state actions are in issue, are slow to provide good representation. To remedy this, it is suggested that the state ensure the suspects access to *pro bono* services of lawyers drawn from a panel supervised by senior counsel. The law needs also to be amended to explicitly provide for the right of suspects to independent legal representation as opposed to affording this right only to the accused.

6.6. Affording a Right to Independent Medical Examination to Victims

Neither Article 11 nor other constitutional provisions provide for the independent medical examination of a prisoner to ascertain as to whether he has been tortured. The Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1978, and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 (Emergency Regulations, 2006) under the Public Security Ordinance, No. 25 of 1947, are also silent in this respect. The Code of Criminal Procedure under Article 122(1) only affords this right to the OIC of the police station,[161] thus the suspect has no such right. On receiving a complaint of torture from the suspect, the magistrate may order an examination by a Judicial Medical Officer. However, this right is commonly not used by the suspect due to fear of retribution upon return to custody.[162]

The cases discussed above reveal that the Supreme Court has more often than not relied on independent medical examination and medico-legal evidence to establish the perpetration of torture. Hence, it can be safely concluded that independent medical examination can often be the most important piece of evidence in an application under Article 11 and the CAT Act. Thus, making a mandatory provision for such an examination would go a long way in ensuring that a clear record of the health condition

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161 Kishali Pinto-Jayawardena, *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* (Copenhagen: The Rehabilitation and Research Centre for Torture Victims, 2009), p. 53.

162 *Ibid.*

of the suspect is available for future use and to ensure that necessary medical care can be extended in time.

6.7. Creating an 'Internal Affairs' Wing Under the National Police Commission

The Supreme Court in the case of *Nandapala* has clearly made the pitch for the National Police Commission to have a separate wing to look into allegations of torture and to conduct the necessary departmental inquiries that would help in bringing the perpetrators to book. The inability to have sufficient data and information on the actual events in a case of torture often results in justice being denied to the victim and it is the responsibility of the state and the NPC, as an independent regulatory body, to ensure that all assistance can be made to the judicial apparatus so that the rights of individuals under Article 11 is upheld.

6.8. Inclusion of the Term 'Suffering' in Section 12 of the CAT Act

Even though it is amply evident that most instances of torture involve the infliction of 'suffering' on the victim, there has been no conviction on the basis of inflicting suffering or mental pain. It is possible in several instances to have no serious physical injuries on the victim and yet subject him/her to immense suffering.[163] Thus, it is necessary that the definition of the term torture under Section 12 of the CAT Act must contain convictions for acts of causing 'suffering' in line with Article 1 of the UNCAT.

6.9. Amendment to the PTA to Prohibit Admission of Evidence Obtained by Torture and Consequential Amendment of the CAT Act

The Evidence Ordinance, 1895 provides that confessions given through inducement, threat or promise are to be excluded from evidence. Similarly, the right against self-incrimination is also upheld through the course of

163 *Ibid*, p. 93.

an investigation till the actual indictment. However, the CAT Act fails to expressly prohibit the use of evidence obtained by torture and the PTA allows for confessions made to a police officer at or above the rank of Assistant Superintendent of Police to be admitted as evidence placing the burden of proving its involuntariness upon the suspect.

> "*A senior human rights lawyer appearing in cases of detainees under the PTA and Emergency Regulations*" opines "*that in 99% of cases filed under the PTA, the sole evidence relied upon are confessions obtained by an ASP or an officer above this rank*".[164]

Hence, it is imperative that such evidence is excluded and that relevant statutory amendments are made to that effect.

6.10. Cessation of Political Interference with the Police Command

The undermining of the line of command in the police hierarchy by politicians has been a major cause for police indiscipline in Sri Lanka. Whatever training and forensic facilities are provided, these privileges may be rendered to naught when politicians interfere in police duties. This practice needs to cease immediately and public pressure needs to be manifested to compel a change of political will. What makes matters worse is the immunity provided to all officers for action taken under the emergency law.[165] These immunity provisions need to be immediately done away with.

6.11. Better Reporting of Court Decisions

The reporting of judicial pronouncements in Sri Lanka in the past few years has been inconsistent and incomplete leading to several major decisions, particularly those in respect to torture and other human rights violations, going unreported and hence inaccessible to lawyers and to the

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164 *Ibid*, p. 130.

165 For example Regulation 9, Emergency Regulations, 2006.

people working in these areas. Hence, the jurisprudence in this area runs the risk of being confined to earlier case law with several leading cases being relegated to the level of obscurity. This trend needs to be checked and efforts need to be made to ensure that decisions are reported in an effective and easily accessible fashion.

6.12 Specific Inclusion of 'Command Responsibility' in the CAT Act

The judgement by the Negombo High Court in the case of *Gerard Perera*[166] exonerating the OIC clearly shows that the interpretation of the contours of torture in Sri Lanka, especially at the level of High Courts, is unclear and is often not in keeping with the spirit of the CAT Act. Hence, it is imperative that the Act be amended suitably to ensure that the doctrine of 'command responsibility' of the superior officer for wrongful acts of his juniors done with his 'consent and acquiescence' is incorporated. Thereby, the control exercised by the superior officers over their subordinates would also increase and can lead to an effective reduction in the cases of torture.

6.13 Relaxation of Time Bar under Article 126 for Article 11 Applications

The one-month time bar in the Constitution is enforced under the presumption that the rule of law is intact and that the administrative and judicial apparatus is efficient, which is not the case in Sri Lanka.[167] There have been instances of Magistrates signing detention orders without sighting the detainee and thus the overall environment of the criminal justice system is extremely fractured and this omission on the part of the Magistrate can often be the starting point of the rights violation of the detainee.[168] Hence, it is necessary that these factors are considered and the

166 HC Case No. 326/2003, Negombo High Court, HCM 02.04.2008.

167 Kishali-Pinto Jayawardena and Lisa Kois, *Sri Lanka: The Right not to be Tortured* (Colombo: Law and Society Trust, 2008), p. 51-52.

168 *Ibid.*

'time bar' be relaxed in cases of torture.

6.14 Follow-up Mechanisms

As discussed in previous sections, one of the primary problems in the cases of torture has been the non-implementation of court judgements. This creates an environment of impunity and, therefore, it is important that a clear mechanism to follow-up the implementation of the judgements be set up with punitive measures at its disposal if wanton disregard for the law is found. The body may constitute of retired Judges of the appellate courts and representatives of professional organisations who may be empowered to periodically review the implementation of the judgements with state authorities and the National Human Rights Commission being asked to file regular status reports before this panel.

6.15 Clarifying and Removing Ambiguities in Statutes

The powers bestowed on state authorities by emergency legislation are vaguely framed, broadening the power of the state. This is seen in the case of the term 'emergency' under the Emergency Regulations 2006 which is not very clearly explained.[169] This is also the case with the definition of the term 'national security' under Regulations 19(1) and (1C) of The Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005.[170] In order to ensure that officers have only that power that is intended to be bestowed upon it by the legislature and that such power is not abused, important terminology must be properly framed,

6.16 Irregular Places of Detention

Under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, detention may take place even at irregular locations and there

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169 Regulations 6 -20, Emergency Regulations, 2006.

170 Regulation 19, The Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005

is no requirement for the state to publish the places where the individuals are to be detained. For example, under Regulation 19(3), persons can be detained "*in such place as may be authorized by the Inspector-General of Police.*" In Regulation 68 (2) it is stipulated that any officer "*may remove such person from any place of detention and keep him in the temporary custody of such officer for a period not exceeding seven days at a time*" in order to question him. Such powers are extremely dangerous as they facilitate the disappearance of detainees.

6.17 Search and Seizure Provisions

Under the Emergency regime, the law does not require a warrant from a court sanctioning search and seizure. Proceedings may be conducted in the absence of the same as well, merely at the discretion of the officer. In this light, reference may be made to Regulation 20 of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005, under which any public officer is empowered to, if authorised by the President, conduct any search and detain individuals for the purposes of the same in the absence of a warrant. Reference may also be made to Regulation 47 and 61 of the same legislation for parallel provisions. Undoubtedly, such provisions create a situation where illegal detention is possible.

7. Conclusion

This chapter sought to provide the reader with a general perspective of the law and practice in respect to the protection of the right against torture in the period of 2008-09 and to familiarise the reader with the various issues pertaining to the right against torture and the extent to which the legal system as well as other actors have gone to protect the rights. In pursuance of this objective, this paper first analysed the legal regime operating in Sri Lanka; international obligations under the ICCPR, CAT, etc. as well as domestic legislation and case law of the High Courts and Supreme Court.

In this light, reference was also briefly made to parallel developments in Nepal and India where the law relating to the right against torture is at

a much more nascent and formative state. Further, reports documented by activists were analysed in order to gauge the extent to which the right against torture is being flouted in practice. Under this segment, various parameters including the grounds for arrest, degree of torture and access to mechanisms of redress were discussed. Next, the chapter examined the failure of democratic institutions in Sri Lanka, such as the National Police Commission and the institution of Emergency law and how far this has contributed to the predicament. In wrapping up the chapter, a host of recommendations were suggested which could be instrumental in fully securing the right against torture in Sri Lanka.

One of the primary conclusions evident from this analysis, which builds on previous studies, is that in the 2008-2009 period, many contradictions were evidenced in the law and practice relating to the right against torture. While the Constitution provided a categorical protection of citizens in this regard, the position is different in Emergency laws, some decisions of courts of law and in the daily practice of the police. Even where good decisions were handed down by the courts, they were not implemented.

Yet, during this period 2008-2009, Sri Lanka was still better placed to secure the right against torture and effectively incorporate the UNCAT into domestic law as contrasted to its neighbours such as India and Nepal, which were still struggling to frame basic legislation in that regard. It is important therefore that the Sri Lankan state utilise its largely positive legislative framework for the protection of its citizens.

The chapter suggested practical and relevant policy changes that needed to be incorporated in the law and in practice. The success of all future endeavours in combating the scourge of torture would be heavily dependent on the success of these reforms. It is clearly appreciated that the reforms suggested would require an immense amount of effort and cannot be achieved over night. However, the success of the reforms lies in as much as its implementation as much as in the

creation of public perception and belief in the rule of law and the need to uphold the same. The future faces a large set of road blocks, as discussed extensively in the chapter, which requires concerted action in response. These actions at the civil society, executive, police and judicial level would require synergies among these diverse elements of the society to achieve the stated objective of ensuring that there is an effective remedy against torture in Sri Lanka.

VII

RIGHT TO FREEDOM OF EXPRESSION

Dilrukshi Handunnetti[1]

1. Introduction

2008-2009 will go down in history as two of the bloodiest and oppressive years in regard to freedom of expression and freedom of the media in Sri Lanka.

The protracted war in Sri Lanka between the security forces of the government and the combatants of the Liberation Tigers of Tamil Eelam (LTTE) drew to an end in May 2009. As military engagements intensified in the years under review, the violence against the media experienced a corresponding increase, crushing the existing voices of dissent and forcing many in the media to adopt inhibitive practices of self censorship.

Since the final phase of the war broke out in 2006, a section of the media had been playing the critical role of watchdog, commenting on the accelerated 'war for peace', subjecting the Sri Lankan government and the armed forces to intense media scrutiny and critique. Though limited to a small section of the media, the debate generated was substantial. The

[1] Attorney –at- law and an investigative journalist; currently Senior Manager at Transparency International Sri Lanka with a focus on advocacy for human rights and improvement of governance. She is a freelance contributor for several publications both local and foreign and is a Jefferson Fellow.

response to analytical or critical media expression was often met with violence and other tactics of suppression.

In the northeast, the very theatre of war, a complete media clampdown prevailed. The only alternative voice heard was that of *Uthayan*. The reporting on the war took place mostly in Colombo or outside of Sri Lanka at a time when only the government-approved media had access, still limited, to the warzone. Foreign correspondents were not allowed entry while those making critical commentary were threatened in numerous ways, converting the war to one without witnesses.

State as Aggressor

The response to critical media voices was made clear in mid 2008. The year set the stage for the escalation of violence against the media. While the year was marred by violence that included extortions, abductions and media personnel continuously coming under threat since 2006, the scales were clearly tipped when a well-known defence analyst Keith Noyahr was abducted and assaulted in May 2008[2].

Noyahr together with his family fled Sri Lanka within 24 hours. He has not expressed any views on the fate that befell him, a clear indication of the level of continued threat. In quick succession, Namal Perera,[3] a former news editor of a private television channel and Deputy Director Advocacy at the Sri Lanka Press Institute (SLPI) at that time, was followed while travelling home with a friend, Mahendra Ratnaweera. They both were assaulted and sustained injuries.[4]

Different pressure tactics were exerted upon the *Sunday Standard* and *Maubima* newspapers, published by the Standard Newspapers group that offered an alternative taste to the reading public. These tactics of

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2 http://www.island.lk/2008/05/24/news1.htm

3 http://freemediasrilanka.wordpress.com/2008/07/01/assault-on-journalist-mr-namal-perera/

4 h ttp://www.thesundayleader.lk/archive/20080706/spotlight-2.htm

intimidation commenced in 2007, with the Terrorist Investigation Department (TID) instigated arrest of Manusamy Parameshwari[5], a translator at the newspaper who also contributed to articles on the abductions taking place in the North East.

The publishing house was soon branded as 'LTTE- funded' coupled with the Department of Inland Revenue (DIR) repeatedly raiding the newspaper office and even the owner's residence. Subsequently, the passports of the two top officials, Tiran Alles and Dushyantha Basnayake were impounded and soon the company bank accounts were frozen. The final nail in the coffin for the *Sunday Standard* Newspaper came with the arrest of Alles and Basnayake making it impossible for the publications to continue against the many odds.[6]

A serious shadow was cast on the media landscape with the arrest of J S Tissainayagam, the editor of the now defunct *North-Eastern Monthly, www.outreachsl.com* and columnist of *The Sunday Times*. He was taken into custody in March 2008 by the Terrorism Investigation Department (TID) together with publisher N Jasiharan and his partner V Valarmathy.[7] Using the laxity allowed by the anti-terror laws to hold suspects for unspecified periods of time without formally charging them, the trio was made to languish without justice for months. Finally, formal charges were pressed against them in August 2008 under the Prevention of Terrorism Act (PTA), an archaic law introduced as a temporary measure way back in 1979 but made permanent thereafter. A massive Free Tissainayagam campaign was launched demanding the release of the jailed journalist which spread beyond the Sri Lankan borders.[8]

It was not only the independently-owned media that came under attack. Targeted violence was unleashed against several employees of the Sri

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5 http://www.lankabusinessonline.com/fullstory.php?nid=899765082

6 h ttp://www.thesundayleader.lk/20090301/exposive.HTM

7 http://www.amnesty.org/en/news-and-updates/news/sri-lanka-jails-journalist-20-years-exercising-right-freedom-expression-20090901

8 http://releasetissa.blogspot.com/

Lanka Rupavahini Corporation (SLRC) in late 2008 following an incident that involved a notorious government politician, Mervyn Silva.[9] Some of the attacked employees openly protested when Silva assaulted a senior employee within SLRC premises. Silva's name has been repeatedly linked to trysts with the media including the stabbings and assaults of SLRC employees.[10] A popular private television station filed action against Silva for criminal assault and he was released on bail.[11]

While some of the key highlights show a direct link to the war, there were less dramatic incidents that drew limited media attention. There were the less publicized but repeated attacks on journalists working in the northeast, particularly *Uthayan* staff, regular attacks on provincial correspondents, for example those who reported on the claymore mine blast in Okkampitiya[12] and the illegal sand-mining case in Bingiriya[13] . Colombo journalists who covered a pre – SAARC clean up in Colombo also came under attack.[14] There appeared to be little tolerance for investigative journalism.

Violent Setting

As 2008 clearly set the stage for heightened violence against the media, the violence peaked in 2009. Truly a violent year with a war-induced humanitarian crisis in the North and debilitating attacks on the media, 2009 recorded a combination of murders, abductions and assaults on journalists, arson attacks on media installations with scores of journalists being threatened into silence. The pressure tactics also forced over 35

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9 http://www.lankanewspapers.com/news/2007/12/23031_space.html

10 http://sundaytimes.lk/080316/News/news0021.html

11 http://wn.com/Minister_Mervin_and_goons_attack_Sirasa_journalists_in_SL and International Federation of Journalists "Under Fire: Press Freedom in South Asia 2008-2009" April 2009 p. 42

12 http://freemediasrilanka.wordpress.com/2008/01/20/sirasa-tv-buttala-correspondent-assaulted-by-a-politician-sinhala-language-release/ and https://lankapage.wordpress.com/2008/01/21/attacks-continue-on-journalists-in-sri-lanka/

13 http://www.ifex.org/sri_lanka/2008/01/17/journalist_stabbed_for_covering/

14 13 http://www.achrweb.org/reports/SAARC-2008.pdf and http://www.himalmag.com/component/content/article/212.html

journalists and media activists into self-exile[15] including several reputed defence analysts.

The period also covers the critical final months of a 26- year- long war and its immediate aftermath. These crucial months recorded, strong suppression of free expression, clear lack of space for dissent, a cloak of secrecy preventing the free flow of information and the extensive use of emergency regulations and the Prevention of Terrorism Act (PTA) resulting in self-censorship and misinformation[16].

Annus Horribilis

The first quarter of 2009 was consumed by violence. Sri Lanka was cited as one of the worst places for journalists to live in by global impunity indices. The International Federation of Journalists (IFJ) ranked Sri Lanka as the fifth worst place[17] for journalists while the New York-based Committee to Protect Journalists(CPJ) in its special report in April 2010 titled "*Getting Away with Murder*", ranked Sri Lanka as the fourth worst place[18] with 10 unsolved murders.. *Reporters Sans Frontiers* (RSF) ranked the country as 162nd [19] out of 175 and the World Association of Newspapers, as the world's third worst.[20]

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15 http://www.bbc.co.uk/sinhala/news/story/2009/06/090617_journalists_exiled.shtml and http://www.cpj.org/reports/2009/06/journalists-in-exile-2009.php

16 "Media in post -war Sri Lanka," Hana Ibrahim, *South Asia Media Monitor* 2010 p.114

17 http://www.ifj.org/assets/docs/059/046/c93b13b-7a4a82e.pdf

18 http://www.globalissues.org/news/2011/01/31/8359 and http://www.cpj.org/reports/2010/04/cpj-2010-impunity-index-getting-away-with-murder.php

19 http://en.rsf.org/press-freedom-index-2010,1034.html

20 http://www.fsmitha.com/world/srilanka.htm and http://www.freedomhouse.org/template.cfm?page=70&release=1066

The year began on an ominous note. On January 6, 2009, the MBC/MTV network was attacked causing extensive damage.[21] Two days later, on January 8, 2009, well- known investigative journalist and founder-editor of *The Sunday Leader*, Lasantha Wickrematunge was murdered[22] in broad daylight sending out a clear message that alternate viewpoints would be met with force and violence. In sheer protest, www.lankadissent.lk[23], a popular newspaper shut down with the symbolic statement "There is no space in Sri Lanka for dissent."

With 16 journalists killed since January 2006, 27 assaulted and five abducted, scores of journalists have fled the country during the past five years[24]. The numbers increased as violence targeting specific institutions and individuals increased.

The violent trend of January 2009 continued with three more incidents taking place in quick succession. The attack on *Rivira* Editor Upali Tennakoon, the abduction and assault of *Uthayan* editor, N Vidyatharan and the physical attack on investigative journalist and media activist Poddala Jayantha reinforced the fear psychosis that had gripped the media community.

Tissainayagam Arrested

Around the same time, J S Tissainayagam's trial also took a different turn with serious charges being levelled against the credibility of the prosecution over the involuntary nature of the extracted confession and the unconditional discharge of Valarmathy and Jasiharan.[25]

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21 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/droi_20090930_8mfreedom_/droi_20090930_8mfreedom_en.pdf and http://www.youtube.com/watch?v=krKRQJExNis

22 http://www.thesundayleader.lk/20090111/spotlight.htm

23 http://news.nidahasa.com/news.php?go=fullnews&newsid=662

24 http://www.thesundayleader.lk/20090503/spotlight.htm

25 http://freemediasrilanka.wordpress.com/2008/12/16/sri-lanka-court-upholds-alleged-confession-by-tissainayagam-ifj/ and *Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p. 15*

In a climate of extreme intolerance, at least three media practitioners had compelling reasons for withdrawing their fundamental rights petitions in exchange of unconditional freedom. After prolonged periods of detention, they withdrew their applications in a grossly unequal exchange.[26]

These were also the final few months of the war. With journalists being driven away from Sri Lanka, for those remaining, the only choice was to practice extreme self-censorship[27]. The intensified military engagements in the north left an indelible mark on the country's media. The work of journalists as message multipliers during the humanitarian crisis was controlled with an iron fist, through the control of information[28] and through preventing access to the warzone. Such control clearly denied affected populations vital information they had every right to receive.

The suppression of alternative viewpoints and misinformation campaigns formed only one aspect of the war against the media. The other, the more devastating component was the physical elimination of dissenters that rendered the absence of an official censorship a farce. This fuelled the fear psychosis that prevailed among journalists, driving them towards extreme self- censorship. The ripple effect was the strong deterioration of Sri Lanka's journalistic content with the quality of information placed in the public domain hitting an all time low[29].

Media scrutiny of vital national issues such as the resettlement of the war-displaced and the development work in the North East post May 2009 was not permitted. Independent journalists were barred from entering the camps for the internally displaced. On December 4, 2009, Human Rights Minister Mahinda Samarasinghe justified the denial of access stating that it could take time to lift the ban on the media access.[30] He said that the ground situation was not yet ready for journalists to freely visit.

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26 *Ibid* p. 3

27 Interview with Colombo-based foreign correspondent on August 15, 2011

28 Information on casualties was not disclosed during the final months of the war. The monthly government update during the extension of the emergency debate too was suspended.

29 Interview with Colombo-based senior media trainer and critic conducted on July 16, 2011.

30 http://www.indianexpress.com/news/sri-lanka-keeps-up-media-ban-on-war-refugees/550028/

While publications such as *Uthayan* and *Sudar Oli* dedicated space for the humanitarian crisis as did the award-winning citizen journalism website http://www.groundviews.org which addressed critical issues overlooked by the mainstream media, most journalists practised self-censorship. Issues of displacement and resettlement were treated as non-priority concerns.

During the two years under review precious little was done to improve Sri Lanka's human rights record or its reputation before the international community. Instead, the country lost credibility and was no longer reviewed for the status of the media in terms of its developments, growth, new media boom, scope or outreach but rather for what it had become with targeted violence against the media[31].

These developments also brought to the fore, the need for creating an enabling environment as the physical safety concerns of journalists overrode industry needs for self-improvement or the public's information needs. In that context, journalism became the second most dangerous vocation in Sri Lanka, coming only second to serving in the armed forces. It was a clear case of killing the messenger.

2. Legal Safeguards

Freedom of expression is a constitutionally guaranteed right in Sri Lanka with an entire chapter of the Constitution dedicated to the guaranteeing of fundamental rights. Chapter III of the 1978 Constitution has laid a firm foundation for the protection of human rights guaranteed specifically through Article 14, the freedom of speech, assembly, association, occupation and movement[32].

While guaranteeing a cluster of rights, Article 14 (1) (a) specifically guarantees the freedom of speech and expression including publication. Strongly associated rights, Article 14 (1) (b) ensures freedom of peaceful

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31 Dilrukshi Handunnetti, 'Truth, the Second Casualty', in *Asia Media Report: Missing in the Media,* March 2009

32 Article 14 of the Constitution of Sri Lanka

assembly, Article 14 (1) (c) the freedom of association, Article 14 (1) (g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise and Article 14 (1) (i) guarantees the freedom to return to Sri Lanka.

The above become important as rights that contribute to, and complement, the right to free expression.

However, it is worthwhile to assess the status of the Freedom of Expression (FoE) in Sri Lanka during the specific period of 2008-2009 with special focus on the implementation of Article 14 (1) (a) in letter and in spirit, taking also into account the existing constitutional limitations on the said right[33] and to make recommendations to address key issues.

While freedom of expression is thus guaranteed, there are several restrictive laws that practically limit the scope of its application. Chief among them are the Prevention of Terrorism Act[34] and the Public Security Ordinance (PSO)[35] through which emergency laws are promulgated.

It is also important to assess the applicability of these two laws to curb and control the media during 2008-2009.

The PSO provides for the enactment of emergency regulations or the adoption of measures in the interest of public security and the preservation of public order. Part II of the PSO confers unfettered power upon the President to enact emergency regulations which have the effect of overriding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.[36]

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33 Article 15 of the 1978 Constitution refers to racial and religious harmony, in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

34 Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 accessed at http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.htm

35 Public Security Ordinance No 25 of 1947 accessed at http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/public_security_ordinance.htm

36 Article 155 (2) of the 1978 Constitution

The PTA on the other hand, was introduced with the purpose of making temporary provisions for the prevention of acts of terrorism in Sri Lanka and of unlawful activities of any individual or group or body of persons within or outside Sri Lanka. Part V of this law prohibits the printing, publishing and distribution of certain publications without the written approval of a competent authority when the said part is in operation.

In addition, the Penal Code also has specific provisions dealing with offences against the State[37] and offences affecting public decency, morals and religious harmony.[38] Several other laws including the Official Secrets Act No 32 of 1955, Profane Publications Act No 41 of 1958, Contempt of Court and the Sub Judice Rule, Parliament (Powers and Privileges) Act No 21 of 1953 and civil defamation law are among the key provisions that regulate and limit the scope of free expression.

As a response to the existing media regulatory mechanism, the Press Council, the print media industry introduced an alternative mechanism through the self-regulating Sri Lanka Press Complaints Commission (SLPCC).

It is important to note that Sri Lanka does not have laws guaranteeing the right to information, whistleblower and witness protection.

3 Political Context

The 2008-2009 period had a context different to any other. Amidst increased military engagements, the entire population was being mobilised to support the war. Clearly there was no room for views of dissent.

Media oppression was often directly linked to the climate of fear that prevailed. There was strategic weakening of the political opposition, the crushing of civil society, the move to deny former Army Commander

37 Offences against the State Sections 8 and 120 of the Penal Code

38 Sections 285, 286, 287, 291 A and 291 B

Gen. Sarath Fonseka the opportunity to engage in democratic politics as every effort was made to create a campaign platform for President Mahinda Rajapakse, founded on war-hype.

Gripped by a fear psychosis, a rapid decline was evidenced both in media freedom and the quality of media content. As much as there was violence unleashed against the media, there were many examples of dangerous and irresponsible journalism with journalists turning into hosanna singers, and embedded journalists practitioners of extreme self-censorship.

Hate speech became a common practice among several State-owned media organizations with institutions undertaking vilification campaigns on behalf of the State. A case in point is the repeated labelling of select journalists and activists as traitors. Footage of well-known journalists and activists, Poddala Jayantha and Sanath Balasuriya were repeatedly shown on ITN inciting the public while branding them as traitors[39] while websites took the smear campaign to the next level.

Marred by violence against media practitioners and institutions, the two years recorded the highest incidents of violence against individual journalists which included targeted killings[40].

The general pattern had been to unleash violence mostly targeting minority community journalists. But during the period under review, this changed. More incidents were committed against majority community journalists. The victims fell into the category of critical media voices or defence analysts, the two types the administration had the least amount of tolerance for.

In similar vein, journalists who were supportive of Gen. Sarath Fonseka's campaign were targeted and harassed. Several had to temporarily seek refuge overseas. Ironically, a group of SLRC employees who participated

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39 http://dbsjeyaraj.com/dbsj/archives/710

40 http://cpj.org/reports/2009/03/getting-away-with-murder-2009.php#more and http://www.newssafety.org/page.php?page=12339&cat=articles

in a protest calling for the implementation of the Election Commissioner's guidelines during the election campaign was harassed. Dozens had to offer letters explaining the reasons for participating in a protest that sought to remind the State media organisations of their responsibility to adhere to the election law.[41]

"We did the right thing. As State media employees, we felt embarrassed by the continued abuse of public media. We were also violating the election law and had no professionalism in our reportage. We called for due adherence to the Election Commissioner's guidelines to promote professionalism. Finally we had to explain ourselves for reminding our organisation to uphold the election law," a senior television producer said.[42]

As the war intensified in the final months, the suppression of the media experienced a corresponding increase with those representing dissenting viewpoints and those analysing the execution of the war being clearly targeted.

As tens of thousands of people were trapped within the war zone, the lack of access to the non-State and international media converted the war effort to one without witnesses with details of the humanitarian crisis being kept as deep dark secrets of the State. Irrespective of the dire need for information at this crucial juncture, absolute control was exercised over information.

3.1 Embedded Journalism

Access was available only for a few hand-picked or embedded State media representatives. The coverage therefore held a pro-government bias and

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41 SLRC employees had to explain themselves in writing as to why they participated in the above protest urging adherence to the election law. One producer who submitted a letter of explanation granted an interview for this chapter on the basis of anonymity. Also read http://sunandadeshapriya.wordpress.com/2010/03/01/sc-orders-probe-interdiction-of-slrc-journalists/

42 SLRC employee interview September 13,2011 on the basis of anonymity

failed as factual accounts with a neutral point of view. There was heavy distortion of facts and missing the multiple dimensions of the humanitarian crisis that deserved substantial media attention. The one-sided nature of media content contributed to the sad lack of understanding in the South and fuelled rumours and gossip that could not be a substitute for verified facts and diligent reporting.

War time tactics were adopted in open subversion of the media, denying the citizenry the right to access verified or truthful information despite the crucial need for objective reporting. The journalistic community was severely polarised. Clearly divided as those for and against the war, the two camps influenced public opinion differently. Those against were quickly branded as 'traitors' and 'friends of the LTTE' and became immediate targets of the government's wrath or more specifically, the wrath of the defence establishment.[43] Those promoting the government agenda, on the contrary, were recognised as 'responsible media practitioners'.

Violence was manifest in different ways in different parts of the country. In the North East, all forms of open reporting came under the heavy hand of militants or the government forces. The targeting of the northern media was also not recorded in all its terrifying details as most incidents went unreported due to fear of reprisals.

The State showed no tolerance for any form of dissent as the entire country was prepared by the government propaganda machinery to celebrate the end of the protracted war. While there was no official censorship, to achieve this end the government made extensive use of the Emergency Regulations and the Prevention of Terrorism Act (PTA).

The continuation of the state of emergency for well over 22 years has heavily impacted on free expression and other individual liberties. This use has not only curbed media freedom, but also undermined the safety and security of journalists and other media workers[44].

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43 Interview with media trainer and critic on July 16, 2011

44 International Federation of Journalists, *Under Fire: Press Freedom in South Asia 2008-2009, April 2009* p. 39

As the war ended, Sri Lanka also drove its choicest media practitioners and activists into exile. Many recognised activists fled which impacted on the strength of media organisations such as the Free Media Movement (FMM) and Sri Lanka Working Journalists Association (SLWJA). This situation was well-utilised by the authorities to further shrink the space for dissent. In retrospect, it is a clear indication of the resilience of a committed few that the media organizations have indeed survived the other war – namely, the one against the media.

4 Key Highlights

2008 in retrospect was a preparatory stage for the violence to come. The full force of violence against the media was experienced in the first quarter of 2009. A debilitating blow was delivered with the brutal murder of *The Sunday Leader* Editor, Lasantha Wickrematunge. Undoubtedly the biggest dissenting opinion writer at the time, Wickrematunge published critical accounts on the war's execution, highlighting the human cost in the war effort. With his murder, the message that dissent was not tolerated was driven home with full force.

Killing Dissent

Lasantha Wickrematunge was no ordinary journalist. Well-known for his popular political column written under the pen name Suranimala, Wickrematunge founded The Sunday Leader together with his borther Lal 17 years ago to offer a defined alternative viewpoint.

Since its inception, the editor's combative spirit was reflected in the newspaper. Wickrematunge's life was also marred by violence as a result. Despite the many trials it faced, the newspaper recorded spectacular triumphs and stood out as a voice for dissenters.

Winner of the 2008 Integrity Award presented by the Berlin-based Transparency International, Wickemataunge celebrated dissent. The newspaper clearly adopted an anti-war stance which came under heavy criticism since 2006. As the war drew to a close, the newspaper amidst repeated threats continued to critically analyse the execution of the war and published stinging commentaries about the human cost of the war.

Wickrematunge's zealous defence of free expression and defiance obviously earned him powerful enemies. A public interest journalism campaigner, Wickrematunge had unending confrontations with the authorities since 2000. The then President Chandrika Kumaratunge sealed The Sunday Leader. A defiant Wickrematunge secured a judicial verdict striking down the law that empowered the government to order such curbing acts.

In September 2000, Wickrematunge was sentenced to two years in jail for criminally defaming President Kumaratunga in relation to an article written in 1995 that held Kumaratunga responsible for not delivering on election pledges. Though Wickrematunge was set free with a suspended sentence, there was no mistaking the intention.

In October 2007, a young reporter Arthur Wamanan was detained on charges of extortion for the publication of a news article on a minister's wife claiming undue perks. Wickrematunge immediately mounted a massive media support campaign in defence of his young colleague. A month later, the newspaper's printing press suffered an arson attack.

Amidst mounting threats to his life, Wickrematunge continued to stay on and publish. "Bear this in mind. Someday many of

> us may be killed but if you don't speak up for what matters, this country will be a pool of blood in the hands of a dictator."[45]
>
> Continuing to defend the space for dissent through the effective tool of investigative journalism, Wickrematunge displayed a spirit that was not daunted by the adversity he encountered throughout his career. In his final testament, published posthumously, Wickrematunge made reference to the struggles of Sri Lanka's independent media: "Countless journalists have been harassed, threatened and killed. It has been my honour to belong to all those categories and now specially the last".
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> Murdered on January 8, 2009 while on his way to work, Lasantha Wickrematunge was named the recipient of the UNESCO World Press Freedom Prize in May 2009. As the chair of Jury stated, "Lasantha Wickrematunge continues to inspire journalists around the world".

Wickrematunge's murder followed further violence. In quick succession, Rivira Editor Upali Tennakoon was stabbed. A kidnap-style arrest of Sudar Oli Editor N Vidyatharan was staged a few weeks later and journalist and activist Poddala Jayantha was abducted and assaulted. The State's response to activism and accountability journalism was quite clear.[46] The arsenal included the draconian counter-terror laws in addition to various modes of physical violence.

In this violent backdrop, J S Tissainayagam's case will go down in the media history among most unjustifiable occasions of the use of the PTA. The International Commission of Jurists (ICJ) critiqued the use of PTA against the senior journalist and noted that the PTA was 'flawed and open

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45 Lasantha Wickrematunge in an interview with the writer published in Asia Media Forum report 2009

46 International Federation of Journalists, *Under Fire: Press Freedom in South Asia 2008-2009 April 2009*, p. 38

to abuse'.[47] The editor of the now defunct North-Eastern Monthly was tried separately while a conditional release was offered to publisher N Jasiharan and V Valarmathy.[48]

While the law required suspects to be produced within 90 days of such detention, in Tissainayagam's case, this requirement was dispensed with. "In the case of Tissainayagam and co-defendants, the authorities were in clear violation of even this loose requirement".[49]

The evidence against them amounted to little more than two published articles that were critical of the government's execution of the war. The first article, an editorial written in July 2006 stated that "the inability to protect its citizens within the areas it controls has caused Sri Lanka international embarrassment". The second article published in November 2006 detailed the deteriorating humanitarian situation in the eastern provincial town of Vaharai, an area that came under severe military bombardment.

During his trial, Tissainayagam stood by all that he wrote, perhaps a decision that cost him dear in the legal wrangle. The senior journalist continued to languish in jail amidst local and international campaigns demanding his freedom. Though sentenced to 20 years of rigorous imprisonment later, Jasiharan and Valarmathy secured their release through a different process where the State offered a crude trade off.

Justice Bartered

J S Tissainayagam, a widely read columnist of The Sunday Times and editor of the North Eastern Monthly and www.outreachsl.com was taken into custody in 2008 over two articles

47 http://asiapacific.ifj.org/assets/docs/117/197/abcb575-5ccb6c5.pdf and http://ipsnews.net/news.asp?idnews=41612

48 Tissa's publisher to be released accessed at http://sunandadeshapriya.wordpress.com/category/features/page/13/ and International Federation of Journalists, *Under Fire: Press Freedom in South Asia 2008-2009, April 2009,* p. 42

49 International Federation of Journalists, *Under Fire: Press Freedom in South Asia 2008-2009" April 2009* p.39

published under his byline. He was convicted on August 31, 2009 and sentenced to 20 years rigorous imprisonment for the published content.

Tissainayagam and his publisher V Jasiharan and his companion V Valarmathy were charged under the PTA. They were indicted in August 2008 after nearly six months in detention without charges being pressed. The evidence against Tissainayagam amounted to a few lines in two published articles and Valarmathy was charged for being an accomplice.

Strangely enough, Tissainayagam's case was heard separately from the other two and the reasons have never been clear. Tissainayagam, it was argued in court, sought to cause disharmony among communities. He was charged under Section 2 (1) (h) of the PTA[50] for promoting enmity among communities.

It perhaps cost Tissainayagam dearly to vouch for every word he wrote. He purportedly signed a confession which he later claimed was signed under duress. It had been argued by the defence lawyer that the journalist witnessed Jasiharan being tortured prior to signing the confession. The defence obtained a court order that Jasiharan should be examined by a JMO. The purported confession had 57 alterations which defeated the purpose of obtaining a confession for any legal purpose.

The trial of Tissainayagam was subsequently separated from Jasiharan and Valarmathy. At a parallel hearing in October 2008, the couple was given the first indication that the prosecution might be willing to withdraw charges.[51] Having put up with systematic ill-treatment and torture in prison, the TID did not wish to have Jasiharan mention in court that he had been

[50] http://asiapacific.ifj.org/assets/docs/236/115/1d464ec-8892c73.pdf

[51] Ibid

tortured while in custody. The conditional release was proposed when the couple filed a fundamental rights petition challenging their arrest.

The release was offered on the condition that the couple would withdraw their fundamental rights petition. That settled, the prosecution submitted to court the lack of substantial evidence to link them to any terrorist organization or act. [52] The FR application was promptly withdrawn. Jasiharan and Valarmathy have since then joined the exiled Sri Lankan community.

In a similar incident of bartering justice, Sudar Oli Editor N Vidyatharan too was offered freedom at the cost of his dignity. Abducted and driven off from a family funeral at Mount Lavinia, there was little hope about his safe return.[53]

Quick interventions by the diplomatic community and media watchdog organizations probably saved his life. Blindfolded and bundled in a gunny bag, he was found metres away from the Colombo Crime Division (CCD) headquarters. There he was formally declared as arrested. [54]

The CCD subsequently handed over the journalist to the TID. In the meantime, Vidyatharan's family filed a fundamental rights petition. The TID offered Vidyatharan's family a conditional discharge. The fundamental rights petition was withdrawn and Vidyatharan was released on the basis that there was no evidence against him.

Tissainayagam was released through a much-publicised presidential pardon in 2010. Since then, he lives in the United States. The manner

[52] Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p. 16

[53] http://www.thesundayleader.lk/20090301/probe.htm

[54] Ibid

in which Tissainayagam was dealt with drew much international ire. It also demonstrated Sri Lanka's failure to respect basic human rights or to honour obligations of a State party in protecting civil and political rights.

The International Federation of Journalists (IFJ) faulted the government for thwarting press freedom and noted that the media conflict worsened with the turning of the war towards a government victory, "where journalists and the media suffered systemic repression, intimidation by government members and security personnel, and the application of draconian counter-terror laws'.[55]

The international impunity indices repeatedly highlighted the fact that Wickrematunge's murder marred Sri Lanka's image in the eyes of the international community and rights groups in an irreversible manner. It was also viewed as a sign of the State's intolerance for criticism and dissent.

Beyond the most gruesome and publicized of incidents, the indices also drew attention to the less talked of murder of Puniyamoorthy Sathiyamoorthy, killed in an artillery attack in a government declared safe zone and the continued suffocating of the media in the war-affected areas of the northeast.[56]

In a strong indictment on the Sri Lankan government, the International Federation of Journalists (IFJ) in its Under Fire: Press Freedom in South Asia 2008-2009 noted: "That physical assaults and kidnappings of media personnel have been State-directed, there is no doubt that the government's desire to shut down expert commentary about the war effort".

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55 International Federation of Journalists, Under Fire: Press Freedom in South Asia 2008-2009, April 2009 p 42

56 Ibid p. 38

4.1 Terrorising the Media

The few incidents highlighted above merely illustrate the irreversible results of the violence unleashed against the media. But the impact of the potent combination of systematic suppression and severe control forced the practitioners into self-censorship and self-exile.

The violence witnessed in 2009 was but the culmination of a series of incidents that undermined the Rule of Law. The war was beginning to turn and the armed forces were jubilant. The thorn in the government's flesh proved to be the irritating columnists who analysed military strategies and questioned the pursuance of a military solution to the national question at great human cost. It was this lack of tolerance for an alternative viewpoint on the war that brought the likes of Keith Noyahr to harm. The fact that he had chosen not to say a word after he left the island demonstrates the pressure exerted on him, though it is no secret as to who the perpetrators were given the style of the attack, with the closest reason being his popular defence column written under the pen name "*Senpathi*".[57]

In quick succession, a former news editor at a privately-owned television station and Deputy Head of Advocacy at the Sri Lanka Press Institute (SLPI), Namal Perera also came under attack. The tipping point however was the murder of Lasantha Wickrematunge in January 2009. The message could not have been clearer.

While the Colombo-based Sinhala majority community journalists became the key targets of violence in the two-year period, the plight of the northern journalists for over two decade had been one of daily struggle to stay alive.

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[57] http://blogs.telegraph.co.uk/news/peterfoster/8589275/The_cost_of_war_and_the_price_of_victory_in_Sri_Lanka/ and http://www.thesundayleader.lk/2011/01/09/a-government-cover-up/

4.2 Hate Speech and State Complicity

The media should ideally play the role of authentic information provider but this is an idealistic expectation. Divided on political and economic lines or on the basis of the various other interests including the owners' agenda and market trends, the media is a complex industry with an agenda influenced by competing interests.

Yet, the media's fundamental duty to inform readers and viewers based on verified facts remains unchallenged. In addition to the lack of professionalism, this polarisation led to some of the worst practices to emerge at a time when the country indeed required responsible and professional media.

There were however, besides simple expediency, compelling reasons for most media organizations to hitch their wagon to the government's war propaganda. If in the good books of the government, they immediately won the 'patriotic' label and the tag of 'responsible journalism' while others were labelled as 'terrorists' and 'traitors'. An alarming practice that emerged during this period was the active branding of dissenters as 'traitors'. As one State-television employee said, "there was also safety in this practice. Those with 'approval' felt safe."[58]

The general trend observed was one of unrepentant vilification of dissenters. While much condemnation had been piled on controversial minister Mervyn Silva, it is also important to note that such behaviour by a minister continues due to overt and covert endorsement of such action by the government he represents and public apathy. Silva had been embroiled in various attacks on media personnel for years but there had been no attempt to discipline the politician at the party level.

He has not only been violently critical of dissenting journalists but was involved in an assault of Sirasa journalists in his electorate, Kelaniya and is

[58] Interview with Silumina journalist conducted in May 2011, Colombo.

remembered for a damning public statement acknowledging responsibility for Lasantha Wickrematunge's murder.[59] This conduct did not result in the governing party's disciplinary mechanism being activated against the notorious minister. Instead, he was afforded political immunity when he first assaulted a senior Sri Lanka Rupavahini Corporation (SLRC) officer within the station premises and months later, allegedly carried out a series of attacks on a group of SLRC staff who protested against Silva's behaviour.

The State-run media, especially during the period under review, appeared to have a license to slander those with alternative viewpoints and to ridicule those promoting media rights as being 'pro-LTTE'. It was as if they were issued a special license to sit in judgment. As if an irresponsible and unethical State-media was not bad enough, there was labelling of senior journalists and activists through specific official and government-affiliated websites.

Right to Representation Denied

In July 2009, the Defence Ministry website[60] branded five lawyers appearing for a contempt of court case on behalf of *The Sunday Leader* as traitors. The principle of right to representation was cast aside when the lawyers were labelled as "having a history of appearing for and defending "LTTE guerillas."[61] *The Sunday Leader* has been locked in multiple lawsuits since 2000.

For a story on the purchase of MIG 27 fighter aircrafts by SLAF published both by *The Sunday Times* and *The Sunday Leader* with identical facts, the Defence Secretary selectively used the

59 http://groundviews.org/2009/07/13/mervyn-silva-publicly-admits-to-killing-lasantha-wickrematunge-and-grievously-attacking-another-journalist/ and http://www.thesundayleader.lk/2010/10/10/mervyn-refuses-to-give-details-of-lasantha%E2%80%99s-killers/

60 http://www.thesundayleader.lk/20090712/NEWS.HTM#We

61 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p. 13 http://www.wsws.org/articles/2009/jul2009/sril-j25.shtml

law by suing only *The Sunday Leader*[62] though both articles were similar in substance.

The Sunday Leader also published an article on a public tender by the Defence Ministry for issuing identity cards for all Sri Lankan nationals. The newspaper published a photo of Defence Secretary as the program was implemented by the Defence Ministry. Though he was not held responsible for the problem described in the report, Rajapakse took objection and filed action.[63] When offered an opportunity to offer an apology and settle the suits, the late Wickrematunge refused to apologise claiming he had the necessary documentation to prove the newspaper's published claims.

Amidst exertion of severe pressure, subsequent to the murder of Wickrematunge, the Defence Secretary obtained a stay order against the newspaper on making references to him. Soon after the war's end, the newspaper published a profile of Gotabhaya Rajapakse and immediately, a law suit was slapped against the newspaper. However, the lawyers who appeared for The Sunday Leader withdrew, according to the Defence Ministry, out of patriotism as the newspaper allegedly sought to defame a national hero.[64]

The newspaper insists that the lawyers were junior and were unprepared for the heightened security at the court premises on the day of the hearing and withdrew due to feeling intimidated and not out of respect for Rajapakse's wartime achievements. The juniors were replaced by five seniors who were soon labelled as traitors.[65]

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62 MIG deal crash lands on government accessed at http://www.thesundayleader.lk/archive/20070715/issues-2.htm

63 http://www.lankanewspapers.com/news/2008/2/25093.html

64 http://www.nidahasa.com/news/news.php?go=fullnews&newsid=825 and http://www.jdslanka.org/2009/10/editors-at-sunday-leader-are-again.html

65 http://www.thesundayleader.lk/20090719/spotlight.htm

With the escalation of the war, there was serious erosion in journalistic ethics especially in the State-run media, strongly influenced by the government to raise battle cries on its behalf. These institutions on a populist drive, took this practice to an extreme, endangering at times the lives of fellow journalists and activists.

A case in point is the identification of two well-known journalists and activists, Poddala Jayantha and Sanath Balasuriya whose physical attributes (both maintain beards) were emphasised while showing video footage on national television of a protest attended by both. They were branded as traitors who worked against national interest.[66]

Safety Undermined

Undermining the safety of Jayantha and Balasuriya, the same television station aired a critical comment by the Inspector General of Police (IGP) alleging that some journalists were on the LTTE payroll. The Sinhala language Dinamina of May 22, 2009 called for the expulsion of professional journalists who grew beards.[67]

The IGP's remarks included: "several journalists, mostly Sinhalese, were on the payroll of the LTTE and were thickly involved in the insurgency".[68] He was further quoted as having said: "They betrayed their noble profession. They not only distorted and misreported against Sri Lanka but also worked for cash and other fringe benefits like fully-funded foreign trips".[69]

In June 2010, a year after the war, media activist and journalist Sunannda Deshapriya appeared before the UN Human Rights Council (UNHRC) to make a statement on the media freedom situation in the country. There was an immediate State media backlash. Deshapriya's statement was posted

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66 http://www.thesundayleader.lk/20090607/onthespot.htm

67 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010p.12

68 Ibid p. 10

69 Ibid p.11

on You Tube under the headline: "Traitor Sunanda Deshapriya lies at the UN Human Rights Council and whitewashes LTTE".[70]

In this regard, Defence Secretary, Gotabhaya Rajapakse also played his role as an active contributor to the ongoing hate speech campaign with quick labelling of dissenters as people with 'blood on their hands'.

Rajapakse also issued a warning to foreign media organizations with dire consequences and of being chased out if they did not behave responsibly. He accused the foreign media of biased reporting specially on the humanitarian crisis.[71] The residence permit of the bureau chief of an international news agency was prematurely terminated allegedly for a series of reports he had filed on the humanitarian consequences of the war.

Upon the abduction and arrest of Uthayan Editor N Vidyatharan, a news reporter who interviewed Rajapakse was labelled an accomplice in terrorism. "You will have blood on your hands if you ask about Vidyatharan" who was known to be a "terrorist", he said.[72] The government claimed that the Defence Secretary had evidence against the journalist over his alleged role in an aerial attack on Colombo on February 20, 2009.

Northern Journalism and Uthayan

Journalism in the north is fraught with danger. Its trials and tribulations only the practitioners would know. For them, the war took place in their own hometowns and it was a case of daily reporting a war that saw different phases, wreaked havoc at their own doorsteps and made their lives a daily struggle to avoid violent death.

70 Ibid p.10 and http://www.youtube.com/watch?v=ZtBCJYhUs94

71 http://penseur21.com/2009/02/02/sri-lankan-official-warns-diplomats-cnn-bbc/

72 http://www.youtube.com/watch?v=x8f4FE8fiAc&feature=related

Jaffna has three local publications, namely Yal Thinakkural, Valampuri and Uthayan. Other Colombo-based Tamil newspapers such as the Veerakesari reach Jaffna in abridged form. Only the government-controlled television channels could be viewed besides Shakthi TV.

While it is certainly not the only media institution that is worthy of mention in the context of journalism in Sri Lanka' embattled North, the story of Uthayan is an exceptional example of how the media struggled to keep their community informed.

The journalists in the north for over two decades have survived with great difficulty. As for Uthayan, the newspaper has struggled to stay alive- along with its journalists. Uthayan has the highest number of journalists killed.

The newspaper today is a two-member operation. It has a circulation of 22,000. The editor and the news editor constitute the team. No trainees have joined for over three years. Safety requirements make the two journalists stay at office and not return home.

N Vidyatharan, a senior Tamil journalist and editor of Uthayan and Sudar Oli became a key target of violence and intimidation in February 2009. He was snatched from a funeral in Mount Lavinia. It was first feared to be a politically-motivated abduction. It took hours to establish the truth with powerful persons including Indian politicians playing a vital role to ensure Vidyatharan's physical safety.

Hours of speculation, contradictory news alerts based on contradictory statements by different law enforcement authorities followed. Finally, the Media Centre for National Security (MCNS) confirmed the arrest as he was a 'wanted person'. The Media Minister Anura Priyadarshana Yapa later

said that he was wanted in connection with an insurgent air raid in Colombo a few days ago.[73] Those who agitated for Vidyatharan's release were labelled as 'people with blood in their hands' and accomplices of crime by Defence Secretary Gotabhaya Rajapaksa.[74]

At a time when the country was moving towards the final phase of the war with the country keen to receive the best possible reportage, the small community of Jaffna journalists had little or no contribution to make. The subject of targeted killings for years, driven out of their homes or threatened into silence, they were dealing with not one but two wars.

In the North, journalism is considered a hazardous profession. It is only worse than being a soldier or an armed cadre. The dangers are plenty. The culture of severe oppression coupled with violence had broken the backbone of Jaffna journalism. There is unofficial censorship everywhere. Jaffna journalists also know the actual price of free expression and the cost of demanding such freedom. In Jaffna, the fear of reprisal had hung like the Sword of Damocles for over two decades. Hence the deafening silence despite the despair.

The same practice was followed by the then Amy Commander Gen. Sarath Fonseka. In an interview published in the State-owned Dinamina in January 2009, Fonseka labeled some sections of the media as traitors who were the 'only barrier to ultimate military victory against the LTTE'.[75]

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73 International Federation of Journalists, Under Fire: Press Freedom in South Asia 2008-2009, April 2009 p.41

74 International Federation of Journalists,Under Fire: Press Freedom in South Asia 2008-2009, April 2009 p. 44

75 International Federation of Journalists, Under Fire: Press Freedom in South Asia 2008-2009, April 2009 p. 44

On June 26, 2008, the State-owned Sinhala daily, Dinamina carried a report alleging that the Sri Lanka Press Institute (SLPI) sent a group of LTTE sympathisers to Norway on a purported training course, a statement vehemently denied by the SLPI.[76]

The government also resorted to slander media institutions and media practitioners. In some instances, reputed journalists and activists were referred to as 'terrorists' and 'LTTE sympathisers'.[77] Some of those named had to later flee the country and at least one, Wickrematunge, was killed.

In response to an article published in *The Sunday Leader*,[78] Poddala Jayantha explained the reason for shifting from his home to a safe house. The state television channels continued to incite the public by labelling Jayantha and others as traitors.

4.3. Role of Media Rights Organizations

As Sri Lanka's media oppression reached an all time high, both local and international media watchdog groups began playing a critical role. With violence targeting key activists which forced some into self-exile, the role of the local rights groups were diminished. Nevertheless, the remaining activists continued to agitate for media freedom and called for justice as their colleagues continued to come to harm.

Two important developments took place during the period. There was a significant emphasis placed on the safety of journalists, and a number of capacity building workshops were conducted in Colombo and the outskirts for media personnel. The number of journalists and activists fleeing the country increased. This trend required the rights groups to play a strongly supportive role of the practitioners coming under the heavy arm of suppression.

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76 International Federation of Journalists, Under Fire: Press Freedom in South Asia 2008-2009, April 2009 p. 43

77 http://www.thesundayleader.lk/20090712/NEWS.HTM

78 http://www.thesundayleader.lk/20090531/Issues.htm

Several national organisations assisted the local media groups to identify the existing risks, prioritise their safety needs and undertake training. In addition, for those under serious threats, international media support groups such as the Committee to Protect Journalists (CPJ), International Federation of Journalists (IFJ) and International Media Support (IMS) offered a broad support scheme.

These organisations put together multiple support schemes that included training on safety, short- term academic study tours overseas, operation of safe houses and individual support schemes including small financial grants. They repeatedly came on missions to assess the prevailing situation in Sri Lanka and engaged with the State at times to call for corrective action.

The International Press Freedom and Freedom of Expression Mission to Sri Lanka sent delegations in October 2006, June 2007, October 2008 and November 2009 to assess the ground situation. They also joined in the campaigns and advocacy efforts of local organizations such as the Free Media Movement (FMM), the Sri Lanka Working Journalists' Association (SLWJA), the Tamil Media Forum, the Muslim Media Forum and others. [79]The national media freedom organisations collaborated with broad social movements to carry out demonstrations and campaign for media freedom and respect for the rights of media professionals.

The mission that visited Sri Lanka in November 2009 drew the conclusion that the political circumstances embodied numerous threats as well as opportunities. The decision by the former Sri Lanka Army Commander Sarath Fonseka to enter mainstream politics as the opposition presidential candidate was viewed as an opportunity to create more space. At the same time, the heightened intensity of the political contest was considered one that would engender threats.[80]

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79 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p.4

80 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p.3

5 Constitutional Obligations

Elected by popular vote, the Rajapakse administration was mandated to end the war. Built into this mandate was the requirement to uphold the Constitution which guarantees among multiple rights, the right to free expression. However, the administration not only ensured a severe media clampdown during the war but continues to silence the critical media and the masses.

If there were expectations that the government would guarantee, post-war, the plethora of rights promised by the Constitution and foster a climate of normalcy, such remain expectations only.

The 17th Amendment established a Constitutional Council (CC) established for the purpose of depoliticising the key public institutions. The Constitutional Council was empowered to make the critical key appointments. During the period n question, the 17th Amendment was disregarded to all intents and purposes.

Besides, it is also an obligation of the government to ensure Law and Order. During the period under review, lawlessness prevailed with the only focus being the theatre of war. However, no attempts were made to investigate the incidents of violence against the media or to improve the journalism standards of the State-owned media. Similarly, despite the occasional comment about the State's seriousness in inviting the exiled journalists' community home, Sri Lanka failed to create a safe environment to aid their return.

Forgotten in this scenario is the important issue of resettlement of the war-displaced. While the State media concentrated all their energies on painting a rosy picture of efficiency and management, the style of coverage itself demonstrates the lack of understanding of the role of the media, especially among the State media, which is to communicate in the public interest.

Filling a Vacuum

Stepping into fill a vacuum and undertake critical reporting on the humanitarian crisis and the plight of the displaced was http://groundviews.org/. The popular website once noted that while news services flooded citizens with short messages on cricket scores, that there was a deafening silence for over three days after the floods that devastated the Menik Farm Camp. It said: "IDPs were shamelessly a non-issue for the Sinhala newspapers and this failure contributed to the South's clear lack of understanding of the plight of those lying in the displaced camps in August and October.[81]

As the war ended, instead of moving towards improving standards and a liberal media culture, the government sent clear signals that the media was to be strictly regulated. Demonstrative of this intent was, first, the announcement of the government's wish to revive the Press Council[82] replacing the self-regulating Press Complaints Commission of Sri Lanka (PCCSL).[83] The second indication was the move to establish the Media Development Authority (MDA) purportedly to 'help guide local media institutions to improve media ethic'.[84]

5.1 Code of Practice

The external backdrop had a strong impact on the quality of journalism in Sri Lanka. Despite the consensual acceptance of the Code of Professional Conduct[85] by the majority of print media institutions, in practice, general adherence remains limited.

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81 http://www.groundviews.org/2009/11/18/180-days-after-the-end-of-the-much-anicipated-return-of-idps-an-eyewitness-account/#more-2026

82 http://www.media.gov.lk/institutions.html#

83 http://www.pccsl.lk/

84 'Media in post-war Sri Lanka,' Hana Ibrahim, South Asia Media Monitor 2010 p. 141

85 Code of Professional practice (code of Conduct) of the Editors Guild of Sri Lanka accessed at http://www.pccsl.lk/code_of_practice.php

Besides a culture of embedded journalism that allowed access to the war zone only to a select group, largely from the State-owned media, it contributed to one of the biggest faux pas committed by the Sri Lankan media. It led to the commission of the historical wrong of partisan coverage of the war.

The lines were drawn tight and those with access were on the 'approved' and 'non-critical' list. In retrospect, such coverage converted the final phase of the war to one without witnesses and clearly a biased record of history. The two years under review reflect the media reproduction of government propaganda.

Media Responsibility

The polarisation of the media contributed to create divisions among the population. It was clearly a question of being pro or against with little in between. Veering away from the fundamental media ethics, the State media mounted vilification campaigns against prominent politicians such as Sarath Fonseka and targeted media activists and branded them as traitors.

"The weak nature of the Sri Lankan media was evidenced in several ways. The mainstream avoided dealing with the humanitarian crisis in some detail. Whether it was only because of the difficult context is a moot point. Clearly there was embedded journalism which confused the people with regard to the role of the media. There was so much hosanna singing and propagandist work done through the State media. The labelling of a section of the media as traitors and running media campaigns in support also demonstrated that Sri Lanka's media is yet to come of age. It lacks clarity and understanding about its own role and social responsibility as practitioners of a profession".[86]

[86] Interview with senor media critic, journalist and trainer on the basis of anonymity

An official of the Sri Lanka Press Complaints Commission (SLPCC) commented; "It is as if there was no respect or understanding of the readers' right to receive authentic information. It also threw open a new discussion topic- guidelines for reporting during times of conflict and war".[87]

Setting New Standards

The idea of public service broadcasting and telecasting has not generated the ideal media response in Sri Lanka. Despite the lack of interest, Young Asia Television (YATV) identified this social need and matched it with a response.

No War Zone was a program series created to promote the peaceful resolution of the national question. Clearly, the program promoted discussion and reconciliation as a means of conflict resolution. "We felt this was an area overlooked by the mainstream media".[88]

Despite the end of a violent conflict that spanned nearly three decades, there are no media initiatives that probe the political question behind the militancy in the northeast or focus on the real issues faced by the many thousands who are internally displaced.

It is in this vacuum that such media content becomes significant. Though limited to terrestrial broadcast on a single channel with a limited footprint, YATV has tirelessly attempted to influence the public thinking through trilingual programs to view things from a non-military perspective and to prioritise the development agenda. In the aftermath of the war, they continue to discuss other post-war issues through a program series titled The Development Diary. It is a small but noteworthy step in the right direction, two years after the war.

87 Interview with SLPCC official on media ethics

88 Sharmini Boyle, Chief Editor Young Asia Television in an interview with the present writer

6. Lack of Investigations

Stemming from the same role of responsibility to ensure a constitutionally guaranteed right is the duty to ensure justice. The impunity indices, while ranking Sri Lanka low, continue to highlight a fact that cannot be denied.

Not only was Sri Lanka's incidents of violence too frequent and grotesque during 2008-2009, there was a clear lack of political will to investigate and bring perpetrators to justice.

Following Lasantha Wickrematunge's murder, family members confirm that there is apathy and disinterest on the part of the authorities. Wickrematunge's widow Sonali Samarasinghe in a letter to the President on March 15, 2009 reminded him of the numerous public assurances he and his ministers made on assuring justice for the dead.[89]

Key challenges for media after war's end: The Report of the International Press Freedom Mission to Sri Lanka noted that the Mission had reason to believe that the Sri Lankan police and security forces possessed information on the murder that they are yet to place before the public.[90]

Subsequent to Wickrematunge's murder, The Sunday Leader Editor Frederica Jansz and News Editor Munza Mushtaq received death threats. The handwriting on the threatening letters was similar to one of the letters received by the late founder-editor of the newspaper, Lasantha Wickrematunge in 2008. The 2009 letters threatened to kill by slicing them to pieces.[91]

Driven out of his home after being brutally assaulted, there is no status update on the abduction and assault of journalist cum activist, Poddala

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89 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p.10

90 Ibid p.10

91 http://www.youtube.com/watch?v=8yvw7UV7iIk&feature=related, http://www.thesundayleader.lk2009/10/24/and-now-they-come-for-us/ and http://cpj.org/2009/10/death-threats-sent-to-paper-of-slain-editor-in-sri.php

Jayantha. Scores of others have been abducted, assaulted and threatened without any investigations being undertaken.

The Agony of an Exile

Poddala Jayantha, well-known journalist and activist lived under grave threat for most part of 2008. His activism displeased the government and impacted on his career and finally on his life itself. "I was also professionally penalised for the stances I took".[92] At one time, he along with a few others were summoned by the Defence Secretary and cautioned not to overstep their boundaries.[93]

Following Wickrematunge's murder, Jayantha left Sri Lanka along with several others. After three weeks, he returned to Sri Lanka as he had important organizational responsibilities as Secretary of the Sri Lanka Working Journalists Association (SLWJA). On June 1 2009, he got off a bus near Ambuldeniya, Nugegoda to return home. A group travelling in a white van awaited his arrival, hustled him into the van and immediately drove off. He was gagged, assaulted and later dropped off near a culvert.[94]

Jayantha upon regaining consciousness cried for help. There was reluctance to assist him by those who gathered but one three wheeler driver who recognised his face, drove him to the Colombo National Hospital. He suffered serious fractures which has left him with a permanent limp. "They were trained persons. They told me to shout as much as I can, as I am used to shouting slogans at protests", he said.[95]

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92 Telephone interview with Poddala Jayantha in May 2011

93 http://www.tamilsydney.com/content/view/1288/37/ and Gotabhaya summons Poddala http://www.youtube.com/watch?v=nd8XPkAwm34

94 http://www.youtube.com/watch?v=mx-NLb7gVC8

95 http://www.wsws.org/articles/2009/jan2009/slel-j30.shtml and http://www.thesundayleader.lk/20090607/onthespot.htm

It is believed by many fellow journalists that one State-owned television station repeatedly targeted Jayantha and showed his visuals inciting hatred creating the backdrop for the violent attack. Days before the assault, the IGP on national television claimed that some journalists who reported on the war were on the payroll of the LTTE and this was aired with visuals of Jayantha at a protest.

On May 22, 2009, an editorial in the State-controlled Sinhala language daily, Dinamina, called for stoning and expelling of professional journalists who grow beards.[96]

As those who received the information about the abduction first, two journalists from www.lankaenews.lk, Sandaruwan Senadheera and Bennet Rupasinghe informed the authorities about the incident.[97] Subsequently, they were arrested for obstructing justice though the case was withdrawn later. Months later, Senadheera in an interview said that if citizens are arrested for informing authorities of breaches of the law, soon enough people will simply mind their own business and not offer help to a fellow citizen under any circumstances.[98]

"I am a very sad person now. In my mind, every morning I go to work in Sri Lanka," says Jayantha.[99] Senadheera and Jayantha are now in exile.

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96 P 12 mission report and http://sunandadeshapriya.wordpress.com/2009/06/19/sri-lanka-war-on-words-continues/

97 http://sunandadeshapriya.wordpress.com/2009/11/12/it-is-beyond-me-to-understand-why-the-police-wanted-to-remand-e-news-editors-for-poddala-assault-case-mahanama-thilakaratne/

98 http://sunandadeshapriya.wordpress.com/2009/11/12/it-is-beyond-me-to-understand-why-the-police-wanted-to-remand-e-news-editors-for-poddala-assault-case-mahanama-thilakaratne/

99 http://transcurrents.com/news-views/archives/3217

An important aspect to note is the majority of victims being persons of Tamil ethnic minority. There was a clear shift from targeting Tamil journalists to the dissenting few majority community journalists since 2006, as evidenced by the statistics.

In February 2009, *The Sunday Leader* submitted a comprehensive list of murders, abductions and assaults of journalists that took place between 2006-February 2009 to the then Inspector General of Police for responses and action.[100] The letter went unacknowledged.[101]

"The moment someone is killed or assaulted, we mentally write them off. Our system has failed to deliver justice time and again."[102]

6.1 Channel 4 and Impunity

Among the more contentious issues concerning the media that reflected the country's civil strife was the releasing of the controversial Channel 4 News video.[103] In late August 2009, the UK-based Channel 4 News broadcast a video purportedly showing Sri Lankan Army soldiers executing two bound and nude Tamil captives. Journalists for Democracy in Sri Lanka (JDS), the original source of the video, claimed that the killings had been filmed in January 2009 by a Sri Lankan soldier using a mobile phone camera.[104]

On September 15, 2009, the Sri Lankan government responded to the UN Human Rights Council (UNHRC) with an official denial. It said that

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100 http://www.thesundayleader.lk/archive/20090208/spotlight-1.htm

101 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p. 10

102 Interview with Uthayan journalist on media freedom in Sri Lanka

103 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue May 16, 2011, p7

104 http://www.youtube.com/verify_age?next_url=http%3A//www.youtube.com/watch%3Fv%3DAj4M7z11utg. http://www.youtube.com/watch?v=c1KheC_OM8c and http://print.dailymirror.lk/news/news/49195.html

the government through four separate investigations has scientifically determined that the video was "fake".[105]

Philip Alston, the United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions welcomed the speediness with which the Sri Lankan government responded to the video. Alston however expressed concern over the impartiality of the experts associated with the exercise, two of whom were members of the Sri Lanka Army (the entity whose actions had been called into question).[106]

The US Department of State also raised concerns about the possible conflict of interest and noted that the best practices would dictate that such an inquiry be undertaken by individuals without any interest in the outcomes of the forensic analysis.[107]

6.2 Conspiracy Theory

Nevertheless, a degree of anxiety prevailed in Colombo and the administration ordered its mission in Berlin to seek the help of a local police in identifying the group of journalists in exile that reportedly 'fabricated' the video footage.[108] Meanwhile, the State-run Sunday Observer published a report seeking to establish that the footage was "an absolute fake".[109] The article openly alleged a conspiracy possibly instigated by journalists in exile.[110]

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105 Statement by Minister Mahinda Samarasinghe at the United Nations Human Rights council in Geneva, Switzerland" September 15, 2009 available at http://mahindasamarasinghe.org/human-rights.html

106 "Sri Lanka Should Permit an Impartial Investigation into the Channel 4 Videotape, Says UN Expert", Statement by Professor Philip Alston issued by the Office of the High Commissioner for Human Rights, September 17, 2009.

107 http://www.state.gov/s/wci/srilanka/releases/145884.htm

108 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p.8

109 http://www.sundayobserver.lk/2009/09/20/fea03.asp

110 Report of the international press freedom mission to Sri Lanka: Key challenges for media after war's end January 2010 p.8

The fact of the matter is that the issue of authenticity of the video notwithstanding, the government and the military apparatus predictably turned the video-related debate into one of clear cut pro or against war debates. The fact being, that there was every probability of human rights violations including torture and extrajudicial killings, it would be childish to deny this possibility of excesses, and more so to believe that counter propaganda could quell such simmering issues.

The video is reflective of what could take place during times of war, and it would be unrealistic to believe that only Sri Lankan soldiers are exempt. Any war has its excesses and there is no way to deny this fundamental fact. Besides, the impartiality of the inquiry itself is a moot point due to the composition of the committee of inquiry.[111]

7 Information Age

In 2008-2009, Sri Lanka experienced a blockade of information, barring of short message services on select days, jamming of news websites and site hacking. The information that was relayed about the war and the humanitarian situation were stringently vetted and were government-approved versions. The absence of an official censorship therefore did not guarantee the free flow of information.

The situation reached such terrifying new heights that scores of journalists, largely defence correspondents fled the country. "There was so much terror associated with the beat. I stopped writing my regular column. There was so much information to share but I knew it would be costly", a reputed defence columnist said.[112]

During the crucial two- year period, access to information was a right denied. Through judicial interpretation of Article 14 of the Constitution,

[111] http://www.un.org/apps/news/story.asp?NewsID=33423

[112] Interview with a former defence columnist

the right to access information has already been upheld[113] though observed in severe breach especially during the period under review.

In April 2009, the government initiated its own short message service (SMS) news alerts. Both the Defence Ministry and the Media Centre for National Security (MCNS) stopped disclosing the casualty figures from the war zone without any explanation for withholding information. The only place where statistics were traditionally offered was the Parliament during the monthly debate for the extension of the state of emergency. . This was an important debate that allowed parliamentary discussion on the progress of the war. This practice too was halted during the final months of the war denying citizens the only available means to learn about casualty figures.

Besides the policy flaw and the stoic denial of information to the public during a crucial period, the available sources of information also proved contradictory. Different government arms as well as pro-LTTE websites released contradictory figures blurring the authenticity of information. A variety of information was made available with regard to the humanitarian crisis and specially the Internally Displaced Persons (IDPs) but with little opportunity to receive verified and reliable verification.

7.1 Emergence of ICTs

Very few developments in information technology caught the public imagination as the Internet did. It has changed the media landscape to one of interaction and citizen engagement, with individuals no longer being passive recipients but also, active publishers and sharers of information.

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113 In EFL Vs UDA Perera & others SC(FR) Application No 47/3004, popularly known as the Eppawala Phosphate Mining Case, villagers, activists and scientists filed action against the UDA for undertaking high intensity mining in the Eppawala area by a US-Japanese consortium. Several residents sued on the basis of their right to movement, residence, occupation and equality being affected by their mining activities. They claimed the public participation was prevented by the non-disclosure of the agreement and the absence of an environmental impact assessment (EIA). In a landmark judgment, the SC ordered the release of the agreement and to desist from entering any agreement in relation to the phosphate mine without the required EIA.

Such platforms are particularly important in places where there is no independent media as it enables individuals to share critical views and to access information. This strength alone galvanises repressive regimes to clampdown on online expression with an unwarranted ferocity.

Along with technological innovation that improved avenues of information generation and sharing, there are new and sophisticated technologies aimed at blocking content, monitor the identity of activists and critics, and criminalise legitimate expression with countries adopting restrictive legislation to justify such measures.

Sri Lanka was a classic example of State attempts to exert a policy of 'command and control' over ICTs as the mainstream media withdrew from crucial reporting. The need for control increased with the proactive role played by web-based journalism to fill the existing information vacuum.

According to the Report to the UN Human Rights Council (UNHRC) dated May 16, 2011 by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, restrictions on web-based information should be ideally confined to specifics such as child pornography and clearly spelt out instances of national security.[114]

The traditional media were bound and gagged by State oppression and the web-based media defiantly came to the fore, tearing the cloak of silence with a display of defiance. While it is not possible to endorse the multitude of websites that mushroomed and sought to relay information on the war and the resultant humanitarian crisis, they played the role of information provider at a time when all formal avenues for accessing information were shut.

The new development led to the emergence of new roles in information dissemination. Though not always played responsibly, this was somewhat

[114] Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, May 2011

reminiscent of the tabloid culture that emerged in response to President Ranasinghe Premadasa's oppressive rule in 1989-1990. Premadasa crushed the JVP-led southern insurgency with a heavy hand. His style of administration gave rise to severe criticism and this opposition was expressed through a proliferation of tabloids that sought to secure some media space for dissent and free expression. Likewise, the information blockade that silenced the mainstream media during 2008-2009 created a huge vacuum. The news websites and some of the social networking sites stepped into the role of content generator at this critical juncture.

The online journalists were not merely filling an existing void. They were creating vital new spaces for traditional journalists to become expressive. For the same reason, citizen journalism's role became more pronounced, as the country's information crisis worsened.

With the suppression of the longer narrative, online expression became the lifeline for most journalists, converting the print mainstream practitioners also to 'digital immigrants'.

This has also brought in fresh problems of controls extending to social media and web-based journalism that were fast becoming extremely popular as critical content generators and often successfully managed to overtake the muzzled mainstream to bring out issues of national importance to the public's attention.[115]

Hack, Block and Assault

As the war drew to a close, it was the www option that managed to make information available about Sri Lanka's humanitarian crisis to the people. Given the stringent control over mainstream media content, online expression became a vital source of information.

[115] http://groundviews.org

A popular news website lankadissent was hacked in May 2008. It shut down on January 09, 2009 after Lasantha Wickrematunge's murder announcing the absence of room for dissent in Sri Lanka.[116] On May 1, 2009, the official Sri Lankan army website also was hacked.

Perhaps by way of retaliation, just the day prior to World Press Freedom Day, the government service provider Sri Lanka Telecom (SLT) blocked three Tamil websites, namely *Puthinam, Tamil Nation and Tamil Canadian*.[117]

Restricting Online Expression and ICTs

The curtailment of online expression and the restrictions on using ICTs is an emerging trend in Sri Lanka. The brief list included here is only representative of the type of incident during the period under review.

- February 4, 2008 – Short Message Service (SMS) blocked as part of the security measures on the occasion of the 60th Independence Day celebrations.
- February 29, 2008 – Tamilnet, a pro-LTTE news source of the ongoing war in Sri Lankan was blocked by local service providers.
- March 6, 2008 – www.outreachsl.lk office raided and on March 7, its editor and The Sunday Times columnist J S Tissainayagam taken into TID custody.
- March 24, 2008 – Books censored by Department of Customs, one on the economic crisis and others on ICTs.
- March 31, 2008 – www.outreachsl.lk office equipment was removed by the TID to verify whether the database contained information 'undermining national interest'.

116 http://ipsnews.net/news.asp?idnews=45711

117 http://ict4peace.wordpress.com/2009/05/02/slt-blocks-tamil-websites/

- May 8, 2008 – Reporters of Associated Press were prevented from covering the eastern provincial elections if unable to produce special permission from the defence authorities.
- May 17, 2008 – www.lankadissent.lk, a popular news and opinion website hacked.
- May 17, 2008 – The Defence Ministry website named some media organizations and the Free Media Movement (FMM) as organisations to be 'mindful of' due to alleged falsification of facts.
- June 17, 2008 – The CID visited the www.lankaenews.com office and questioned its editor and news editor over story content and sources.
- June 27, 2008 – Military cut off CDMA telephones in Mannar District. Government banned the use of telephones with GPS facility and connections were deactivated following Defence Ministry directives.
- July 20, 2008 – CDMA telephones suspended in Jaffna by the Telecom authorities. Approximately 7,000 subscribers were affected.
- August 5, 2008 – A public interest petition was filed by a group of lawyers challenging the Telecommunications Regulatory Authority (TRC) on the restriction on the use of mobile telephones.
- November 5, 2008 – CPA filed a FR challenging proposed regulations to control broadcast and television media in the backdrop of 'technological advances of the recent decades, internet and telephonic communication were undermined'. Regulations were later withdrawn.
- November 27, 2008 – SLBC censored BBC Sinhala and Tamil service programmes.
- December 12, 2008 – BBC World Service censored.

- January 9, 2009 – www.lankadissent.lk website shut down in protest against the prevailing culture of impunity and oppression.
- May 1, 2009 - Sri Lanka Army website hacked.
- May 2, 2009 - Government service provider SLT barred access to Puthinam, Tamil Nation and Tamil Canadian.

(Source: Free Media Movement)

It was reported in the media that Sri Lanka was seeking Chinese assistance to block and filter online content.[118] China has in place one of the most sophisticated systems for controlling information on the Internet, and has adopted extensive filtering systems that block access to websites containing key words such as 'democracy' and "human rights".[119]

In this backdrop, La Rue's report to the United Nations Human Rights Council(UNHRC) makes special note of the fact that governments tended to be secretive about sites that are blocked which made it difficult to assess whether access to content is being restricted for a legitimate purpose or not. Importantly, it stated that even where justification is provided, blocking measures remained often unnecessary or disproportionate to achieve the purported aim and often blocked without the intervention of or possibility for review by a judicial or independent body. The report rightly stresses on the need to focus efforts on prosecuting those responsible as opposed to mere acts of blocking.

Besides the desire to prevent information from reaching the end-user, it is also directly targeting those who seek, receive and impart politically sensitive information via the Internet. "Such actions are often not only to

[118] http://ict4peace.wordpress.com/2010/02/11/sri-lankan-government-to-block-internet-and-censor-independent-web-media/

[119] Center for Democracy and Technology, "Regardless of Frontiers: The international Right to Freedom of Expression in the Digital Age", version 0.5 –Discussion draft (April 2011) p5

silence legitimate expression, but also to intimidate a population to push its members towards self-censorship".[120]

The Special Rapporteur in his recommendations to the UNHRC records deep concern over 'increasingly sophisticated blocking or filtering mechanisms' used by States for censorship. The lack of transparency surrounding these measures also makes it difficult to ascertain whether blocking or filtering is really necessary for the purported aims put forward by countries. La Rue's recommendations urge States to "focus their efforts on prosecuting those responsible for the production and dissemination of child pornography, rather than on blocking measures alone".[121]

"The Special rapporteur remains concerned that legitimate online expression is being criminalized in contravention of States' international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalize expression on the Internet. Such laws are being often justified as being necessary to protect an individual's reputation, national security or to counter terrorism. However, in practice, they are frequently used to censor content that the Government and other powerful entities do not like or agree with."[122]

7.2 Offshore Journalism

Besides the physical harm caused to journalists, there were other undemocratic practices that denied the people the right to receive truthful information and caused Sri Lanka to lose the cream of the industry's practitioners by driving them towards self-exile.[123]

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120 Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, May 2011

121 Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, May 2011

122 Ibid

123 http://www.thesundayleader.lk/20090607/onthespot.htm

Among the new developments in response to the authoritarianism that raged was the flourishing of offshore journalism. With over 35 journalists having fled Sri Lanka during the two years under review, exiled journalists became not only a primary source of information but also, media activists highlighting issues concerning Sri Lanka and playing the role of independent content generators.

Most of these journalists were driven out by the sheer terror that engulfed Sri Lanka during the particular period. It is important to note that while the majority was genuine, there were some who used this opportunity to seek greener pastures using the political context as a springboard. However, the numbers were indeed limited.[124]

It is therefore important to understand the context[125] that paved the way for this exodus as well as to examine the survival-related issues of journalists in exile[126] and the absence of support systems. Those who fled were well-known dissenters and activists who opposed the war effort or the style of its execution.

The European Council in 2007 made special reference to exiled journalists the world over. It paid tribute to 'all journalists and media that further democracy and the rule of law by investigative journalism into political and social issues which are of public concern while respecting the standards of journalistic ethics. Hate journalism, which confuses propaganda with reporting, defames individuals and inflames rather than illuminates public debate, is also growing and needs to be confronted".[127]

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124 Foreign Minister Rohitha Bogollagama issued a warning to Sri Lankan expatriate community about unpatriotic acts. Originally reported in the Ceylon Daily News under Chaminda Perera's byline the report can be accessed at http://sunandadeshapriya.wordpress.com/2009/06/23/traitors-will-be-brought-to-book-fm/

125 Bill Ristow, Independent media in exile: A report to the center for international media assistance, June 2011

126 ibid

127 Resolution 1535 (2007) of the Council of Europe on threats to the lives and freedom of expression of journalists

Right to Safe Return

Post-war, it becomes all the more important to rectify the reasons that contributed to losing invaluable human wealth of Sri Lanka in stark violation of their fundamental right to live, practice a profession of their choice and to safely return to Sri Lanka.[128]

It is also important to critically examine the multitude of problems journalists in exile faced here as well as overseas. Despite a constitutional guarantee on freedom of movement and of choosing one's residence within Sri Lanka and (i) the freedom to return to Sri Lanka,[129] those who fled have serious concerns in this regard. It is justified fear given the context in which Poddala Jayantha returned to the country after a brief period in exile.[130] Jayantha who left Sri Lanka after Wickrematunge's murder returned a few weeks later and was brutally assaulted, forcing him to seek permanent exile.

The European Council Resolution importantly emphasises on the freedom of expression and information in the media to include the right to express political opinions and criticize the authorities and society, expose governmental mistakes, corruption and organized crime, and question religious dogma and practices.[131]

It is perhaps this critical function during the final phase of the war that drew the government's ire towards the unarmed media community. Journalists, even the worst of practitioners, as per the Universal Declaration on Human Rights of 1948, remain non-combatants and the violent responses they have drawn for expressing opinion has reduced Sri Lanka to a barbarous state.

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128 Article 14 of the 1978 Constitution

129 Article 14 (1) (h)

130 http://www.thesundayleader.lk/2011/04/15/sri-lankan-journalist-speaks-of-attacks-on-media/

131 Resolution 1535 (2007) of the Council of Europe on threats to the lives and freedom of expression of journalists

According to the International News Safety Institute (INSI), over a 1,000 news media personnel around the world have been killed trying to report- and this is an average of two deaths per week.[132]

Indicative of the violent trend in Sri Lanka, this report recorded 16 deaths during the period under survey. Across the globe, shooting was by far the greatest cause of death. It observed a trend with regard to war reporting[133] and noted that embedded journalists were more secure with independent news reporters or unilaterals accounting for 92% of the dead.

Referring to the dangerous global trend, the report stated: "It will be noted from the report that many details of fatal incidents over the decade are unclear or unknown. Records are often inconsistent and lacking in precision, sometimes because of the absence of proper investigation, other times because the circumstances were not fully recorded and still others, because death so often is cloaked in the fog of war."

The South Asian Media Monitor 2010[134] concludes "among the countries where the exodus of journalists and bloggers was particularly dramatic were Iran, with more than 50 and Sri Lanka, with more than 29."

In the aftermath, Reporters Sans Frontiers (RSF) Secretary-General Jean-Francois Juilliard expressed grave concern over this "dangerous tendency". He strongly emphasised the need for the States to take responsibility for the deteriorating human rights records including the murder of journalists and the hostile conditions that prevent a free media culture.

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132 International News Safety Institute (INSI) Survey, March 2007 accessed at www. newssafetycom

133 International News Safety Institute (INSI) Survey, March 2007 accessed at www. newssafetycom

134 'Where is Prageeth? South Asia Media Monitor 2010 p. 127

8 Conclusion and Recommendations

In retrospect, the period 2008-2009 was one of the worst for human rights in Sri Lanka, and specially spelt doom for freedom of expression.

Sri Lanka now requires a post-war media culture. The Sri Lankan State, the human rights and free expression defenders and citizens should critically examine the need to uphold the Constitutional guarantees made available to the people and make concrete suggestions on how to foster a plural media and proactively create opportunities and new spaces for the free flow of information.

The war left many scars, and the journalistic community in Sri Lanka was not spared. Besides the armed forces, perhaps journalists encountered the most amount of danger for practicing their vocation.

To usher in a new media culture, the State should ideally lead but in the absence of such, the civil society and media rights groups should urge new mechanisms that promote responsible and plural media, shedding the shackles of the past and war-time media practices such as biased coverage and embedded journalism. In the final analysis, such practices do not result in the mere violation of free expression but a broad spectrum of other rights besides causing deterioration of the industry standards.

As the INSI urged, all violations must be investigated thoroughly and all perpetrators be prosecuted. By failing to act, governments allow criminals to dictate what citizens read and see. Further, it calls on individual governments to routinely include an assessment of a country's record which should be a crucial aspect to consider when granting development assistance or aid. "Free and independent media must be recognised as a key dimension of efforts to eradicate poverty."[135]

[135] International News Safety Institute (INSI) Survey, March 2007 accessed at www.newssafetycom

After 26 years of war, a new opportunity has presented itself to learn from history and to usher in a new media culture. There is a strong role for the media itself in pushing for change. It is something that most countries that had experienced violent conflict have consciously and systematically moved towards.

At present, there is no coherent government policy in this regard. Besides the attempts to further command and control through the reintroduction of the Press Council and other restrictive laws, the government has signalled towards the Singapore model of information control.

The government clearly lacks policy direction in helping evolve a post-war scenario. There is also no training on conflict sensitive reporting, on developmental and investigative journalism that are critical components of such an evolution process. Such an educational process will enhance the quality of reporting but develop a media that is conscious of the rights of others including recipients of information.

Following the May 2009 victory of the war, much was expected by way of political reforms that would not only enable reconciliation and peace-building but also restore democratic freedoms that have been seriously eroded during the 26 year-old war.

The need of the hour is to foster a post-war media culture that will cast the war hype aside and promote ethnic integration and focus on development while focusing on a plural media that supports and enjoys the right to free expression in Sri Lanka.

"Whenever one journalist is exposed to violence, intimidation or arbitrary detention because of his or her commitment to conveying the truth, all citizens are deprived of the right to express themselves and act according to their conscience…We must declare war on impunity," noted UNESCO Director General, Koichiro Matsuura.[136]

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[136] World Press Freedom Day, 2003 http://unesdoc.unesco.org/images/0015/001567/156773e.pdf, p 4

On a similar note, the United Nations High Commissioner for Human Rights, Navaneetham Pillay, summed up Sri Lanka's post war situation succinctly in her report to the UNHRC in March 2010, where she said, "the opportunity for peace and reconciliation continues to be marred by the treatment of journalists, human rights defenders and other critics of the government". Sri Lanka needs to move from this abyss to a media culture that is socially responsible and respectful of the citizens' right to secure truthful information.

VIII

SOCIO-ECONOMIC RIGHTS

Juanita Arulanantham[1]

1. Introduction

This chapter will consider some of the important developments relating to socio-economic rights in Sri Lanka in the years 2008 and 2009. In analysing the development of these rights over the past two years extensive reference will be made to the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Sri Lanka's report on the implementation of the Covenant on Economic, Social and Cultural Rights in 1998[2]. This is meant to serve as an evaluation of the obligations Sri Lanka has been able to fulfil with regard to the recommendations made by the Committee.

2. International obligations

Sri Lanka's international obligations clearly recognise the role of economic, social and cultural rights within the scheme of human rights. Several provisions of the Universal Declaration of Human Rights recognise these rights. Article 22 recognises the right to social security and its realisation

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2 See http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.24.En?Opendocument

through national effort and international cooperation and according to the organization and resources of each state, the economic, social and cultural rights indispensable for one's dignity and the free development of one's personality.

Sri Lanka's primary economic, social and cultural rights, however, are embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it acceded in 1980.

Internationally, the traditional conception of economic, social and cultural rights not being inherently justiciable[3] has now changed. This is clearly reflected in the two primary documents in the light of which the ICESCR is to be interpreted today - The Limburg principles on the Implementation of the International Covenant on Economic, Social & Cultural Rights (The Limburg Principles) and The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (The Maastricht Guidelines).

By virtue of Section 10 of The Maastricht Guidelines, even developing countries like Sri Lanka are obliged to ensure the realisation of certain economic, social and cultural rights, as they are unable to justify continual violation of core minimum standards due to resource constraints. Article 10 reads: 'In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.' The primary reason for this is the recognition, as stated in section 4 of the Maastricht Guidelines and section 3 of the Limburg Principles that 'all human rights are universal, indivisible, interdependent and interrelated and that thus equal attention and urgent

[3] Craig Scott and Patrick Macklem, '*Constitutional Ropes of Sand or Justiciable Guarantees?*' 141 U.Pa.L.Rev.1 at 66.

consideration should be given to the implementation, promotion and protection of civil and political and economic, social and cultural rights.

Section 8 of the Limburg principles also states that although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately (section 22[4]) while other rights can become justiciable over time. Also under section 21, 'to achieve progressively the full realisation of the rights' requires states to move as expeditiously as possible towards this realisation. Under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realisation. This stance is reinforced by section 8 of the Maastricht Guidelines according to which the state cannot use the 'progressive realisation' provisions in Article 2 of the Covenant as a pretext for non-compliance. Section 23 of the Limburg Principles further states that the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of available resources.

Section 6 of the Maastricht guidelines also details the obligations of states to respect, protect, fulfil and prevent violations of economic, social and cultural rights. According to these provisions, the obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires states to prevent violations of such rights by third parties. The obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.

Section 7 of the Maastricht Guidelines discusses the obligation of conduct and the obligations of result - both of which are applicable to states. The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. The obligation of result requires states to achieve specific targets to satisfy a detailed substantive standard.

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[4] According to this section 'Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in Article 2(2) of the Covenant.'

Section 16 of the Maastricht Guidelines discusses state responsibility in relation to violations: The state responsible must establish mechanisms to correct violations, including monitoring, investigation, prosecution, and remedies for victims. Section 24 states that at a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aid in formulating any decisions relating to violations of economic, social and cultural rights.

It is thus clear that on an international level, Sri Lanka has very clearly established substantive legal obligations towards achieving the realisation of a reasonable standard of social and economic rights.

3. National Framework

The Sri Lankan Constitution does not directly recognise socio-economic rights as justiciable. In Article 27(2)(c) however, Sri Lanka's Directive Principles of State Policy does recognise that the State should ensure the realisation by all citizens of an adequate standard of living for themselves and their families. This will necessarily include the guarantee of socio-economic rights such as the right to food and health. It is submitted further, that judicial recognition of a constitutional right to life in *Silva* v. *Iddamalgoda*[5] could be expanded to include socio-economic rights. A similar trend is clearly evident in Indian jurisprudence. *Maneka Gandhi* v. *Union of India*[6], for example, stated that the constitutional right to life includes 'the right to live with dignity'. *Coralie* v. *Union Territory of Delhi*[7] expanded this pronouncement, holding that the right to life includes the right to live with human dignity and all that this entails, namely the bare necessities of life. The 'right to live with human dignity and all that this entails' will clearly include basic socio-economic requirements relating to food, health, education etc. It is hoped that this judicial trend will be followed in Sri Lanka as well in order to ensure a meaningful recognition of the right to

5 [2003] 2 Sri L.R. 63

6 1 SCC 248, 1978

7 AIR 1981, SC 746

life in terms of socio-economic rights. Nevertheless, even assuming that Sri Lanka's recognition of the right to life entails all the above aspects as well, it is clear that protection of economic, social and cultural rights under Sri Lankan law is inadequate. In order to ensure certainty of the legal recognition of at least basic socio-economic rights, it is essential that they are included in the Constitution as enforceable fundamental rights. This would be a positive step towards meeting international obligations requiring the realisation of 'core minimum standards' relating to socio-economic rights.

4. Poverty

The Committee noted that in spite of the relatively low per capita income, Sri Lanka has achieved progress in providing essential social services. However, it noted with concern that 22% of the population was living in poverty and that many women and children were suffering from malnutrition.

The emerging economic development in South Asia is propelling Sri Lanka into the middle income status, the World Bank report for 2008[8] stated. This is a result of rapid economic growth, declining poverty and progress in human development in these countries for more than a decade.[9] However, the year 2008 saw only a relatively slight improvement of the situation – it was reported in March of that year that 20% of the country's population live below the poverty line.[10] A positive development was Sri Lanka's highly acclaimed economic growth in 2005. Despite this, there was, however, a clear failure in poverty reduction strategies.[11] It is also of importance to note that, although information was not fully accessible, it was reported that poverty was relatively higher in the North and East. [12]

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8 *The World Bank Annual Report* 2008 http://siteresources.worldbank.org/EXTANNREP2K8/Resources/YR07_CH2_RP04_SAR.pdf

9 'Sri Lanka moves into middle income status', *Island,* December 12, 2008

10 '20% of country population live under poverty line – Dr. Bandara', *Island,* March 1 ,2008

11 Nanayakkara, Rukshana "Right to Development" in *Sri Lanka: State of Human Rights 2006,* pp 329 -346 ,Colombo: Law & Society Trust, 2007

12 *ibid*, p.340

In a positive response to this situation, the government, in recognition of the need to address this issue identified the necessity of poverty statistics for small areas as a basis for prioritizing, planning, and implementing location efficient development and poverty eradication projects. It was reported that in response to this, the Census Department now classifies *grama niladhari* divisions by poverty.[13] It is hoped that this will form a basis for the implementation of effective strategies in addressing poverty.

5. Plantation Workers

The Committee noted with concern the uncertain situation of 85000 Tamils of Indian origin living in Sri Lanka. They possessed neither Indian nor Sri Lankan citizenship, have no access to basic services such as education, and were effectively denied the enjoyment of several economic, social and cultural rights.

Clearly, the state is responsible for the enjoyment of economic, social and cultural rights by plantation workers, under its general international obligations relating to these rights under the UDHR, ICESCR, and the Limburg Principles and Maastricht Guidelines. In addition to this, however, Sri Lanka is also obliged to do so under The Conditions of Employment of Plantation Workers Convention, 1955 (Convention No. c110), which it ratified on 24.04.1995.

Efforts were made in keeping with these obligations, greatly improving the plight of workers. The Grant of Citizenship to persons of Indian Origin Act No. 35 of 2003 granted nearly 300,000 stateless persons of Indian origin citizenship.[14] Recognition of the citizenship of this community is extremely significant towards the realization of their socio economic rights as it entitles them to the facilities provided by the state in relation to healthcare, education etc. Further, The Grant of Citizenship to Persons of Indian Origin (Amendment) Act, No. 6 of 2009 and Grant

[13] 'Census Department classifies GN divisions by poverty', *Daily News*, May 26, 2008

[14] '300,000 new citizens', *Sunday Times*, October 5, 2003

of Citizenship to Stateless Persons (Special Provisions) (Amendment) Act, No 5 of 2009, both passed in early 2009, were reportedly expected to grant citizenship to over 150,000 stateless persons.[15] Despite this extremely positive development, however, there are still concerns relating to the living conditions of workers.

Sri Lanka's tea industry achieved US $ 1 billion in 2007 and 2008. However, a report by the Department of Census and Statistics in 2008 revealed that the Estate Sector poverty was at a staggering 32% (in 2007) – 2% above the 2002 figure and far above the national average of 15.2%.[16] This clearly reflects an unjustifiable disparity between the national income generated by this group and the ability of the group to enjoy the benefits of this income. Although there are some claims that that there is a vast improvement since privatisation in 1992,[17] there is still clearly much work to be done in relation to working conditions, education, healthcare and housing. The years 2008 and 2009 both saw reports of unsatisfactory housing conditions, especially relating to toilets, drinking water and proper drainage often resulting in illness among workers.[18] Female workers suffer worse conditions in this regard as even trade unions agitating for better working conditions of workers, place little or no emphasis on the provision of specific facilities for women (e.g., rest rooms for female workers),[19] including more women at a decision making level in trade unions will ensure that there is more gender sensitivity in their lobbying for the rights of all plantation workers.

The lack of adequate salary increases is another enduring concern for plantation workers. The year 2009 saw yet another protest relating to this.[20]

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15 'Relief to the stateless', *Daily News*, January 9, 2009

16 'US $ 1 billion tea industry and poverty on estates', *Financial Times*, July 10, 2008

17 'Poverty on Estates: the correct picture', *Financial Times*, August 29, 2008

18 See for example 'Estate Problems not solved: Workers on the Fence', *Daily Mirror*, August 12, 2008 and "Estate workers languish in appalling conditions', *The Island*, 17 October 2009

19 'Non provision of rest rooms for plantation women, a violation of their rights', *The Island*, 7 March 2009.

20 'Estate workers press for basic salary increase' *The Sunday Times,* 6 September 2009

The State must hold plantation companies accountable for the provision of the basic salary and the provision of proper hygienic living conditions for workers.

The lack of National Identity Cards has been cited to be a major cause of poverty in the estates, as it is necessary for individuals to access tertiary and vocational education and opt for lucrative jobs, including those overseas.[21] Under the obligations of the state, under section 6 of the Maastricht Guidelines to fulfil the enjoyment of economic, social and cultural rights, it is required to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. This would clearly include the administrative measure of issuing proper identification to the members of the plantation community.

6. The Right to Adequate Food

As discussed above, the only local legal recognition of the right to food in Sri Lanka is the indirect one derived from the judicial recognition of the right to life. Sri Lanka's international obligations relating to the right to food, are however, set out very clearly. Article 25 of the UDHR recognises that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food. This is more widely elaborated in Article 11 of the ICESCR. The Article states that States shall recognise the fundamental right of everyone to be free from hunger, and thus take measures to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems to achieve the most efficient development and utilization of natural resources.

The period 2008 - 2009 was marked by several events that impacted on the enjoyment of the right to food.

[21] 'Lack of NIC cause of poverty in Estate Sector', *The Island*, May 17, 2007

The international alert relating to food containing melamine had a substantial local impact as well. Local authorities took fairly timely action to minimize the impact of this.[22]

Rice was specified as an essential commodity in January 2008.[23] In light of the fact that rice is the staple food of most of the Sri Lankan public, this was indeed a welcome development, especially for lower income groups.

In keeping with the global food crisis,[24] the drastic increase in the general cost of living in the year 2008 was especially evident in the cost of food items.[25] The impact of this was severe, especially on the ability of lower income groups to afford proper and adequate nutrition. The impact of this was worsened by the new Consumer Price Index, which was criticised as being not representative enough of the impacts of inflation on the poorest groups in society which suffer most from the increases in the cost of living, particularly on food items.[26] Under the state's obligation under section 6 of the Maastricht guidelines to fulfil the enjoyment of economic, social and cultural rights, the state was required to take appropriate legislative, administrative, budgetary, judicial and other measures towards correcting this situation.

7. Cost of Living

It was reported in early March 2008 that the rate of inflation was 21.6%, which economic analysts say is the highest in South Asia.[27]

In addition to the increase in the prices of food items, a drastic increase in the general cost of living itself was also evident. In February 2008, the

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22 'At least 37 items being tested for Melamine', *Daily Mirror*, October 17, 2008. see also 'Court Rules that Edna products do not contain Melamine', *Daily Mirror*, November 22, 2008 and 'Traders who charge for packaging to be fined', *Sunday Observer*, November 2, 2008

23 'CAA empowered to prosecute rice hoarders, black marketeers', *The Island*, January 25, 2008.

24 'Global crisis as food prices soar' *Daily News*, April 22, 2008

25 'Consumers fighting a losing war'*, Sunday Times*, March 9, 2008

26 'Implications of the New Consumer Price Index', *Financial Times*, January 27, 2008.

27 'Consumers fighting a losing war', *Sunday Times*, March 9, 2008

government announced that the electricity rates had to be increased by 40% to salvage the financial crisis of the Ceylon Electricity Board, but postponed this measure following public protests.[28] A 'religious purposes electricity tariff' was introduced in 2008, which taxed places of religious worship, homes for the aged, orphanages and homes for the handicapped certified by the Director of social services as charitable institutions.[29]

It is submitted that such drastic increases in the cost of living violates the economic and social rights of the public embodied in Article 25 of the UDHR and Article 11 of the ICESCR. Both these provisions recognise the right to a standard of living adequate for the health and well-being of himself and his family. The increase in the cost of living in Sri Lanka in the year 2008, most certainly prevented many from being able to experience this right. Here, too, under the state's obligation under section 6 of the Maastricht guidelines to fulfil the enjoyment of economic, social and cultural rights; the state was required to take appropriate legislative, administrative, budgetary, judicial and other measures towards correcting this situation.

8. Right to Health

Sri Lanka's international obligations clearly recognise the right to the enjoyment of physical and mental health. This is reflected in Article 25 of the Universal Declaration of Human Rights and, further elaborated on in Article 12 of ICESCR.

Unfortunately, local legislation makes no direct reference to the right to health. However, the judicial recognition of a constitutional right to life in *Silva* v *Iddamalgoda*[30] could arguably be expanded to include the right to health. Indeed, it is submitted that this expansion is necessary. This position may be strengthened by the argument that the extraordinary

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28 'Consumers fighting a losing war', *Sunday Times*, March 9, 2008

29 'Consumers frizzled as electric shocks hit', *Sunday Times*, August 4, 2008.

30 [2003] 1 Sri L.R. 14 & [2003] 2 Sri L.R. 63

damages awarded in the case of *Sanjeewa, Attorney-at-Law (On Behalf Of Gerald Mervin Perera)* v. *Suraweera, Officer - In - Charge, Police Station, Wattala and others*[31] reflects an implicit recognition of the right to health. The position could be further strengthened by the argument that in Article 27(2), the Directive Principles of State Policy acknowledge the state's commitment to environmental health, which may be regarded as an aspect of the broad concept of the right to health on account of the phrase 'the continuous improvement of living conditions.' This argument may be buttressed by Article 27(2)(14) which decrees that 'the state shall protect, preserve and improve the environment for the benefit of the community'

As the Committee noted, in spite of the relatively low per capita income, Sri Lanka has achieved progress in providing essential social services including free health care. However, effectiveness and access to these services are seriously compromised in several ways, primarily through work stoppages and instances of malpractice. This was clearly evident in the events of the years 2008 and 2009.

8.1 Strikes/Work Stoppages and Related Threats

As recognised by Article 8 of the ICESCR, the right to form and join trade unions and the right to strike are both important socio-economic rights. The Covenant recognises, however, that restrictions for the protection of the rights and freedoms of others may be imposed on the former. Further, the right to strike is only guaranteed provided that it is exercised in conformity with the laws of the particular country. Given these restrictions on the right to join trade unions and the right to strike, it is clearly important to consider whether the reasons for which strikes were conducted warranted this infringement on the public's right to health. Further, under Section 15 of the Maastricht Guidelines, the state is responsible for violations of economic, social and cultural rights through its omissions. This includes the failure to establish policies to implement the Covenant and the failure to regulate activities of individuals or groups to prevent them from violating

[31] [2003] 1 Sri L.R. 317

economic, social and cultural rights. This obligation is strengthened by those of the state under section 6 of the Maastricht Guidelines requiring the state to 'protect' rights by preventing violations of such rights by third parties. This will clearly include the failure to address legitimate grievances of medical personnel effectively and without delay, thus forcing them to resort to strike action, leading to the infringement of the public's right to health.

One reason for the conduct/threatening of strike action was the payment of allowances/salary increases to medical personnel.[32] This issue involves two socio-economic rights: The right to health and the right to just and favourable remuneration.[33] To achieve the balance between the right to adequate remuneration and the right to agitate for it through trade union action with the public's right to health, both authorities and medical personnel ought to attempt to resolve the issue through dialogue etc. and treat strikes as the last resort. Thus, an encouraging report that emerged in 2008 was that the President directed health authorities to prepare a common salary policy for the health sector before irregularities resulted in more chaos.[34] The realisation of a satisfactory policy fulfils the obligations of the state under section 6 of the Maastricht Guidelines, which requires states to 'fulfil' its duties in regard to the realisation of rights – by appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.

Medical personnel at the cancer hospital also struck work protesting that they were inadequately trained to perform their task – administering chemotherapy.[35] Here not only was the right to health of the patients endangered due to both the risk of improper administration of the

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32 'MOs threaten TU action', Island, June 5, 2008; 'Cancer hospital nurses back', *The Island*, December 16, 2008.
See also 'GMOA threatens token strike'. Daily Mirror, September 12, 2008 and 'ACHSU protests leading to July 10 token strike', *Daily Mirror*, June 30, 2008.

33 The right to just and favourable remuneration ensuring an existence worthy of human dignity recognised in Article 7 of the ICESCR

34 A better deal for nurses', *Daily News*, 19th January 2008

35 'Cancer hospital nurses back', *The Island*, December 16, 2008

treatment and later, the strike, but that of the nurses as well. This was fortunately resolved following a dialogue with authorities.[36] However, ideally this course of action ought to have preceded the strike.

Some strike action seemed clearly justified due to the extremely serious and urgent nature of the grievance. Strikes were conducted protesting lapses in security for medical personnel in the North and East, following incidents of killing of[37] and demands of ransom from[38] medical personnel. However, responsibility of the government under section 15 of the Maastricht Guidelines places an obligation on them to have provided adequate security in order to ensure the realisation of two aspects of economic, social and cultural rights. On the one hand, the right enumerated under section 23 of the UDHR to just and favourable conditions of work, and secondly, by preventing strike action, the public's right to health.

Strikes were also conducted protesting transport conditions imposed by authorities in the North of the country, citing military reasons.[39] This was an instance in which, it is submitted, both health authorities and personnel ought to have attempted to resolve the issue through dialogue, instead of resorting to strikes.

Several strikes/interruption to work took place for completely unjustifiable reasons, such as protesting against an appointment,[40] or the designation given to Medical Officers in a publication[41] or a refusal by medical personnel

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36 'Cancer hospital nurses back', *The Island*, December 16, 2008

37 'GMOA threatens to launch TU action', *Sunday Leader*, January 20,2008.

38 'Vavuniya docs continue to strike', *The Island*, December 6, 2008

39 'Docs threaten to cripple Vavuniya hospital over transport woes', *The Island,* September 26, 2008. See also 'Vavuniya hospital strike over travel curb', *Daily Mirror*, February 15, 2008.

40 'Doctor's token strike makes OPD, clinical services, "sick"', Daily News October 25, 2008. See also A'pura hospital docs strike in protest over director appointment', *The Island*, October 22, 2008.

41 'Strike to continue until RMO designation corrected', *The Island*, May 9, 2008

to wear uniforms.[42] Medical services were seriously compromised due to disputes between doctors and nurses,[43] even resulting in the loss of lives.[44] In one case, nurses not in uniform even entered the ICU and removed life supporting oxygen masks from patients and cut off the phone connection.[45] In 2009, welfare centres for Internally displaced persons were deprived of the service of doctors protesting the cancellation of certain transfer lists.[46] In such instances of clearly unjustifiable abuse of public dependence on health services, under section 18 of the Limburg Principles, states are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors. The ability of the Sri Lankan state to do this is, however, greatly limited due to the fact that economic, social and cultural rights are not directly recognised as legally enforceable. Despite these limitations, there were certain encouraging responses by the state to some of these incidents.

In one instance, the court ordered nurses engaging in strike action to resume work. Another positive response by the state was the preliminary investigation completed on the strike at the Ratnapura Hospital, which resulted due to a verbal confrontation between a doctor and a nurse. Following this, the ministry was expected to charge sheet the responsible

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42 It was reported in May 2008 that male nurses at the Peradeniya Hospital were refusing to wear their uniforms and that this resulted in doctors and other nurses being unable to deliver standard health services to patients, as it was difficult to identify which individuals were male nurses. See 'Peradeniya male nurses spurn uniforms', *The Island*, May 22, 2008

43 'Blood war as docs, nurses clash', *Daily Mirror,* July 3, 2008; 'Trade Unions hold patients to ransom', *Sunday Observer*, May 11, 2008. See also 'Ministry completes preliminary inquiry on Ratnapura hospital strike', *Daily Mirror*, May 14, 2008.

44 A verbal confrontation between a nurse and a doctor resulted in trade union action at the Ratnapura hospital which cost the lives of six patients, including three infants. See 'Trade Unions hold patients to ransom', *Sunday Observer*, May 11, 2008. See also 'Ministry completes preliminary inquiry on Ratnapura hospital strike', *Daily Mirror*, May 14, 2008.

45 'Striking nurses resort to sabotage', *The Island*, January 30, 2008; 'Operating theatres still not operational', *Daily Mirror*, February 8, 2008

46 'Post intern docs in IDP welfare Centres get absent over cancellation of transfer lists', *The Island*, 9 July 2009

parties.[47] These responses accord with section 22 of the Limburg Principles which enumerates that any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels. It also fulfils its obligations under section 16 of the Maastricht Guidelines, which enumerates that the state responsible must establish mechanisms to correct violations, including monitoring, investigation, prosecution, and remedies for victims. Unfortunately, however, the strike continued in defiance of the court order.[48] The implications of such action on not only the right to health, but even the rule of law in Sri Lanka, are indeed disturbing.

8.2 Medical Malpractice and Corruption

There were also several incidents of medical neglect, and corruption[49] reported in 2008 and 2009. A scandal was exposed at the National Blood Transfusion Centre regarding the use of expired apheresis kits on donors and critically ill patients.[50] Mixed anti-sera were reported as found at the Castle Street Blood Bank. Anti-serum is a chemical used to identify if the donor and the patient's blood tallies. The issue has reportedly been going on for six months. During the time of the report, only emergency transfusions were being carried out. The issue was serious as the hospital was dealing with pregnant mothers, who could thus be given a wrong blood type during delivery.[51] There was also, reportedly, a probe into the use of outdated plasma found at the National Hospital. According to its Director, there was no procedure at the hospital to check on its quality

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47 'Trade Unions hold patients to ransom', *Sunday Observer*, May 11, 2008. See also 'Ministry completes preliminary inquiry on Ratnapura hospital strike', *Daily Mirror*, May 14, 2008.

48 'Peradeniya nurses continue to defy court order', *The Island*, February 2, 2008

49 'Health Ministry Transactions under probe – Bribery Commission', Island, February 21, 2008. There was also a report that consultants were allegedly directing patients to particular scanning centres, prescribing specific lenses, drugs etc. lured by commissions. 'Docs reveal corrupt practices at Eye hospitals', *The Island*, March 28, 2008.

50 See 'Whose hands have blood on them?', *Sunday Times*, August 3, 2008.

51 See 'Mixed anti-sera at Castle Street blood bank – GMOA' *The Island*, August 7, 2008.

– they relied on the blood transfusion service to issue quality goods.[52] Many incidents resulted in the death of patients.[53] Public shock followed an incident in 2008, where a Doctor punished a nurse by injecting her, causing her to fall ill.[54]

An important incident in 2009 was the discovery that certain Indian companies were involved in exporting syringes, injections and drugs found to be contaminated. The Sri Lankan government responded by banning the registration of these companies, and the Indian High Commissioner responded by assuring a full probe into the matter.[55]

An incident of medical negligence, causing tremendous public shock in 2009, was the death of two children following administration of the Rubella vaccination.[56] All these incidents clearly infringe on the enjoyment of the public's right to health. There is clearly a need to curb such incidents of malpractice by both holding the responsible individuals accountable for their actions and taking adequate disciplinary actions in a timely manner. In the incident concerning the rubella vaccine, steps were taken to investigate the matter and hold those responsible accountable.[57] However, some members of the medical community protested these measures. Medical Health officers in the Matara district, threatened to withdraw from the government's immunisation programme, demanding that the charge

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52 See 'Probe into use of outdated Plasma at the National Hospital', http://srilankafirst.com/general/4558.html?print

53 A Girl died at Ragama Hospital as she was not treated for 5 hours after being stung by a snake. See 'Doc punishes nurse with jab', *The Island*, March 6, 2008. See also 'DIG Health calls for reports on child's death', *The Island*, March 5, 2008. Six infant deaths and cut injuries to 4 babies during caesarean section were reported at the Negombo Base Hospital in June and August 2008. See 'WPC, GMOA assure impartial probe into death of infants', *The Island*, October 16, 2008. Another child died on the administration of a vaccine. See 'Vaccine concludes little Dilki's journey of life', *Daily Mirror*, July 9, 2008

54 A Doctor punished a nurse regarding the administration of an injection by injecting her with the same, as a result of which the Nurse fell ill. 'Doc punishes nurse with jab', *The Island*, March 6, 2008

55 'Indian HC pledges full probe', *Daily News*, 3 December 2009

56 'Alleged medical negligence revealed in Rubella vaccination tragedy', *The Sunday Island*, 19 March 2009

57 See 'Rubella incident: Dossiers sent to PSC for disciplinary action' *Daily Mirror*, 1 April 2009

sheet issued against the Chief Medical Officer of Health be withdrawn. The officer was issued a charge sheet for acting in breach of the relevant guidelines. Medical officers of the district alleged that this officer had no choice in the matter due to the inadequate resources available to him at the time, and further that some of the alleged guidelines that were breached were not in force at the time. Further, there were also allegations that the quality of the vaccine administered was itself questionable.[58] Although it is commendable that efforts were taken to hold those responsible accountable, authorities should also seriously consider other factors that affect the effectiveness with which the sector functions. Thus, efforts should be made to ensure that officers are given clear guidelines on which to function, and that they are also supplied with adequate human and other resources.

8.3 Legal Developments in the Health Sector

There were several important events in the year 2008 and 2009 relating to the legislative and regulatory framework of Sri Lanka's health sector. This clearly determines the effectiveness with which the sector operates, which in turn impacts on the enjoyment of its services by the public.

The trade unions in the health sector conducted a joint effort to quash the proposed Blood Transfusion Act, alleging that this could compromise the availability and quality of blood.[59] Another important development was the placing of blood banks under the authority of hospital directors, in order to increase effectiveness and improve outstation productivity.[60] Further, the GMOA opposed a telemedicine arrangement with India as they alleged that in the event of mishap/negligence, Indians could not be held accountable as they are not bound by Sri Lanka's Penal Code.[61]

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58 'Medical Health Officers to withdraw from immunization programme', *The Island*, 13 November 2009

59 'United they stand against 'bloody' bill', *The Island*, August 20, 2008

60 'Blood Banks under hospital directors' http://www.sinhalaya.com/news/english/wmview.php?ArtID=15601

61 'Telemedicine bad medicine – GMOA', *Daily Mirror*, July 24, 2008.

A most important development concerning health related legislation was the Supreme Court directive in 2009, on the draft bill titled 'An Act to regulate medicinal drugs and devices, cosmetics, nutraceuticals and functional foods.' The Petitioners in this case (who included the Patients' Movement for the Rights of Patients) asked for a court directive to the Health Minister to present the draft Bill to Parliament. Petitioners also sought a declaration that the fundamental Right to Equality and the Equal Protection under the law granted to them and the citizenry continues to be and/or is in imminent danger of being infringed because of the failure to do this. The petitioners stated that in October 2005, the Health Minister publicly undertook to present a health policy by what was referred to as the draft to the said Bill. They alleged that the long delay in achieving this may be due to illegal efforts of influential medicinal and pharmaceutical companies, adversely affected by such a regulatory regime. The Court here ordered the Attorney General to find out the reason for the delay.[62] It is hoped that this positive example by the judiciary, is followed by members of the executive as well, as passing of this law would address a serious problem in the Sri Lankan health sector. As enumerated in Article 12 of the ICESCR, access to medicine is a core element of the right to health. However, poorer patients are denied this right, due to the inability to pay for escalating costs of life saving drugs prescribed under brand names.[63] A drugs policy addressing this would thus greatly benefit such patients.[64]

Such instances of establishing and agitating for and against developments by both the government and trade unions, with the effectiveness of the health sector in mind, are indeed encouraging steps in achieving effective enjoyment of the right to health.

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62 'Court tells AG to find reason for delay in draft legislation', *Daily Mirror*, 12 September 2009

63 'Social determinants of Health', *Daily Mirror*, 25 July, 2009

64 'People's Movement for the Rights of Patients', *The Sunday Leader,* 30 August 2009.

8.4 Other Issues in the Health Sector

Several other events during the year also present implications relating to the right to health. The right to health of residents in the North and East was thus infringed upon, due to the inability of concerned parties to arrive at a speedy consensus regarding sending medical personnel to the area. [65] There was also concern expressed regarding the unavailability of a particular vaccine in government hospitals,[66] and the wide use of a dangerous illegal abortion pill in Sri Lanka.[67] Prompt investigation should be conducted into such allegations, in order to ensure that those responsible are held accountable for their actions and such activity infringing upon the public's right to health is ended.

The availability of free health care provided by the state in Sri Lanka is in itself an extremely important positive step in ensuring the right to health of all Sri Lankans. However, there is undeniably much to be desired in the overall quality of health care - arguably to the extent that the collective right to health itself is violated. Addressing the above areas of concern will contribute greatly towards improving this situation. In addition to this, it is also important to give serious consideration to whether the existing health care system itself requires change. In 2006 the People's Movement for the Rights of Patients presented a health care model centred around a public insurance model funded by a combination of taxation and a mandated social security system that is income based. This will integrate the public and private health sectors and provide a stable funding base to extend the benefits of free, point of delivery health services to the entire population. The economic burden of the health system will be collectively shared according to the ability of citizens, ensuring universal health coverage.[68]

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65 'New Doctors should serve North and East', *Island*, February 5, 2008.

66 In February, the GMOA expressed concern over the potential health consequences of the Japanese Encephalitis vaccine being unavailable in government hospitals for the second and third doses. This could badly affect poorer sections of the public that could not afford to access private hospitals for treatment. The health ministry however, stated that the disease was uncommon in Sri Lanka, so the vaccine was unnecessary. The GMOA countered this by stating that it was included under the National Immunisation Programme. See 'GMOA concerned over lack of vaccine, ministry cares not', *The Island*, February 14, 2008

67 'Deadly Drugs: Two illegal abortion pills used widely in Sri Lanka', *Sunday Island*, April 6, 2008

68 'National health insurance for all Lankans' *Daily Mirror*, 18 July 2009.

9. Internally Displaced Persons[69]

Article 20 of Maastricht Guidelines recognises that as in the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. It also recognises that certain groups suffer disproportionate harm in this respect, and specifically refers to internally displaced persons as an example of such a group.

In 1998, the Committee recognised that the conflict has resulted in large scale internal displacement of people, hindered government efforts to provide essential services in the affected areas and diverted resources from social and development objectives. The Committee expressed concern for those displaced by the conflict and lack basic sanitation, education, food, clothing and health care. Issues of a similar nature arose again with the resumption of military hostilities following the ending of the Ceasefire Agreement in early 2008.[70]

The Guiding Principles on Internal Displacement[71] although not directly enforceable, reflect Sri Lanka's obligations under international Human Rights law and International Humanitarian Law. The Guiding Principles apply equally to state and non state actors such as the LTTE and the TMVP. The primary duty and responsibility to provide protection to IDPs, however, lies with the national authorities, and the IDPs have the right to request and receive such protection and assistance from the Government (Guiding Principle 3). In instances where the state does not have the capacity to do so because it lacks the means to do so, it has an obligation to seek the assistance of others, particularly international organisations; the Guiding Principles also state that such support shall be considered in good faith and not as interference in a state's internal affairs. Where the state does not have the capacity to do so because it does not have *de facto* control over parts of the territory, without prejudice to their legal status,

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69 Renuka Senanayake, 'Internally Displaced Persons: Some Key Human Rights Issues' pp 19 - 47 *Sri Lanka: State of Human Rights 2003,*Colombo: Law & Society Trust.

70 Human Rights Watch, January 2009 country summary, Sri Lanka, URL

71 E/CN.4/1998/53/Add.2.

those who do have *de facto* control are obliged to respect the rights of IDPs and secure their protection.

According to the Asian Human Right Commission (AHRC) reports of the year 2008, over 80% of the population of the Vanni was displaced.

Throughout Sri Lanka's years of conflict, IDPs have continually faced problems of inadequate assistance, prolonged delays, arbitrary acts and rampant corruption in the distribution of assistance. According to reports by the AHRC of the year 2008, the resources of food available to these IDPs were inadequate, and the supply of these food rations was too slow.[72] The AHRC reported that the distribution of food fulfilled the minimal requirement of preventing starvation, but that the provision of three square meals a day was impossible. Malnutrition and undernourishment was prevalent among the internally displaced. Rapidly shifting frontlines during the conflict resulted in rapid displacement. This caused delays in administrative procedures such as registering the displaced that they may be entitled to dry rations etc.

According to the AHRC reporting on the situation in the year 2008, the situation of the IDPs was worsened by the recalling of humanitarian agencies from the Vanni. The AHRC reported that these agencies provided shelter materials, basic medicine, sanitary facilities and utensils etc. to the IDPs and that they were the main supplier of clean and safe drinking water to the IDPs. The AHRC also reported these agencies as being an important provider of transport facilities to families fleeing their homes. This was an especially important function in light of the astronomical costs of transport in the area.[73]

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[72] http://material.ahrchk.net/hrreport/2008/AHRC-SPR-017-2008-SriLanka_AHRR2008.pdf. See also 'Life in the North and East' – Extract from Special No. 31 dated October 28, 2008 issued by the University Teachers for Human Rights, Jaffna.

[73] http://material.ahrchk.net/hrreport/2008/AHRC-SPR-017-2008-SriLanka_AHRR2008.pdf. See also 'Civilians of Wanni are wretched of Lankan earth, D.B.S. Jeyaraj, *Daily Mirror*, October 4, 2008.

The Report of the Representative of the Secretary General on the Human Rights of the Internally Displaced Persons (2007) highlighted the importance of documentation for IDPs as it is often instrumental in ensuring their access to public services, entitlement to humanitarian assistance etc.

A serious concern during the latter stages of the conflict was the civilians being held hostage by the LTTE in the areas it continued to control.[74] The LTTE forces resorted to using them as human shields,[75] killing those attempting to flee from LTTE controlled areas.[76]

Following the cessation of military operation, large-scale returns of IDPs began in the final three months of 2009, in particular of the approximately 280,000 more recently displaced persons who had been held in IDP camps since the end of the war in May. Of that group, approximately 155,000 had been returned to their home districts by the end of the year. Many of them were not able to return to their actual homes due to significant damage from the war or due to uncleared land mines. An additional 108,000 remained mostly in the government-run Menik Farm IDP camps near Vavuniya by year's end. The Menik Farm camps had originally held approximately 250,000 IDPs, without freedom of movement, from the end of the war in May 2009 until late October. This restriction on the IDPs right to freedom of movement necessarily impacted adversely on their certain socio economic rights such as the right to housing. The IDPs remaining in Menik Farm were unable to enjoy their right to the freedom of movement until December 2009, when a system of temporary exit passes was implemented for those who had not yet been returned to their districts of origin and remained in Menik Farm. Some observers stated that this exit pass system still did not qualify as freedom of movement.[77]

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74 'Mahanayakes urge LTTE: Let civilians go' *Daily News*, 3 February 2009; 'India asks LTTE to release civilians, offers to evacuate them', *The Island*, 19 Feb 2009

75 'Tales of horror from 'human shield' victims', *Sunday Times*, 15 Feb 200

76 'Thousands come to Visvamadu', *Daily News* 9 Feb 2009; 'Tigers kill 19 more civilians, injure 75,' *Daily News*, 11 Feb 2009, 'Civilians fleeing for safety shot at,' *Virakesari,* 11 Feb 2009

77 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*; *2009 Country Reports on Human Rights Practices* - March 11, 2010

The government-run Menik Farm IDP camp provided basic assistance to IDPs, along with a number of other much smaller camps scattered throughout the north and east of the country. The government did not allow open access to Menik Farm,[78] although access for UN agencies and some NGOs improved as the year progressed. During the months of detention at Menik Farm and other smaller camps, international observers and local legal experts questioned the legality of this long-term detaining of IDPs under the law, including the emergency regulations and the PTA. These laws require that any detainee be specifically named and detained pending further investigations, and informed of the reason for the detention.[79]

In 2009 the government accepted assistance from NGOs and international actors for the IDP camps but management of the camps and control of assistance was under the military rather than civilian authorities. Food, water, and medical care were all insufficient in the first several weeks after the end of the war, but by July the situation had stabilized and observers reported that basic needs were being met.[80]

In June 2009, the military withdrew from inside the camps but continued to provide security around the barbed wire-enclosed perimeter. There were allegations of crimes and sexual assaults inside the camps, both by outside persons and by other IDPs, but access was not allowed to independent observers to evaluate these reports or to determine if there was significant variance in the number of such crimes over the level expected for a non-refugee population of similar size.[81]

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78 'Outsiders and organisations not allowed to enter Vavuniya IDP camp,' *Daily News*, May 1st 2009

79 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*; *2009 Country Reports on Human Rights Practices* - March 11, 2010

80 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*; *2009 Country Reports on Human Rights Practices* - March 11, 2010

81 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*; *2009 Country Reports on Human Rights Practices* - March 11, 2010

The government released IDPs arbitrarily and did not effectively coordinate with local or international aid agencies who were asked to provide assistance on short notice.[82] The government failed to coordinate with military personnel in the IDPs' home locations. In September, several small groups of IDPs were released from Menik Farm, but were detained for several weeks in closed "transit" camps until the local military officials had re-screened them.[83]

The government cooperated with the UNHCR and other humanitarian organizations in assisting IDPs, however, it ended access for ICRC's protection work in IDP camps in July 2009, requesting that a new, post-war operating mandate be negotiated before such work could be resumed. By the year's end this negotiation was not yet complete, leaving the ICRC unable to provide protection support in the IDP camps.[84]

The plight of those displaced - not merely during recent hostilities – but also in earlier stages of the conflict should not be forgotten. In his report in 2007, the Representative expressed concern as to whether IDPs were entitled to restitution or compensation for their property, regardless of whether they chose to return, integrate locally or relocate. The Representative stated that many IDPs in the East had no information about when they might reclaim their homes or receive compensation. He also stated that to his knowledge, no one in the North and East had received compensation for loss of their land or home in a High Security Zone (HSZ). Among the long-term displaced were Muslims evicted from Jaffna in 1990 by the LTTE. In 2009 the government announced they would be allowed to return to Jaffna. A small number had reportedly moved back by the end of the year, but many others were either unaware yet of the change in policy, or had younger family members who felt more at home in Puttalam. The government had not permitted other IDPs,

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82 'Releasing IDPs: Lack of coordination prevails,' *Daily Mirror*, October 15 2009

83 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*; *2009 Country Reports on Human Rights Practices* - March 11, 2010

84 US Dept. of State , Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka*, *2009 Country Reports on Human Rights Practices*, March 11, 2010

primarily Tamils, to return home because their places of origins were declared HSZs, despite announcements during the year that these HSZs would soon be reduced or eliminated.[85]

As highlighted in The Report of the Representative of the Secretary General on the Human Rights of the Internally Displaced Persons (2007), it is also important that the government makes arrangements to restore livelihoods and provide training and assistance to develop income-generating activities for the large portion of displaced whose displacement also resulted in loss of their livelihood. Particular attention should be paid to developing opportunities for the most vulnerable, especially female headed households. In this, support should be extended from both the non-governmental and private sectors and the international community.

10. Education

The Committee noted that in spite of the relatively low per capita income, Sri Lanka has achieved progress in providing essential social services including free and compulsory education for all persons up to the age of 16.

Despite this however, human rights reports of subsequent years have documented several inadequacies in relation to the quality of, and the access to education[86] which infringe on the effective realisation of the right to education. In 2009, for example, it was reported that 50% of children in Colombo are not sent to primary schools at all.[87] Further, in 2008 access to education for more than 250,000 primary school age children was seriously disrupted and the increase in displacements further

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85 US Dept. of State - Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Sri Lanka; 2009 Country Reports on Human Rights Practices,* March 11, 2010

86 For example, State of human rights 2006, pp.337-8 reported the quality and access to education for the year 2005 to be unsatisfactory.

87 'Colombo Students' rights usurped?', *Daily Mirror*, 14th December 2009

aggravated this situation.[88] The year 2008 also saw a shortage in text books and teachers' instruction manuals.[89] The failure of large numbers of children to gain admission to grade one at the beginning of the year has also been an enduring problem.[90]

A major inadequacy is the lack of legal recognition of the right to education. The judiciary has, however, made some attempt to ensure the realisation of this right through the means of other constitutionally guaranteed fundamental rights. The Supreme Court has sometimes upheld the claim of parents that their right to equality is violated, when their children are denied state schools. *Haputhantirige v. Karunawathie*[91], for example, was a case responding to the crisis relating to Grade I admissions. Here, the Supreme Court declared an applicable circular by the Ministry of Education to be inconsistent with the fundamental rights chapter of the Constitution and ordered it to be set aside. The Court also ordered the National Education Commission to develop a national policy for school admissions and eventually finalized a draft policy. In this case the Court observed that the guidelines issued by it are a just and equitable arrangement furthering the fundamental right to equal protection of the law (Article 12(2)). It has even been stated that it is arguable that the constitutional basis of this judgement was not limited to the right to equality, unlike some other cases,[92] especially when considering the fact that the Court refers to the directive principles of state policy as well (Article 27(1)(h)).[93]

The creation of guidelines for admission following this Court decision was not, however, without controversy. Allegations were levelled against

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88 'UNICEF Report reveals: Education of 250,000 children affected by armed conflict', *Sunday Leader*, 23rd November 2008

89 'Lambs to the slaughter in Education Department mess: Shortage of texts for O/L examination', *The Sunday Times*, 27 May 2008.

90 'Education Ministry to seek Supreme Court intervention on Grade I admission circular', *The Island*, 16 January 2008

91 SC (FR) Application No. 10/2007 SC Minutes 30.07.07

92 *Premalatha v. De Silva* SC (FR) Application No. 344/2002, SC Minutes 25.11.02

93 Dinesha Samararatne, 'Economic and Social Rights in an 'activist' Sri Lankan Supreme Court', *LST Review*, Vol 19 Issue 254, Dec 08, pp 12-25

the Education Department for failing to consult teachers and other professionals in the education sector before finalizing the method of admission of children into Grade 1 classes in 2009.[94] Such steps are indeed important to ensure that methods prescribed are realistically effective. Further, the guidelines set by the Ministry of Education with the concurrence of the National Education Commission reportedly differed from the guidelines set by the Supreme Court in 2007 regarding the abolition of the quota system which was reactivated under the new guidelines. According to media reports, interested parties ensured that, contrary to the Supreme Court guidelines, proximity was a factor under the new guidelines.[95] There were further allegations of political interference in the selection process.[96]

Efforts to reduce corruption surrounding school admissions continued in 2009, when it was reported that the concept of National Schools was to disappear with the introduction of the National Education Act under which these schools would be categorised simply as primary and secondary schools. The change was meant to lessen the competition to enter children into 'National' schools as they would be made 'secondary' schools and children would be admitted under an examination system. The ministry reportedly decided to scrap the outdated Education Ordinance No. 31 of 1939. A National Commission was appointed to help formulate the New Act. It was hoped that the proposed Act would be presented to Parliament within 3 months of the report in January. Reportedly, the Commission had made a similar proposal 2 years prior to the report, but the Ministry of Education did not present it to the Supreme Court during the hearings on Grade 1 admissions due to 'pressure from certain quarters that were encouraging corruption in the legal system.[97]

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94 'Controversy over Grade I admissions' *The Island*, 21 May 2008

95 'Ministry of Education on collision course?', *The Sunday Times*, 18 May, 2008; 'Ministry of Education instructions relating to admission of children to Grade one in all government schools in year 2009' , *The Island*, 29 May 2008.

96 'Schools flout Supreme Court directive on Grade I admissions: Politicians interfere in selection process', *The Island*, 8 February 2008.

97 'Level admissions field for all schools', *The Sunday Times*, 18 January, 2009

Another development regarding school admissions was the scrapping of the Grade Six 'special' quota. Thus, Alumni and present student connections are not to be considered in future admissions to schools. This was a response to complaints that students with higher marks at school exams were denied entry into schools over those with lower marks due to the 'special' quota. However, Grade 6 admission quotas for certain other special categories remain, including children of parliamentarians, armed service officers on transfer and expatriates working in Sri Lanka. Criticisms were made of this position, stating that if one category was dropped, then to be fair, so should all others.[98] This criticism is indeed justified and such quotas should only be retained if there is adequate justification for doing so. (Example: quotas for officers on transfer etc. might be a practical necessity as opposed to a mere position of favour)

11. The Right to Adequate Housing

The Committee noted with grave concern the continued acute shortages of adequate housing and construction materials for homes in need of repair.

The Committee noted with concern that the situation of demolitions and illegal settlements in Sri Lanka are uncertain. In light of this, a positive judicial development since the report is the case of *Heather Therese Mundy v. CEA and Others*[99], where the Court awarded compensation to evicted home owners for the violation of their right not to have been given adequate notice that their lands were going to be acquired. This order was based on the concept of the Public Trust Doctrine and also the fundamental right to Equality, guaranteed under Article 12 of the Constitution.

There were, however incidents following this infringing on the right to housing and the right to be free from forced evictions.

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98 'Grade Six Special quota scrapped: Alumni and present student connections will not be considered in future admissions to schools', *The Sunday Times*, 5 October, 2008

99 SC Appeal 58/03, SC minutes of 20.01.04

An event generating much public shock in the year 2008 was the order by the Ministry of Defence, prior to the South Asian Association for Regional Co-operation (SAARC) conference held in Sri Lanka, of the eviction of slum dwellers without providing alternative housing.[100] An affected party filed a fundamental rights application on the right to the equal protection of the law, as he had received no notice of the eviction. The Supreme Court stayed the eviction order till the matter was heard by Court.[101] The Supreme Court allowed an application by these residents requesting permission to meet the officials of the UDA in order to work out a settlement. The Court also directed that the *status quo* be maintained by directing the UDA not to demolish the illegal housing structures at Slave Island till then.[102] Although this was indeed a positive judicial response, this order was reportedly disregarded by the police and the UDA. There were also attempts to intimidate an attorney –at-law who had proceeded to the police station to serve the order and a municipal councillor who had also taken steps in this regard.[103] In 2009, it was reported that the residents who were evicted in this incident were relocated in temporary sheds and that the Urban Development Minister assured that they would be relocated to permanent houses which at the time were reportedly being constructed with hopes to complete them by the end of the year.[104]

In June 2007, surprise raids were conducted by police in targeted areas in Colombo and Tamil inhabitants ordered into buses taking them to Vavuniya or Trincomalee, from where they came.[105] In the fundamental rights application of *CPA v. Victor Perera*[106] the petitioners argued that the evictions violated the right to equality, equal protection of the law, freedom of movement and freedom to reside anywhere in Sri Lanka. Also forcible transfer of civilians is a crime against humanity under international

100 'Defence Ministry's eviction order send shock waves among the city', *Lanka News*, 14 July 2008

101 'SC stops demolition till July 27th, *The Island*, 19 July 2008

102 'UDA, residents urged to settle issue', *Daily News*, July 31, 2008

103 'A crime on our conscience', *Sunday Times*, July 27, 2008.

104 'Summit refugees hope for new houses soon', *Daily Mirror*, 20 Jul 2009

105 'Hundreds of Tamils dislodged from Colombo' *Daily Mirror*, 8 June 2007

106 SC (FR) Application No. 177/07, S.C.Minutes 05.05. 2008

law.[107] The Supreme Court made an interim order that evictees should be given freedom to determine where they wanted to live, that the police should not prevent them from coming back to Colombo and prohibited the police from similar actions in future. The government complied immediately.[108] The eviction order by the Defence Ministry was claimed to be in the interests of national security. The litigation concluded with the undertaking by the government to refrain from similar actions in the future.

The evictions cases recognise the right to be free from eviction and the right to equality, but are not so clear regarding the right to housing as a right in itself. In the case involving the Tamil lodgers, the Court terminated the hearing without pronouncing on the infringement on rights that the application involved, on the basis that substantial relief was given. In the case involving the slum dwellers, the Court terminated the application after the interim order on the basis that government proposals for alternative housing were satisfactory.[109]

Although the response of the Court is encouraging, given the lack of explicit legal recognition of the right to housing, it is clear that the need for such recognition is present.

12. Conclusion

Constitutional reforms before independence led to a comprehensive social welfare policy in education, food and healthcare. Thanks to this, even today, primary, secondary and tertiary education is free. Thus, social indicators are generally on par with developed nations - literacy rate is 92.5%; net enrolment in primary schools is 97.5%. However, as the discussion in this chapter clearly reflects, the effective realisation of these rights leaves much to be desired. As the discussion in the chapter reflects, in some cases this

107 'SC stops eviction of Tamils from Colombo', *Daily Mirror*, 9 June 2007

108 'Dislodged Tamils Back to Colombo', *Daily Mirror*, 9 June 2007

109 Dinesha Samararatne, 'Economic and social rights in an 'activist' Sri Lankan Supreme Court', *LST Review*, Vol 19 Issue 254, Dec 08, pp 12-25

situation may be addressed by institutional or executive changes. However, the primary gap is clearly the legal non-enforceability of socio economic rights. A major argument against this is the resource and policy decisions the implementation of economic and social rights involves. However, the cases show the possibility of the Court applying the resource and policy decisions economic and social rights involves. The opposition based on this argument is further unjustified because, as Samararatne argues, the realisation of civil and political rights may also involve such resource applications and policy decisions. [110]This is clearly reflected in the case of *CWC v. Minister of Defence.*[111] Here, the Court found that the right to be free from arbitrary arrests and detention for several people were violated. The Court went beyond the traditional remedy of ordering the payment of compensation. The order included a census of detainees; setting up a commission to entertain complaints regarding future arrests and the setting up of a new court.

It is thus hoped that the awakening consciousness of socio economic rights obligations will eventually lead to a less traditionalist approach in the judicial interpretation of the Sri Lankan Constitution as far as these rights are concerned. It is encouraging to note that in certain areas – health, education, housing etc. – that judicial thinking regarding the realisation of these rights has been relatively progressive.

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110 Dinesha Samararatne, Economic and social rights in an 'activist' Sri Lankan Supreme Court', *LST Review*, Vol. 19 Issue 254, Dec 08, pp 12-25

111 SC (FR) Application No. 428/07, SC Minutes 22.09.08

IX

TRADE AND HUMAN RIGHTS: EU GSP+ EXTENSION

Supipi Jayawardena[1]

1. Introduction

GSP+ (Generalised System of Preferences) has been one of the important tag-lines in the media and in the vocabulary of most of the Sri Lankan politicians and even that of the International Community in recent years. GSP+ is recognized as a unilateral preferential trade scheme of the European Union (EU) that allows businesses in Sri Lanka to export more than 7,200 items to the EU duty free. Since gaining eligibility in mid-2005, the GSP+ has helped Sri Lankan exports become more price competitive compared with other exporting countries with lower cost bases. In the wake of its first cycle from 2005 to 2008, there were some Human Rights related concerns raised by the EU and in the process, Sri Lanka lost the benefit with effect from 15th August 2010. However, this is an attempt to analyse and understand the human rights issues raised by the EU with regard to the GSP+ trade preference since 2008 and as to how the Sri Lankan State has responded to those issues and the level of impact on the country.

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This paper will first include some background information of the GSP scheme and the GSP+ scheme. Thereafter it will briefly focus on the GSP + scheme from the period 2005 – 2008.

The next part of the paper presents an introductory note on the GSP+ and Sri Lanka. It sets out the core objectives of granting such a benefit to the country and how far it has achieved those objectives during the period of benefit.

This analysis will gradually lead to focus on the investigation of the EU, on the implementation of some core human rights Conventions and other related issues, and as to how the Government of Sri Lanka responded to such issues. The discussion will lead up to the point of the loss of GSP+ and the government's reactions to it. The conclusion will mainly focus on an analysis of the whole situation from the point of view of the author.

2. GSP

The European Community was the first to implement its own GSP in 1971. From the very beginning, GSP has been an autonomous trade policy instrument, directed towards development.

The European Union's (EU) Generalised System of Preferences is a trade arrangement that provides preferential access, in the form of reduced tariff for goods when entering the EU market. There are 176 countries and territories which enjoy this preference. It is generally applied for a period of three years at a time. Most importantly, GSP plays a specific role in encouraging the industrialization of the developing and least developed countries, along with the diversification of their exports and the consequent growth of income.

The contemporary EU GSP presents three different regimes[2]:

[2] ***Generalised System of Preferences,*** European Commission at http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/

The standard GSP, which provides preferences to 176 developing countries and territories on over 6200 tariff lines.

The special incentive arrangement for sustainable development and good governance, known as GSP+ which offers additional tariff reductions to support vulnerable developing countries in their ratification and implementation of international conventions in these areas

The Everything But Arms (EBA) arrangement, which provides Duty-Free, Quota-Free access for all products for 49 Least Developed Countries (LDCs)

The focus for the purpose of this paper is the trade preference that was granted to Sri Lanka (EU GSP+).

2.1 GSP+: A Deal for Vulnerable Countries

It is recognized that GSP+ is an additional preference for vulnerable countries, which ratify and implement international standards in the fields of human rights, core labour standards, sustainable development and good governance.

The EU GSP regulations define vulnerability of a state, as one that is not classified by the World Bank as a high-income country and where five largest sections of its GSP-covered imports are more than 75% of its total GSP covered imports, and where its GSP-covered imports are less than 1% of the total GSP covered imports.

Secondly, it emphasizes on the ratification and the implementation of the 16 core human and labour rights UN/ILO conventions and at least 7 out of 11 to be on the protection of the environment and good governance conventions[3].

[3] The requirement criteria set out by the EU in mid 2005.

Fourteen states and territories were eligible for GSP+ trade preference under this scheme from 1st of January 2006 to 31st December 2008. They were Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Panama, Peru, Sri Lanka[4] & Venezuela.

2.2 GSP Scheme: 2005 to 2008

The GSP scheme operates within an overall cycle of ten years. The present cycle began in 2005 and will continue till 2015. It was established by the European Commission via a communiqué on the 7th June 2004.[5] However, the first GSP scheme of the present cycle, entered into force only on the 1st of January 2006 and expired on the 31st December 2008.

According to Council Regulation EEC No: 2454/93[6] products are divided into two categories as sensitive products and non-sensitive products. Sensitivity is determined in relation to the effect that imports into the community could have on community products. Common Customs Tariff specific and *ad valorem* duties are fixed for such products. They are however, suspended where the rate of an *ad valorem* duty reduced in accordance with the provisions of the GSP is 1% or less and the rate of specific duty is EUR 2 or less[7].

This paper will focus mainly on the GSP+ scheme for the period 2005-2008 as that was the one Sri Lanka was enjoying. Under the special incentive arrangement for sustainable development and good governance, Common Customs Tariff *ad valorem* duties on products listed in the Annexure II of the Council Regulation are in principle suspended. Moreover, the specific

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4 Sri Lanka's eligibility was fast tracked, to take effect from July 2005, in response to the Tsunami crisis

5 European Commission (COM(2004) *461- Official Journal* C 242 of 29.9.2004

6 *Provisions implementing the community customs code, European Commission* at http://europa.eu/legislation_summaries/customs/l11010b_en.htm

7 *General System of Preferences 2006 – 2008, European Commission* at http://europa.eu/legislation_summaries/external_trade/r11020_en.htm

duties are also suspended, unless there was also an *ad valorem* duty. In fact, specific duties on certain products i.e. chewing gum are limited to 16% of the customs value. This new arrangement entered into force, exceptionally, on 1st July 2005.

3. GSP+ and Sri Lanka: An Introduction

The European Commission granted the GSP+ status to Sri Lanka in July 2005. This is a unilateral trade concession granted to developing countries. Sri Lanka and Mongolia are the only countries in Asia that enjoyed this special status with the EU.[8] This facility enabled Sri Lanka to export around 7200 product categories duty-free to the EU.

The main benefit of the GSP+ scheme is that it encourages more value-addition in Sri Lanka and therefore encourages backward integration, which will result in the setting-up of new industries, thus creating substantial employment in the country. The granting of duty-free access to so many products, have also encouraged the Sri Lankan industries to diversify its exports to the EU. Given this context, taking a more technical approach, this paper will next analyse whether the expected objectives of the GSP+ trade preference have actually been achieved by Sri Lanka during its first phase from July 2005 to December 2008.

4. GSP+ in Sri Lanka: Has It Achieved the Core Objectives During the First Phase?

The GSP+ trade preference of the European Union was granted to Sri Lanka in July 2005, and was implemented over a period of three and a half years[9]. Hence, before analysing the next cycle of the trade preference, it is important to understand whether Sri Lanka as a State has been able to attain the three core objectives of the GSP+. The following analysis will indeed produce an answer to that question.

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8 During the 2005- 2008 cycle.

9 The 1st cycle from July 2005 to December 2008.

The three core objectives of the GSP+ as per the time of granting it in July 2005 were:

1) Poverty reduction
2) Promotion of sustainable development
3) Good governance in beneficiary countries.

The proceeding discussion will be mainly in two segments. The first will involve the discussion on the first two core objectives and whether they were achieved during the first cycle of the GSP+ benefit. The second will mainly focus on the aspect of good governance in Sri Lanka and whether we have ratified and implemented the identified 27 International Conventions.

Objectives 1 & 2: Poverty reduction and sustainable development

Sri Lanka, a middle-income GSP+ beneficiary country is eligible to export 7200 products to the EU at Zero duty.[10] However, we only export around eight items of considerable value to the local economy, of which around 50% are apparel related. In this context, it is important to also have an understanding on what is meant by sustainable development at this stage of the discussion.

Sustainable development is defined in line with this notion as an enduring contribution to the economic and social development of the country at the macro level. It also envisages sustained enhancement of the economic and social wellbeing of employees and their households and indirect beneficiaries of the particular industry; i.e. apparel industry[11]. As the apparel industry is the most significant in proportion, it will be taken as a case study in analysing whether GSP+ has actually helped Sri Lanka in poverty reduction and sustainable development.

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10 Under the 2005-2008 cycle

11 Muthukrishna Sarvananthan and H.M.P.Sanjeewanie, "*Has GSP+* contributed to poverty reduction and fostered sustainable development in Sri Lanka?" *In GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

This could be further analysed with the use of statistics for the decade (2001-2009) in comparison with total country exports together with the apparel exports as given below.

Year	Apparel Exports (Rs Mn)	Total Country Exports (Rs Mn)
2001	208,624	430,372
2002	214,895	449,850
2003	231,652	495,426
2004	268,573	583,967
2005	276,144	638,276
2006	303,263	716,579
2007	347,670	845,683
2008	355,995	878,499
2009	358,374	813,911

Exports of the Garment Sector together with the total country exports[12]

The above table explains the economic development the country has achieved, by presenting the increase in the total exports with that of apparels over the first decade of the millennium, except for the last year where the global financial crisis would have had an impact. Since the beginning of the decade, exports have almost doubled. Exports in apparels have followed the same pattern.

To be more precise on the fact whether this economic development is mainly as a result of the GSP+ trade preference with the EU, the following table on apparel exports by destination would be helpful.

[12] Statistical Appendix Table 27 Table 63 (Exports), *Annual Report 2009*, Central Bank of Sri Lanka.

Year	Total (Mn)	EU	US	Other
2005	276,144	99,870	164,126	12,148
2006	303,263	120.019	169,718	13,525
2007	347,670	157,671	173,658	16,341
2008	355,995	173,753	160,928	21,314
2009	358,374	187,226	147,667	23,481

Apparel Exports by Destination[13]

The above table indicates the increase in Sri Lanka's exports to the EU market during the period of the GSP+ first cycle and has been the largest apparel export value generated by them as well. Therefore, it is possible that the above highlighted development in the exports of the country is in consequence of the trade preference from the European Union. The increase took place despite the global financial crisis. A 15 per cent drop in exports to the US during the 3 year period from 2007 to 2009 is visible.

The proceeding discussion indeed clearly explains that the country has achieved one of the goals of GSP+ in terms of economic development. In fact, it is further to discuss whether this 'development' has contributed to its sustainable nature via sustained enhancements of the economic and social well-being of employees and whether it has made any contribution to poverty reduction in the country. In order to research this notion, we will be using the results of a survey of apparel producing factories jointly undertaken by the Department of Labour and Oxfam (Australia) in 2006. The unpublished final report (dated January 2008) was quoted in a publication[14] that has been used here. As there are no similar studies conducted after this survey, we consider it as the best source available at the moment.

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13 Statistical Appendix Table 69 (Country Classification of Garment Exports), *Annual Report 2009*, Central Bank of Sri Lanka.

14 Muthukrishna Sarvananthan and H.M.P.Sanjeewanie, "Has GSP+ contributed to poverty reduction and fostered sustainable development in Sri Lanka**?"** In *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

The survey had covered altogether five hundred and thirty one factories, out of which;

Small	125	23.5%
Medium	222	42%
Large	122	23%
Extra Large	35	6.5%
Unclassified	27	5%

Although 531 factories were surveyed, only 504 were included in the data analysis as 27 factories that were classified in size were discarded. However, it is also important to note that all 504 factories surveyed had not actually answered all the questions in the comprehensive questionnaire, mainly as a result of the inapplicability of certain questions or due to other reasons.

Altogether the survey in apparel factories had covered 177,339 employees and the breakdown is as follows:

Small firms	8,095	4.5%
Medium sized firms	40,042	22.5%
Large firms	73,700	41.5%
Extra-large firms	55,502	31.5%

Out of the total employees mentioned above, 67% (119,299) had been females while 33% of them (58,040) had been males. Most significantly, 64% of total employees had been in the age group of 19-29 years while a similar proportion had been unmarried. Further, the survey profile indicates 37% of total employees were employed for less than one year and 45% of them were employed for a period ranging from 1-5 years.[15] Moreover, the final segment of statistics also indicates that the labour turnover among these employees is relatively high.

[15] *Ibid.*

With an understanding on the basic profile of the employees, the next phase of this paper will analyse the remuneration and cost of production, together with the factors relating to health, nutrition, dignity of labour, living and working conditions in order to understand whether the economic development made during the period has trickled down to the society and contributed to the reduction of poverty levels in the country.

In terms of the basic salaries of employees in the surveyed factories in 2006, the findings indicate the range of basic salaries of different salaries of employees was generally lower than the minimum wage set by the Wages Board of the garment manufacturing trade.

Category of Employees	Range of Salaries in 2006 (LKR per month)	Category of Employees	Range of Minimum Wage in 2006 (LKR per month)
Checkers Grade III	2,848 – 3,912	Grade I (a)	3,480 – 3,620
Cutters Grade II	3,250 – 5,550	Grade I (b)	3,450 – 3,570
Helpers Grade III	2,560 – 4,340	Grade II	3,335 – 3,435
Ironers Grade III	2,563 – 4,200	Grade III	3,306 – 3,386
Machine Operators Grade III	3,100 – 4,950	Grade IV	3,250 – 3,310
Pattern Makers Grade I (a)	850 – 3,650	Grade V	2,645
Technicians	2,452 – 3,800		
Packers Grade IV	2,130 – 2,980		
Line Leaders Grade I (b)	2,543 – 3,500		
Supervisors Grade I (b)	3,593 – 6,450		
Others	345 – 1,564		

Basic Salaries in the Apparel Industry by Category of Employee in 2006[16]

[16] *Ibid*, table 8, p. 33.

However, the above table indicates that the salaries of cutters, machine operators and supervisors were an exception. The survey also notes not all firms were paying lower than the minimum wages set by the Wages Board. On the other hand, the highest wage paid to checkers in the factories is higher than the minimum wage set by the Wages Board.

In order to examine the notion of this section, it is prudent to compare the lowest statutory minimum wage and the poverty line in Sri Lanka in 2006. The national poverty line in the country during this year had been at LKR 2,200 per person per month according to the Department of Census and Statistics.

	2002	2003	2004	2005	2006	2007
Lowest statutory minimum wage (LKR)	2300	2300	2645	2645	2645	2645
Official poverty line (LKR)	1423				2200	2500
Average lowest wage (LKR)					893	
Growth in lowest statutory minimum wage (%)		15.0			31.81	
Growth in Apparel Exports to the EU (%)		41.52			43.45	

Growth in lowest statutory minimum wage in the apparel sector vis-à-vis growth in Apparel Export Values to the EU 2002-2007[17]

Therefore, it is already proven that wages received by many workers in the apparel factories were only marginally higher than the threshold wages by

[17] *Ibid*, table 9, p. 33.

the poor in that year The actual situation in terms of take-home pay of many apparel industry workers according to the survey is higher than the basic salaries noted above, mainly because of the involuntary overtime work they do[18]. Almost 42% of the respondents work 10 hour shifts (nearly the same proportion by females and males), and another 22% work 12 hour shifts (22% of females and 21% of males). Further, large (28% do 12 hour shifts and 36% do 10 hour shifts) and medium (18% do 12 hour shifts and 51% do 10 hour shifts) sized factory workers do longer hours than small (12% do 12 hour shifts and 27% do 10 hour shifts) factory workers. Although 54% of the workers have indicated that they do overtime in order to earn more money (51% of females and 59% of males), 35% of them have indicated that overtime was not an option, but compulsory (37% of females and 30% males).[19] Therefore, it is clear that a higher proportion of female workers are forced to work overtime.

The compulsory overtime work has also resulted in occupational health hazards to female workers. Women workers who do night shift overtime work were found to have greater prevalence of anaemia with low mean haemoglobin concentration.[20]

With this understanding, this paper will further analyse the growth in the lowest statutory wage in the apparel sector in comparison to the apparel export value to the European Union during 2002-2007. It has to be noted, that while the lowest statutory wage in 2006 was LKR 2,645 the average wage in the surveyed garment factories was only LKR 893 according to the table given above. Hence, there is a clear cut discrepancy in the lowest statutory minimum wage and the average lowest wage of the survey respondents.

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18 Pradeep Peiris, *Opinion Survey of Garment Workers*, August, (2008), Colombo: Friedrich Ebert Stiftung.

19 *Ibid.*

20 June- 2007, Labour Gazette (Official publication of the Department of Labour of Sri Lanka) Dr.N. C.Amerasinghe (National Institute for Occupational Safety and Health), Nutritional Status of Female Garment Factory Workers in the Katunayake Free Trade Zone, Sri Lanka.

Further, the growth in the lowest statutory minimum wage during the period 2002-2004 and 2005-2007 were lower than the growth in the value of apparel exports to the EU. During the period of 2002-2004, the lowest statutory minimum wage was increased only by 15% in comparison to 41.5% increase in the value of apparel exports to the EU. Similarly, in the period of 2005-2007 the lowest statutory minimum wage has increased by 38% in comparison to the value of apparel exports to the EU which increased by 41%. At a glance one could argue that the rise in the lowest statutory minimum wage was very much higher during the GSP+ period.

However, the point that needs to be stressed here is that these higher growths in export earnings have been recorded in spite of a shrinking workforce.[21] It is a commonly accepted fact that consequent to the phasing out of the Multi-Fibre Arrangement in 2004, unit prices in the industry dipped sharply due to intense competition in the open market. Therefore, a steep growth in earnings inevitably relates to higher production volumes. The striking factor here is that these growth figures have been achieved with a shrinking workforce. It means that the workload of every worker has surged disproportionate to their growth in the levels of income.

Although the minimum wages of middle and lower level workers in the apparel industry remains low, managerial and executive level employee salaries were eternally handsome[22]. Given the notion of the above discussion, one may argue that the GSP+ has not contributed to any increase in the welfare of lower and middle level workers. The economic development gained via the drastic increase in the exports of the country has not trickled down to the grassroots, but has been enjoyed by a handful in the industry that is at managerial and executive levels. Therefore, one could argue that the GSP+ has neither contributed to the poverty reduction nor contributed to the sustainable development in Sri Lanka by

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21 Government and industry statistics generally indicate that compared to the year 2000, the directly employed workforce in the sector has shrunk by at least 50 per cent.

22 Muthukrishna Sarvananthan and H.M.P.Sanjeewanie, "Has GSP+ contributed to poverty reduction and fostered sustainable development in Sri Lanka?" In *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

improving the well-being of middle and lower level workers who comprise the overwhelming majority of the total apparel workforce.

It is widely perceived that workers in the apparel industries in most countries are exploited not only through low wages but also through poor working conditions. The lack of labour rights is a key factor contributing to this predicament. As a result, the apparel factories are also portrayed as 'sweatshops' at times[23]. Although apparel factories in some countries are accused of using child labour, those of Sri Lanka have no such record. In fact, they still could be considered as sweatshops given the low wages, poor working conditions and disregard of the rights of employees. [24] According to a 2008 survey conducted on garment factory workers almost 59 per cent of the respondents who participated in the survey have said that they get only 14 days of annual paid leave whilst only 8% of them said they get only 21 days of annual paid leave.[25]

The data presented in this part of the paper helps to examine whether Sri Lanka has been able to attain the expected objectives from the first and the second goals of GSP+ scheme during the first phase, draws the conclusion that the period has marked a significant development in terms of the exports to the EU. In fact, it is questionable whether it really contributed to poverty reduction or sustainable development either at micro or macro levels. Therefore, unfortunately it is very doubtful whether two of the triple objectives of the GSP+ trade preference to Sri Lanka have been attained during the period.

However, the proceeding discussion will next analyse whether the GSP+ has at least been able to attain the final objective of good governance.

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23 *Ibid.*

24 Anberiya Hanifa (2003) "Success stories in organizing women workers and Trade Union Rights in FTZs: Case Study of Sri Lanka" October, Colombo: ILO in *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

25 Pradeep Peiris ,*Opinion Survey of Garment Workers*, August, (2008), Colombo: Friedrich Ebert Stiftung.

Objective 03: Good Governance

The objective of good governance in terms of the GSP+ trade preference with the EU is based on the notion whether we have ratified and implemented the required 27 International Conventions. Therefore, one of the requirements to qualify for the GSP+ scheme of tariff relief is that Sri Lanka (the beneficiary country) is placed under a general obligation to ratify and fully implement the international conventions listed in Annexure III of the European Council Regulation (EC) No: 980/2005 of 27th July 2005, which set out the scheme of general tariff preferences.

As the controversies are mainly laid in terms of the ICCPR and the ILO conventions, this section of the paper will be based on a critical analysis on the implementation of those international legislation within Sri Lanka.

It should be noted that in the context of an escalating armed conflict since the year 2006, the legal and political climate relating to the protection and promotion of human rights commenced to decline in Sri Lanka and the international community was sensitive to that situation. Most importantly, the Supreme Court decision of *Singarasa v. Attorney General*[26] holding that whilst the accession of Sri Lanka to the ICCPR was legal, valid and bound the State at International Law, it created no additional rights as recognized in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation was found to be extremely controversial. The Supreme Court in that case further went on to hold that the accession to the First Optional Protocol to the ICCPR, which allows individuals to address complaints of violations of ICCPR rights to the Human Rights Committee, was invalid and unconstitutional.[27]

When this stand brought discredit to the Government of Sri Lanka in terms of re-qualifying for the GSP+ scheme in 2008, the government adopted

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26 S.C (Spl) LA No: 182/99; SCM 15th September 2006.

27 Rohan Edrisinha and Asanga Welikala, "GSP Plus and the ICCPR: A critical appraisal of the official position of Sri Lanka in respect of compliance requirements" in *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

several methods, in response. In addition to an intensified campaign of diplomatic lobbying, the specific legal measures the government adopted in order to meet the criticisms of the Singarasa judgment were two-fold.[28]

Firstly, it enacted a piece of legislation called International Covenant on Civil and Political Rights (ICCPR) Act, No: 56 of 2007 to give effect to the rights recognized by the ICCPR at domestic law that were not already recognized by the Constitution or by existing law.

Secondly, the Government engaged the consultative jurisdiction of the Supreme Court under Article 129(1)[29] of the Constitution and sought an Advisory Opinion from the Court as to the extent of compliance of the Sri Lankan Constitution and law with the rights contained in the ICCPR.

The most appropriate method of the full implementation of the ICCPR is through appropriate amendments to the Constitution and by providing comprehensive enabling statutory provisions through the ICCPR Act in order to make possible the rights enshrined in the ICCPR are exercisable. Unfortunately, this has not taken place within the context of Sri Lanka. These issues were raised by the European Union during the GSP review process. The Constitution of Sri Lanka and other local legislation provide provisions for the exercise of only a limited number of rights embedded in the ICCPR.

It is important to note that the Act contains only four main substantive rights, mainly in sections 2, 4, 5, and 6. They are; the right to be recognized as a person before the law, entitlements of alleged offenders to legal assistance, interpretation and safeguards against self-incrimination, certain rights of the child and rights of access to state benefits. The Act has much more to cover in terms of scope and is highly inadequate in meeting the necessary requirement.

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28 *ibid.*

29 Article 129, of the 1978 Constitution.

Moreover, although the Constitution recognizes the Sovereignty of the people, the ICCPR Act was not made available to the public for engagement during the drafting process. The legislation was of national interest, but passed without any public participation.

In March 2008, the President sought an advisory opinion from the Supreme Court on the following: [30]

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to civil and political rights in the International Covenant on Civil and Political Rights (ICCPR) of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitution process prevailing in Sri Lanka?

2. Whether the said rights recognized in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka?

The Supreme Court's advisory opinion had clearly recognized that the Sri Lankan legal system is consistent with the human rights standards protected by the ICCPR. In fact, the advisory opinion also contained an annexure, but this was never made public. However, the interventions made by the petitioners, Centre for Policy Alternatives, Rohan Edrisinha, Lal Wijenayake and the Legal Aid Commission in this regard were refused on the basis that they were based on hypotheses.[31]

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30 The Supreme Court's Advisory opinion, in GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka

31 Rohan Edrisinha and Asanka Welikala, "GSP plus and the ICCPR: A critical appraisal of the official position of Sri Lanka in respect of compliance requirement in *GSP+ and Sri Lanka: Economic Labour and Human Rights Issues* (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka

Hence, it is evident that, the Government would not initiate any constitutional amendments to give effect to the ICCPR within Sri Lanka, or recognise in law the right of citizens to access the UN Human Rights Committee in the light of the Supreme Court's declaration that the accession to the First Optional Protocol was unconstitutional. However, it is important to note that the fundamental rights chapter in the Constitution of 1978, the ICCPR Act of 2007, and the other statutory provisions cited in the Annexure to the ICCPR Advisory Opinion case, taken as a whole, fails to comply with the requirement of ratification and the full implementation of the ICCPR. This goes to prove the inconsistency of the local legal regime with the international requirement. The Supreme Court's reasoning in its Advisory Opinion was fundamentally flawed because it failed to realize that mere recognition of a right in a bill of rights or a law is inadequate. The textual formulation of the right, the limitations that may be imposed on such rights and the mechanisms to ensure that the scope and extent of the right cannot be limited unreasonably or disproportionately are key to assessing whether the rights are effectively protected and implemented. The Supreme Court's advisory opinion ideally represented a cursory and superficial review of the bill of rights and other laws and failed to subject the texts to the critical scrutiny that was required for a comprehensive evaluation of whether the Sri Lankan legal regime was compatible with the ICCPR.[32]

Taking this notion forward from the ICCPR, we will next analyse the benchmarks for Sri Lanka to achieve compliance with international legislation on core labour standards, with particular reference to the ILO conventions.

The findings of the ILO supervisory bodies over the years have provided a solid body of evidence pertaining to non-enforcement, lapses and violations of labour law in Sri Lanka. In order to mitigate the negative impact caused as a result, there are key recommendations made by the supervisory bodies of the ILO and they are analysed in brief, in the proceeding discussion.

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[32] *Ibid.*

As we are already aware, in the cases of *Singarasa v. Attorney General* (2006) and the *Joint Apparel Association Forum and Others v. Sri Lanka Ports Authority and Others* (2007), the Supreme Court of Sri Lanka had clearly stated that certain provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Conventions of the ILO are inconsistent with the Constitution of Sri Lanka. In response to a complaint to the ILO Governing Body Committee on Freedom of Association in September 2006 by Sri Lankan Trade Unions and two international Global Union Federations challenging the order of the Supreme Court of Sri Lanka overruling certain principles of ILO Conventions No. 87 and 98; they ruled that the unions were entitled to seek redress from an external body while their matter was pending before the court.[33]

In terms of the other statutory laws and practices, there are several gaps recognized in the areas on restrictions on the public sector, union certification procedures for the purpose of collective bargaining, anti-union discrimination, compulsory arbitration, and consistency with the ILO constitution and on the right to strike. To be more specific on these areas, the Trade Unions Ordinance of Sri Lanka imposes serious legal restrictions on public sector unions with regard to their right to federate and confederate. Section 21(1) (b) of the Trade Unions Ordinance provides that the Registrar is to refuse to register any trade union of peace officers or government staff officers unless the rules of the union contain a provision declaring that "the Union shall not be affiliated to or amalgamated or federated with any other trade union, whether of public officers or otherwise…" Similarly, Chapter XXXV of the Establishments Code too restricts public officials from joining Trade Unions by (a) prohibiting public officers from becoming members of any trade union which permits persons who are not public officers to be members and (b) prohibiting any person who is not a public officer being appointed to be a patron or office bearer or admitted to membership of any organization of officers, except as provided for under the Trade Union Ordinance.

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[33] Benchmarks for Sri Lanka to achieve compliance with international legislation on core labour standards (with reference to ILO Conventions No.87 and No.98) in GSP+ and Sri Lanka: Economic Labour and Human Rights Issues (October 2008), Friedrich Ebert Stiftung and Centre for Policy Alternatives, Sri Lanka.

Secondly, the union certification procedures for the purpose of collective bargaining were also highlighted as another area of criticism. Despite the Industrial Disputes (Amendment) Act, No. 56 of 1999 that provides recognition of unions for the purpose of collective bargaining upon the showing of a sufficient minimum representation at a workplace, the provision on introduction of a four week time period to conclude holding all union certification polls and giving effect to interconnected polling procedures remain unenforced. Moreover, on behalf of the Sri Lankan Trade Unions, various other international and global union bodies have repeatedly raised their concern on lowering the 40 per cent threshold for compulsory recognition of trade unions and enabling joint claims of unions for recognition for the purpose of collective bargaining.

Anti-union discrimination is another area of concern in Sri Lanka's statutory laws and practices. Victimization of union activists continues as a result of the inaction of labour enforcement authorities. Hence, the adoption of statutory measures to enable trade unions to have direct access to courts in order to have their complaints on unfair labour practices and anti-union discrimination examined by the judicial authorities, adoption of necessary changes to the Industrial Disputes Act, clearly specifying a fixed maximum period of time for the department of Labour to institute action before the Magistrate's Courts on complaints of unfair labour practices and anti-union discrimination, and increasing the fine for contraventions of provisions concerning this, to a degree that would result in creating a dissuasive character in the law are some of the important amendments that need to be introduced to Sri Lankan law to be in line with the ratified ILO conventions and principles.

According to Section 4(1) of the Industrial Disputes Act, the Minister may, if he or she is of the opinion that an industrial dispute is a minor dispute, refer it by an order in writing for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference. Moreover, under Section 4(2), the Minister may by an order in writing, refer any industrial dispute to an industrial court for settlement.

Hence, it is recommended to introduce an amendment to the Industrial Disputes Act to guarantee that the reference of labour disputes to compulsory arbitration is done only at the request of both parties to the dispute.

The restrictions on the right to strike within the law are also highly criticized in this context. Although Sri Lanka's labour law gives statutory recognition to the right to strike, its lack of proper implementation is of serious concern Local statutes are not consistent with the requirements of the ILO with regard to when a service can be declared as essential and the right to strike can be suspended. Sri Lanka's lack of political will to give effect to the recommendations of the ILO Governing Body Committee on Freedom of Association Case No.2515 (Sri Lanka), which pertains to this matter, is a serious concern.

The above analysis clearly articulates that during the period of July 2005 to December 2008, Sri Lanka as a State had not been able to achieve the core objectives of the GSP+. The initial phase of the analysis in this regard indicates how the economic benefits have actually not made a difference among the masses and how it had not trickled down to the community. In fact, it had been enjoyed by a few commercial giants. The second phase of the analysis highlights, how the legal/statutory provisions together with the court decisions and other acts have not been able to promote good governance within the country. Therefore, it is evident that Sri Lanka as a beneficiary State of GSP+ concession during the phase of three years from mid-2005 to end 2008 has not been able to achieve the key objectives as pledged at the time of the receipt of the tariff preference.

In the wake of 2008, the debate on the GSP+ trade concession was more specifically focused on the effective implementation of the three conventions in issue in Sri Lanka. They were:

1. International Covenant on Civil and Political Rights (ICCPR)

2. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

3. Convention on the Rights of the Child (CRC)

However, in its application for GSP+ in 2005, Sri Lanka stated that it had deposited instruments of ratification and effectively implemented all 16 Human Rights Conventions referred to in Article 9 and listed under Part A of Annexure III of the Regulation. The above key documents were also listed among the Conventions / Covenants ratified.

5. Government of Sri Lanka on Ratification and Effective Implementation of the Conventions

The Government of Sri Lanka also gave an undertaking to maintain the enforcement of the conventions and their implementing legislation and measures, accepted regular monitoring and review of its implementation record.[34] In the Status Report on ratification and implementation of the conventions referred to in Annexure III to Sri Lanka's GSP+ application (Status Report), it was stated that they have subscribed to the Optional Protocol to the International Covenant on Civil and Political Rights.

With regard to the issue on the legislation incorporating the provisions of three conventions/covenants in issue; the Status Report stated that the Constitution of Sri Lanka guarantees the promotion and protection of human rights of the citizens of the country. Those include mainly the freedom of thought, conscience and religion (Article 10), freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 11), right to equality (Article 12), freedom from arbitrary arrest and detention and punishment and prohibition of retroactive penal legislation (Article 13) and freedom of speech, assembly, association, occupation

[34] Francoise Hampson, Leif Sevon and Roman Wieruszewski (September 2009) Implementation of certain Human Rights Conventions in Sri Lanka, European Commission at http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/SNAA-7WZ5BY-full_report.pdf/$File/full_report.pdf.

and movement (Article 14).[35] Some of these rights may be restricted only according to the provisions of the supreme law of the country for the purposes of national security, racial and religious harmony and national economy (Article 15 of the Constitution of Sri Lanka).

In addition to these provisions, the report further elaborated on the role of the Supreme Court in the protection of human rights of citizens. It further discussed the 17th Amendment to the Constitution and the Human Rights Commission of Sri Lanka as two effective mechanisms in protecting and promoting human rights within the country.

The status report of 2008, further explains the mechanisms and structures in place to protect and promote the provisions in CAT and CRC. The Government of Sri Lanka via the report moreover expressed the constitutional guarantees in place to incorporate the provisions of ICCPR to the law of the State. In addition to the constitutional provisions, they further have placed significant importance on the decision of the Supreme Court on recognizing civil and political rights in the ICCPR and the ICCPR Act as two principal steps in the process. (This paper has discussed this issue in an earlier section as well). Most importantly, the government's statement on zero-tolerance on human rights violation in terms of the CRC and CAT as mentioned in the report seems very impressive in preserving the rights of the people of Sri Lanka.

However, irrespective of this report forwarded by the Government of Sri Lanka, it was decided to hold an investigation on the effective implementation of the three conventions/ covenants in issue, by the European Union in October 2008.

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[35] Status Report on Ratification and Implementation of Conventions referred to in Article 8 & 9 and listed under Parts A and B of Annex III by Sri Lanka, annexed to Note Verbale Ref.B/ EC/8(5) and submitted to the EC on 20 September 2005.

6. Investigation on Sri Lanka's GSP+ Preference by the EU

At the end of the first three years of the GSP+ trade preference, the European Union conducted an investigation on the effective implementation of the three conventions/covenants in issue in order to determine whether Sri Lanka is entitled to continue to enjoy the GSP+ benefits for the next three years, commencing from January 2009 or not. GSP+ was essentially strengthening the country's economy significantly.

The investigation in 2008 mainly focused on three main conventions/ covenants as the EU found there were deep-rooted problems and violations with regard to the provisions enshrined in those international instruments. Hence, the expert panel on the investigation presented their final report mainly focused on assessing whether the national legislation of Sri Lanka corresponds to the obligations under the three conventions, whether the obligations under these conventions are actually, adequately and effectively applied in practice and whether the institutions set up in Sri Lanka to protect human rights fulfil their task. Secondly, the expert report proceeded to assess how the obligations imposed by the three conventions / covenants are met in practice. For that purpose both the national legislation and the conduct in practice of national authorities, including the courts which have the potential of violating human rights were carefully examined. Thirdly, the investigation looked into the structure and functioning of the authorities for the protection of human rights, including providing a remedy for any violations.[36]

The investigation was mainly a desk review on some documents put forward by the Government of Sri Lanka and various Non- Government Organizations. In the wake of the investigations, on the basis of the materials before the panel of investigators, they had concluded that the three conventions under scrutiny have not been effectively implemented

[36] Francoise Hampson, Leif Sevon and Roman Wieruszewski (September 2009) Implementation of certain Human Rights Conventions in Sri Lanka, European Commission at http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/SNAA-7WZ5BY-full_report.pdf/$File/full_report.pdf.

in Sri Lanka. In the submissions made before the European Commission, by the Government of Sri Lanka, it was stated that the legal system of Sri Lanka adequately complies with the legislative requirements of the conventions. The investigation report did not agree with the statement of the government.

The investigation report had highlighted how the emergency legislation poses a number of problems within the system that overrides provisions elsewhere in the legislation, including the Constitution. In the emergency legislation, human rights are restricted beyond that which is permitted according to the conventions and sweeping powers are given to the authorities. Criminal offences are vaguely defined and the regulations containing provisions that excessively limit, or eliminate, the accountability of State agents. Basic rights relating to a fair trial are undermined by the operation of emergency regulations. Many of the State authorities in Sri Lanka entrusted with the task of protecting human rights have lost legitimacy and credibility because of the non-implementation of the 17th Amendment to the Constitution. In the assessment of the Panel, this is a result of political decisions. The evidence has shown that the police are unable or unwilling to investigate human rights violations. It also indicates that torture in police custody is widespread. The absence of a witness protection programme and harassment of witnesses discourages them from appearing and operates as a disincentive to make complaints.[37]

They further claimed that the court system in Sri Lanka has failed in protecting and promoting human rights within the country. They highlighted some instances which have resulted in a politicised system. That is judges being removed by the Judicial Service Commission when they have demonstrated too much independence. Moreover, several severe restrictions on access to justice were further pointed out. The Supreme Court not being easily accessible from the North and the East of Sri Lanka, provisions in the emergency regulations that shield actions against officials from the courts. Together with all these the court system in general is very

[37] *Ibid.*

slow in protecting human rights in the country. In addition to the court system, the capacity of the National Human Rights Commission has been questioned in the report as well.

Apart from the weaknesses inherent in the systems and structures, there are also several issues of concern that would hinder the proper implementation of the principles and norms in the above mentioned three conventions /covenants that were highlighted during the investigation. The years 2005 – 2009 were marked by the dysfunction of the criminal investigative structure; unlawful killings perpetrated by soldiers, police; paramilitary groups and others during the period of investigation and lack of investigative ability by the police and torture practised with impunity due to the operation of the PTA and emergency regulations; and the State's failure to prevent enforced disappearances. Further issues of concern are the State's failure to carry out effective investigation into those alleged disappearances, restrictions on freedom of movement with particular reference to mass internment of the civilian population in the North during the period of investigation, negative impact placed by emergency regulations on freedom of association and assembly, physical and serious attacks against journalists, government propaganda and policy that erodes the freedom of press and the recruitment of child soldiers by the LTTE and various paramilitary groups during 2005 to 2008 have alarmed the investigation panel in terms of the human rights situation in Sri Lanka. Unfortunately, they were totally unsatisfied regarding the steps taken by the government of Sri Lanka to remedy the situation. More or less, they claimed that the steps taken were not adequate as a State and according to them the situation was not in par with the protection and promotion of the provisions enshrined in the three Conventions / Covenants as well.

On the basis of these findings which were elaborated in detail in a report, the investigation conducted by the European Commission concluded that Sri Lanka has not sufficiently given effect to the provisions of the ICCPR, the CAT and the CRC both in law and practice during the period under review. Hence, this investigation did not bring any satisfactory outcomes for Sri Lanka to continue with the GSP+ trade preference with the EU.

The report outcome eventually resulted in a temporary suspension of the GSP+ trade benefit to Sri Lanka due to the fact that Sri Lanka had breached its commitments in the GSP+ application in 2005. However, the European Commission indicated its intention to pursue its dialogue with Sri Lanka on the substantive human rights problems identified in the report and the steps the country can take to address them.[38]

6.1 Temporary Withdrawal of GSP+ Benefits to Sri Lanka and the Government's Reaction

In February 2010, European Union Member States decided to temporally withdraw GSP+ preferential tariff benefits to Sri Lanka following the report of an exhaustive investigation carried out by the Commission[39]. It was made clear in the statement issued by the Commission that the suspension of GSP+ benefits is temporary, as the overarching EU objective was to use GSP+ as an incentive to underpin improvements in the human rights situation in Sri Lanka. This temporary withdrawal was to take effect six months later. This provided additional time for Sri Lanka to address the problems identified.

In response to the temporary withdrawal of GSP+ trade benefits to Sri Lanka, the Ministry of External Affairs clearly stated that they were willing to continue the engagement with the EU during the coming six months period with a positive view to sensitizing the EU with a constructive dialogue, concerning both the rapid, demonstrable and sustainable progress that has been gained since the end of the conflict situation and the steps that would be taken in that direction. Moreover, they were emphasizing on sensitivity to the sovereign prerogative of the people of Sri Lanka in the process of their engagement. The statement issued by the Government of Sri Lanka was more on a positive note, as they believed that the GSP+ facility would indeed pave the way for economic empowerment, including

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38 Commission Statement on Sri Lanka GSP+ Report (19 October 2009) European Commission, Brussels, at] http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145141.pdf

39 European Commission, Brussels "EU Temporary withdraws GSP+ trade benefits from Sri Lanka" (15th February 2010) at http://trade.ec.europa.eu/doclib/press/index.cfm?id=515

the recovery of the North and the East from the losses suffered due to terrorism.[40]

The dialogue between the Government of Sri Lanka and the EU was, however, not a great success. In June 2010, the EU offered to extend the tariff preference by another six months subject to certain conditions. In the absence of any formal response from the Sri Lankan government to the said offer, the EU withdrew its tariff preference with effect from 15th August.[41]

6.2 Sri Lanka Lost GSP+: No Negative Impact on the Country?

The Government Spokesman, Media and Information Minister Keheliya Rambukwella commenting on the announcement by the EU on the withdrawal of the GSP+ clearly mentioned that there would not be any change in the government's position regarding the EU conditions and stated that the government would not accept the conditions put forward by the EU as the government had already made arrangements to meet the consequences. Moreover, he stated that the loss would be only around 85 million Euros, and that could be remedied via other markets.[42]

On the other hand, the Central Bank of Sri Lanka in a recent press release[43] clearly stated that as the country was facing issues in terms of GSP+ trade benefits for the past two years, the Government as well as many exporters to the EU has already taken measures to deal with the risk. Moreover, they had highlighted several such measures as well. They can be listed as:

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40 *Statement on the EU decision for the temporary suspension of the GSP+ facility to Sri Lanka* (16th February 2010) Ministry of Foreign Affairs, Colombo, Sri Lanka http://www.slmfa.gov.lk/index.php?option=com_content&task=view&id=2309&Itemid=75

41 EU regrets silence of Sri Lanka regarding preferential import regime http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/888

42 *GSP+ issue-no change in government's position* (6th July 2010)Media Release, Government of Sri Lanka, Colombo http://www.news.lk//index.php?option=com_content&task=view&id=15842&Itemid=44

43 *Sri Lanka prepared to face the GSP+ withdrawal challenge* (1st July 2010), Communications Department, Central Bank of Sri Lanka, Colombo. http://www.thesundayleader.lk/2010/07/03/central-bank-prepared-to-lose-gsp/

- Improving the Sri Lankan business environment and confidence levels significantly, by ending the conflict.
- Stabilizing and improving almost all macro-economic fundamentals, including in particular;
  - Achieving a low level of inflation, thereby significantly reducing the pressure on cost of inputs;
  - Establishing lower rates of interest, thereby substantially reducing the cost of borrowing;
  - Building up foreign reserves to historically high levels, thereby enhancing investor confidence in the Sri Lankan economy;
  - Ensuring stability in the Sri Lanka rupee exchange rate, thereby enhancing predictability of the domestic foreign exchange market;
- Establishing an enabling environment where Sri Lankan businesses could access international capital and debt markets for funding requirements at lower costs;
- Achieving political stability in the country, thereby further improving confidence and reducing policy uncertainties;
- Obtaining the removal of Sri Lanka from the list of countries described as "high war risk" countries by underwriters;
- Improving internal work processes and systems of exporting entities, thereby leading to substantial productivity enhancements.

Economic Development Minister Basil Rajapakshe further expressed his view in this regard[44]; the loss of GSP+ according to him would not have a huge adverse impact as forecasted. As Sri Lanka has a good and creative

[44] Mahanama Abeywickrema, "Losing GSP+ no great loss for Sri Lanka, Basil Rajapakse", *The Sunday Leader* 9.5.2010 online edition, Colombo at http://www.thesundayleader.lk/2010/05/09/losing-gsp-no-great-loss-for-sri-lanka-—-basil-rajapaksa/

workforce, the country would indeed look at improving the textile industry, which boasts of a long history in Sri Lanka. In the meantime, the textile sector has also expressed much confidence in expanding and increasing its export earnings during the next four years, by targeting to raise it from the current Rs. 2.2 billion to Rs. 5 billion.

Hence, according to the Government of Sri Lanka, the loss of GSP+ is the result of a conspiracy of the opposition and the Tamil Diaspora, it will not bring any negative impact to the country as it has been ready to face this risk for the past two years. As a result, the people have no need to be fearful of losing their employment in the apparel sector.

7. Conclusion:

GSP+ Trade with the EU and Human Rights: Issues and Consequences

The GSP+ trade to Sri Lanka with the EU came to an end on 15th August 2010. Some sources allege, as a result Sri Lanka will stand to lose US$ 500 million per year.[45] These will lead to a decline of revenue of garment exports which stood at US$ 3.6 billion last year to US$ 2.7 or 2.8 billion. However, the Government of Sri Lanka still believes firmly that they cannot adapt to the conditions proposed by the EU on human rights in order to regain the concession.

The following is the full list of conditions set out by the EU for the extension of the preference:

1. Reduction of the number of derogations to the ICCPR.
2. Take steps to ensure that the key objective of the 17th Amendment to the Constitution, namely to provide for independent and impartial appointments to key public positions, is fully safeguarded, including

[45] GSP+ ends today- Sri Lanka loses Rs 570 billion annually, *Lanka Truth* at http://www.lankatruth.com/index.php?option=com_content&view=article&id=6426:gsp-ends-today-to-lose-rs-570-billions-to-sri-lanka&catid=34:lead-news&Itemid=50

through a Constitutional Council which adequately reflects the interests of all political, ethnic and religious groups and minorities within Sri Lankan society.

3. Repeal of the remaining part of the 2005 Emergency Regulations, notably those Regulations concerning detention without trial, restrictions on freedom of movement, ouster of jurisdiction and immunity and repeal of 2006 Emergency Regulations (Gazette No. 1474/5/2006). If GoSL considers that it is essential to retain certain provisions which are compatible with the ICCPR or UNCAT, such as provisions concerning possession of weapons, such provisions should be transferred to the Criminal Code.

4. Repeal of those sections of the Prevention of Terrorism Act which are incompatible with the ICCPR (in particular, sections 9, 10, 11, 14, 15, 16 and 26) or amendment so as to make them clearly compatible with the ICCPR.

5. Repeal of the ouster clause in section 8 and the immunity clause in section 9 of the Public Security Ordinance or amendment so as to make it clearly compatible with the ICCPR.

6. Adoption of the planned amendments to the Code of Criminal Procedure, which provide for the right of a suspect to see a lawyer immediately following his arrest.

7. Legislative steps necessary to allow individuals to submit complaints to the UN Human Rights Committee under the First Optional Protocol to the ICCPR and to the UN Committee against Torture under Article 22.

8. Steps to implement outstanding opinions of the UN Human Rights Committee in individual cases.

9. Extension of an invitation to the following Special Procedures who have requested to visit Sri Lanka (UN Working Group on Enforced Disappearances, UN Special Rapporteur on Torture, UN Special

Rapporteur on Freedom of Expression, UN Special Rapporteur on Independence of Judges and Lawyers).

10. Responses to a significant number of individual cases currently pending before the UN Working Group on Enforced Disappearances.

11. Publication of the complete final report of the 2008 Commission of Enquiry.

12. Publication or making available to the family members a list of the former LTTE combatants currently held in detention as well as all other persons detained under the Emergency Regulations. Decisive steps to bring to an end the detention of any persons under the Emergency Regulations either by releasing them or by bringing them to trial.

13. Granting of access to all places of detention for monitoring purposes to an independent humanitarian organization, such as the International Committee of the Red Cross.

14. Adoption of the National Human Rights Action Plan by Parliament and its prompt implementation.

15. Take steps to ensure journalists can exercise their professional duties without harassment.

For over two years, the government of Sri Lanka and the EU have had a tit-for-tat battle with claims and counter claims, and unwillingness to compromise by either party has eventually brought a bitter end to the whole issue. In fact, after analysing the sequence of events in detail in the proceeding discussion, it was felt that the government should be faulted to a greater extent. In 2005 when the government applied for the GSP+ benefits they expressly agreed to implement the annexed list of 27 international conventions / covenants which included the ICCPR, CAT and CRC. Unless Sri Lanka was ready to abide by the rules and regulations, they should not have ideally applied for it. The government has also not shown any genuine interest in preserving at least the very basic human rights guaranteed in the Constitution of Sri Lanka.

Nearly 15 months have passed since the end of the war with the LTTE. The Government still claims that most of these conditions cannot be adhered to, due to security concerns. Sri Lanka is still under emergency regulations. The younger generation of this country has never experienced freedom. No committed and a genuine reconciliation process is in place to address the human rights issues raised by various parties during the last phase of the war. Even the most basic remedial mechanisms on human rights violations are not in place in the country today, the judiciary and the Attorney General's department are highly politicized, the Human Rights Commission is no longer officially functioning[46] and the police service is a mere service to the government in power and the list can go on and on. Hence, the laws and the very basic structures that are in place to protect and promote human rights of the people have failed in providing redress and protection, as I have been explaining in the earlier stages in this paper.

As we are already aware, the government has vehemently denied the allegations in the investigation report by the EU and has been following hard-diplomacy as a tool of negotiation, which has only resulted in shaming its image more and more within the international community and losing the economic benefits which can be brought to the people of this country. In my opinion, they should have been supportive of the investigations carried out by the EU rather than refusing to cooperate. On the other hand, in such a context when the EU team conducted its investigations overseas where several human rights groups and trade unions only made submissions, there was no opportunity for the government side of the story to be articulated. What could the government expect in such a situation other than their application for the second round of concessions being rejected?

Eventually and most importantly, the Government of Sri Lanka needs to keep in mind the cold hard fact that the Sri Lanka needs the GSP+ far more than the EU needs to give it. There cannot be any request for these

[46] Annexure 01- Letter to the Human Rights Commission from the Presidential Secretariat with regard to terminating its official functions due to the fact that the Commission not being appointed as yet

concessions as the government claims on taking legal action against the EU[47]. These actions and statements would only cause embarrassment to Sri Lanka in the international community. Anyone would understand this simple logic of which the government pretends it does not know: if you are asking someone else for their money or preferential access to their markets you cannot really demand it when it is not forthcoming. This is where soft diplomacy would have ideally played an advantageous role for the country. The EU acts as an organization with complete *bona fide*, extending its grant package of Rs 8.4 billion for two more years from 2011 to 2013 and being open to dialogue even at the time of loss of the concession to Sri Lanka.

The government has become popular among the people of this country compared to any other regime, mainly due to its Sinhala nationalist political ideology. However, the government should not leave room for Sinhala nationalist ideology to jeopardize its political survival. It must not be overcritical or hostile towards the international community when it raises human rights issues, which will lead to Sri Lanka being sidelined and discredited internationally. The government's approach towards the EU and other international actors should be strategic and calculated.

Hence, it is important for the government to handle issues of human rights through a process of dialogue with the EU in a flexible manner in order to regain the economic benefits it brings to the country at a critical time of need.

[47] Government to Sue EU, if GSP+ not granted, at http://www.defence.lk/new.asp?fname=20091219_05

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SEXUAL ORIENTATION AND GENDER IDENTITY RIGHTS

Marini Fernando[1]

1. Introduction

In June 2010, many individuals and civil society organizations supported a month's celebration of activities organized by EQUAL GROUND[2], to celebrate LGBT Pride[3] in Sri Lanka. Amongst the month's highlights was a news clipping titled "Lanka for Dialogue with Gays"[4] which spelt out that the Sri Lankan government was open for dialogue with Sri Lanka's gay community, but would not take any decision which could hurt the culture of the country. The Prime Minister was quoted as saying that the government must first identify what sort of "equal rights" the gay community in Sri Lanka wants. Prime Minister D.M. Jayaratne further commented that while matters concerning gay people including gay

1 Women's Support Group.

2 An organization which identifies itself as working for equality for all sexual orientations and gender identities.

3 LGBT pride or gay pride is the concept that lesbian, gay, bisexual, and transgender (LGBT) people should be proud of their sexual orientation and gender identity.

4 'Lanka for dialogue with gays,' Indika Sri Aravinda, *Daily Mirror*, June 25, 2010 http://www.dailymirror.lk/index.php/news/4626-lanka-for-dialogue-with-gays.html

marriage were acceptable in western countries, the gay community in Sri Lanka will have to define the rights they seek in order for the matter to be given consideration.

In a bid to enter into a dialogue with the Prime Minister, many organizations working on this issue replied indicating their willingness for such an engagement. However, to date this reply has not been met with any response from the Sri Lankan government. Thus in a bid to identify what the appeal for 'equal rights' means to just one section of the diverse communities working on sexual rights in Sri Lanka, this paper will explore the implications of human rights frameworks for Lesbian Bisexual and Transgender women. The acronym LBT[5] will be used as an abbreviation for Lesbian Bisexual and Transgender. When the word transgender is used, it will include transwomen[6] and transmen.[7]

2. Fundamental Rights

The rights of the Sri Lankan citizen are enshrined in Chapter III of the Constitution.[8] Article 12 of the same chapter states that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds. The Constitution does not explicitly guarantee protection on the grounds of sexual orientation or gender identity. It also does not give any indication of the fact that the term 'sex' refers to anything other than the system of biological classification used to distinguish sex at birth as male or female.

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5 The terms LBT are not ones which are identified with by many in the country. There are critiques of using these terms universally, when really in singular countries they are unfamiliar. However, this is not an indication of the lack of awareness or practice of intercourse between partners of the same sex. Additionally, with regard to transgender though the term is unfamiliar, many cases have been recorded to suggest their existence in Sri Lanka.

6 Transwomen or MTF (male to female) – term used to identify a person who was male gendered at birth but whom identifies as female, lives as a woman or identifies as feminine.

7 Transmen or FTM (female to male) – term used to identify a person of a female biological birth who identifies as masculine.

8 The 1978 Constitution of the Democratic, Socialist Republic of Sri Lanka

As will be elucidated in this chapter, this omission in the Constitution (in relation to discrimination) has an immense impact on sexual minorities[9]. The chapter will also attempt to shed light on the impact of penal legislation that criminalizes consensual adult same sex activity in Sri Lanka. It argues that this legislation places sexual minorities at a severe disadvantage in accessing rights, protections and legal guarantees. The chapter will also scrutinize the impact of Sri Lanka's vagrancy laws on the country's sexual minorities, particularly in relation to arbitrary detention. Overall the chapter will elaborate on the different practices that often manifest themselves as social exclusion, not least because policymaking is not inclusive of non-heteronormative ways of life.

The Impact of Sexual Orientation and Gender Identity not being ruled out as grounds for discrimination.

Section 17 of the Constitution of Sri Lanka sets out the remedies that are available to a person in respect of an infringement or imminent infringement, by executive or administrative action, of a fundamental right to which a person is entitled under the provisions of the Chapter. Usually, such remedy is an application to the Supreme Court of Sri Lanka. Many such cases have been filed on various infringements; the remedies have included redress, compensation, restitution, reinstatement promotions. Whatever the result of such a Fundamental Rights Application, a mechanism is in place for a person to seek redress for a grievance from the most superior court of justice. Since the Constitution does not guarantee either equality or freedom from discrimination on the basis of sexual orientation or gender identity, there have been innumerable instances when individuals have faced discrimination due to their non hetero-normative choices and ways of life. In such cases, access to the protections and remedies offered by the law has been minimal. The following cases have been recorded by the Women's Support Group.[10]

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9 The term 'sexual minority' is one which is loosely understood as being a person whose identity, orientation or practices differ from the majority of the surrounding society. This group is one that is understood as practicing consensual sex.

10 The Women's Support Group – identifies itself as an organization working to protect the rights of Lesbian Bisexual and Transgendered Women.

1) A case involving a transman who was dismissed from employment once his biological (female) sex was discovered. Instances when lesbians in Sri Lanka have been deprived of job opportunities in the private sector because they do not dress in a feminine way.

2) Instances when promotions have been withheld or delayed in the case of members of the security forces who have been suspected of being lesbians

Sri Lanka's National Human Rights Commission investigates complaints of human rights violations and thus is an important site of potential remedial action. However, a scan of the Human Rights Commission's Act will reveal that the enabling law restricts its scope to 'fundamental rights' alone—in short to those human rights that are entrenched in the Constitution and therefore justiciable. This leaves out all human rights which Sri Lanka has undertaken to respect, protect and fulfill under international law.[11] The Human Rights Commission Act also empowers the National Human Rights Commission to make recommendations to the Government on measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards.[12] However, there has been no known initiative that has been taken by the Human Rights Commission towards striking down the discriminatory laws that affect sexual minorities.

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11 Law & Society Trust, ' Sri Lanka Atrophy and Subversion of the Human Rights Commission', *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 2010

12 Section 10 (d) Human Rights Commission of Sri Lanka Act No. 21 of 1996

3. The Impact of Criminalization

Under Section 365A of the Penal Code Amendment Act No. 22 of 1995[13], it can be understood that consensual sex between adults of the same sex, whether in public or private, is criminalized. As in many other South Asian countries, sexual minorities in Sri Lanka grapple with a harsh and discriminatory law that proscribes "gross indecency", a term that is never actually defined. Up to 1995, this legislation applied only to men; in that year, a movement to raise awareness on the need to reform the law led to it being made gender neutral. Now, women too come under the ambit of the law, and for the past 13 years, consensual sex between two women, whether in private or in public, has been criminalised. The law itself is flawed, since the act of gross indecency has not been defined in the statute. As such, although there is an assumption that an act of sexual intercourse between consenting adults of the same sex could constitute the violation of such a law, this remains at the level of assumption due to the absence of any clear definition of gross indecency in the law. Though the law has not been tested in a court of law, its existence makes sexual minorities vulnerable, not only in their life choices or sexual practices but also in their activism around sexual rights.

The Vagrants Ordinance

The Vagrants Ordinance is another law that places people from LBT communities at grave risk. By virtue of Section 2, a police officer has the discretion to arrest without a warrant any person who behaves in a riotous or disorderly manner on a public street or highway.

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[13] Any person who, in public or private commits, or is a party to the commission of, or procures or attempts to procute the commission by any person of, any act of gross indecency with another persons, shall he guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determind by court to the person in respect of whom the offence was committd for the injuries caused to such person.

Section 3 (1)(b) specifies that

> Every common prostitute wandering in the public street or highway or in any place of public resort and behaving in a riotous manner or indecent manner ... shall be deemed an idle and disorderly person and shall be liable upon first conviction to be imprisoned with or without hard labour for any term not exceeding 14 days or to a fine.

Section 3(2) specifies that such a person can be arrested without a warrant.

Organizations working with those who have been held in detention under this law, have received information that this law is enforced in a purely subjective manner, since it is within the discretion of the police to determine what constitutes riotous or disorderly conduct. The police have the sole power to determine the *mens rea* of the person on the streets and decide if her / his intention is for the purpose of commercial sex work. Some reports reveal that innocent bystanders could be victimized by this ordinance. In most cases, unfortunately, people from lower socio-economic backgrounds have been the most vulnerable to such detention. Sadly these people have little recourse to legal fees and have had to bribe their way to freedom for an offence they never committed in order to ensure that there is no record of their arrest.

The law, as it stands at present, requires the police to present the alleged offender before a magistrate within 24 hours. However, if the offender is apprehended on a Friday, he / she could remain in detention for over 48 hours. Reports of victimization and abuse have emerged in some cases when arrests were made at night and the alleged offenders were detained in police stations overnight. It must be noted here that transgendered persons are the most vulnerable to this law. Their manner of dress (often

different to their biological sex) seems to trigger the assumption that they are prostitutes.[14]

4. International Standards

The Yogyakarta Principles

It might be said of Sri Lanka that the most basic and crucial impediment to the rights of sexual minorities is the existence of legislation that can be read to criminalize consensual sex between adults of the same sex. For a State that is genuinely interested in taking measures to protect the rights of sexual minorities, a close study of the Yogyakarta Principles could help map some of the steps. The Yogyakarta Principles, drafted in 2006, are a set of international principles that bind States on issues of sexual orientation and gender identity. Defined as a universal guide to human rights, the Yogyakarta Principles promise a different future in which all people born free and equal in dignity and rights can fulfill that precious birthright. Considering the Sri Lankan Prime Minister's comment to the media that he would like to engage in understanding "what sort of equal rights gay people need", decriminalization can be articulated as a crucial need in the Sri Lankan context. The staff of the National Human Rights Commission has been trained on the Yogyakarta Principles at internationally hosted meetings. However, there seems to be some reluctance to take up cases on anything other than fundamental rights as spelt out in the Constitution.

The Yogyakarta Principles recommend:

1. Rights to Universal Enjoyment of Human Rights, Non-Discrimination and Recognition before the Law. They spell out steps that should be taken in order to rule out discrimination on the basis of Sexual Orientation and Gender Identity. They even cite as an example the impact of laws that criminalise homosexuality;

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[14] A. Nichols, 'Dance Ponnaya Dance' *Feminist Criminology* April 2010, Volume 5, No.2 http://fcx.sagepub.com/content/5/2/195 ; 'Don't Abandon the Gay Men,' R. Mohamed , *The Sunday Leader*, 6 June 2010 http://www.thesundayleader.lk/2010/06/06/don%E2%80%99t-abandon-the-gay-men/

2. Rights to Human and Personal Security. They address fundamental rights to life, freedom from violence and torture, privacy, access to justice, and freedom from arbitrary detention;

3. Economic, Social and Cultural Rights which include social security, education, employment, health and accommodation;

4. Right to Expression, Opinion and Association, which include the right to express oneself, one's identity and one's sexuality without State interference. Also included are rights to participate peaceably in public assemblies and events and otherwise associate in community with others;

5. Freedom of Movement and Asylum, which highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity;

6. Right to participate in Cultural and Family Life;

7. Rights of Human Rights Defenders, which recognizes the right to defend and promote human rights without discrimination based on sexual orientation and gender identity. States, too, have an obligation to ensure the protection of Human Rights Defenders working in these areas;

8. Rights of Redress and Accountability, which affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations;

9. Additional Recommendations, which include recommendations set out for national human rights institutions, professional bodies, funders, Non-Governmental Organizations, the High Commissioner for Human Rights, Agencies of the United Nations, Treaty Bodies, Special Procedures, and others.

The celebrated Yogyakarta Principles have a long way to go to pass into International Law. Although they have been articulated as a much-needed set of guidelines which demand compliance from States, they have not been negotiated; furthermore, there has not been any agreement reached with States to honour these principles. In fact, the Principles themselves seem to be overly ambitious, as, to date, not one single United Nations Treaty refers to homosexuality. Thus, the Principles have been criticized as being merely a radical social policy vision presented as a binding norm.[15]

5. Media Representation of LBT issues

On many occasions, issues faced by LBT people in Sri Lanka have been represented in a homophobic and prejudiced manner in the newspapers and on radio channels and television talk shows. Some of these media channels are State owned and managed. These media representations have contributed to the resistance in society to making any progress towards understanding the issues faced by LBT persons.

One of the most hateful of these representations appeared in a letter to the Editor published in *The Island* newspaper on 20 August 1999. The writer called for convicted rapists to be let loose on lesbians who were planning a conference in Colombo. A complaint was lodged with the Press Council by Mr. Sherman De Rose who, in his capacity as coordinator of Companions on a Journey (COJ), acted on behalf of the Women's Support Group (WSG) which had organizational support from COJ.[16] The outcome was unexpected. Not only did the Press Council decide that the newspaper was right to publish that letter, but it determined that "lesbianism itself is an act of sadism and salacity and publication of any opinion against such activities does not amount to a promotion of sadism or salacity but any publication which supports such conduct is an obvious promotion of such violence, sadism and salacity."[17]

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15 PA Tozzi, *Six Problems with the Yogyakarta Principles*, 2007, http://www.c-fam.org/publications/id.439/pub_detail.asp accessed on April 20, 2011

16 Companions on a Journey – An organization working for gay rights in Sri Lanka

17 Sri Lanka Press Council (2000 judgment of 2nd June 2000).

Ironically, the Press Council did not seem to be perturbed that the article was aimed at inciting rape which is a criminal offence.

The Respondent newspaper presented that the Constitution of Sri Lanka recognized the family as the basic unit of society and that the government is bound to protect the family unit in terms of Article No 27 (12) of the Constitution. They argued that the family unit consists of a man and a woman; that two men or two women cannot make a family unit; and that lesbianism is illegal, immoral and obscene under our law.[18]

6. Broadening the Meaning of Family and Protecting the Economic, Social and Cultural Rights of LBT Persons

In the draft Shadow Report on the status of LBT people in Sri Lanka, which was being submitted to the CEDAW Committee in 2011, the WSG stressed the need to broaden the meaning of the term "family" to include same sex partners.[19] Consider the many consequences of this complete lack of interest in revising the archaic understanding of family.

6.1 Loan facilities. There are many loan facilities available to Sri Lankans on the basis of the shared income of married partners. Same sex partnerships are not afforded this privilege as the State does not recognize them as constituting a family. Many banks do not even offer supplementary credit cards to those who are not registered spouses or related by blood. As such, same sex couples face difficulties when trying to secure housing or making investments.

6.2 Renting a place to live. Renting a place to live can often be a struggle for same sex couples because of the implications impact of Section

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[18] Sri Lanka's Media Complaint Backfires, Planetout ,2005 http://www.glapn.org/sodomylaws/world/sri_lanka/slnews006.htm.

[19] WSG (2011) *The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women* January 2011, http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf.

365A and the fact that their partnerships are not recognized as constituting a family. Landlords are reluctant to rent their premises to single women, or to women living together, some voicing the fear that the space might be used for commercial sex work.

6.3 Employees' Provident Fund. An employee can access part of their employees' provident fund (to which they too contribute their salaries) on the basis of marriage. However, since same-sex couples are not permitted to register marriage in Sri Lanka, they are prevented from accessing these monies till they are at the age of retirement.

6.4 Adoption. Sri Lanka does not permit the adoption of children on the basis of same-sex partnerships. While heterosexual partners are able to conceive children and share parenting, it is a cumbersome procedure for same sex partners, involving reliance on medical expertise, and sperm donors.

6.5 Citizenship. – A citizen of Sri Lanka is able to pass on his / her citizenship to her/ his foreign spouse. Same-sex couples are not able to pass on their citizenship to their long term partners because they are not recognized as a family unit and are not able to register their partnerships.

6.6 Inheritance. In the case of heterosexual unions, property is inherited by a spouse when his/her partner has died without leaving a will. However, a surviving partner of a same-sex union is not considered a lawful heir and inherits nothing, even in situations of long term cohabitation. In the event of death of one partner of a same-sex partnership, the procedure is cumbersome in order to provide proof of which property belonged to the surviving partner of their shared investments.

7. The Impact of Criminalization on the Work of Human Rights Defenders and LGBT Non-Governmental Organizations

Criminalization hampers the work of human rights defenders and non-governmental organizations working to protect the rights of sexual minorities in Sri Lanka. Unable to withstand the stigma attached to their work, or function with the lack of government policy to protect their rights, individuals and NGOs are often constrained and have to confine their work to areas such as sexual health, gender, and broader human rights issues. In Sri Lanka, human rights defenders have faced enormous challenges in their work for the rights of sexual minorities. Some have been painted by the media as loose women and their work has been discredited.[20]

It has been a very difficult task to articulate issues relating to the rights of sexual minorities within a civil and political human rights framework. On many occasions, these issues have not received as much emphasis as other rights-related issues such as the freedom from torture or the right to life. Additionally some organizations working on broader human rights concerns have been reluctant to work in solidarity with organizations working on issues faced by sexual minorities due to fears of stigmatization. It must also be noted that organizations have difficulties documenting vital information on sexual minorities. Homophobia, criminalization, and lack of enabling social policies mean that, many fear to come forward on issues to do with their sexuality. Some contact is made with organizations, particularly through help lines associated with these organizations. However, it is difficult to gain an in-depth understanding of the issues because, most often, organizations are unable to take the initiative to make inquiries, study patterns and investigate the concerns faced by these

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[20] 'Lesbian Conference in Colombo'?, P Alles, *The Island*, 20 August 1999.
"If by some chance those lesbians manage to get the necessary approval to hold their convocation, I request the police authorities to round up a sizeable collection of convicted rapists and let them loose among the jubilant but jaded jezebels when their assembly is in full swing, so that those wanton and misguided wretches may get a taste of the zest and relish of the real thing."

people. Because adult consensual same-sex sexual activity can be read as being criminalized in Sri Lanka, LGBT organizations have also faced difficulties obtaining funds for their work.

8. Protection from Violence

Sri Lanka does not have any laws or policies that specifically protect LBT people from violence. Of course there do remain protections that are applicable to any citizen. However, in many cases to do with violence targeted against LBT people, protection makes little sense without an understanding of the specific nature of the violence.

Consider the following examples:

A gay man attending a private party at a popular Colombo night club was assaulted by the staff of that club. Many offered the injured man assistance to make a police report and seek redress, but the victim was not keen to take this step in case it exposed his sexuality.

A case of intimate partner violence was not reported to the Police in case it exposed the sexuality of the individuals concerned.

Two women were reported to the Police as lesbians by one of the women's uncles. The Police then held the women in detention for questioning.

There are also many reports of self harm and suicide that are not openly attributed to issues relating to sexual orientation and gender identity. Cutting, burning, and alcohol and substance abuse have figured in some of the cases recorded by local organizations. Some cases of women's double suicide have been reported in the media.

1) The bodies of two young women floated ashore in Kalutara in April 1999. Police investigations led to the discovery of a diary of one of the women which revealed that the two had been in love and had been heart-broken at having to live apart.[21]

[21] *Lankadeepa* 30 April 1999

2) The bodies of two young female garment factory workers were washed ashore on the beach in Galle in October 2001. The police investigation revealed love letters that the two women had written to each other.[22]

3) Two young women reported to be lesbians committed suicide by hanging themselves from a rubber tree on August 20, 2002 at Rambodagalle. In two letters found at the scene, the women had asked for their bodies to be buried side by side. [23]

These cases of self-harm indicate the need for training for counselors and medical professional which would help them to identify the links between sexuality and self hate. Counselors also need to be sensitive to sexual orientation and non heteronormative lifestyle choices. In order to provide appropriate advice.

Is homosexuality still considered a disease by the majority of Sri Lankan society? This question is raised by advertisements in the media from medical practitioners claiming to have a cure for homosexuality.[24] Of course the articles do not specify the treatment that is administered, but they do convey the impression that homosexuality is a disease requiring a cure. For instance one such article[25] described homosexuality as the commonest sexual orientation disturbance, and arbitrarily placed it on the same scale as transvestism, voyeurism, fetishism and pedophilia. The article is said to be written by a consultant psychologist and is an indication of the homophobia and lack of awareness evident in even professional service providers.

As previously detailed, the absence of data on issues faced by LBT people is indeed a problem, considering the information that LBT organizations have received of violence faced by individuals on account of their sexuality. Unfortunately, organizations are compelled to work quietly in documenting

22 *Lakbima* 24 October 2001

23 *The Island* 24 August 2002

24 *Lakbima* 28 December 2008

25 Treating alternative forms of sexual expression , R.A.R. Perera, , *Island*, 15th February 2008

these cases for fear of exposing those who faced violence parties and re-victimizing them. Thus it is important to conduct a comprehensive mapping exercise that identifies the causes of violence, the impact of violence, and the measures that are in place for redress and protection.

It must be noted here that the Prevention of Domestic Violence Act of 2005 allowed for cohabiting persons to be protected from violence inflicted by the other party. However, in the case of LBT people, since the partnership itself is not recognized by law, the nature of intimacy between them is invisible and not taken into account in the provisions on protection.

9. Employment

Some private companies in Sri Lanka have workplace non-discrimination policies in place, but the practice is not wide spread. Furthermore, these policies have not been adopted across the board and in a uniform manner by all establishments. In the corporate sector in particular, the enactment of policy around sexual harassment is left entirely to the discretion of companies as there is no national policy placed upon the corporate sector with regard to adopting sexual harassment policy, in the workplace. Additionally, very few companies involve employees in either the formulation or dissemination of knowledge on policymaking. In most cases there is a lapse in specifying that discrimination would be ruled out on the basis of sexual orientation and gender identity thus making it difficult to make a case or an appeal for discrimination on the basis of sexual orientation or gender identity. The workplace is largely overlooked in the state's formulation of non-discrimination policies. Non-discrimination policies either do not exist in the State sector in this regard or are very rare; furthermore employees are not given any awareness about these policies. To date, there has not been a policy which specifically takes into consideration some of the possible scenarios of violence faced by lesbians, bisexual women, and transgendered people.

LBT folk often grapple with issues relating to their identity. Of late there have been many newspaper reports[26] of incidents in which women are alleged to be "deceiving the public" by "misrepresenting" themselves as men. In many such instances these 'women' have revealed that they dressed in men's attire because they perform manual labour. Since employment in carpentry and construction is usually dominated by men, they explain, women who men who work as women in these trades have to face ridicule, abuse and insults from their male co-workers. As such, they prefer to pass as men. Although they adopt men's attire, they do not have *mala fide* in such representations; in most cases the employer holds a copy of their national identity card on which their identity is quite clearly marked as female. Some believe that they are men born in a female body; their understanding is that they express a male identity that makes them comfortable. Some wish to seek employment as men because they feel that women are treated badly by their employers. In private conversations, some members of the security forces have spoken of being uncomfortable with their uniforms and dress codes. The khaki skirt hampers the movement of the police women, they say, and makes it difficult for them to perform their duties.

Transgendered persons in Sri Lanka are denied the right to recognition by the State due to the lack of a structured system which spells out steps allowing for changes made to be recorded under the category of 'sex' on their birth certificate and national identity card. Because there is no legal provision to change that record on these documents, people are advised to change their birth certificates prior to undergoing sex altering surgery. In fact a medical practitioner risks his/her license if he/she performs sex altering surgery on a client whose birth certificate records his / her sex at birth. Since sex reassignment surgery is not offered under the government health service, patients have to seek this option in private hospitals. Thus the option of sex reassignment surgery is only available to a limited number of people who can afford the high costs of private medical care.

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[26] 'Women Disguised as Men' *Sunday Divaina* 17 May 2009; 'Bo Disguised as Girl since the age of 18', *Lankadeepa* 31st August 2010

10. The Right to Health

According to Anand Grover, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, the criminalization of private consensual sexual behavior between adults constitutes an infringement of the enjoyment of the right to health, both directly and indirectly.

As he explains

> "apart from failing to meet the objectives of criminal law, criminalization encourages violence, abuse and stigmatization and impairs upon the dignity of individuals and infringes the enjoyment of the right to health of same sex communities." [27]

In the draft shadow report to the CEDAW committee, the Women's Support Group suggests that the healthcare system in Sri Lanka is blind to the existence of LBT communities, and that these communities are denied equality of access to healthcare. An important consequence of the lack of awareness of the potential health needs of these communities is the lack of services targeted to meet those needs. In particular, the design of reproductive and sexual health material does not involve consideration of the specific needs of these communities.

Criminalization makes LBT people more vulnerable to a range of violations of their right to health. As is clear from some of the cases of exploitation and abuse recorded by organizations working with sexual minorities, it is possible to take advantage of the discriminatory laws that allow for these injustices to go unreported. For instance, although higher level health care professionals have been trained in maintaining standards of confidentiality, there is little information available on whether lab technicians, and assisting nurses and other minor staff are bound to protect confidential information on patients. In one instance, for example, a woman who tested positive for

[27] A. Grover, Statement, session to the Human Rights Council, Geneva, 2010 http://www.un.org.au/files/files/HRC%2014%20-%20Anand%20Grover%20Statement%20FINAL%2003June10.pdf

HIV/AIDS complained that lab technicians had revealed her HIV status to people in her home town and that her house had been attacked in reaction to this news[28]

Male sex workers remain a population that is most vulnerable to at risk of HIV infection. Sri Lanka's report to the United Nations General Assembly Special Session on HIV/AIDs (UNGASS) 2008–2009, estimates there to be 35,000-47,000 sex workers in the country, and 24,000-37,000 men who have sex with men (MSM)

For these groups access to healthcare is severely compromised by the shadow of criminalization cast by Section 365a.

An analysis[29] of data from a study of MSM and transgender people in Asia (conducted in 2008) concluded that:

- Stigma and discrimination, particularly amongst healthcare providers, is a major disincentive to seek treatment;
- Unethical disclosure of sexuality and/or HIV status by healthcare staff perpetuates distrust in local healthcare infrastructure;
- Strong cultural norms pertaining to sexuality impedes availability of accurate treatment information, creates the fear of disclosure, and an increased chance of social isolation and loss of social support;
- Gender-based discrimination makes treatment an additional challenge for HIV-positive transgender people

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28 I Can Tell a Married Woman, Sri Lanka Plus, 2008 Available at: http://srilankaplus.blogspot.com/2008/04/i-can-tell-married-woman.html

29 J. Goodwin Legal Environments Human Right and HIV Responses among men who have sex with men and transgender people in the Asia and the Pacific: An Agenda for Action, United Nations Development Programme (UNDP) / Asia Pacific Coalition on Male Sexual Health (APCOM), (2010)

11. Concluding Recommendations

To conclude, I would like to echo some of the key submissions of the shadow report submitted by the Women's Support Group to the CEDAW Committee

a) To repeal Section 365a of the Penal Code which criminalizes consensual adult same-sex activity in public and private spaces.
b) To amend article 12(2) of the constitution which deals with non-discrimination, so that it includes sexual orientation and gender identity.
c) To develop and implement uniform policies for the state sector and the corporate sector which enshrine the principles of non-discrimination in the workplace, based on sexual orientation and gender identity.
d) Broaden the definition of sexual harassment to specifically refer to situations of harassment based on sexual orientation and gender identity.
e) Refer to the Yogyakarta Principles as a guide to assist in policy development.
f) Respect sexual and gender identities as a fundamental but potentially mutable aspect of all human beings.

A definition of sexuality rights therefore should include the right of all persons to express their preferred sexual orientation and gender identity without fear of persecution.

XI

RIGHTS OF PERSONS WITH DISABILITIES

Dilhara Pathirana[1]

> *We are all vulnerable to disability, temporary or permanent, especially as we grow older. In most countries, at least one person in ten is disabled by physical, mental or sensory impairment. A quarter of the global population is directly affected by disability as care-givers or family members*
>
> *Persons with disabilities encounter many disadvantages. They are often the poorest and most excluded members of society. Yet they routinely show tremendous resilience, and achieve great heights in all spheres of human endeavor"* (Message of UN Secretary-General, on International day of Persons with Disabilities, 3rd December 2009)

1. Introduction

This chapter attempts to examine and analyze Sri Lanka's laws and policies relating to the rights of persons with disabilities. It determines to what extent Sri Lanka has complied with internationally accepted norms and

[1] LL.B (Colombo); Attorney-at-Law, Law & Society Trust, Colombo. I am greatly indebted to B. Skanthakumar Head, Economic, Social and Cultural Rights Programme, Law & Society Trust for his guidance and encouragement which enabled the writing of this chapter. I am also grateful to Prof Fiona Campbell, reviewer of this chapter for her valuable comments and suggestions.

practices in the formulation and, notably in the implementation of law and policy.

The focus of this chapter will be the significant developments and trends in disability rights in the years 2008-2009. However, it will mention the main highlights pertaining to disability rights from 2000- 2007 since the last Sri Lanka State of Human Rights Report which dealt with disability rights was in 2000.[2]

This chapter seeks to reiterate the rights based approach to disability as opposed to a welfare or charitable approach, which is unfortunately still institutionalized in the terminology of the structures created for the protection of these rights. Persons with disabilities are equally entitled to the rights enshrined in the Universal Declaration of Human Rights (UDHR) which states categorically that: "all human beings are born free and are equal in rights and dignity."

The human rights model enables to dispel negative perceptions and a patronizing approach towards people with disability which sadly prevails even today. It is vital that disabled persons are recognized as persons who can make a significant contribution towards the political, economic, social and cultural development of the community.

Although Sri Lanka passed legislation protecting and promoting the rights of persons with disabilities as far back as 1996 by enacting the Protection of Rights of Persons with Disabilities Act, No. 28 of 1996, the implementation of some of its key provisions, namely the rights of disabled persons to access public buildings have been breached by the state agencies.[3]

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2 See Sri Lanka: State of Human Rights: 2000, (Law & Society Trust, Colombo 1999), p. 242 – 249)

3 Protection of Rights of Persons with Disabilities Act, No 28 of 1996 and Protection of the Rights of Persons with Disabilities (Amendment) Act, No 33 of 2003

It is a grave indictment on the state agencies entrusted with the duty of protecting and promoting disability rights and the duty to uphold the law that the extreme measure of judicial intervention was required to enforce basic provisions in the national law such as accessibility to public buildings through the fundamental rights application filed by rights activist for people with disability, Dr Ajith Perera.[4]

While Sri Lanka was one of the first countries to sign the Convention on the rights of persons with disabilities, it is disappointing to note that it has not up to date ratified the Convention.[5]

2. International Standards

Apart from the recently introduced Convention on the Rights of Persons with Disability and the Optional Protocol, the provisions which have been tailored and designed exclusively for the protection of people with disability; there are several international covenants (General Conventions) and Declarations which also ensure and protect their rights.

2.1 International Bill of Rights

The earliest Declaration[6] in protecting all human rights is the UDHR through Article 25. Although the International Covenant on Economic, Social and Cultural rights (ICESCR) does not make express provision for the rights of persons with disabilities, it protects such rights through the principles and Articles on equality and non-discrimination contained therein.[7]

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4 SC (FR) Application 221/2009

5 www.undisabilityrights.org

6 A Declaration is a non-binding instrument under human rights law. It is a principle of statement or a common standard of achievement, which has strong moral and political value. However, while the 1948 Universal Declaration of Human Rights for example was not originally intended to have binding force, its provisions have since gained binding character as customary law. http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/gender-equality/legal-instr

7 Articles 2 & 3 of the ICESCR

The General Comment on Persons with Disabilities made by the Committee on Economic, Social and Cultural Rights further clarifies and confirms, and also reaffirms the applicability of human rights to people with disability.[8]

2.2 Other International Instruments

Among other Instruments and Declarations that safeguard disability rights are the Convention on the Rights of the Child, which deals with the specific case of disabled children, the Declaration on the Rights of Mentally Retarded Persons.[9] The Declaration on the Rights of Disabled Persons[10] including all types of disabilities and The Standard Rules on the Equalization of Opportunities for Persons with Disabilities which are guidelines beneficial to policymakers but they are not binding on states.

2.3 Biwako Millennium Framework

In May 2002, UNESCAP (UN Economic & Social Commission for Asia & the Pacific) adopted a resolution which resulted in the Biwako Millennium Framework which outlines issues, action plans and strategies towards an inclusive, barrier free and rights based society for persons with disabilities[11] To achieve this goal, the framework identifies seven priority areas for action which include the involvement of self-help organizations of persons with disabilities in the policy-making and decision making process; special emphasis on women with disabilities; the importance of early detection, early intervention and education with relation to disabled children; significantly increasing training, employment, including self-employment; access to built environment and public transport since inaccessibility to the built environment, including public transport is still a major barrier to inclusion. Another priority area which assumes importance in the 21st

8 For a detailed discussion on this, see State of Human Rights 1998, Law & Society Trust, p 320)

9 General Assembly Resolution 2856 (XXVI) of 20th December 1971

10 proclaimed by the UN General Assembly – see State of Human Rights: 98, p 321

11 www.unescap.org/esid/psis/disability/bmf/summary.html

century is access to information and communication which comprise access to information, communication and assistive technologies

2.4 Convention on the Rights of Persons with Disabilities and the Optional Protocol

On 13th December 2006, The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities. It was open to signature on 30th March 2007. Sri Lankan is one of the signatories to the Convention, yet is still to ratify it whereas developing countries like Bangladesh, India and the Philippines have already done so. According to Cyril Siriwardene, Chairman, Joint Front for Persons with Disabilities Organizations, the Sri Lankan government was delaying its ratification as it is still to enact a progressive Draft Disability Rights Bill.[12]

The Convention does not create new rights but reaffirms existing rights already contained in General International Conventions while making more specific and elaborate provisions for the rights of persons with disabilities. It therefore obliges states that ratify the Convention to incorporate its provisions in its domestic laws, to ensure that disabled persons are no longer discriminated against.[13]

Due to constraints of space and the limited scope of this chapter, several selected Articles will be discussed.[14]

Article 1 defines the purpose of the Convention which is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"

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12 Regional Conference Leonard Cheshire Disability - Perspective from Sri Lanka – Cyril Siriwardhane, 2007

13 UNICEF, Handicap International – secondary source – Performance report 2008, Ministry of Social Services

14 The International Convention on the Rights of Persons with Disabilities contains 50 Articles

The Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. Persons with disabilities are not viewed as "objects" of charity or those who merely need medical treatment or social protection; but as persons with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.[15]

Persons with disabilities have not been defined by the Convention. It merely says "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

By adopting the word "include" in its definition of disability, the Convention provides for the expansion of the term disability. Thus persons who have short term disability too can be covered under this definition. This is further supported in its preamble which says that "disability is an evolving concept."

[15] www.un.org/disabilities

Articles 2 defines key terms used in the Convention, namely 'communication', 'language', 'discrimination on the basis of disability', 'reasonable accommodation' and 'universal design.'[16]

Article 3 underscores several general principles which apply to all persons including persons with disabilities such as respect for inherent dignity, individual autonomy, the principle of non-discrimination, full and effective participation and inclusion in society, equality of opportunity and accessibility.

The Convention goes on to define the rights of persons with disabilities and the obligations of states parties towards them. These obligations include the state's duty to promote the full realization of all human rights and to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention; to take into consideration the human rights of persons with disabilities in all its policies and programmes. It also stipulates that public institutions and private institutions act in conformity with the Convention; the promotion of research and development of universally designed goods, services and equipment in ensuring the economic, social and cultural rights. The state party is also required to make maximum use of its available resources

[16] www.un.org/disabilities "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;
"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation "Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed. "Communications" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology; "language" includes spoken and signed languages and other forms of non spoken languages.

so as to progressively achieve the full realization of rights. Under the Convention, the state is required to consult persons with disabilities in the formulation of law and policy and implementation, especially relating to disability rights.

Article 5 states that parties to the Convention ensure equality before the law and prevent and take measures to eliminate discrimination. It also makes room for affirmative action[17] to be taken in achieving *de facto* equality of persons with disability.

Articles 6 and 7 provide further protection to women and children with disabilities considered to be more vulnerable and subject to multiple discrimination.

Article 9 of the Convention which deals with accessibility is of immense significance in ensuring the independence and dignity of the rights of persons with disabilities. Access to the physical environment, to buildings, public places, offices, and recreational facilities, access to transportation, information and communication enable persons with disabilities to participate in and contribute to all aspects of life.

The principle of accessibility aims to remove the barriers that hinder the enjoyment of rights by persons with disabilities. Accessibility is not merely physical access to places, but also access to information, technologies, such as the internet, communication, and economic and social life. The provision of ramps, sufficiently large and unblocked corridors and doors, the placement of door handles, the availability of information in Braille and easy-to-read formats, the use of sign interpretation and interpreters, and the availability of assistance and support can ensure that a person with a disability has access to a workplace, a place of entertainment, a voting booth, transport, a Court of law. Without access to information or the ability to move freely, other rights of persons with disabilities are also restricted.

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[17] A policy or a program that seeks to redress past discrimination through active measures to ensure equal opportunity, for example as in education and employment.

Persons with disabilities are routinely denied basic rights such as receiving an education, moving around freely living independently in the community, obtaining employment, even when well qualified, accessing information, obtaining proper health care, exercising political rights, such as voting and making their own decisions. The Convention addresses and makes provision for all these rights.[18]

In Article 25 which guarantees the right to education for persons with disabilities, the Convention stipulates that the State party shall ensure an inclusive education system at all levels. It further states that persons with disabilities shall not be excluded from the general education system on the basis of disability. It encourages and fosters the notion that persons with disabilities should be mainstreamed while providing reasonable accommodation to suit individual requirements. The Convention discourages the establishment of special schools and institutions as far as possible in the education of persons with disabilities.

Article 27 of the Convention recognizes the rights of disabled persons to work and employment on an equal basis with others. It stipulates that the work environment must be open, inclusive and accessible to persons with disability. This is to be done by enacting appropriate legislation and by adopting other measures such as prohibiting discrimination in the recruitment, hiring and employment, career advancement; ensuring trade union rights; employment of persons with disabilities in the public sector; paving the way for them to have effective access to general technical and vocational programme and training; promoting the employment of persons with disabilities in the private sector through affirmative action programmes, incentives and other measures.

Article 25 of the Convention recognizes that persons with disabilities have the right to the enjoyment of the highest attainable standard of healthcare without discrimination on the basis of disability. It caters to the special needs of persons with disabilities by making provision for

[18] Articles 19, 27, 25 and 29 of the Convention

early identification and intervention in treatment and services designed to minimize and prevent further disabilities, including among children and older persons. It also stresses that the health services will be in proximity and easy reach of their communities.

International cooperation is widely believed to be essential for the full realization of the rights of disabled persons. The Convention in Article 32 expressly acknowledges this relationship, and obliges states parties to cooperate with other states and/or with relevant international and regional organizations and civil society in capacity building. This is achieved through the exchange and sharing of information, experiences, training programmes and best practices. It is also achieved through research programmes and by facilitating access to scientific knowledge and technical and economic assistance, including facilitating the use of accessible and assistive technologies.

By incorporating a separate Article on international cooperation, the Convention underscores the need for all such efforts, including international development programmes, to be accessible to and inclusive of persons with disabilities. Taking into account that in many countries, particularly in developing countries where the there is a higher percentage of persons with disabilities living in poverty; a failure to include persons with disabilities in planning and implementing development programmes would only aggravate existing inequalities and discrimination within society.[19]

The Convention affirms that not only states parties, but civil society, including organizations representing persons with disabilities, and international and regional organizations, such as the United Nations, specialized agencies, the World Bank and other development banks, and regional organizations, such as the European Commission and the African Union too have a role to play in fostering international cooperation to promote the rights of persons with disabilities.[20]

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19 www.un.org/disabilities

20 www.un.org/disabilities

Article 34 of the Convention deals with the Committee on the Rights of Persons with Disabilities, a body of human rights experts tasked with monitoring the implementation of the Convention. Initially, it is to consist of 12 independent human rights experts, with half elected for a two-year term and half elected for four-years. Thereafter members will be elected for four-year terms, with half the members elected every two years. When the Convention has achieved 80 ratifications, the Committee will be expanded to 18 members.

All states parties are required to submit regular reports to the Committee outlining the legislative, judicial, policy and other measures they have taken to implement the rights affirmed in the Convention. The first report is due within two years of ratifying the Convention; thereafter reports are due every four years. The Committee will examine each report and address its concerns and recommendations to the state party in the form of "concluding observations".

The Optional Protocol to the Convention on the Rights of Persons with Disabilities is a side agreement to the Convention which allows parties bound by it to recognize the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals who have exhausted their domestic remedies and wish as a last resort to obtain redress through the protocol. The Optional Protocol entered into force with the Convention on 3 May 2008. As of December 2009, it has 87 signatories and 48 parties.

The Convention can be considered as one of the greatest achievements of the Disability Rights Movement. The concept and definition of disability as enshrined in the preamble of the Convention has moved away from the oppressive medical model of disability which focused on the physical or biological condition of persons with disability attributing to them a 'sick role' and thereby perpetuating dependency on the medical profession to the exclusion of the social and human rights model, which views societal,

environmental and attitudinal barriers[21] as the real causes excluding persons with disabilities from the mainstream of society and not their disability per se.

In keeping with the new ideology of the Disability Rights Movement, the Convention incorporates the principles of inclusion[22] and empowerment,[23] as opposed to those of oppression and marginalization, which was the end result of following the medical model.

The preamble to the Convention defines disability as an evolving concept and that disability results from interaction between persons with impairment and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. This interpretation reinforces the principle that it is society's response to disability at a given time that contributes to the marginalization and oppression of persons with disability. By referring to disability as an 'evolving concept' it leaves room for its expansion and flexibility taking into consideration the social and cultural setting at a given period in time or place.

The preamble to the Convention places emphasis on the inherent dignity of persons with disabilities by recognizing the autonomy and independence of such individuals to make their own choices and more importantly that persons with disabilities should have the opportunity to be actively involved in the decision-making processes which concern them which include legislation and policy.

The Convention is designed in its entirety to give effect to the main objectives of including and empowering those with disabilities. Many

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21 *Disability Rights Quarterly*, Vol. 23, No 1 (2003), at http://www.dsq-sds.org/

22 'Inclusion' is a term used by people with disabilities and other disability rights advocates for the idea that all people should freely, openly and without pity accommodate any person with a disability without restrictions or limitations of any kind.

23 Empowerment refers to the process of increasing the political, social, economic strength of persons with disabilities and enabling them to develop confidence in their own capacities.

superstitions prevailing in Sri Lanka stigmatize individuals who have a disability. Many still believe that coming face to face with a disabled person when one starts a journey, for example, will bring bad luck. People who have disabilities are not welcome at weddings because of the superstition that they may bring misfortune.[24]

Also, there is a belief that one gains merit by showing charity towards disabled persons who are considered to have sinned in their past life. Thus charity practised in the belief that the giver is more fortunate than the recipient reinforces the negative attitudes of the inferiority of people who are disabled and results in their exclusion from mainstream society. This greatly impairs the self-esteem and dignity of persons with disability.

3. National Law and Policy

3.1 Constitutional Provisions

The 1978 Constitution does not expressly recognize the rights of persons with disabilities. However, Article 12 (1) states that "all persons are equal before the law and are entitled to equal protection of the law" and thus by implication brings the rights of persons with disabilities within its ambit. Article 12(4) provides for affirmative action or special provision being made in the case of women, children and persons with disabilities.

3.2 Statutory Provisions

Statutory recognition was given to the rights of persons with disabilities with the enactment of the Protection of the Rights of Persons with Disabilities Act, No 28 of 1996. The Act established a "National Council for Persons with Disabilities vested with power to take action regarding all matter concerning "the promotion, advancement and protection of the rights of persons with disabilities"

[24] National Policy on Disability 2003

Section 23 of Part V of the Act prohibits the discrimination against persons with disabilities in recruitment to any employment or office, admission to any education institution and in access to any public buildings or public places

Sections 24(1) & (2) provide for redress to the petitioner or aggrieved party in cases where there has been a violation of rights mentioned in section 23 whereby the applicant can apply to the High Court established under Article 154 P of the Constitution.

Protection of the Rights of Persons with Disabilities (Amendment) Act, No 33 of 2003, was passed in order to draft a regulation on accessibility. The newly inserted section 23(3) thus states that "the manner and mode of providing facilities to allow access by disabled person to public buildings, public places and common services shall be prescribed by regulations."

3.3 Accessibility Regulations of 2006 and Amendment of 2009

Consequent to the passing of this amendment, vital regulations named Disabled Persons (Accessibility) Regulations, No 1 of 2006 was made by the Minister of Social Services and Social Welfare under section 25 and section 23 of the Protection of Rights of Persons with Disabilities Act No 28 of 1996 and published in the Gazette Extraordinary No 1467/15 dated 17th October 2006 prescribing specifications and the required design to be followed in the construction of buildings to accommodate and provide access to disabled persons.

Section 2(1) of the regulations is applicable to all public buildings, public places and to places where common services are available to which buildings, places and services persons with disabilities have access to" It further provides that all public existing buildings, public places and places where common services are available, shall within a period of 3 years from the coming into operation of these regulations (which is October 17th 2006), be accessible to persons with disabilities in compliance with the provisions of the regulations. It further states that all plans relating to

buildings must conform to performance specifications and designs. It also states that no Certificate of Conformity shall be issued by the 'relevant authority' in respect of any buildings, construction, reconstruction or renovation of public buildings when such standards are not adhered to.

Some of the specific areas mentioned in the regulations that need to be made accessible to persons with disabilities are parking areas, pathways and corridors, ground and floor surfaces, steps, stairs, ramps, lifts, elevators, doorways, entrances, toilets, parks, zoos and other recreational places, bus stops and railway stations etc are given in the regulations.

The accessibility regulations of 2006 clearly states that all existing buildings shall be accessible to disabled persons within 3 years whereas all new buildings that would be constructed must comply with the design and architectural specifications stipulated and illustrated in the schedule of the regulations.

However, many new buildings and existing buildings have not been made accessible to persons with disabilities in spite of the time frame given in these regulations. The National Council for Persons with Disabilities, the main implementing agency created under the Act, under section 12(p) requires it (National Council) to "introduce programmes to make the physical environment accessible to persons with disabilities."

The filing of a fundamental rights petition in 2009 by disability rights activist, Dr Ajith Perera seeking an order to implement the accessibility regulations and the resultant activism and advocacy highlighting the issue of the lack of physical accessibility to public buildings; (in spite of having laws/regulations providing for its implementation) brought to the notice of the public and the implementing state agencies such as the line ministries the necessity and urgency of the need for accessibility requirements in public building (FR case and the orders issues by the SC will be discussed later in the chapter – SC (FR) 221/2009 dated 14th October 2009).

Since most government buildings, institutions and other public buildings had not complied with the accessibility regulation of 2006, and the time

limit was about to expire, the 3 year period given to provide access facilities to public building, public places and places where common services are available was extended up to 8 years by Extraordinary Gazette Notification No 1619/24 dated 18.09.2009.

4. National Policy on Disability - 2003

As a response to the repeated requests of the Disability Rights Movement, the National Policy on Disability was conceived and approved by the Cabinet of Ministers in 2003.

One of the most positive features of this policy is the active and central role played by the Disability Rights Movement in the drafting of it. As a result, a realistic and progressive approach has been adopted in addressing most of the concerns and issues pertaining to disability.

The policy is fairly comprehensive in its coverage and relevant research has been undertaken to inform policy development and formulation in the findings of the social research study done as a precursor to this policy.

Target groups covered by the policy are those with visual, speech, hearing, mobility, intellectual and psychiatric disability and disability arising from epilepsy and other causes. The inclusion of disability arising from epilepsy covers also impairment arising out of neurological disorders. The words 'other causes' leave room for the expansion of other types of disabilities apart from the ones enumerated.

The policy mentions only schizophrenia as a common cause of mental disability and fails to list other common mental disorders like depression and anxiety states (affective disorders) and post traumatic stress disorders which are very common in Sri Lanka considering the three decade ethnic conflict which took its toll on civilians and combatants alike.

The main strength of the National Policy lies in its definition, recognition and acceptance of disability as the 'attitudinal and environmental barriers

that hinder their (disabled people) full and effective participation in society on an equal basis with others.'

The policy gives strategies to overcome barriers habitually encountered by disabled people in realizing socio-economic rights such as employment, vocational skills, education (inclusive of higher education and non formal education),housing, health and use of public services. Barriers to inclusion given in the policy among others are environmental, communications and cultural barriers.

In one of the many strategies adopted by the policy for the inclusion and integration of people with disability, the mass media has been identified as a means whereby information related to disability will be disseminated to educate, mobilize and activate civil society and so promote the social inclusion of people who have disability. The policy goes on to add that the mass media will take measures to reduce stereotyping and negative socio-cultural and customary beliefs and practices relating to disability.

However, the policy fails to pinpoint the fact that, it is the mass media, which very often contribute to negative stereotyping of persons with disabilities, particularly those suffering mental disability by describing persons who have committed violent crimes as mental patients, psychos etc. The media, through its irresponsible reporting reinforces the association between mental illness and violence, which greatly contributes to negative perceptions held by the public as the mass media is a powerful influence in shaping attitudes and perceptions relating to disability.

Despite some of its shortcomings, a comprehensive policy of this nature mainly from the input provided by the Disability Rights Movement is advantageous in giving direction to the framing of rights based laws, strategies and their implementation in protecting and promoting disability rights.

4.1 Mahinda Chinthanaya Policy - 2005

The Mahinda Chinthanaya Presidential Election Manifesto of 2005 states the importance of treating all differently abled persons as respected citizens without any discrimination.

Mahinda Chinthanaya pledges to take appropriate steps to provide for inclusive education to persons with disabilities. It states that measures will be taken to ensure that children with disability receive education in popular government schools, in order to move away from the present practice of having separate schools for those with different disabilities which results in a sense of alienation. It also addresses negative attitudes and perceptions in society of persons with disabilities.

On the issue of providing access to public places, the Mahinda Chinthana states: "convenient access facilities for differently abled persons will be provided as a matter of priority in all public buildings."

The Election manifesto also pledges to enact legislation to protect the rights of differently abled persons.

Other measures taken to assist persons with disabilities are the monthly grant of Rs 3,000 for each family with a differently abled person and not having any income; the donating of homes by the government to persons with disabilities; providing necessary vocational skills; 3% reservation of jobs (in establishments where there are over 100 employees) for persons with disabilities; Donation of houses to disabled soldiers within a period of 3 years; health grants from the President's Fund, covering entire cost to finance major operations like heart and kidney transplant and establishment of small and medium enterprises to employ differently abled persons.

5. National Mental Health Legislation and Policy

Sri Lanka has one of the highest suicide rates in the world. The psychological trauma and stress suffered by survivors of the Indian Ocean

tsunami of 2004 and the victims of the three decade ethnic conflict needs to be urgently addressed. Therefore it is imperative that Sri Lanka adopts an effective and progressive mental health law and policies.

The main legislation governing mental health and disability arising out of mental illness is an antiquated law, namely the Mental Diseases Ordinance of 1873, which was enacted in the 19th Century and has not been amended thereafter. The central features of this legislation are the emphasis on institutionalization through treatment and detention of those affected by mental illness. This is totally in conflict with the present day interpretation of mental disability which is clearly rights based. This insular approach has given away to a more enlightened and progressive social model where the focus is on recovery and integration with the community as citizens with equal rights.

The long title of the Mental Diseases Ordinance states that the provisions deal with "the care and custody of persons of unsound mind and their estates" Clearly the title of the law and the name of the enactment use terminology of a bygone era where there was a strong institutionalised bias when dealing with those afflicted with mental disorders.

Several attempts at introducing a new Mental Health Act, one in 2001 and the more recent one in 2007 were merely abortive efforts which resulted in much consultation and discussion, but failed to become law due to difference of opinion and lack of consensus among certain main stakeholders in the field of mental health.

The Draft Mental Health Act of 2007 is a vast improvement to the existing law with the title of the Act stipulating that the legislation is to protect the rights of persons with mental illness, provide for the care, treatment, continuing care, rehabilitation of persons with mental illness.

Some of the salutary features of this Draft Act are the elimination of offensive terminology and replacement of terms in line with rights discourse and provisions and mechanisms to deal with promotion,

prevention, rehabilitation is given, unlike the existing Ordinance which only deals with treatment and institutionalization.

Other important rights of mental health users such as human dignity, privacy, protection of property, informed consent, freedom from exploitation and abuse are also addressed.

However, the Draft Act fails to address adequately some fundamental issues which are central to mental disability such as stigma and social well being. Social well- being is mentioned in the preamble but not addressed in the Act.[25]

The Act makes no reference to the issue of stigma and the social issues that affect persons with mental disorders due to this. It does not sufficiently address the rights of persons living in the community who are on life long medication. Important socio-economic rights such as the right to employment and access to services have not been dealt with effectively.

The Mental Health Policy (for the years 2005 – 2015) has an impressive rights based approach in its vision and principles. In its mission statement it provides mental health services at primary, secondary and tertiary level, and ensures that mental health services will be linked to other sectors and further pledges to protect human rights and dignity of people with mental illness.

The positive feature of this policy is that it prioritized the development of community based mental health services and the decentralizing of services, involving the downsizing of large mental hospitals with the provision of local mental health facilities[26]

However a close examination of the seven areas of action which constitute the main provisions of the policy reveals that much focus is given to the

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25 Interim Report on Mental Health Bill, 9th October 2007

26 http://www.whosrilanka.org/LinkFiles/WHO_Sri_Lanka_Home_Page_Mental_Health_Factsheet.pdf

treatment of patients and training of medical personnel. There seems to be no provision for civil, political and economic rights such as the right to employment, right to vote, right to enter into contracts. The policy fails to address the main two premises on which the social model (as opposed to the medical model) is based that of inclusion, empowerment and ultimately integration into society. It does not address sufficiently the socio-economic and attitudinal and cultural barriers mental health users face in their day to day life due to the entrenched stigma accompanying this kind of disability. The policy does not make much provision in addressing stigma and marginalization. Although tackling stigma and promoting mental wellbeing is given as the sixth area of action, it merely states that a national strategy will be designed and implemented to reduce stigma and discrimination. The details and main strategies in handling stigma should have been included in the policy itself as this is the main obstacle for mental health users to integrate into society.

Positive attitudes and behaviors towards those who endure mental disorders is a giant step forward in their recovery process.

The overall policy and the Draft Mental Health Act lack an integrated approach towards disability, given that disability is accepted and seen as 'attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.' The focus, still, to a great extent, seems to be on a very medicalized approach, instead of one of inclusion and empowerment where mental health users are not oppressed or marginalized which is a social reality.

6. Performance of State Institutions In Promoting And Protecting Disability Rights & National Laws, Policy & International Standards

The focal point and the overseeing state agency in charge of formulating and implementing programmes on the promotion and protection rights of persons with disabilities and the administration and operation of the Rights of Persons with Disabilities Act No 28 of 1996 is the Ministry of Social Services and Social Welfare. The National Council for Persons with Disabilities and the National Secretariat for Persons with Disabilities are the statutory institutions which come under the Ministry of Social Services which deal specifically with disability rights and issues.

The years under scrutiny will focus primarily on 2008-2009 based on the work done so far by the National Secretariat for Persons with disabilities and the National Council for Persons with disabilities which is documented in their performance reports for the years 2008-2009.

The Performance report for 2008 produced by the Ministry of Social welfare documents and lists the targets achieved by the National Council for Persons with Disabilities

The report highlights the monthly social welfare payment allowance of Rs 3,000/- for families of persons with disabilities initiated under the Mahinda Chintana (the Election Manifesto and policy document of President Mahinda Rajapaksa, 2005). The sum of Rs 7.6 million has been allocated for the year 2008 to be distributed among 2125 families.

The National Policy on Disability 2003 states that "people who have disability are among the poorest segments of the Sri Lankan population." It also affirms the well known fact that disability and poverty are closely interlinked. While a monthly allowance will indeed to some extent alleviate the poverty and hardship of those indigent persons with disability, there are questions about the sustainability of such social welfare benefits.

The National Policy clearly indicates that key socio-economic factors such as adequate education and gainful employment for persons with disabilities are indispensable in ensuring their dignity and independence. Thus it would be more appropriate to allocate substantial funds to generate employment and for purposes of education.

The Council provides medical assistance to patients with disabilities, the maximum health allocation per person being Rs. 20,000/-. This programme is implemented to promote health of persons with disabilities.

The allocation for 2008 being Rs 3 million and out of which as at end October Rs. 1.6 million has been granted to 131 patients. Under this programme, assistance is being granted to patients for heart surgery, kidney implants, hip-bone surgery, knee cap surgery.

Medical assistance under this programme is also provided for obtaining medicine which is not available in government hospitals and traveling expenses for attending clinics.

Medical assistance provided since 2005 is given in the following table

Year	No of Persons with Disabilities	Financial Expenditure (in Rs million)
2005	230	4.515
2006	236	3.585
2007	205	2.720
2008	184	2.504
2009	168	2.209
Total	1023	15.533

The above table illustrates the financial allocations to provide medical assistance from 2005 – 2009 and the number of beneficiaries. In 2005 the number of beneficiaries is 230, while in 2007, 2008 and 2009 there is a drop in the number receiving assistance. Are we to assume that there is a decrease in the number of persons with disabilities with each passing year?

Thus in the Year 2008, 184 persons benefited from medical assistance, while in 2009 the number of beneficiaries has dropped to 168.

It is interesting to note that in the study titled "Report of a Social Research Study on Disability", (draft March 2003) commissioned by the Ministry of Social Welfare, 67% of the individuals in the study did not know about the services provided by the Ministry. Further that only 53% of those that knew about the services had benefited from them.

The Ministry conducts islandwide mobile service programs to provide assistive devices like spectacles, wheelchairs, elbows, crutches and tricycles to needy disabled persons. The following table gives the number of persons with disabilities who benefited from such services

Distribution of Assistive Devices

Year	No of Mobile Services	Beneficiaries	Financial allocation
2005	32	20338	NA
2006	22	17701	NA
2007	45	31956	NA
2008	42	31830	NA
2009	43	15763	6.15 million

Source: Performance Report 2009, National Council for Persons with Disabilities

The Ministry of Social Services has provided assistive devices to IDPs in welfare camps in the North up to the 3rd quarter of 2009.

The following table shows the Assistive Devices distributed among each zone in the welfare camps.

Distribution of Assistive Devices

Assistive Devices	Zone 0	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	others	Total
infant wheel chairs	29	85	15	14	41	15	26	225
Wheelchairs	10	10	10	86	33	10	58	217
Elbows	05	10	20	10	11		59	115
Crutches	20	30	20		45	25	50	190
Tricycles	05	10	15	05	10	05	08	58
Wheelchairs with commode		140	44	20	76	20		300
Plastic chairs	100	100	300	330	800		370	2000
White canes		09	24	07	10			50
Braille slates			02					02
Chairs with commode		140	44	20	76	20		300

Additional services and activities by the Ministry of Social Welfare in 2009 to the IDPs are listed below:

- Provision of 240 artificial limbs for persons with disabilities among internally displaced persons.
- Needs assessment of persons with disabilities in Vavuniya welfare centres by senior social service officers
- Taking action to fit artificial limbs to IDPs with the collaboration of the Jaipur foot programme of India
- Making facilities for 1,500 persons with disabilities among internally displaced persons to live with their families and relatives.
- Action has been taken to rehabilitee persons with disabilities in welfare centres in Vavuniya under the CBO (Community based organisation) and training programmes conducted for CBO volunteers.

- Programmes implemented under the Child Guidance Programme of the Department of Social Services for disabled children in the welfare villages of Vavuniya.

Self-employment Programmes for persons with disabilities is another activity conducted by the National Council and National Secretariat proclaimed to improve the living conditions of persons with disabilities. A maximum sum given to each person is of Rs 10,000. The amounts paid and the number of beneficiaries is shown in the table given below.

Year	No of Persons with Disabilities	Financial Expenditure (in Rs M.)
2005	170	1.651
2006	114	1.064
2007	211	2.041
2008	386	3.607
2009	347	3.438
Total	1228	11.801

The Council under the Ministry of Social Services and Welfare provides vocational training under the vocational training division. This special programme is being implemented by the Council and Secretariat for persons with disabilities to provide vocational training to young men and women with various disabilities to enable them to be engaged in self-employment or obtain employment opportunities in the private sector and also to make them active stakeholders in the national economy. Under this programme vocational training is provided annually for such persons at the Department of Vocational Training Centres at Seeduwa, Amunukumbura, Ketawala-Levila, Wattegama and Thelamubuyaya.

Vocational tools and equipment have been provided to beneficiaries who have successfully completed training to enable them to commence self-employment projects. Thus each trainee is being provided with a set of

tools worth Rs 10,000/-. Tools have been issued to 84 trainees in 2007, 79 trainees in the year 2008 and to 138 trainees in the year 2009.

Accordingly, for 14 voluntary vocational training centres, including the 6 vocational training centres of the Department, a sum of Rs 13.432 million has been spent in the year 2007, Rs 9.331 in the year 2008 and Rs 10.272 million in the year 2009 (as at 30.09.2009) Training has been provided to 701, 706 and 673 trainees respectively.

While commending the work done so far by the Ministry in providing self-employment and vocational training to persons with disabilities, it is submitted that much more should be done in these too vital areas of self-employment and vocational training. More financial allocations and increase in the target number of beneficiaries are imperative.

In the Performance Report of 2007, the importance of self-employment to persons with disabilities is highlighted drawing on the data collected in the 2003 survey of the socio-economic conditions of persons with disabilities. The data in the following table is evidence of it.

Employment	**Sex**		**Total**
	Male	**Female**	
Self-employment	36%	19%	32%
Public sector	34%	13%	29%
Private sector	9%	25%	13%
Casual Labour	11%	25%	12%
Domestic income avenue	9%	12%	NA
Community services	1%	6%	NA
Total	**100**	**100**	**NA**

The Additional Secretary to the Ministry of Social Services and Social Welfare in the Performance Report of 2007 states, on the basis of data given in the above table that "the main source of income of persons with disabilities comes from self-employment."

She also lists out a number of challenges that persons with disabilities engaged in self-employment face such as lack of managerial skills, lack of marketing skills, lack of access facilities (communication and built environment), soaring prices of raw material, and difficulty obtaining credit. She recognizes the fact that the Ministry should adequately address these issues.

Although there is a law which stipulates that establishments with over 100 employees should reserve 3% of employment opportunities for disabled persons, only a few government institutions observe this rule.

The Ceylon Federation of Employers too has a job database and persons with disabilities are encouraged to apply. But as the statistics indicate only a small percentage of persons are employed by the private sector, the majority having to fall back on self-employment as the most viable form of employment.

The National Council and National Secretariat has also commenced a housing assistance programme. The *Supiri Vasana Sampatha* of the National Lotteries Board sponsored this programme. The maximum housing assistance per person is Rs. 100,000.

Particulars of housing assistance provided since 2005

Year	No of Persons with disabilities	Financial Expenditure (in Rs million)
2005	486	4.500
2006	698	15.828
2007	588	21.998
2008	**807**	**37.948**
2009	**657**	**48.134**
Total	3236	128.408

A programme to repair houses owned by to disabled persons was financed by the Ministry under the Mahinda Chinthanaya. This program was opera-

tive from 2006 – 2007. In 2006 a sum of Rs 9.836 million was spent on repairing 22 houses, while in 2007 Rs 9.800 million was spent for the repair of 178 houses. It is regrettable that this programme has been discontinued during the years 2008/2009.

Under its special education programme unit, the Ministry of Social Welfare has been conducting Braille, sign language, mobility and orientation courses since 2007 receiving momentum along with the naming of 2007 as the year of accessibility.

The Braille project was launched in July 2007. For the first batch, 28 public officers from 11 branches in the Ministry of Social Services and Social Welfare have been recruited for training. Of these, 20 have successfully completed the course and received certificates in April 2007. As and when necessary their services will be obtained to read Braille of the visually impaired and also to translate necessary documents into Braille.

The Course for the 2nd batch was commenced in 2008 for 30 public officers in 14 other ministries. Their course will be completed in November 2008 and certificates will be given to them after conducting the test.

The Braille Training Course for the 3rd batch is to be commenced in the Tamil medium in December 2008. Three graduates were being trained for the higher level English Braille course. They were selected from universities who made these requests.

The Braille course for the third batch was commenced on 17th March 2009 and 32 public officers from 17 ministries admitted for the course. The Braille course for the 4th batch in Sinhala and English commenced in the first week of September. This course is conducted for 25, in the Sinhala medium and for 22 in English medium in 4 groups.

Other activities under the Braille Unit in 2009 is the Braille course for specialized teachers who are engaged in the field of education with the visually impaired under the programme of Integrated Education System; a Braille Course for university students who require Braille training and

knowledge in higher education; to start a Braille course for blind persons and their relevant family members and obtain a Braille Printing Machine for the Ministry – NSPD Braille Unit to prepare necessary books, news bulletins and magazines relevant to the Braille system.

The sign language course for public officers of the Ministry of Social Services and Welfare was commenced in December 2007. Twenty public officers attended this course and the duration was 6 months. The first step of the course was completed in June 2008. The second step commenced in May 2008 and 18 officers from the ministries attended the course.

In examining the work done under the Special Education Programme Unit, it is pertinent to note that the introduction of these courses for public officers is of fairly recent origin, namely 2007. It is important for those in the Ministry of Social Services working on issues of disability rights to have adequate training to equip them to interact and communicate with those they serve in their medium of communication. One of the functions of the National Council for Persons with Disabilities under section 13 of the Protection of Persons with Disabilities Act, No 28 of 1996 is to implement schemes and provide access to information and communication to persons with disabilities. In keeping with its statutory obligations, it would have been better if the ministry took timely action to implement such useful programmes sooner.

6.1 Access Facility Programme

In the Performance Report of the National Council for persons with disabilities for 2008, the access facility programme is highlighted as one of the targets achieved. The targets referred to are the legal provisions to enable persons with disability access to public buildings, namely people with disability Persons Accessibility Regulations, No 1 of 2006 published in Gazette No 1467 and the efforts made by the Council to obtain recommendations from professionals including Sri Lanka Institute of Architects so as to formulate necessary amendments – (to extend the period of implementation up to 8 years).

A special discussion was scheduled in 2009 in this matter with Ministers and Secretaries of the Ministries of Tourism, Urban Development and Sacred Area Development, Housing and Common Amenities, Post and Telecommunication, Highways and Transport etc.

6.2 Awareness Programme – Accessibility

Several awareness programmes were conducted on access facilities to public buildings and places to create awareness among officers of the government Institutions at provincial, district and divisional level by the end of October this year. The amount spent on this is around Rs. 294,000.[27]

An inter-Ministerial Committee has had 8 meetings as at 2009. They have discussed the need for accessibility to public buildings, and necessary guidance and instructions have been given to the Ministry of Social Welfare. Many Ministries are said to have taken action to provide access facilities in their institutions for persons with disabilities. In addition this Inter Ministerial Committee, awareness programmes were held for relevant officers in the construction field including Department Officers, Divisional Secretaries and Technical Officers at provincial, district and divisional level. In 2008, 31 awareness programmes were held. In 2009 up to end of October, 23 awareness programmes were conducted utilizing Rs 0.571 million.

6.3 Accessibility to Buildings

As stated in the Performance reports of 2008/2009 under this programme, action has been taken to provide accessibility facilities to more than 150 Divisional Secretariats. In addition, accessibility facilities were provided to several other public buildings. The amount spent for the programme is Rs 1.378 million. These facilities were also provided to the Colombo National Museum, Town Hall theatre, Elphinston theatre, John de Silva theatre, Dehiwela Municipality and the Public Library, a number of post

[27] Performance report – 2008.

offices and railway stations. At Maradana Railway Station facilities like TV monitor, lifts and sanitary facilities have been provided for persons with disabilities.

The Performance report of 2009 states that discussions were held with the Legal Draftsman and the Disabilities Rights Bill is being redrafted on the instructions of the Attorney-General. According to the recent inquiries made by the writer, it was disclosed that the Bill is currently with the Legal Draftsman.[28]

The Performance report further refers to the Cabinet Paper submitted by Minister of Social Services & Social Welfare on 11.03.2009 regarding "Provision of Special Facilities for voting at elections by visually impaired persons (accompanying a helper to the polling centre for casting the vote) approval has been received at the Cabinet meeting on 01.04.2009 to submit the Elections Special Provisions Bill to Parliament and this has been submitted to the Parliament.

7. Duty of Collecting Statistics on Disabled Persons

There has not been a proper survey at a national level to determine the magnitude and scale of the number of persons with disabilities in Sri Lanka. There are varied accounts of the number of persons with disabilities in Sri Lanka. A nationwide survey of persons with disabilities has never been conducted, therefore available statistics vary and the accuracy and reliability are questionable.[29]

Mr R. M. Guneratna, disability rights activist who is a member of the Sri Lanka Council for the Blind and Legal Consultant for the Disability Organisation Joint Front & Leonard Cheshire Disability Resource Centre estimates the percentage of disabled persons at 12% taking into consideration those disabled by war and other factors. It is of some

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28 Social Service Ministry officer - Feb 2010

29 – Performance Report 2009, p. 18, article written by Attanyake, AAL Provincial Councilor, Uva Province).

concern that this figure (which is a reasonable estimate) has been rejected outright by Deputy Minister of Social Services and Social Welfare, Lionel Premasiri. He estimates this at a much lower figure – this too not based on any reliable data or statistics to assess national figures.

It is submitted that a national survey or census of the number of disabled persons and type of disability etc should have been conducted by the Ministry of Social Services – by their policy formulation and implementation bodies the National Council for Persons with Disabilities and the National Secretariat.

Section 12(f) of the Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 states the Council Shall "maintain accurate statistics relating to persons with disabilities and the services available to such persons"

No doubt a national census of persons with disabilities would be a fairly big undertaking, involving time, effort, skill and availability of adequate resources. However, it must be emphasized that for the formulation and implementation of various disability programmes and development programmes; accurate and reliable statistics relating to persons with disability, especially at a national level and, then giving a breakdown of the figures in the various provinces is vital.

The Convention on the Protection of Persons with Disabilities, Article 31 places the obligation on states parties to collect appropriate information including statistical and research data to enable them to formulate and implement policies to give effect to the Convention.

Sri Lanka is far behind in ensuring human rights for those who have sensory disabilities, such as people who are blind and deaf. A lack of television programmes in sign language, specifically the news, partly denies people who are deaf their human rights of receiving information as stated in the Convention. Out of the leading state run television networks (Rupavahini,

Channel Eye and ITN), only Rupavahini presents a news programme in sign language which is only one a week.[30]

In the field of education, not much progress had been made to make it inclusive and accessible to persons with disabilities. The Mahinda Chinthana states that "appropriate steps" would be taken to "provide facilities for differently abled children to receive education in popular schools, in order to move away from the practice of having separate schools for those with different disabilities." However, telephone calls to many popular schools (by groundviews) Visaka Vidyalaya, Sirimavo Bandaranike Vidyalaya, Devi Balika, Ananda College and Mahanama College revealed that these schools did not accept differently abled students with the exception of D.S. Senanyake College which did accept disabled students but required an application from the education ministry.

Ishan Jalil, who has been blind since birth and attended the blind school in Moratuwa, says that during his O' Levels (which he sat for in 2005) there were no textbooks available in Braille for subjects like mathematics, science and English. However, at the Colombo University where he is reading for a bachelor of arts degree, he says that not only is the administration extremely helpful, but facilities for visually impaired students are of a very high standard, mentioning specifically the availability of a computer centre designed for those visually impaired.[31]

8 Disability Rights Advocacy

Like many marginalised groups, disabled persons find it difficult to have their voice heard in public policy matters due to the fact that the 'disabled lobby' is perceived as an afterthought, deprived of an influential and decisive voice and therefore easily disregarded.[32]

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30 www.Groundviews.org/2009/12/12/the –rights-of-the-disabled-forgotten-and-forsaken/)

31 *Ibid*

32 Fiona K. Campbell,. "Disability, legal mobilization, and the challenges of capacity building in Sri Lanka" Marshall Vol. 3, ch 8)

Traditionally, disabled people have been seen as passive recipients of services, in need of competency training and deprived of agency. In Sri Lanka, there is an array of disability focused NGOs, a number of umbrella bodies and disabled people's organizations (DPOs). These organizations have succeeded to a great extent (especially at grassroots level) through their leadership training programmes and awareness raising (capacity building) in empowering disabled people living in their communities. There are DPOs run by locals with disabilities which are formal social organizations made possible by a community development approach based on community based rehabilitation, (CBR) rather than professional, commercial approaches to rehabilitation adopted in the West. Thus CBR emphasizes local control and leadership of disability programs by disabled people.[33]

This is in keeping with the notion of empowerment which encourages disabled people to be involved in what concerns them.

AKASA is one of the many DPOs active in Sri Lanka. It is an Association of Women with Disabilities and consists of a network of self-help groups, devoted to creating opportunities for its members. It encourages disabled people to develop their skills, abilities and talents in order to obtain equal opportunities for their full participation in society and live as independent and self-reliant citizens.

In Sri Lanka, there is anecdotal evidence to suggest that there is a lack of sufficient complex skills related to self-determination for disabled people due to barriers such as inadequate funding, transportation, limited knowledge of leadership training and difficulties recruiting people for leadership roles.[34]

Community based rehabilitation usually involves an effort to de-stigmatize people with disabilities, often through promoting particular disabled

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[33] *Ibid p.118*

[34] Powers et al, 2002 – Fiona Campbell – Disability, Legal Mobilization and challenges of capacity, *Marshall* vol. 3, ch 81

persons as positive role models. Several DPOs and NGOs have aimed to address these barriers. The Disability Organizations Joint Front (DOJF), founded in 2001, is an umbrella organization of 18 affiliated disability organizations who work in concert. Although primarily an advocacy organization, the DOJF is increasingly involved in capacity building programs for disabled people in the areas of legal education, public speaking, budget management, and committee skills through the creation of a network of leadership training.

Sri Lankans with disability have little knowledge of the services provided by the Department of Social Welfare. The ADB (2005) has observed that the knowledge of legal remedies for the violation of rights and holding those responsible accountable for service provisions was severely lacking.[35]

At present, there is no freedom of information law in Sri Lanka. It is interesting to note that the Law Reform Commission of Sri Lanka in its Report on Freedom of Information, 1996 stated that "the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access."[36]

Lack of information, including lack of access to official documents on government policies such as social security initiatives, access regulations, medical records, legal aid and education, affects the realization and enjoyment of political, economic and social rights.

In *Fernando v. Sri Lanka Broadcasting Corporation & Others*[37] the Court stated "that information is the staple food of thought and that the right to information, *simpliciter* is a corollary of the freedom of thought guaranteed by Article 10. Prof. Fiona Campbell argues that this authority could be used to initiate a petition for fundamental rights violations under Article 10 and its link to Article 14 1(a) of the Constitution arguing that

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35 Fiona K. Campbell - Disability, Legal Mobilization and challenges of capacity, *Marshall* Vol. 3, ch 8)

36 Law Reform Commission, 1996

37 (1996) 1 SL.R. 157

various authorities were remiss in providing information in an expeditious, transparent and accessible manner to disabled people. [38]

In *Environment Foundation Limited v. Ratnasari Wickremanayake*[39] Justice Ranaraja expanded the principle of *locus standi*[40] This expansion of the principle of *locus standi* enables NGOs to lodge applications before the courts in matters relating to the implementation of disability law such as was undertaken by the Public Interest Law Foundation in 2000.[41]

9. Supreme Court Order – 2009

Disability rights received a significant boost and gathered momentum with the filing of the fundamental rights application by Dr Ajith C.S. Perera, a disability rights activists, head of IDIRIYA, (a voluntary organization promoting the rights of persons with disabilities) to enforce the states obligations on accessibility for persons with disabilities to public buildings.[42] Dr Perera, who appeared in person, complained to Court that there is continuing and ongoing discrimination affecting disabled people of Sri Lanka, thereby denying them productive opportunities as equal partners in national development.[43] He submitted that although the rights of people with disability have been guaranteed under the Protection of the Rights of Persons with Disabilities Act No 28 of 1996 and Accessibility Regulations No 1 of 2006, these rights are yet not recognized and neglected at even new public places.

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38 Fiona K. Campbell - Disability, Legal Mobilization and challenges of capacity, *Marshall* Vol. 3, ch 8)

39 CA Application No 137/96) (popularly known as the Zoo case)

40 A principle about who can bring a petition to the Courts/right to be heard) to include *petitioner* who acts in the public interest to ensure that laws are applied to all.

41 *Public Interest Law Foundation v. The Municipal Council of Colombo, CA 602/2000; Public Interest Law Foundation v. The Ministry of Justice CA 603/2000*)

42 *Sunday Times* 18th Oct 2009

43 *Sunday Times* – 18th October 2009

He pointed out that contrary to popular myth, it would not be expensive to establish these specified minimum design requirements at new buildings enabling people with disability easy access and furthermore eliminate common safety hazards to all other people.

It was pointed out that a large number of disabled persons, including members of the armed forces injured in the war were inconvenienced by the continual failure to provide easy access in public places. He stated that an estimated 16% of the population are disabled with restricted mobility and require easy access to public buildings. The Petitioner cited over 50 ministers in the government for failing to implement the Disabilities Act. Among them being the Minister of Social Services and the National Council for Persons with Disabilities being the main state agencies entrusted with implementing the Disabilities Act. The Court was informed that though there was an order issued a few years back (Accessibility Regulations of 2006) and which expires in October this year (2009) nothing constructive had been achieved for the improvement of the facilities made available for people with disability.

The state defending itself said that the government and the respective authorities concerned have taken measure to make alterations and improve facilities for people with disability in most of the public places under government control.

And the state further contended that in the light of the present financial situation and difficulties faced, it will take some time to implement all the requirements that the Petitioner requested.

However, the Petitioner disputed the claims made by the state counsel and said that being in the National Council for Persons with Disabilities, he had visited many places like some of the post offices said to have adequate accessibility features for people with disability, and that these are not at all up to the required standard.

The Court comprising Chief Justice Asoka de Silva, Justices Saleem Marsoof and S.I. Imam recognized that in terms of the Protection of

the Rights of Persons with Disabilities Act and the regulations made thereunder, no persons should be discriminated on the ground of disability and their mobility restricted in a manner which precludes or impedes them from gaining reasonable physical access to public building with facilities provided within such buildings, especially toilet facilities.[44]

Accordingly the Court ordered[45] that all new public buildings defined under the accessibility regulations No 1 of October 17, 2006, should provide reasonable access in accordance with the design standards of regulations in force, to those who are physically challenged. The Court further ordered that all authorities should refrain from approving plans or issuing 'Certificates of Conformity' in respect of buildings which would violate the Court order. The court also ordered that "Failure to comply would draw punitive repercussions under the laws set in."

The Court order directs that "you would be at liberty to file a motion, if there is a violation" and states that the commissioners of local government and officers of the UDA are equal partners and equally responsible for enforcing these orders.

Accessibility to public buildings is a basic right of persons with disability. It is guaranteed and ensured in Sri Lanka's national law, policy and in international declarations and treaties. While some attempts have been made by the state authorities to provide accessibility facilities like ramps, railings, wide entrances etc at certain places like museums, theaters, libraries, post offices – these places do not meet the desired standards that are specified in the accessibility regulations and therefore fall short of providing effective access to persons with disability. It is this sorry state of affairs that compelled the intervention of the Supreme Court to implement the law.

Commenting on why the 1996 Act for the Protection of the Rights of Persons with Disabilities has proved largely defunct, the petitioner, Dr

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44 *Sunday Times* 18th Oct 2009

45 SC (FR) 221/2009 dated 14th October 2009

Perera said it was partly because the penalty for its violation was inadequate. Failure to adhere to the previous law would have resulted in a fine not exceeding Rs 10,000 or imprisonment for a term not exceeding one year or both.

According to the current law, (the discussed supreme court order above) any violation of it could result in punitive repercussions. The positive outcome of the Court order is that many new building that have come up or coming up are providing accessibility features in their new constructions.

According to rights activist, Dr Ajith C.S. Perera within six months of filing the petition, there have been a great many gains in relation to accessibility, albeit largely limited to entrances to public buildings, perhaps more than in all the previous six years! That alone according to him constitutes a success.

It was following the issuance of the order and direction, that the Urban Development Authority made a statement that all public buildings would be made accessible to all physically challenged people in the country. Further, the UDA Enforcement Department, Director W.A. Siriwardena said that he would issue a special circular directing all officers to enforce these new features when approving the construction of new buildings.[46]

The enormous contribution made by disability rights groups has led to making rights real for persons with disabilities. It has been the driving force behind legal reform and policy both at the national and international level. Like in many areas of law reform, the fight for disability rights has been long and arduous. The rights achieved so far are a testament to their persistence, tenacity and commitment to promote and protect the rights of persons with disabilities.

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[46] *Daily Mirror*, 8/12/2009

10. Conclusion and Recommendations

Concerns & challenges: constraints in implementation and enforcement

As seen by the foregoing discussion, there are many obstacles that have to be overcome in ensuring and protecting the rights of persons with disabilities. An inept bureaucracy failed to establish a formal mechanism to implement legislation and thereby lend any practical effect, in providing access to disabled persons, even in respect of new public buildings.

In spite of the gains made in disability rights, with national and international law reiterating the inherent dignity and worth of all human beings, disabled persons continue to be looked at in a negative and patronizing manner. Cultural and attitudinal barriers are often one of the most challenging and hardest to overcome because of the deep seated and entrenched prejudices people hold regarding persons with disabilities.

Lack of consensus among stakeholders in the formulation of laws have been a source of much concern as this has led to many laws, at present the Draft Disability Rights Bill being unduly delayed and put on hold. The Draft Bill was initially introduced as far back as 2004. The Act is said to be a vast improvement from the existing law (protection of rights of persons with disabilities) and is in line with the UN Convention on the rights of Persons with disabilities.[47]

The disability Rights Bill has become a bone of contention between disabled rights activists and the Ministry of Social Welfare. According to visually impaired lawyer and rights activist Mr R.M. P.H Gunaratna this important Bill which addresses special needs of persons with disabilities has still not been presented in Parliament.[48]

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47 Phone interview Zacky, Leonard Cheshire, lawyer working on disability rights

48 *Sunday Times*, 18th October 2009

The Draft Disability rights Bill deals with aspects such as access to physical environment, insurance, a 3% job allocation, training, education, paying special attention to disabled children, youth and women and people with severe disabilities. Mr R.M Gunaratna[49] points out that the current Act has only one clause on the rights of persons with disabilities and that the 65 clause Bill is a vast improvement in keeping with modern trends. He says: "it is gathering dust in the Ministry without being presented to Parliament even after having gone through all the procedures."

According to Deputy Minister of Social Services and Social welfare, Lionel Premasiri, no consensus was reached with regard to the setting up of a 'Disability Authority' due to the disability rights activist advocating for an independent body. According to him such important subjects need the support of the government because issues have to be addressed and the National Council on Disability now in operation is the ideal body to oversee disability rights issues.

It is submitted that it is precisely because the Council for Persons with Disabilities and other state agencies have largely proved to be ineffective and lethargic (evidenced by failure to implement the accessibility regulations) in protecting the rights of disabled persons, that an independent body has been proposed. Political interference, inefficiency and corruption are endemic in Sri Lanka's public institutions. To state that the National Council for persons with Disabilities is ideal is ludicrous in light of its current performance. It is conceded that work has been done, as shown in the preceding sections of this article, but the work done falls far short of the required standards that will ensure the dignity and protection of persons with disabilities as equal citizens of this country.

[49] He is a member of the Sri Lanka Council for the Blind, legal consultant for the disability organizations Joint Front and the Leonard Cheshire Disability Resource Centre.

Recommendations

- When drafting laws, proper enforcement mechanisms (especially adequate penalties for breach of laws) should be in place. Lack of stiffer penalties for violations and absence of an effective implementing mechanism[50] was one of the reasons violators were not punished and escaped with impunity.

- Continued advocacy and awareness raising. Awareness raising is particularly important in empowering persons with disabilities as it is by knowing about their rights and the legal remedies therein that enable them to realize their rights. Continued and sustained advocacy is vital as many of the laws and policies both national and international now in existence were the outcome of long drawn out struggles and lobbying of disability rights organizations.

- Since the government is considered the main stakeholder and protector of persons with disabilities, political representation should be provided for persons with disabilities by providing a quota for disabled persons at the provincial, local and national level. Electing persons with disabilities to positions of political power will go a long way to obtain the commitment and dedication that is presently lacking. For instance, a disabled minister or parliamentarian will be much more amenable, committed and passionate about protecting disability rights as opposed to a person who is not disabled and does not have a stake in the benefits accruing from the protection of these rights.

- To encourage the participation of persons with disabilities in developing district and provincial policies and designing development activities. Participation of persons with disabilities at all levels will increase their access to the quality of services. They can recommend necessary alterations, amendments or additions to existing programs to protect their rights. Participation of persons with disabilities will

[50] Cited by the petitioner in the fundamental rights application, Dr Ajith Fernando

sensitize state and non-state officials to enhance knowledge of both groups on the needs of persons with disabilities. It is a learning process for both the state and non-state sectors to accommodate persons with disabilities. Participation of every organization of persons with disabilities is denied at the national level due to lack of space. As such accommodating, encouraging and promoting their participation at the district and provincial levels will provide more opportunities for persons with disabilities to express their opinions.

- To collect accurate statistical data as to the numbers, socio economic situation, education standards and skills of persons with disabilities, which is crucial to promote inclusion of persons with disabilities in development activities. If there are gaps in the collecting data, such gaps should be addressed to minimize errors and to reduce the undercounting of persons with disabilities.

- A barrier-free environment is the only means for the most vulnerable to participate and be included in society. Access requires that people with disabilities and other stakeholders are informed and aware of disability issues and have access to available data (i.e. demographics) on disability. It requires that services and resources reach the most vulnerable in rural and urban communities and reach all persons with disabilities, irrespective of age, sex, ethnicity, geography, language and disability.

- To establish a databank that provides information on persons with disabilities. Access to information is vital for inclusion of persons with disabilities in development and social protection initiatives implemented by the state and non- state sector.

- In the collection of statistics for the formulation of policy and implementation of programme for persons with disabilities, obtaining statistics has proved to be somewhat difficult due to the sensitive nature of the information and prevailing attitudes towards disability. Thus assurance of confidentiality, privacy should be assured and skills training in gathering such data should be provided.

- There should be a mechanism to prevent stalling of essential laws/ policies through an attitude of compromise, balancing of competing views whereby a consensus is reached without inordinate delay which frustrates the rights of the very persons the stakeholders engaged in consultations profess to protect. Stakeholders, particularly the state, as the primary provider and protector of right of persons with disabilities should be mindful and duty bound to expedite legislation, especially in keeping with its national and international obligations which state that the government is under an obligation to enact legislation to protect, promote and advance the rights of persons with disabilities.

- To provide quality training to persons with disabilities, enabling them to secure employment in the competitive labour market. This is vital as the unemployment rates are comparatively high in Sri Lanka. Some of the curricula and training courses available are outdated and not geared to modern employment requirements.

- To mainstream disability into all state sector activities is important to ensure a rights based approach to addressing disability issues. All sectors should be sensitized on the needs of persons with disabilities and to provide resources for their inclusion into these programs.

XII

ENVIRONMENTAL RIGHTS

Mathilal de Silva[1]

1. Introduction

This Chapter seeks to examine the institutional and legal framework of environmental management in Sri Lanka. With regard to the legal framework, this chapter will focus on constitutional protection of environmental rights followed by the general environmental law which covers nuisance law and local governmental law. The chapter will also focus on the possibility of a right to a clean environment which has attracted jurisprudential debate. The chapter will discuss how far the right to a clean environment has been incorporated into the laws of Sri Lanka. This chapter will also survey the developments that have taken place through the judgments of the Superior Courts. It will also examine the application of the main mechanism available to the Central Environmental Authority (CEA) to regulate pollution and related environmental issues to achieve sustainable development, mainly through judgments thereby contributing to the strengthening of environmental rights of the people in Sri Lanka.

[1] Senior lecturer/Law, Department of Commerce, Faculty of Management & Commerce (USJ); Examiner in Constitutional and Administrative Law (Sri Lanka Law College)
B.A. (Hons.) Geography (S.J.P); M.A (Biogeography) (S.J.P); LL.B (Colombo); LL.M (Colombo).

Man has always interacted with nature; it is the destructive character of that interaction since the Industrial Revolution that has caused concerns for the natural environment. The United Nations Conference on the Human Environment in June 1972 declared that man is both the creator and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.[2]

The term "environmental rights" is used to denote those procedural rights which are found in international human rights instruments (which have found their way into international environmental instruments as well) and which are being applied in relation to environmental issues. Thus, the freedom of information, the right to participate in the decision making process and other rights are being increasingly used in relation to environmental issues. Such application, however, is not a recognition of a separate right to a clean environment. It is simply the application of existing procedural rights to environmental issues and the use of the existing human rights machinery for the vindication of environmental disputes. These procedural rights must also be distinguished from substantive rights recognized in international human rights instruments such as the right to life, right to health or the right to an adequate of standard of living. In other words, it is the violation of an existing substantive right as a result of an environmental problem that sets the human rights machinery in motion. Here too, reliance is placed on existing human rights and does not denote the acceptance of a new right to a clean environment. At the national level, existing human rights machinery has been used to vindicate environmental disputes, or address the violation of human rights as a result

[2] The Stockholm Declaration on the Human Environment adopted 16th June 1972.

of an environmental problem. Thus, in the absence of specific machinery in relation to the resolution of environmental disputes, the invocation of human rights standards has become popular at the national level. India is a particularly good example where due to judicial activism, the right to life clause in the Indian Constitution has been interpreted in a broad manner to include the right to a clean environment and the right to an adequate standard of living.

The right to a clean environment, on the other hand denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants. Thus, for example, a victim does not have to prove that his right to life (or any other right) has been violated as a result of an environmental problem. A victim should vindicate his/her right to a clean environment, assuming however that the parameters of this right can be laid down.

The object of environmental law is to preserve and protect nature's gift to mankind such as water, air, earth and atmosphere from pollution and the environmental destruction towards 'sustainable development'. But the law alone cannot tackle the problem of environmental destruction and sustainable development. There has to be awareness of the problem and sustainable efforts are required to tackle it. An important development in the present context, although not necessarily recent, is the convergence of the environmental movement with the human rights movement at the national level, particularly in developing countries. This is not always so; sometimes human rights and environmental rights can be in conflict as when indigenous people are not allowed to take produce from protected forests. Many environmental problems give rise to human rights violations, like the right to health, livelihood and in extreme cases, the right to life itself. Due to the lack of enforcement machinery for environmental issues in some countries, the human rights machinery has been used to seek redress for environmental problems. Thus, the right to life and the right to health are frequently invoked in relation to environmental issues.

With regard to international perspectives, the people of the world have in the Universal Declaration of Human Rights (UDHR) (1948) "re- affirmed

their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and a better standard of life in larger freedom"[3] and specifically guaranteed to everybody "the right to a standard of living adequate for the health and well -being of himself and his family." [4] In fact, the state parties to the International Covenant on Economic, Social and Cultural rights have expressly recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,[5] and that the steps that they will take to achieve the full realization of this right "include the improvement of all aspects of environmental and industrial hygiene."[6] The 1972 Stockholm Conference on Human Environment[7] was the first major global initiative to deal with environmental problems in a comprehensive manner. It has been acknowledged by the Stockholm Declaration (1972) that "man has a fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for the present and future generations."[8] In order to accelerate a concerted global response, the United Nations took another historic step by convening the United Nations Conference on Environment and Development in Rio De Janeiro in June 1992.[9] The Vienna Convention for the Protection of the Ozone Layer seeks to protect "human health and the environment against adverse effects resulting in modifications in the Ozone Layer[10] and its Montreal Protocol seeks to lay down precautionary

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3 The Preamble of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly Resolution 217A (iii) of 10th December 1948.

4 *ibid.* Article 25(1)

5 Article 12(1) of the International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (xxi) of 16 December 1966

6 *Ibid.*, Article 12(2)

7 Stockholm Declaration adopted on 16.06.1972

8 Principle 1 of the Stockholm Declaration

9 The Rio Declaration on Environment and Development, 16th June 1992

10 The Vienna Convention for the Protection of the Ozone Layer, 1985 produced in AALCC & UNEP, Asian /African Handbook on Environmental Law (1999), page 27.

measures to control global emissions of substances that deplete it."[11] The United Nations Framework Convention on Climate Change 1992[12] and its Kyoto Protocol[13] seeks to "regulate levels of greenhouse gas concentration in the atmosphere, so as to avoid the occurrence of climate change on a level that would impede sustainable economic development or compromise initiatives in food production.

In fact, International instruments are not confined to the objective of making the world a better place for humans to live in, as is clearly illustrated by the proliferation of international conventions and agreements for the protection and preservation of wetlands specially as a habitat for waterfowl,[14] migratory species of wild animals,[15] species of fish[16] biological diversity,[17] nature and natural resources[18] and endangered species of fauna and flora.[19] These international instruments clearly demonstrate the concern of the international community for a healthy environment for all life forms including human beings and lead to the inevitable conclusion that the environment is a fundamental right for all living things. The Vienna Declaration on Human Rights of 1993 also endorses the right to development. Noting that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually

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11 Montreal Protocol on Substances that deplete the Ozone Layer, 1995 reproduced in AALCC & UNEP, Asian African Handbook on Environmental Law (1999), page 47

12 The United Nations Framework Convention on Climate Change, 1992 reproduced in AALCC & UNEP, Asian /African Handbook on Environmental Law (1999), page 77.

13 12. Kyoto Protocol to the UN Convention on Climate Change, 1997 reproduced in AALCC & UNEP, Asian /African Handbook on Environmental Law (1999), page 104.

14 Convention on Wetlands of International Importance Especially as Waterfowl Habit, 1971 and its Paris Protocol, 1982

15 Convention on the Conservation of Migratory Species of Wild Animals, 1979.

16 Convention on the Prevention of Marine Pollution by Dumping From Ships and Aircraft, 1972 and its 1996 Protocol. See also the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species, 1995.

17 Convention on Biological Diversity, 1992

18 ASEAN Agreement on the Conservation of Nature and Natural Resources, adopted on 9th July 1985 at Kuala Lumpur

19 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, see also the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, entered on 8th September, 1994

reinforcing, it re-affirms the right to development as established in the Declaration on the right to Development[20] and reflecting the wording in the Rio Declaration stresses that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

The concept of sustainable development – the solution proposed by the World Commission on Environment & Development (WCED) to reconcile environmental protection with economic development – also has human rights implications.[21] It is clear that a complex relationship exists between human rights, environmental protection and economic development. Given this inter-relationship, it is not surprising that it has also received the attention of the International Court of Justice (ICJ), Justice Weeramantry, the then Vice President of the Court, who not only recognized the link between environmental protection and human rights, but also placed environmental protection *within* human rights doctrine: In his separate opinion in the *Case Concerning the Gabcikovo- Nagymaros Project*[22], Justice Weeramantry noted:

> The protection of the environment is likewise a vital part of contemporary rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments[23]

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20 The UN General Assembly adopted in 1986, the Declaration on the Right to Development

21 *Our Common Future,* (also known as the Brundtland Report*), Report of the World Commission on Environment & Development* 43 (1987).

22 *Gabicikovo v. Nagymaros* Project, C.G. Weeramantry, *Environmental Aspects of Sri Lankas Ancient Irrigation System*, Sarvodaya Vishva Lekha Publishers page 24.

23 *ibid*

2. Legal Framework of Environmental Protection and Environmental Rights in Sri Lanka.

Sri Lanka's environmental law is a curious mixture of civil law and common law principles derived from Roman-Dutch law, English law, statute law, juristic writings and judge made law. Another development that should be noted is the interpolation of a new level of provincial government after the 13th Amendment to the Constitution in 1987 which specifies three lists: the Reserved List, the Provincial List and the Concurrent List. The constitutional amendment introduced a new level of institutions between the central government and local governments. Provincial Councils have the exclusive right to legislate through statutes on matters specified in the Provincial List. The subject of environmental protection is placed in the Concurrent list as well as on the Provincial list. Provincial Councils and Parliament can both legislate on matters on the Concurrent List provided it is done in consultation with each other. The North Western Provincial Council (NWPC) enacted legislation on environmental protection by Statute No. 12 of 1990. The Waste Management Authority (WMA) of the Western Province was established under the Statute No. 9 of 1999 of the Western Provincial Council to enable a clean and healthy environment in the Western Province.

2.1 Constitutional Protection through Fundamental Rights.

At the outset, it would be useful to distinguished between the two forms of action mentioned in the 1978 Constitution, namely the (a) fundamental rights jurisdiction (FR) and the (b) writ jurisdiction.

(a) Fundamental Rights Jurisdiction

A Bill of fundamental rights is incorporated into Chapter III of the 1978 Constitution. As regards fundamental rights, the rights guaranteed by Articles 10,11 12(1) 12(3) and 12(4) of the 1978 Constitution are available to all natural and juristic persons, whereas the rights guaranteed in terms of Articles 12(2) and 14 are available only to citizens. Articles 10 and

11 cannot be applied to juristic persons. The right to move the Supreme Court in terms of Articles 17 and 126 of the Constitution in respect of the infringement or imminent infringement of a fundamental right by executive or administrative action is itself a fundamental right under the 1978 Constitution. By virtue of Article 126(1) of the Constitution, the fundamental rights jurisdiction of the Supreme Court is sole and exclusive. Moreover, where in the course of a hearing in the Court of Appeal into an application for a writ, it appears to the Court that there is a *prima facie* case of infringement or imminent infringement of a fundamental right, such a matter in terms of Article 126(3) of the Constitution must be referred to the Supreme Court for determination.

The Constitution of Sri Lanka contains several provisions relating to the environment. For example, Article 27(14) of the Constitution of Sri Lanka states that it is the duty of the State "to protect, preserve, and improve the environment for the benefit of the community." In addition, Article 28(f) of the Constitution makes it a "fundamental duty" of every person to "protect nature and conserve its riches." These provisions, however, are not set out in the chapter on fundamental rights: they are to be found in the chapter entitled "Directive Principles of State Policy and Fundamental Duties" and are not enforceable in a court of law since the Constitution specifically states so (Article 29 of the Constitution). However, they are not redundant. Article 27(14) of the Constitution can be useful in *mandamus* applications while Article 28(f) is routinely invoked by Petitioners filing cases on public interest litigation. Although the Constitution contains an enforceable chapter on fundamental rights, it does not contain an express right to a healthy environment, or an express right to life. Nevertheless, environmental disputes involving mining and quarrying have reached the Supreme Court on the basis that they involved the violation of other declared fundamental rights including the freedom from cruel, inhuman, and degrading treatment, the right to equality, the right to choose one's residence and the right to carry on a lawful occupation.

The Supreme Court seems to have shown greater attention to environmental issues in dealing with fundamental rights cases filed in that Court under

Article 126 of the Constitution. In *Gunaratne v. Homagama Pradeshiya Sabha and others*[24] in the context of an allegation of the violation of the fundamental right to equality guaranteed by Article 12(1) of the Constitution by the suspension of permission granted to establish a saw mill, Amerasinghe J. emphasized the importance of "publicity, transparency and fairness"[25] for the achievement of sustainable development. In *Jayawardena v. Akmeemana Pradeshiya Sabha and others*[26] the Supreme Court took into consideration the fact that air pollution and noise pollution altered the receiving environment by making it less conducive to public safety and health. In this case the Petitioner, who had obtained an Environmental Protection License from a *Pradeshiya Sabha* for setting up a metal crushing operation at Kalahe, complained that his fundamental rights guaranteed by Article 14(1)(g) of the Constitution to engage in "any lawful occupation, profession, trade, business or enterprise" was infringed by the decision taken by the *Pradeshiya Sabha* to stop the metal crushing operation. As Amerasinghe J. observed:–

> 'Article 14(1)(g) of the Constitution declares and recognizes the right of every citizen to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. The emission of dust and noise from the metal crushing operation was lawful only if such operation was licensed. In the circumstances, the Petitioner's occupation, business or enterprise was unlawful in terms of section 23A read with section 23B of the National Environmental Act and he cannot complain that he had any right to carry on such an activity. I therefore declare that Article 14(1)(g) was not violated.'[27]

Another important case is *Bulankulama and others v. Secretary, Ministry of Industrial Development and others*[28] (better known as the *Eppawala case*). The

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24 [1998] 2 Sri L.R. 11

25 *ibid.* at page 16.*per* Amerasinghe J.

26 [1998] 1 Sri L.R 316.

27 *Ibid.* at page 321 *per* Justice Amerasinghe

28 [2000] 3 Sri L.R 243.

judgment of this case is mainly devoted to the discussion of how the proposed agreement violates fundamental principles of environmental protection. The proposed agreement between the government and a foreign company granted the foreign investor the sole and exclusive right to search and explore for phosphate and others minerals and do mining operations.

The Petitioners being residents of Eppawela mainly engaged in cultivation, one of whom was the *viharadhipati* of a temple, complained of the infringement or imminent infringement of their rights under Articles 12(1), (14)(g) and 14(1)(h) of the Constitution by reason of the proposed agreement. Having specifically referred to the international norms and their ancient antecedents, the Supreme Court pointed out that even in the contemporary law of Sri Lanka (provisions of the National Environmental Act) the State is obliged to utilize natural resources in a manner that took inter-generational equity into account. The Court held that the proposed agreement between the government and the foreign company did indeed violate the rights of the Petitioners under Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution.

In its well considered judgment in this case, the Supreme Court recognized that rights held in common by all citizens may be vindicated by any citizen. On the question of standing, the Court stated that the Petitioners, as individual citizens, have a constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of this citizenry of Sri Lanka – rights they share with the people of Sri Lanka.[29] As already noted, the right to a healthy environment or even the right to life, is not explicitly included in the list of fundamental rights guaranteed by the Constitution. The question then is, can the right to a healthy environment be implied from the fundamental freedoms and rights expressly guaranteed by the Constitution. In *Sriyani Silva v.*

[29] *ibid.*

Iddamalgoda, Officer in Charge, Police Station Payagala,[30] where the widow of an army deserter claimed that her husband was tortured to death while in police custody, the Supreme Court was called upon to decide whether the 'right to life' was guaranteed by the Constitution of Sri Lanka, even though such a right was not among those expressly enumerated as fundamental rights. The Court made the following observation in regard to this question –

> 'Although the right to life is not expressly recognized as a fundamental right that right is impliedly recognized in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say, a person has a right not to be put to death because of wrongdoing on his part, except upon a court order. (There are other exceptions as well, such as the exercise of the right of private defense). Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise. Thus Article 13(4), by necessary implication, recognizes that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life – which he can be deprived of only under a court order'.[31]

The Supreme Court of Sri Lanka thus came to the conclusion that the Constitution of Sri Lanka did implicitly recognize the right to life. It goes without saying that the right to a healthy environment is necessary to sustain the right to life. In this context, it is necessary to bear in mind the words of the High Court of Kerala in *F.K Hussain v Union of India* that the right to life is "much more than the right to animal existence and its attributes are manifold, as life itself."[32] Indeed, the right to life may be described as the arch of all rights and freedoms expressly guaranteed by the Constitution.

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30 [2003] 2 Sri L.R. 63.

31 [2003] 2 Sri L.R 63, at page 75. per Justice Mark Fernando

32 31. AIR 1990 Kerala 321 at p. 323.

It is possible to argue that the fundamental right to life ought to be interpreted in the light of the Directive Principles of State policy: that the state shall protect, preserve and improve the environment for the benefit of the community,[33] and that it embraces those attributes that are necessary for the realization of an adequate standard of living "including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of continuous improvement of living conditions and the full employment of leisure and social and cultural opportunities.[34] As declared in Article 28 of the Constitution, the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and it is the duty of every person in Sri Lanka "to protect nature and conserve its riches.[35] Even though the Directive Principles of State Policy set out in Article 27 and the Fundamental Duties enumerated in Article 28 of the Constitution are expressly declared to be non-justiciable,[36] they certainly can be considered in interpreting other provisions of the Constitution including those seeking to confer fundamental rights.[37] Sri Lanka is duty bound to foster respect for international law and treaty obligations[38] and the Supreme Court will necessarily view the question whether there is a fundamental right to a healthy environment in the light of the relevant international conventions, treaties and agreements referred to above.

While many states do not embody a specific right to a healthy environment, they do have mechanisms in place to address human rights violations. These mechanisms have been used by environmentalists and victims of environmental injustices to vindicate their rights. Though not without its

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33 Article 27 (14) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978

34 *ibid.* Article 27(2) (c).

35 *Ibid.* Article 28(f) see, also *dicta* of Amerasinghe J. in *Bulankulama v. Secretary Ministry of Industrial Development,* [2000] 3 Sri L.R. 243, at p. 257.

36 *Ibid.* Article 29.

37 See, *Seneviratne and Another v University Grants Commission and Another*, [1978-80] Sri L.R. 182 specially at pp 216-219, *Maithripala Senanayake, Governer of the North Central Province and Another v. Gamage Don Mahaindasoma and Others* [1998] 2 Sri LR 333 at p. 349

38 *Ibid.,* Article 27(15). *Sunila Abeysekara v. Ariya Rubasinghe* [2000] 1 Sri L.R. 314 at p. 353.

own problems, these human rights mechanisms have played an invaluable role in protecting environmental rights. A pioneer in this field has been the Indian Supreme Court which has adopted an expansive interpretation of the right to life clause in the Indian Constitution. It has pointed out that the right to life does not mean the right to any kind of life and that it includes the right to live in a healthy environment. Thus, in *Subash Kumar v. State of Bihar*[39] the Indian Supreme Court stated:

> *The right to life is a fundamental right under Article 21 if the Constitution and it includes the right to enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.*[40]

Thus, the Indian Supreme Court has elevated the right to environment to the status of a fundamental right, a violation of which is actionable under the Constitution.[41] In neighbouring Sri Lanka, the judiciary has not been so innovative, although it has, in its own way, contributed to the development of environmental law. One reason for the lack of innovation may perhaps be due to the fact that the Sri Lankan Constitution does not embody a right to life clause. The Constitution of the Democratic Socialist Republic of Sri Lanka under the chapter on Directive Principles of State Policy and Fundamental Duties, guarantees that the 'State shall protect, preserve, improve the environment for the benefit of the society. This is a reciprocal duty on the part of the State as well as the public[42] Despite these constitutional guarantees and obligations, the degradation and pollution of the environment has continued. The duty cast on the State to protect and conserve the environment for the benefit of the

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39 AIR 1991 SC 420

40 *Ibid.*

41 *Ibid.*

42 Article 28 of the Constitution states as follows:
The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches.'

people is not a new concept that was introduced by the legislature with the enactment of the Second Republican Constitution of 1978. In the *Danube River Case*[43] the Vice President of the International Court of Justice, Judge C.G Weeramantry referred to the conversation of King Devanampiya Tissa (247 –207 B.C) and Arahat Mahinda dating back to the 3rd century B.C. The excerpts from the said conversation

'O Great King, the birds of the air and beasts have as equal rights to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it….."[44]

(b) Writ Jurisdiction

In terms of Article 140 of the Constitution, the Court of Appeal was vested with the exclusive jurisdiction to issue orders in the nature of the writs of *Certiorari*, Prohibition, *Procedendo*, *Mandamus* and *Quo warranto*. But with the enactment of the 13th Amendment to the Constitution in 1987, the High Courts of the Provinces have jurisdiction to issue such writs in respect of matters relating to the subjects devolved on the Provincial Councils.

The Sri Lankan courts have been sensitive to environmental concerns in dealing with cases brought before them. In examining how Sri Lankan courts have faired in the endeavour to ensure a healthy environment, it is useful to begin with several applications filed under Article 140 of the Constitution of Sri Lanka seeking prerogative remedies such as writs of C*ertiorari*, prohibition, *Mandamus or* Q*uo warranto.* The concept of prerogative writ is a concept of English Law. Historically in England, writs were originally available only to the Crown and not to the subject. Later they were made available to the litigants in order that they may be used to ensure lawful and efficient government. The Royal Charter of Justice 1801 introduced the writ jurisdiction into Sri Lanka. Presently, the source of law to grant prerogative writs is the Constitution of 1978. A

43 *Danube River case* – (1997 General List N 92 25th September 1997 (ICJ)

44 Mahawansa; Chapter XIV

writ of *Certiorar*i is sought asking the court to quash or cancel an illegal, wrongful or unjust decision already made by an administrative body or a public official. A writ of prohibition is sought to stop a public officer or a state body from arriving at a wrongful decision. The writ of *Mandamus* provides the means of enforcing the performance of public duties by public authorities. A writ of Q*uo warranto* is available to challenge the entitlement of a person to hold public office. The writ of *habeas corpus* is available as a remedy in respect of any person improperly detained in public or private custody. The writs of Q*uo warranto and habeas corpus* are quite irrelevant to environmental matters.

In *Environmental Foundation Ltd. v. The Land Commissioner and others,*[45] the writ jurisdiction of the Court of Appeal was invoked to challenge the proposed lease of certain State land situated in Kandalama in Dambulla adjacent to the Kandalama tank, for the purpose of constructing and running a luxury hotel. Although the application was filed by a non-governmental organization as a public interest litigator, the Court of Appeal took into consideration the environmental impact of the proposed lease and granted interim relief against the Land Commissioner and Minister of Lands, Irrigation and Mahaweli Development. In the later Southern Expressway cases reported as *Heather Therese Mundy v. Central Environmental Authority and Others,*[46] the Court of Appeal was not positive and gave no relief, which situation was corrected by an enlightened judgment by the Supreme Court. In this case the proposed Southern Expressway was planned as a network of new highways to cater to the increasing transport demand on existing roads such as the Galle Road. When the matter came up by way of appeal to the Supreme Court, that court adverted to the 'public trust' doctrine, which in essence meant that:

> "powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that

[45] [1993] 2 Sri L.R. 42.

[46] SC Appeal 58-2003, SC Appeal 59/2003, SC 60/2003, SC Minutes dated 20th January 2004.

> their exercise is subject to judicial review by reference to those purposes."[47]

Justice Mark Fernando, the presiding judge of the Bench delivering the judgment expressed the view that the historical English Law limitations on prerogative writs are no longer applicable, because the Sri Lankan courts are not the courts of the Sovereign, and no deference is due to the Crown or the Executive, which are bound by the public trust doctrine, and are subject to the fundamental rights. It was stated that constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and have correspondingly expanded the nature and scope of the public duties amenable to *Mandamus* and the categories of wrongful acts and decisions subject to C*ertiorari* and prohibition, as well as the scope of judicial review and relief.

2.2 Environmental Protection through Other Laws – Overview.

The National Environmental Act No. 47 of 1980 (NEA) is the basic national charter for protection and management of the environment in Sri Lanka. The NEA was amended by Act No. 56 of 1988 to include a provision relating to environmental impact assessment contained in Part IV C of the statute entitled "Approval of projects." The Part IV C of the NEA was further amended by Act No. 53 of 2000. Under the provisions of section 23 Z of the NEA, the EIA (Environment Impact Assessment) process applies only to "Prescribed Projects" which have been specified by the Minister in charge of the subject of environment in Gazette Extraordinary No. 772/22 of 24th June 1993 and the list of prescribed projects was amended by Gazette Extra-ordinary No. 1104/22 of 6th November 1999 and Gazette Extraordinary No. 1108/1 of 29th November 1999. The NEA process implements through designated Project Approving Agencies (PAA) as prescribed by the Minister under section 23 Y of the NEA. Under section 23 CC of the NEA, regulations have been made by the Minister stating the procedures that should be

[47] *Ibid.*

followed in order to achieve the EIA requirements of the NEA. The orders and regulations are included in Gazette Extraordinary No. 772/22 of 24th June 1993 as amended by Gazette Extraordinary No. 1159/22 of 22nd November 2000.

The purposes of an Environmental Impact Assessment (EIA) are to ensure that development options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. Environment Impact Assessments are intended to foster sound decision making not to generate paperwork. The EIA process should also help public officials make decisions that are based on the understanding of environmental consequences and take actions that protect, restore and enhance the environment.

At present, 23 state agencies have been specified as Project Approving Agencies (PAA) by the Minister under section 23 Y of the NEA as contained in Gazette Extraordinary No. 259/14 of 23rd February 1995, Gazette Extraordinary No. 978/13 of 4th June 1997 and in Gazette Extraordinary No. 1373/6 of 29th December 2004. The EIA practices and procedures of every PAA should ensure that high quality environmental information is available to public officials and citizens before decisions are made and before the government makes any significant commitments of environmental resources.

Under the present law, pollution control is achieved through environmental standards and licensing. The 1988 amendments to the NEA introduced them. The Act calls it Environmental Protection Licenses (EPL). The CEA and local government institutions issue the license. Activities listed by the Minister in the Gazette (Gazette Extraordinary dated 22.11.2000 No. 1159/22) require licensing. In addition, waste discharge, emission and disposal into the environment must comply with standards. Under the

NEA, the Minister has established some standard[48] The Minister has also fixed licenses fees under NEA by Gazette Extraordinary dated 22.11.2000 No. 1159/22.

The polluter pays principle has received significant acceptance worldwide since the 1992 Rio Declaration.[49] Courts in India have recognized the principle and even applied it in the absence of statutory provisions.[50] The principle has gained significant acceptance worldwide. The principle recognizes that the polluter must pay the prevention and remediation cost of adverse environmental impacts. Obviously, prevention costs must be borne before the waste reaches the environment. Remediation costs arise after the waste has adversely affected the environment. When licensing controls pollution, it is possible to insist on the licensee undertaking preventive measures before the polluter discharges, emits or deposits waste into the environment. The issuance, renewal, suspension and cancellation of the license are critical control points for ensuring compliance with preventive measures. It is practical and easier to ensure that the polluter pays the prevention cost. Making certain that future remediation costs are borne by the polluter is more difficult. Collective damage is likely where several waste streams end up in a common medium such as a river or the air. Environmental remediation of common elements such as air and water generally becomes the responsibility of the government or the local government. It is therefore essential to charge remedial costs from polluters ahead of time. The most effective way of doing so is to include remediation costs in licenses fees. Calculating the cost of remediation is however, a difficult task. Those who pollute more ought to pay more than

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48 General discharge standards and some industry standards were established by Gazette Extraordinary No. 595/16 dated 02.02.1990. Mobile emission standards, fuel standards and vehicle import standards were established by Gazette Extraordinary No. 1137/35 dated 23.06.2000. Noise standards were fixed by Gazette Extraordinary No. 924/12 dated 23.05.1996. Ambient air quality standards were established by Gazette Extraordinary No. 850/4 dated 20.12.1994.

49 Principle 16, Declaration on Environment and Development, United Nations Conference on Environment and Development, Rio de Janeiro, 1992.

50 *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212; *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647

those who pollute less. The receiving environment's ability to process the pollutant is also a factor that affects remediation costs. Polluters who are well within standards should be paying less than those who are marginally so. Numerous factors have a bearing when deciding on future remediation cost. Factors include the carrying capacity of the receiving eco system, clean up technology costs; lost eco system services, best restoration methodology etc.

Environmental Impact Assessment (EIA)

At present three laws impose EIA obligations: the National Environmental Act (NEA), the Coast Conservation Act No. 57 of 1981 (CCA) and the Fauna and Flora Protection Ordinance (CAP 567) as amended by Act No. 49 of 1993. A number of Ministries and other government agencies have been designated under the NEA as Project Approving Agencies over the conduct of the EIA process. For the purposes of the Fauna and Flora Protection Ordinance, the Director of Wildlife Conservation exercises EIA authority. Under the NEA and regulations made thereunder, an EIA or IEE (initial environmental examination) is required for every listed project referred to as Prescribed Projects. There are currently some 52 projects listed by generic description, magnitude and location. Among these are river basin development and irrigation projects, construction of hydroelectric power stations exceeding 50 MW, thermal power plants exceeding 25 M, hotel projects of over 99 rooms or resorts of more than 40 ha, projects involving the involuntary resettlement of more than 100 families, port developments, construction of highways of more than 10 km etc. Under the CCA, the Director of Coast Conservation has the discretion to require an EIA with respect to permit applications for development activities within the coastal zone. The current Coastal Zone Management Plan states that the Director will call for an EIA when such activities may have potentially significant impacts on the coastal zone. Under the Fauna and Flora Protection Ordinance, an IEE or an EIA is required for carrying out a development activity of any description within a distance of one mile from the boundary of any National Reserve declared under the Ordinance. The procedure applicable for the conduct

of an EIA, however, is the same as under the NEA. An IEE is defined as a written report where possible environmental impacts of the projects are assessed, with a view to deciding whether or not the impacts are significant. The purpose of an IEE is to decide whether or not an EIA is required.

Since the EIA regulations were gazetted in 1993, a number of cases involving their interpretation have reached the Court of Appeal and the Supreme Court. Even prior to the EIA regulations being gazetted, the Supreme Court in *Amerasinghe and others v. AG et.al,*[51] drew attention to the availability of provisions in the NEA empowering the CEA to subject development projects to environmental assessments. The Court observed that when the regulations were gazetted, statutory provisions for public participation would be available. In a later case[52] which was filed after the EIA regulations, the question arose as to whether it was adequate to make the EIA report available to the public in the English language alone. The Court granted leave to proceed for violation of language rights guaranteed by the Constitution. The case was later settled with the PAA agreeing to make the EIA report available in Sinhala and Tamil as well. In *Environmental Foundation Ltd, v. the Secretary, Ministry of Transport and Highways et.al* [53] a PAA that demonstrated an overt interest in the project under review, was disqualified by reason of bias from functioning as he PAA under the EIA regulations. The Petitioner, a non-governmental organization, had applied to the Court of Appeal for a writ of prohibition. After the Court issued notice on the Respondents, the case was settled with PAA being changed and the CEA being appointed as the new PAA.

Environmental Protection Licensing (EPL)

Environmental protection licensing (EPL) is another important regulatory tool introduced by Act No. 56 of 1988 (Amendment) to the NEA. The NEA states that "No person shall discharge, deposit or emit waste into the environment which will cause pollution except under the authority of

51 [1993] (1) Sri L.R. 376.

52 SC (FR) Application No 413./93

53 Court of Appeal Writ Application No. 549/94

a license issued by the Central Environmental Authority and in accordance with such standards and other criteria as may be presented under this Act."[54] The regulations necessary to implement these provisions were gazetted in February 1990 and became effective from the 1st of July 1990.[55] These regulations set down the procedure for applications for EPLs, the manner in which such applications should be assessed, and the criteria that should be applied in granting or refusing an EPL. These regulations also establish discharge standards for effluent into inland surface waters onto land for irrigation purposes, and into marine coastal areas. The regulations further establish tolerance limits for effluent from textiles, tanning and rubber industries.

Environmental Impact Assessment (EIA) has been effective since 1993. An amendment to the NEA in 2000 by the National Environmental (Amendment) Act No. 53 of 2000 simplified the EIA process and reduced public participation in the process. The NEA allows the Minister to publish a list of projects and undertakings that require an environmental assessment (Section 23 Z of the NEA). The Minister first published such a list in 1993 and revised it twice thereafter. The NEA requires the use of an EIA or IEE or both as environmental assessment tools. Partly due to industry pressure, the Minister enacted regulations in 1993 to force the project approving agency to decide on an IEE or EIA at an early stage of the process. (Section 6 of the EIA regulations 1993). The scheme was not consistent with the definition of an IEE found in the NEA. The very purpose of an IEE is to decide whether an EIA is necessarily or not.[56] For this reason, an IEE is necessarily for every listed project while an EIA may be required only if there are "significant" environmental impacts disclosed after an IEE. The Minister corrected this anomaly by an amending regulation in 2000.[57] The evaluation of all listed projects now begins with an IEE after which, the project – approving agency decides

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54 Section 23 A of the NEA

55 National Environmental (Protection and Quality) Regulations No. 1 of 1990, published in Gazette Extraordinary No. 595/16. dated 2nd February 1990

56 The purpose of an IEE is clear from its definition in Section 33 of the NEA

57 Amending EIA regulation published in Gazette Extraordinary No. 1159/22 dated 22.11.2000

whether an EIA is necessary or not. However, the original 1993 project list has remained largely unaltered. The original list was on the basis that both an EIA and IEE would have to pass through almost identical processes involving public notification and scrutiny. That was also changed by the NEA amendment in 2000 and public notification confined only to an IEA[58] The 1993 project list consists of a limited number of 53 projects with high magnitude thresholds[59] that was perhaps reasonable where all projects had to undergo a rigorous process involving public notification. There is no justification for maintaining high threshold magnitudes for listed projects after the IEE process was simplified and removed from public notification. Nor is there a good reason for not widening the scope of the project list. A wider project list with lowered thresholds will ensure that doubtful projects will not escape the environmental impact assessment net.

Since an IEE is compulsory for all listed projects, the project approving agency has to give its mind to the nature and scope of impacts in every case. That is necessary because the agency has to assess if the environmental impacts are "significant" or not and accordingly decide whether an EIA is required. In the Sri Lankan context, wide discretionary power inevitably leads to abuse or misuse. A clear statement of what kinds of impacts are "significant" in the context of each listed project would help to reduce the area of wide discretion. Such a statement could be part of the guidelines or regulations. Industry, regulators and civil society would welcome such clarification. It would reduce the margin of error, abuse and misuse.

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58 Section 4 of the National Environmental (Amendment) Act of 2000 (Amends section 22 BB (2) of the Principal Act).

59 For example, hotels require approval only if they have more than 199 rooms. A road requires approval only if it exceeds 10 Km in length.

2.2.1 Nuisance Law

The Common Law principles of nuisance are part of the law of Sri Lanka. Although nuisance is a tort developed in England, the concept has found its way into Sri Lankan and South African law. The law of nuisance allows owners and occupants of land who are victims of environmental pollution to sue for declarations, injunctions and damages. The Sri Lankan Courts have even recognized that one does not need to wait till the nuisance manifests itself and that potential victims could bring a *quia timet* to prevent nuisance[60]. The law makes a distinction between private and public nuisances.[61] Public nuisance is an offence punishable under section 261 read with section 283 of the Penal Code No. 2 of 1883. 'Public Nuisance' which belongs to the domain of the criminal law is defined as follows in section 261 of the Penal Code.[62]

> "A person is guilty of a public nuisance who does any act or omission which causes any common injury, danger or annoyance to the public or to the people in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

From the environmental perspective, a prosecution for public nuisance under the Penal Code is not the most efficacious means of safeguarding the environment. The fine is totally inconsistent with contemporary standards and moreover, there is no procedure for the abatement of nuisance or direct relief to the victims of such a nuisance under the Penal Code. The removal and abatement of Public Nuisance is provided for in several Sri Lankan statutes including the Nuisances Ordinance No. 15 of 1862, the Municipal Councils Ordinance No. 29 of 1947 as amended, the Urban Councils Ordinance No. 61 of 1939 as amended and the Pradeshiya Sabha Act, No. 15 of 1987 and the Police Ordinance. Sometimes referred to as 'statutory nuisance' all these involve instances where governmental and

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60 *Arlis Appuhamy v. Kavidane* [1983] 2 Sri LR 493

61 For a detailed discussion of these differences see Salmond *Law of Torts*, 17th ed.1977 p 49.

62 *Ibid*

local governmental institutions are required to take various measures in the face of public nuisance.

More importantly, Chapter XI of the Criminal Procedure Code Act, No. 15 of 1979 provides for the abatement of nuisances through appropriate proceedings in the Magistrate's Court. The procedure for the abatement of a public nuisance can be initiated by any person by lodging information with the Magistrate. Section 98 of the Criminal Procedure Code No. 15 of 1979 empowers the Magistrate then if necessary, after taking evidence, to issue a conditional order for the abatement of the nuisance. The Respondent on whom the order is served may then show cause against the order or comply with the same. If the Respondent chooses to show cause, the court may take evidence and decide to discharge the order or vary the same or make the same absolute. The Court also has a limited power to issue injunctions pending the determination of the case. *In Elal Jayantha v. OIC Panadura Police*[63] the Court of Appeal pointed out that this special procedure should be followed in cases filed for the abatement of public nuisance and that the procedure for summary trial of offences should not be resorted to. In *Greena Fernando v. Teckla Saparamadu*[64] the Court of Appeal held that once a conditional order is issued, the burden of adducing evidence and starting the case was on the Respondent. It was also held in the case that a party who moves to have the conditional order set aside or modified must in the first instance adduce evidence to show that the order is not reasonable and proper. An important question that arises in public nuisance cases is the effect of an EPL and arguments that the industry is acting within the terms of the EPL and within environmental standards. In *Keangnam Enterprises v. Abeysinghe,*[65] the Court Appeal was called upon to decide whether the Magistrate's jurisdiction was ousted if the Respondent has obtained an EPL from the CEA. The Court did not decide this issue since it transpired that the Respondent in this case did not have the EPL on the date the conditional order was made

63 [1986] 1 Sri LR 334.

64 [1990] 1 Sri LR 270

65 [1994] *1 S A E L R 1*

but had obtained the same subsequently. The Court did however, make a distinction between an EPL and licenses issued by other agencies including local authorities, and emphatically stated that other licenses could not be equated to an EPL. In the early Sri Lankan case of *Marshal v. Gunaratne Unnanse et. al.*[66] it was stated that a permit under the Police Ordinance was no defence to a prosecution for public nuisance under the Penal Code. In *Keengnam*[67] the Respondent was in possession of a license from the government to use explosives and had site clearance permits from the *Pradeshiya Sabha* but had no Environmental Protection Licenses (EPL). Justice Ananda Grero asserting the primacy of the EPL, stated that no other permits were equivalent to it and that it is an essential prerequisite under the National Environmental Act (NEA). Although public nuisance is a crime, civil damages in tort are recoverable by persons who prove that they have suffered special injuries *i.e.,* over and above that suffered by others. This has been recognized in English Law from early times[68] (see for example, *Castle v. St. Augustine's Link*s, this principle was invoked by some of the persons aggrieved to claim civil damages in the Sri Lankan case of *Keangnam Enterprises Ltd v. E.A Abeysinghe & Others.*[69] Courts in such cases are called upon to decide on the recoverability and quantum of compensation.

The most salient feature distinguishing private from public nuisance is that the former envisages the unreasonable interference with the use and enjoyment of another's property, while the latter involves interference with a general right/s of the public or a section of it. It has been held in Sri Lanka that the Magisterial jurisdiction to abate or remove public nuisance, does not apply to cases of private nuisance (*Sinna Guru v. Inspector of Police , Karavanella)*[70] The question whether the 'public' element has been satisfied in turn, depends *inter alia* on several factors including the number of persons affected, the nature of the rights and whether the persons

66 (1895) 1 N.L.R. 179

67 (1994 1 SAELR 1

68 (1922) 38 TLR 615.

69 **(**1994) (1) SAELR

70 (1957) 61 NLR 186.

belong to a general, unascertainable mass. Lord Denning remarked that it is sufficient if a nuisance is so 'widespread in its range or so indiscriminate in its effect that it would be unreasonable to expect one person to take preventive legal measures as opposed to the community at large.'[71]

Neither the NEA nor other environmental laws have citizen suit (enforcement) provisions. That gap has led to the public nuisance provisions contained in the Criminal Procedure Code 1979[72] becoming a popular environmental remedy. Environmental issues ranging from garbage disposal to air and water pollution have come before the Magistrates' Courts by way of applications to abate public nuisances. The growth of this area of litigation is a recent phenomenon triggered by initiatives of public interest law groups and the Ministry itself.[73] As an environmental remedy, public nuisance litigation has used in the recent past. Public nuisance litigation has thrown up several procedural problems. Many of these only require simple legislative changes. The provisions of the Criminal Procedure Code, 1979 (CPC) apply to a number of specific situations set out in the law.[74] They are numerous and overlap. There is no principle behind the enumerated situations. Rather, they appear to be arbitrary enumerations of public nuisances. Perhaps they were the most common when the CPC was first drafted over a century ago. The chapter in the CPC[75] deals with the abatement of "public nuisances." A public nuisance is an offence under the Penal Code and has a defined and settled meaning. Section 283 of the Penal Code makes a public nuisance a punishable offence. Section 261 defines a public nuisance to be an act or illegal omission that "causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property

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71 *A.G. v. P.Y.A Quarries Ltd.* (1957) 1 All. E.R. 894

72 Sections 98-106 of the Criminal Procedure Code**,** 1979 as amended from time to time

73 In 1995 the Ministry of Transport, Environment and Women's Affairs together with the Inspector-General of Police issued a circular (No. 1196/95 of 30.03.1995) to all police stations advising them to file public nuisance abatement proceedings under the Criminal Procedure Code 1979.

74 Section 98 of CPC describes a set of situations that qualify for abatement under its provisions.

75 Chapter IX of the CPC (Sections 98-106)

in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to the persons who may have occasion to use any public right." According to the same section, it is no excuse to a charge of public nuisance that it causes some convenience or advantage. There is no logical reason why the same definition should not be appropriate to proceedings under the CPC as well. Environmental issues that now come before the courts by way of public nuisance abatement proceedings tend to also fall within the Penal Code definition. Amending the CPC so as to harmonize it with the Penal Code definition will simplify the law and reduce confusion. Such proven acts will then be both an offence under the Penal Code and open to abatement under the CPC.

There is also some confusion about the procedure involved. The CPC provides a procedure distinct and separate from summary criminal trials for abatement of public nuisances. In summary criminal trials, after the filing of a prosecution a summons or warrant of arrest goes out. The accused is then charged and tried. In nuisance abatement proceedings, the court issues an *ex-parte* "conditional order" based on material provided by a public official or private informant (Section 98 of the CPC) . A Respondent served with a conditional order has the option of complying with it or asking the Court to cancel or vary it (section 100 (A) of the CPC). But the Respondent must do so within the time fixed in the conditional order. Failure to do so results in the conditional order being confirmed (made absolute).[76] A conditional order becomes effective only after the court confirms it. Until then, it remains an anticipated order and has no effect. In this sense, it is like an order *nis*i , a concept familiar to judges and lawyers alike. Some people misunderstand the meaning of a conditional order.[77] They assumed that it is an order with conditions and that it is effective immediately on service. Magistrates do have power under the CPC to impose conditions to prevent and abate nuisances. But these conditions are a substantive part of the order itself. The term "conditional order" is

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[76] Section 100 (2) of the CPC

[77] from time to time, the Appellate Court has pointed out the difference in procedure applicable to public nuisance and drawn the attention of the lower judiciary to it. For example, see the case of *Elal Jayantha v . Officer In Charge, Panadure police station* [1986] 1 Sri L.R. p. 334

not a reference to these substantive conditions. Rather, it is a reference to the order taking effect at the end of a period fixed in the order. Judges and lawyers also confuse the special injunctive power the court has in nuisance abatement proceedings under the CPC. The Court has power under section 104 of the CPC to issue an injunction to accompany a conditional order. The injunction is effective immediately while the conditional order is effective only after confirmation. The conditional order itself is often confused with an injunction. Courts sometimes fuse both orders into one. That creates confusion for the Respondent and untangling them later becomes an arduous task. Suitably amending the law to clarify this language will help immensely. Changing the terminology from 'conditional order" to "order *nisi*' might be one way to achieve clarity.

2.2.2 Powers and Functions of Local Authorities for the Prevention of Nuisances and Waste Disposal

(a) The Prevention of Nuisances

All three Local Government Statutes embody provisions to deal with nuisance issues. For the prevention of nuisances, action may be taken under section 136(A) of the Municipal Councils Ordinance No. 16 of 1947 as amended by No. 42 of 1979 and No. 39 of 1986 Acts. Such action may also be taken under section 127 (D) of the Urban Councils Ordinance No. 61 of 1939 as amended by No. 48 of 1984 Act. Such action may also be taken under section 106 of the *Pradeshiya Sabha* Act No. 15 of 1987. In addition the duties of the conservation of the environment have been entrusted with local government institutions in accordance with the power delegated under section 26 of the National Environmental Act of 1980 as amended. It is also the duty of the local governmental institutions to periodically carry out careful inspections in their authorized areas and ascertain the preventable offences under section 100 of the Local Government Act No. 15 of 1987. Irregular activities conducted by owners of industries revealed during these inspections or by public complaints may be prosecuted under the National Environmental Act in the Magistrate Court.

(b) Waste Disposal

The National Environmental Act, No. 47 of 1980 as amended is the main legislation under which several regulations on waste disposal have been established. The National Environmental Act defines waste as any matter whether liquid, solid or gaseous or radio-active, which is discharged, emitted or deposited in the environment in such volume, consistency or manner as to cause an alteration of the environment. Sri Lanka is a party to the Basel Conventions on the Control of Transboundary Movements of Hazardous Waste and their Disposal since 1992. In line with Article 4 of the Basel Convention, Sri Lanka has taken steps to control imports and exports of several types of hazardous waste through legislative and administrative measures. Regulations for the management of hazardous waste were published in the Gazette Extraordinary No. 924/13 of 1996 in the form of an amendment to the National Environmental (Protection and Quality) Regulation No. 1 of 1990. This regulation has provisions for the control and monitoring of hazardous waste collection, reuse, recovery and disposal of hazardous waste. Electronic waste generated locally is also increasing with the penetration of technology into rural areas as well. Waste waters generated from different stages in industrial processes may contain various toxicants or pollutants that are seriously harmful to the natural aquatic environment when released without proper treatment. Enforcement of suitable regulations to minimize their adverse effects is essential.

3. Judicial Response towards the Protection of Environmental Rights.

The judiciary, as the guardian of the rights of the people is charged with the responsibility of judicial administration. It has a duty to co-operate in the endeavour, to build up the social welfare state, by administering the laws of the land and by dispensing justice between parties. Nobody would suggest that the Court should embark on eye ball to eye ball confrontations with the legislature, which must be acknowledged as the primary expression of the public will. Yet, the complexity of modern societies, and the never-ending pressure of public interests are such that the legislature, laying down

generalizations in statute law, will inevitably leave gaps which the judges must fill in distilling the statutory provisions into the precise principles needed for the resolution of conflict in the litigation process. Therefore the role of the judge takes on new dimensions when the application of the law in its literal sense does not necessarily result in justice.

As the contemporary social values and norms regarding environment change from time to time, existing laws might not address such changes, hence the judges in the superior courts may engage in reforming the social policies as well as legal principles. Further even with the updated legal framework, the implementation of such laws may be inefficient which invite the active intervention of the judiciary. Where environmental law in Sri Lanka is concerned; the norms and values in addition to the national resources base have changed dramatically in the recent past. The adversarial legal system inherited from Britain had not given adequate room for judges to actively get involved to address the environmental issues in the field of environmental law.

Therefore it is pertinent to discuss in a study of this nature the role of the Sri Lankan judiciary, the Supreme Court in particular, through its judgments, in the context of environmental law towards the protection of environmental rights in Sri Lanka. An analysis of relevant judgments casts new light particularly on several areas relating to environmental rights of the people and governmental obligations namely, (a) expanding *locus standi* (b) domestic application of international environmental instruments (c) public trust doctrine (d) right to information and right to a clean environment. A discussion on the above mentioned areas relating to environmental rights as applied and asserted by the courts in Sri Lanka is given below.

3.1 Application of *locus standi*, International Instruments, Public Trust Doctrine and Environmental Rights.

Even though the Indian Supreme Court had engaged in judicial activism from the late 1980s, it took another decade to influence the Sri Lankan Courts. The first such instance was experienced with the well known

Eppawala Phosphate Case (Bulankulama and others v. Secretary, Ministry of Industrial Development and others)[78] in 2000. This judgment is mainly devoted to the discussion of how the proposed agreement violates fundamental principles of environmental protection. This judgment casts new light particularly on three areas relating to environmental rights of the people and governmental obligations namely (a) expanding *locus standi, (b)* application of international environmental instruments and (c) public trust doctrine.

With regard to *locus standi*, in its well considered judgment in this case, Justice Amerasinghe recognized that rights held in common by all may be vindicated by any citizen. The Court analyzed that in the circumstances of the case too, such collective rights provide the context in which alleged infringement or imminent infringement of the Petitioners' fundamental rights ought to be considered. With regard to the application of international environmental instruments, the Court in that case stated that even though principles set out in the Stockholm (1972) and the Rio (1992) Declarations are not binding and serve as 'soft law;' as a member of the United Nations, this can hardly be ignored by Sri Lanka. By referring to the two aforesaid international declarations, the Supreme Court highlighted principles relating to sustainable development and made a bold pronouncement that the proposed agreement in question should be reviewed within the framework of international environmental law. The judgment draws also on ancient practices adopted by rulers of Sri Lanka in exploiting natural resources that paid due regard to the natural order of the environment by citing the separate opinion of justice Weeramantry in *Hungary v. Slovakia Case.*[79]

Highlighting the principles of sustainable development the Supreme Court in the *Eppawala Phosphate Case* recognized that human beings who are at the centre of the concept of sustainable development are entitled to a healthy and productive life in harmony with nature. The Court laid

78 [2000] 3 Sri L.R. 243

79 ICJ Reports 1997

emphasis that environmental protection should constitute an integral part of the development process and cannot be considered in isolation from it. With regard to the public trust doctrine the Court emphasized that all organs of government have a duty as guardians to preserve the natural resources of the people as evidenced by the scheme put in place by the Constitution. Here too, the Court made a pronouncement that the Court has a crucial role to play in the oversight of executive action in relation to natural resources management. As the Court noted, Parliament too, plays a crucial role by providing legislative guidelines that expressed the will of the people in this regard.

The judgment in the *Eppawala Phosphate Case* broke new ground in the field of environmental law in Sri Lanka which was followed by several other important and highly sensitive environmental issues. One judgment which referred to the *Eppawala Phosphate Case* is the judgment in *Mendis v. Kumaratunge & Others.*[80] The Petitioners in this case alleged that a sale of a land acquired for a public purpose, to a private entrepreneur to create an exclusive and private golf resort, was an infringement of their fundamental right to equal protection of the law guaranteed by Article 12 of the Constitution. In this case two propositions of the *Eppawala Phosphate Case* were specifically adverted to. One is the application of the aspects of the Public Trust Doctrine together with Article 28(1) of the Constitution which states that the exercise and enjoyment of rights and freedoms is inseparable from the performance and obligations and accordingly it is the duty of every person in Sri Lanka to protect and conserve its riches. Secondly, with regard to the submission of standing or *locus standi*, the Supreme Court in the *Mendis Case*[81] concurred with the opinion of Justice Amerasinghe in the *Eppawala Phosphate Case*[82] that the Petitioners to such litigation cannot be disqualified on the basis that their rights happened to be ones that extend to the collective citizenry of Sri Lanka. With regard to the *locus standi* the Court in *Environmental Foundation Ltd v. Urban Development*

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80 SC (FR) Application No. 352/2007 decided on 08.10.2008.

81 *ibid*

82 [2000[3 Sri LR 243.

Authority and others Case[83] stated that the word 'Person' as appearing in Article 12(1) should not be restricted to natural persons but extended to all entities having a legal personality. The Court in that Case also noted that the difference between Article 12(1) and Article 14(1) does not disqualify it from doing so under the Article 14(1). It is therefore obvious, that through these judgments the Supreme Court has endeavored to broaden *locus standi* thereby strengthening the procedural aspects of the rights of the people in Sri Lanka. This study also reveals that the Supreme Court in its judgments relating to environmental matters tends to place reliance on international environmental concepts adverted to in these instruments too. The reference to such instruments and concepts in the *Eppawala Phosphate Judgment* has already been made. The Supreme Court in the *Wattegedara Judgment*[84] stated that the importance and relevance of international instruments must be recognized when reviewing executive action *vis –a- vis* the environment.

The Supreme Court in the *Wattegedara Judgment* even went on to explain the phrase 'sustainable development'. Accordingly, natural resources must be utilized in a suitable manner in keeping with the principle of intergenerational equity which requires, as the Court stated, the state as the guardian of our natural resource base should not compromise the needs of future generations while attempting to meet and fulfill the present need for development or commercial prosperity. The Supreme Court in that case also emphasized the link between sustainable development and the Public Trust Doctrine. Accordingly, the state is enjoined to consider contemporary demands of sustainable development through the efficient management of resources for the benefit of all and the protection and regeneration of our environment and its resources. The Court referring to Principle 21 of the Stockholm Declaration (1972) and Principle 2 of the Rio Declaration (1992) recognizes the right of each state to exploit its own resources, pursuant however, to its own environmental and developmental

83 SC (FR) Application No 47/2004 decided on 28.11.2005

84 SC (FR) Application 118/2004 decided on 05.04.2007

policies. The Supreme Court in the *Wattegedara Judgment*[85] also pointed out that the Principle of sustainable development prioritizes human needs and contributes to a healthy and productive life in harmony with nature. Therefore according to the Court, environmental protection as envisaged under the Constitution forms an integral part of such development.

3.2. Application of Articles 12(1) and 14(1)(g) of the Constitution and Environmental Rights

The examination of the judgments analyzed in this study reveals that some of the cases were based on the violation of Articles 12(1) and 14(1)(g) of the Constitution. In *Jayawardena v. Akmeemana Pradeshiya Sabha & others* [86], the Petitioner's allegation that his fundamental rights guaranteed by Article 14(1) (g) of the Constitution to engage in 'any lawful occupation, profession, trade, business or enterprise' was infringed by the decision of the *Pradeshya Sabha* to stop metal crushing operation was rejected by the Supreme Court. Justice Amerasinghe held in this case that the emission of dust and noise from the metal crushing operation was lawful only if such operation is licensed and the licensee acts in compliance with it. Accordingly, where the licensee violates such conditions in the licenses, then it is treated as if he had no license. Article 14(1)(g) of the Constitution has not been infringed as decided in this case. Thus, the Supreme Court in these two cases laid down the parameters of Article 14(1)(g) of the Constitution.

The examination of judgments discussed in this chapter reveals that many of the cases were based on the violation of Article 12 (1) of the Constitution in the absence of a specific fundamental right to a healthy environment in the Constitution. Therefore, it is appropriate at this stage to examine the circumstances in which the Court found a violation of Article 12(1) of the Constitution. The Petitioners in the *Eppawala Case*[87] alleged that the

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85 SC (FR) Application 118/2004 decided on 05.04.2007

86 [1998] 1 Sri L.R. 316.

87 [2000] 3 Sri L.R. 243

proposed agreement would result in the violation of their fundamental rights under Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution. The Court found that foreign companies' exception from submitting their project to an EIA was an imminent violation of the Petitioner's right to equal protection of the law. The law (National Environmental Act) as the Court stated, requires every prescribed project to be subjected to an EIA affording the public an opportunity to air their views on the proposed project. To buttress this point the Court also referred to principle 10 of the Rio Declaration which requires public participation. A necessary corollary of equal protection of the law is that no one is above the law. In this instance, the public was excluded from participating in the final decision regarding the impact on the environment through a unilateral act of the executive.

The *Rasquinho case*[88] which concerned a purported lease and abuse of statutory power in violation of the doctrine of public trust was also based on the infringement of fundamental rights to the equal protection of the law. The alleged infringement was in relation to the project been carried out by the 18th and 19th Respondents in the area described as the Attidiya wetland, which includes an extension of the Bolgoda lake, canals and water retention areas. The Petitioner contended that the 1st Respondent had illegally leased an extent of approximately 30 acres of the said area to the 18th Respondent, being a private company for a period of 50 years, which has caused serious damage to the environment. The finding of the Court was that the construction has been carried out illegally and in violation of the fundamental rights of the Petitioner pursuant to the purported authorization secured by the 18th and 19th Respondent from an illegal and biased executive process and the work in question was environmentally destructive.

The Supreme Court in this case held that the fundamental rights of the Petitioner guaranteed under Article 12(1) of the Constitution was infringed by (i) illegal action on the part of the Respondent authorities in

88 SC (FR) Application No. 455/2007. decided on 19.11.2008.

entering into the agreement in question (ii) to facilitate executive treatment granted to the Respondent and (iii) also the failure of the Respondent authority to take steps according to the law to restrain the illegal action of the Respondent company. The Court declared that the lease by the 1st Respondent – Sri Lanka Land Reclamation and Development Corporation originally designated as the Colombo District low lying Area Rehabilitation and Development Board was void *ab initio* and of no effect or force in law.

The *Environmental Foundation Ltd v. Urban Development Authority & Others*[89] which concerned the purported management agreement pertaining to the lease of Galle Face Green and the refusal by the UDA to disclose relevant information was based on Article 12(1) together with Article 14(1) (a) of the Constitution. The Court decided that the refusal on the part of the UDA to disclose the relevant information amounts to an arbitrary exercise of power in the absence of specific reasons that support such refusal which is violative of Article 12(1) of the Constitution. In addition the Court decided that the bare denial of access to official information by the UDA amounts to an infringement of the fundamental rights guaranteed by Article 14(1) of the Constitution. The case of *Mendis and Another v. Kumaratunge and others*[90] was also based on Article 12(1) of the Constitution. The Court found that the UDA's actions amount to a total abdication of its authority to the dictates of the 1st Respondent and accordingly stands in violation of the doctrine of public trust and Article 12(1) of the Constitution. The Court also found that the 1st Respondent had failed to further the public trust and stands in infringement of the Article 12(1) of the Constitution.

The case of *Ashik & Others v. Bandula & Other*[91] was also based on Article 12(1) of the Constitution.[92] The Court found that the people had been denied the equal protection of the law by the failure of the

89 SC (FR)Application No. 47/2004 decided on 28.11.2005

90 SC (FR) Application No. 352/2007 decided on 08.10.2008

91 SC (FR)Application No. 38/2005 decided on 09.11.2007

92 SC (FR) Application No. 174/2003 decided on 17.02.2006. [2006] 1 Sri LR 369

executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act, No. 47 of 1980 as amended to safeguard the public from the harmful effect of the noise pollution. In the *Vishvanath v. Divisional Secretary and Others* case the violation of fundamental rights guaranteed by Article 12(1) of the Constitution was also alleged. However, the Supreme Court found that the Respondents had not acted arbitrarily or unreasonably when they refused the Petitioners application to renew the permits. In this case Justice Shirani A. Bandaranayake delivering the judgment of the Supreme Court went a step further to explain the scope of Article 12(1) of the Constitution. Accordingly Article12 (1) embodies a guarantee against arbitrariness in the decision making process. The Court referred to Article 14(1) of the Indian Constitution which corresponds to Article 12(1) of our Constitution and cited the Indian Supreme Court's landmark case on equality – *E.P Royappa v. State of Tamil Nadu.*[93]

The Indian Supreme Court in this case as cited in the Vishvanath Judgment stated that 'equality is a dynamic concept with many aspects and dimensions and that it cannot be cribbed, cabined and confined within the traditional and doctrinaire limits'. Apart from the *Vishvanath case,*[94] there are several other cases discussed in this chapter concerning arbitrary acts of the Respondent state authorities where the violation of Article 12(1) of the Constitution was alleged. In two cases examined in this chapter our Supreme Court has decided that the Petitioners' rights involving environmental matters had not been violated by the decisions of the respective Respondent authorities. Therefore those Petitioners were not entitled to such rights. These two cases are *Vishvanath v. Divisional Secretary and Others*[95] and *Jayawardena v. Akmeemana Pradeshiya Sabha and Others*[96] In the *Vishvanth Case*[97] Petitioners fundamental rights

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93 AIR 1974 SC 555

94 SC (FR) Application No. 174/2003 (2006) 1 Sri. LR p369. decided on 17.02.2006

95 SC (FR) Application No. 174 2003. (2006) 1 Sri LR P 369 and decided on 17.02.2006

96 [1998] 1 Sri LR 316.

97 SC (FR) Application No. 17.4 2003. (2006) 1 Sri LR P 369 and decided on 17.02.2006

application founded on Article 12(1) of the Constitution was dismissed on the ground that there was no infringement of his fundamental rights guaranteed under Article 12(1) and Article 14(1)(g) of the Constitution. The Court held that the refusal to extend the Petitioner's authority not arbitrary and was justified by both (a) protest of affected parties and (b) environmental considerations. Justice Shirani Bandaranayake referring to justice Weeramantry's judgment in *Hungary v. Slovakia*[98] pointed out that EIA means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. Responding to the allegation of the Respondent that it is just a matter of renewal of the permit and licenses upon his fulfillment of the requirements at the application stage, the Court made it clear that EIA is a dynamic process and is not confined to a pre-project evaluation of possible environmental consequences.

The Petitioner in the *Vishvanath v. Divisional Secretary, Maduhurawala and others*[99] also came before the Court alleging that his fundamental rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution were infringed as the 2nd and 6th Respondents had refused to renew his permit under the Explosive Act and the 5th and 6th Respondents had refused to renew the trade permit in respect of the Petitioner's quarry.

The contention of the Petitioner was that since he had fulfilled all the necessary requirements at the time he applied for all the permits and licenses and moreover as all the relevant authorities had granted the required permits and licenses, that he is entitled to get the relevant permits and license renewed, subject to the payment of relevant renewal fees. His position was that if it is a matter of renewal of a permit or a license, then he would be automatically entitled for such renewal. In these circumstances, the court found it necessary to consider not only the allegations made by the Petitioner but also the grievances of the 1st to 6th Respondents, 7th to 20th Respondents and villagers of the area. The grievances of the villagers

98 141. ICJ Reports 1997.

99 SC (FR) Application No. 174/2003, (2006) 1 Sri LP p369. decided on 17.02.2006

were threefold – destruction to the road, damage to their residences and the damage to the environment.

The Court observed that by the time the Petitioner had applied for the renewal of his permits, there had been strong protests from the residents of the area in and around the Petitioner's quarry on the adverse effect the quarry would have on their environment. The Court referred to *Jayawardena v. Akmeemana Pradeshiya Sabha and Others*[100] where *the* Court held that 'the strong protest of the affected community underscored the urgency to take remedial action' and upheld the cancellation of the said existing quarry license as it amounted to noise and air pollution.

In a situation where permits have to be issued to operate a quarry, the assessment of the impact on the environment over such an operation will also have to be carried out from time to time and therefore will have to continue until the venture is completed. The Court referred to the *Gabcikovo v. Nagymaros* judgment[101] where Justice Weeramantry in his separate opinion stated as follows:

> "Environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact the EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, the EIA must continue, for every such project can have unexpected consaquences..."[102]

Therefore the Court decided that the 1st to 6th Respondents had not acted arbitrarily or unreasonably when they refused the Petitioner's application to renew the permits and licenses issued to him. Moreover there was

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100 [1998] 1 Sri L.R. 316

101 *Gabcikovo v. Nagymaros* - Project, Environmental Aspects of Sri Lanka's Ancient Irrigation System, Sarvodaya Vishva Lekha publishers. P.24

102 *ibid.*

no infringement of the Petitioner's rights under Article 12(1) of the Constitution. Therefore the Court dismissed the application.

3.3. Judicial Response to Environmental Degradation.

Four judgments examined in this study directly dealt with the issues of environmental destruction. These four judgments of the cases are (1) *sand mining case (2) air pollution case (3) noise pollution case and (4) Wattegedera case.* In *Siriwardhena v. Geological Survey and Mines Bureau case*[103], judicial activism was evident more than in any other time of our judicial history. This case was popularly known as the Sand Mining Case. In the said case, a particular person came before the Supreme Court claming that his sand mining license was cancelled by the Geological Survey and Mines Bureau (GSMB) .The GSMB appearing on the notice of the court submitted that the said license was cancelled due to the recommendation of the Divisional Secretary of the area, who has to be consulted before issuing any license by the GSMB. It was revealed that there was environmental degradation in the said area, and there was also a growing public protest against the mechanized sand mining. Thereafter the Supreme Court ordered the GSMB to file a complete report on the circumstances in which the Bureau had issued licenses permitting mechanized mining of sand and clay along the Maha Oya river. Further it was directed that the said report should be prepared in consultation with the Central Environmental Authority. The report should take into account the impact on the environment of the area and also the views of the people of the area. Till such report is submitted, the bureau was directed to suspend all the licenses issued to those engaged in mechanized mining of sand and clay in the area. Upon filing of the said report it was revealed that the river banks of Maha Oya was in imminent danger of being eroded, and the Court ordered the GSMB to totally refrain from granting licenses for mechanized sand mining in the Maha Oya. Once this order was made, the GSMB had issued a few licenses, and when this was conveyed to the Court, Sarath N. Silva CJ, considered it as a matter of contempt of court and summoned the Chairman of the

[103] *Siriwardhena v. Geological Survey and Mines Bureau*: SC (FR) Application 84/2004

GSMB for explanations. Further a few individuals who were involved in mechanized sand mining with a license, after the interim order was issued by the Supreme Court were summoned and penalties were imposed with fines and imprisonment by the Supreme Court itself. This disobedience by these sand miners was considered as a contempt matter by the Supreme Court which is a another positive move that appears to go even beyond the Indian prospect of judicial activism. This can be seen as a positive step by our Supreme Court, where the Court has taken pains to summon and punish the sand miner violating the stay order, rather than directing such matters to be handled by inferior courts such as the Magistrate's Court[104]. As the Supreme Court noted, this case was similar to the manner in which the Indian Supreme Court acted in *MC Mehta v. Union of India*[105] Case. Further the Supreme Court directed the GSMB, to conduct a survey in the Maha Oya river banks to identify suitable places for sand mining.

Taking a further step in this, the Court directed the Environmental Foundation Limited (EFL), an organization involved with environmental conservation in Sri Lanka, to monitor and assist in the above survey of the GSMB. This is similar to the Indian practice of appointing committees to look into the matter and report to the Court the remedies and alternatives. This is a novel trend of the Sri Lankan Supreme Court towards the direction of judicial activism. The Maha Oya river banks would have being eroded by miles by now, if not for this active intervention of the Supreme Court. In addition to these, the Ministry of Environment was involved in drafting a 'National Sand Resource Policy' which emerged as a consequence of this case, and which will obviously protect the sand mines and banks of many other rivers in addition to that of the Maha Oya.

In *Geethani Wejesinghe v. Minister of Environment and others*[106] where an individual filed a fundamental rights application, claiming the non-

104 The Supreme Court referred to a similar Indian Supreme Court Judgment in Indian Council for Enviro- Legal Action v. Union of India. Where the Indian Supreme Court recognized and applied the principle of polluter pays.

105 AIR 1997 SC 734

106 SC (FR) Application 87/2007

implementation of existing regulations relating to air pollution, is a violation of her right guaranteed by Article 12(1) of the Constitution. This is popularly known as the *Air Pollution Case*. In the aforesaid matter the Supreme Court had ordered the National Transport Commission and the Central Environmental Authority and other stakeholders to jointly implement a city traffic control policy. As an initial step of this, most of the roads in the Sri Lankan capital, Colombo were made one way, and it might develop to a status of 'park and ride' system, which is a popular traffic control plan used in developed countries, which is far beyond the aspirations of the Sri Lankan public, without such intervention from the Supreme Court.

The noise pollution case involved issues relating to noise pollution, non-issuing of loud-speaker permits and imposing restrictions on such use as being in breach of the fundamental right in Article 12 of the Constitution. The Supreme Court noted that the complaint emerged from Muslims themselves as to the harmful effects of excessive emission of noise from loudspeakers in mosques. The evidence also revealed that the case had gone on for more than 2 years in the Magistrate's Court to enable suitable regulations to be made to be implemented by the Central Environmental Authority (CEA) effectively. But such action failed due to, according to the Supreme Court decision, disputes, vacillation, and on the whole, a lack of collective will to take positive action. The Court pointed out that courts in Sri Lanka have had the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute public nuisances.[107] The Supreme Court referring to the Indian Supreme Court Judgment in *Re Noise Pollution*[108] firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The court held that people have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act, No. 47 of 1980 as amended by Act No. 56 of 1988

[107] *Marshall v. Gunaratne Unnanse* (1886) 1 N.L.R. p 179.

[108] AIR 2005 S.C. p.3136.

to safeguard the public from the harmful effects of noise pollution along with several other directions. The *Wattegedara Wijebanda v. Conservator General of Forest and others*[109] case involved the denial by the authorities a permit to mine a quarry of Silica Quartz deposits, while granting a similar permit on the same land to another person. The Court also found the disturbing evidence of collusion between the 8th (Chairman, Dambulla *Pradeshiya Sabha*) and 6th Respondents with respect to the issue of the environmental license. Evidence also disclosed that environmental license was issued even prior to the relevant inspection report The Court in this case emphasized that

> "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 environmental 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."[110]

Although the Directive Principles of State Policy are not specifically enforceable against the State, they provide important guidance and direction to the various organs of the State in the enactment of laws and in carrying out the functions of good governance. The Court noted that the Indian Supreme Court has increasingly cited the Directive Principles of State Policy as being complementary to fundamental rights[111] The Supreme

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109 SC (FR) Application 118/2004 decided on 05.4.2007

110 *ibid*

111 *Vide Som Prakash Rekhi v. Union of India* (1981) AIR (SC) 212, M.C. *Mehta v. Union of India*, (1988) AIR (SC) 1037; *Rural Litigation and Entitlement Kendra, Debradun v. State of Uttar Pradesh*, (1988) AIR (SC) 2187). In *Damodar Das v. the Special Officer, Municipal Corporation of Hyderabad,* the High Court of Andhra Pradesh has interpreted Article 48A, the provision dealing with environmental protection, as imposing an obligation on the government including Courts to protect the environment ((1987) AIR AP 171). In *M. Mehta v. Kamal Nath* (1997) 1 SCC 388, the Indian Supreme Court has recognized the right of the public to expect certain lands and natural areas to retain their natural characteristics.

Court referred to the separate opinion by Justice C. G Weeramantry in the *Danube case*[112] The Court in the *Wattegedara case* also paid attention to the emerging principles of public accountability in the field of environmental law. The 'accountability principle' as the Court explains establishes that public servants should be held directly accountable to the public for their actions and inactions. While 'the polluter pays principle' internalizes the costs of pollution to corporate or individual polluters, and 'the principle of public accountability' extends this liability towards corrupt or incompetent regulators for the most egregious instances of mis-regulation. The principle is borne from a growing recognition that environmental degradation is by and large the product of government corruption and inertia. The Court added that each public official assumes a heightened responsibility upon accepting public office, and every public official is universally empowered with the trust of the people.

Therefore the Court held that the application of the Petitioner for conducting mining activities has been rightly refused by the relevant authority. The Court found that the Petitioner's right to equality protected under the Constitution of Sri Lanka has been violated by the arbitrary and capricious acts of the Respondents, which led to the wrongful granting of a mining license to the 6th Respondent under conditions of fraud and collusion. The Court consequently made the declaration that his rights enshrined in Article 12(1) of the Constitution have been violated.

3.4. The Right to Information as an Environmental Right

Environmental Foundation Ltd. v. Urban Development Authority of Sri Lanka[113] also known as the *Galle Face Green Case* relates to a purported management agreement or lease entered into on 15.12.2003 by the 1st Respondent (Urban Development Authority – UDA) with the 2nd Respondent (E.A.P Networks (Pvt) Ltd – EAP Ltd), whereby it was sought to hand over the management and control of the 14 acre seaside promenade of Colombo

112 *Hungary v. Slovakia* ICJ Report (1997)

113 SC (FR) Application No. 47 2004

– the Galle Face Green, to E.A.P Ltd. This is an application filed in the public interest, considering the purported exercise of power by the UDA alleged to be an infringement of Article 12(1) of the Constitution and the refusal to disclose information alleged to be an infringement of Article 14(1) (a).

The Court observed that although the right to information is not specifically guaranteed under our Constitution as a fundamental right, the 'freedom of speech and expression including publication guaranteed by Article 14(1) (a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. The Court emphasized that it should necessarily be so where the public interest in the matter outweigh the confidentiality that attach to affairs of state and official communications. The Court added that the UDA by publication of the aforesaid document containing the bold headline 'More Transparent than Glass' brought the matter of the agreement entered into with the EAP Group into the public domain.

The Supreme Court held that the bare denial of access to official information by the 1st Respondent amounts to infringement of the Petitioner's fundamental rights as guaranteed by Article 14(1)(a) of the Constitution.

3.5. The Requirement of either IEER or EIAR

The Petitioner in *Environmental Foundation Ltd. v. Central Environmental Authority and Others*[114] was a non-governmental organization engaged in environmental activities and registered with the first Respondent Authority. The Petitioner's complaint was that the decision of the first Respondent Authority to grant approval to the said project on the basis of an Initial Environmental Examination Report (IEER) without calling for an Environmental Impact Assessment Report (hereafter referred

114 *CA* 1556/2004 (2006) 3 Sri LR 3. P 57. Decided on 31.07.2006)

to as the EIAR) was arbitrary and unreasonable in view of significant environmental impacts of the project Therefore, the Petitioner sought a writ of *certiorari* to quash:-

a) the approval given for the said project by the first Respondent Authority and ;
b) the annual permit granted to the fourth Respondent by the second Respondent.

The evidence produced by the 1st Respondent indicates that the decision in question was taken by the Technical Evaluation Committee (TEC) and not the CEA. Thus, the Court emphasized that it cannot issue a writ of *mandamus* directing the first Respondent, to call for an EIAR in respect of the said project. The discretion to call for an EIAR or IEER has to be exercised by the first Respondent and by the first Respondent only. Any clear departure from the objects of the statute is objectionable and renders the act invalid in law. Public orders made by public authorities are meant to have public effect and are intended to affect the conduct of those to whom they are addressed and must be construed objectively. The Court stated that the TEC has no jurisdiction under the Act to decide whether an IEER or EIAR is required in respect of a prescribed project. The first Respondent in the view of the Court had failed to exercise its discretion reasonably and in good faith in discharging its public duty. The first Respondent cannot in law surrender the discretion vested in it to the TEC.

Therefore the Court allowed the application and held as follows.

(i) The Project Approving Agency has discretion to call for an IEER or an EIAR from the 4th Respondent in order to decide whether approval should be given. The law contemplates that such report has to be considered by the Project Approving Agency - CEA.

(ii) When a statute requires the power to be exercised in a certain form, the neglect of that form in exercising that power is *ultra vires*..

(iii) Where a power is exceeded or abused, any act done in such excess or

abuse of the power is done without authority. The *ultra vires* doctrine effectively controls those who exceed or abuse the administrative discretion which a statute has given.

3.6. An Aspect of the Jurisdiction of the Magistrate's Court in Public Nuisances

Premasiri Weerasekera and four others v. Keanganam Enterprises Ltd [115] is a case decided by the Court of Appeal and concerned an allegation of public nuisances. The Respondent – Petitioner- Respondent Company had established a metal quarry, a metal crusher and asphalt plant at a site in Damahana, Balangoda for the purpose of developing and rehabilitating the Kandy – Balangoda road. Informant – Respondent – Petitioner complained of a public nuisance caused by the activities of the Respondent- Petitioner – Respondent Company. The learned Magistrate, having considered the submission of the parties and also having given his mind to the case of *Keangnam v. Abeysinghe*[116] overruled the preliminary objection and ruled that the license does not deny the Magistrate's Court jurisdiction in respect of a public nuisance. The Respondent, Petitioner, Respondent Company thereupon moved the High Court in revision. The High Court issued a stay order staying the operation of the learned Magistrate's Order and subsequently quashed the Order of the learned Magistrate. The Informant – Respondent- Petitioner moved the Court of Appeal in revision against the Order of the High Court. The Court of Appeal allowed the revision application and held as follows."

The only way in which the jurisdiction of the Magistrate could be ousted is to include clear, specific provisions to oust such jurisdiction. One cannot by reading section 29 of the National Environmental Act conclude that the Magistrate's jurisdiction has been ousted.

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115 *Court of Appeal Case No.* CA (PHC) APN 40/2004. HC Ratnapura No. HCRA 56/2002. MC Balangoda No. 73896 decided on 26.05.2009.

116 [1984] 2 Sri L.R. 271

There is no inconsistency or repugnancy between the provisions of the Code of Criminal Procedure pertaining to nuisances and of the National Environmental Act. The Code is geared to remove and abate nuisances where as the National Environmental Act seeks to control pollution and noise. The Court of Appeal has wide reversionary powers. The reversionary jurisdiction vested in the Court cannot be fettered by the fact that the right of appeal has not been exercised. While the Court could exercise its reversionary jurisdiction to satisfy itself of the legality of the High Court Order, it should be used sparingly and in exceptional circumstances.

3.7. The Remedies for Violation of Environmental Rights

With regard to the remedies granted by the Court, on an analysis of the judgments discussed in this chapter, it reveals that the Courts have gone a step further in granting remedies instead of just deciding the cases. In the *Rasquinho* judgment[117] the Supreme Court in addition to declaring the purported lease to be void and of no force in law, directed that remedial measures be taken early to ensure that the environmental damage that had been caused be reversed and drainage facilities are restored to avoid the flooding of houses and roads. The Court further directed the Sri Lanka Land Reclamation and Development Corporation to submit a report to the Court within 2 months of the remedial measures to be taken and the possible use to be made of the land in keeping with the law. The Court further held that no legal claim for illegal construction, carried out except as an equitable measure for compensation, can be made.

In the *Galle Face Green Case*[118] the Court in addition to declaring the purported agreement to be *ultra vires* and of no force in law, ordered that the Galle Face Green should be maintained as a public utility and necessary resources for this purpose should be made available by the government of Sri Lanka.

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117 SC (FR)Application No. 455/2007. Decided on 19.11.2008

118 SC (FR) Application No. 47/2004 decided on 28.11.2005

In the *Ashik case*[119] the Supreme Court in addition to declaring the violation of Article 12(1) of the Constitution made several directions in terms of Article 126 (4) of the judgment as the Court considered being just and equitable in the circumstances of the case. The Court made these comprehensive procedural declarations due to the failure of the executive to establish by way of regulations an effective legal regime as mandated by the National Environmental Act to safeguard the public from the harmful effects of noise pollution. The Supreme Court in this case specifically directed that till the regulations are made, its directives and the circular issued by the IGP would continue to be in force and enforced by the Supreme Court.

The Court in the *Mendis Case* declaring the entire transaction invalid in law and thereby null and void, directed the Director General of the Bribery Commission to conduct an immediate inquiry of the entire transaction in terms of the Bribery Act No. 11 of 1954 as amended. The Court made an important pronouncement also that 'the Supreme Court has the power to make an appropriate order even against a Respondent who has no executive status where such Respondent is proved to be guilty of impropriety or connivance with the executive in the wrongful acts violative of fundamental rights. In the sand mining case,[120] as the case was popularly known, judicial activism was evident than any other time in our judicial history. In this case, the Supreme Court ordered the GSMB to file a complete report on the circumstances in which the bureau had issued licenses permitting mechanized mining of sand and clay along with the Maha Oya river. The Court also directed the Geological Survey and Mines Bureau (GSMB) to conduct a survey in the Maha Oya river banks to identify suitable places for sand mining. Further, this judgment also resulted in the drafting of the National Sand Resource Policy of the government. The Supreme Court also imposed fines on those who violated the court order on the ground of contempt of court. These judgments reflect the intention of the Court to provide adequate safeguards to the public to ensure their environmental rights.

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119 SC (FR) Application No. 28/2005 decided on 09.11.2007

120 SC (FR) Application No 84/2004

4. Conclusions

Sustainable development requires continuous economic growth with minimum stress to the environment. It is well acknowledged that one major stride in achieving sustainable development is through the integration of environmental concerns into the development activities and in all aspects of decision making. Integration of environmental concerns could take place through interventions at national, regional and local level and via policy, legal and institutional interventions. During the review period there have been many strides in terms of policy, institutional and legal reform in support of environmental conservation. These actions however have been insufficient in maintaining a healthy environment that is necessary for sustainable development mainly due to reasons such as lack of an integrated approach, implementation and policy failures, lack of monitoring, insufficient resources and deficiencies in enforcement have also aggravated the situation.

Issues related to urbanization are mostly continuing in large cities and more relevant to the Colombo Metropolitan area. The more serious issues are air pollution due to vehicular traffic, noise pollution especially in the vicinity of industrialized areas and roads with heavy traffic, lack of proper drainage facilities and poor maintenance of canals and outfalls, increased flooding due to filling of wetlands, from industrial and domestic wastes etc.

With regard to waste management, in the National Policy on Solid Waste Management, it is specified that waste management in the country should follow the polluter pays principle, the enforcement of which needs suitable legislative measures. Therefore, in order to cover the expenses, the local authorities should adopt appropriate management based instruments. Imposing appropriate service charges on large scale waste producers based on the weight of waste is also needed. However, it is very important that the funds thus collected should be utilized in an open and transparent manner. The waste management laws should be strictly enforced. Penalties should be appropriate and hence the laws need to be amended. Presently there

is a trend of local authorities to look for responsible public – private and community partnerships in solid waste management. The lengthy process of procuring the services, lack of infrastructure, political and financial issues are among the constraints. While private sector partnerships can lead to sustainable operation, far sighted contracts should be formulated, so that the service providers could be penalized for poor performance. While long term contracts are more economical, they can also create monopolistic conditions.

At the local authority level, under the provisions available in sections 129, 130 and 131 of the Municipal Councils Ordinance, sections 118, 119 and 120 of the Urban Councils Ordinance and sections 93, 94 and 95 of the Pradeshiya sabha Act No. 15 of 1987, collections and disposal of solid waste is vested with the local authorities. Waste in this regard may be street refuse, house refuse and any other similar substances collected by the local authorities. Under section 12 of the National Environmental Act of 1980 as amended, the Central Environmental Authority (CEA) may issue directives to any local authority with the concurrence of the Minister in charge of the subject of environment, to cause to do things that the CEA deems necessary for protecting the environment within the local authority area.

Local authorities are also provided with provisions under the Town and Country Planning Ordinance as amended by Act No. 49 of 2000 and by urban development laws to formulate appropriate planning of land in the respective areas of jurisdiction. As this local physical plan has a legal status, local authorities have ample opportunities for planning and establishing waster management facilities. Further, more local authorities have the powers to establish by laws under their respective acts, thereby to have control over most specific waste management activities in the area. The local authorities are also directed by their respective acts to provide places convenient for the proper disposal of all waste they collect. The National Environmental Act requires an EIA to be undertaken if the capacity of the proposed site exceeds 100 tons of waste per day. Many local authorities are engaged in the daily collection of waste, but

several smaller local authorities with low population densities collect less frequently. Several local authorities including the Colombo Municipal Council have outsourced the collection of waste within their cities which has to be properly regulated.

The civil war in the North and East which ended last year had made it impossible to implement any conservation activities during the past three decades in those areas. Deterioration of land in these areas occurred. e.g. due to the passage of heavy military vehicles and the explosion of bombs etc. The harm suffered and the economic consequences arising out of such conflicts are reasonably well appreciated. However, what is often insufficiently appreciated are the effects (including destruction of eco-systems) of military preparations and activities on the environment.

As contemporary social values and norms regarding the environment change from time to time, existing laws might not address such change, hence the judges in the superior courts may engage in reforming social policies as well as legal principles. Further, even with an updated legal framework, the implementation of such laws may be highly inefficient which invites the active intervention of the judiciary. Where environmental law in Sri Lanka is concerned, the norms and values in addition to the natural resources base had changed dramatically in the recent past. The adversarial legal system inherited from Britain had made no room for the judges to actively get involved to address the environmental issues in the field of environmental law.

The developments in the field of human rights could be used to expand the country's judicial process. Referring to the role of judges, as Justice Weeramantry[121] has correctly pointed out; judges are engaged in the process of developing the law, in which they do not merely decide cases in the light of the existing law. It is becoming increasingly legitimate to justify judicial decisions in terms of human rights norms and declarations. The Sri Lankan case law referred to earlier reveals that already our Courts

[121] C.G Weeramantry, *Justice without Frontiers: Furthering human rights* (Vol 1). Kluwer Law International, the Hague London/ Boston 1997 P 26

have taken that essential step following the Indian Supreme Court role, in developing the new human rights based remedies, to assist the average person in the sphere of environmental law.

In the absence of a specific right to environment, procedural rights such as freedom of information, right to participate in decision making process and the right to seek redress for violations of rights and substantive rights such as right to life and right to health have been used at the national level pioneered by the Indian judiciary to recognize the right to a healthy environment and the right to an adequate standard of living. In the case of Sri Lanka, since our Constitution does not recognize as fundamental rights, the right to life and the right to health, environmental rights of the people have been asserted mainly by way of equality provisions of the Constitution by judicial activism.

This trend is likely to continue as long as a distinct human right to a healthy environment is not recognized. The right to a healthy environment on the other hand denotes the identification of a separate individual human right. The recognition of a right to a healthy environment is the wider formulation that would accompany both pollution and conservation. Therefore this study recommends the incorporation of a justiciable fundamental right to a healthy environment in the fundamental rights chapter of our Constitution. The substantive right to a healthy environment must be complemented by the procedural environmental rights discussed in this chapter and it is only when such complementarity is achieved coupled with an eco-centric approach that environmental protection can be effectively enforced. Unless it is embodied, a violation of this right cannot constitute the subject matter of a fundamental rights petition. Moreover, such a right should be afforded to every person as opposed to citizens only.

The continued infringement of a law over a period of time is facilitated by a high level of laxity, tolerance and even collusion on the part of the administrative authorities concerned with the implementation of the law. The continued tolerance of such violations not only renders the law nugatory but also encourages a level of lawlessness and adoption

of means which must not be tolerated in a civilized society. The Court in the *Wattegedara Case*[122] also recommended that a strong regulatory framework with requisite checks and balances is therefore an imperative for the effective and meaningful application of any conservation law. In this connection, the Supreme Court in the *Wattegedara Case* referred to the Indian Supreme Court in the case of *ICELA vs. Union of India*[123] where it stated the enactment of a law tolerating its infringement is at times worse than not enacting a law at all. A law is not only meant for the law abiding citizen and it is the function of the enforcement officials to ensure that the spirit of the law is enforced and honored by all.

This study has observed the emerging principle of public accountability in the field of environmental law due to judicial activism. The accountability principle establishes that public servants should be held directly accountable to the public for their actions and inactions. While the 'polluter pays principle' internalizes the cost of pollution to corporate or industrial polluters, and the 'principle public accountability' extends this liability towards corrupt or incompetent regulators for the most egregious instances of irregularities. Each public official including the President of the Republic assumes a heightened responsibility upon accepting public office as evidenced in the *Mendis v. Kumaratunge Judgement.*[124] The concept of good governance requires the government to promote accountability, public participation, transparency, and a sound legal framework for equitable development. Of all these elements in our view, public accountability as referred to above may not as yet have developed to an extent which warrants its application in the country

A perusal of the judgments points to the fact that in most cases the Court used the language of the new doctrine on equality rather than use the traditional reasonable classification doctrine. The Court was content to base its judgments on whether the alleged actions or omissions on the part

122 SC (FR) Application No. 118/2004 decided on 05.04.2007

123 AIR 1957 AC 3519,

124 SC (FR) Application No. 652/2007 decided on 08.10.2008

of the executive were arbitrary. In an innovative judgment, The Supreme Court in the *Wattegedara Case*[125] held that 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.

The judgment in *Mendis v. Kumaratunge & others*[126] broke new ground in the field of public law in Sri Lanka, with its implication for environmental law as well. The judgment of the *Ashik Case*[127] expanded the horizons of environmental rights of the people. Although secularism - as a constitutionally entrenched principle, reinforcing the equality of all communities – not recognized by the 1978 Constitution, the Supreme Court in the *Ashik Case* by innovative interpretation gave an implied recognition to it by referring to Article 3 of the Constitution. Moreover, instead of just deciding the case, the Court went a step further to fill up the lacuna in the law by issuing a number of directions which are in fact rights as well as obligations of the State. In more recent Supreme Court judgments such as the sand mining case[128] and the air pollution case[129], the judicial activism of the Sri Lankan Supreme Court was evident than any other time of our judicial history. There are environmental rights that can be exercised during the decision making process such as public participation in the EIA process. On the other hand, there are environmental rights that are of a remedial nature such as legal and administrative justice. The public should be encouraged to exercise their rights in the former category. Then the need to resort to remedial rights may be minimal. While it is important for people to be aware of their rights, they must also be more concerned about their duties towards environmental protection. In terms of Article 28(1) of the Constitution which states that the enjoyment of rights and

125 SC (FR) Application No. 652/2007 decided on 08.10.2008

126 SC (FR) Application No. 352/2007 decided on 08.12.2008

127 SC (FR) Application No. 38/2005 decided on 09.11.2007

128 *Siriwardhena v. Geological Survey & Minds Bureau* SC (FR) Application No 84/2004

129 *Geethani Wijesinghe v. Minister of Environment & Others*. SC (FR) Application No. 87/2007

freedoms are inseparable from the performance of duties and obligations. Therefore vigilance about possible violations of rights and enforcement alone is not sufficient in our efforts to protect the environment.

The role of the judiciary becomes a particularly pertinent subject for discussion in the context of an analysis of the environmental dimension of public nuisance. For, the case law illustrates that the success or the failure of public nuisance as a means of environmental protection and the degree of either, is to a large extent dependent on judicial sensitivity, attitude and approach in the particular case. The need for access to justice and access to courts of law was stressed by the courts. Balancing of interests is the crucial theme in private nuisance, but public nuisances, which belong to the realm of the criminal law, would seem to disallow such a process. The NGO sector has played and will hopefully continue to play an important role in environmental management, awareness creation and advocacy in the country. While the Court expressed its profound distress and dissatisfaction towards the functioning of specified state authorities, the Supreme Court took time in the case of *Environmental Foundation Ltd v. Urban Development Authority and Others*[130] to place on record a word of appreciation, particularly to Environmental Foundation Ltd, an NGO for the timely intervention as the Petitioner.

Standards are a useful and even essential way to regulate pollution. The NEA by section 32 gives the Minister discretion to establish environmental standards as appropriate. However, there seems to be a lack of consistency, participation, transparency and accountability in setting standards. The CEA followed a participatory process to draft mobile air emission, fuel and vehicle import standards as a result of the judgment of the Supreme Court which mandated that task by an order in the case of *Lalanath de Silva v. Nandimitra Ekanayake, Minister of Environment*[131] where it was alleged that the Petitioner's right to life and right to equality before the Ministers and the agency's failure to establish those standards had violated the law. Standards are generally a compromise between competing needs and

[130] SC (FR) Application No. 47/2004 decided on 28.11.2005

[131] Unreported case No. SC (FR) Application 569/98, SC Minutes of 2nd November, 1999.

interests. Economic, technological, scientific, ecological and human health considerations all have a place in formulating standards. Reforming the way the standards are set would enhance the ability of industry to react to and comply with new standards. It will also facilitate the early identification of implementation issues. The participation of civil society will enhance accountability and the final standards will have greater acceptance all round. Moreover, reforming must provide for civil society and industry to initiate new standards. There are cases in which lobbies within industry may have competing interest, each preferring a lower or higher standard. Interests and needs in society keep changing. It is difficult for the CEA and the Ministry to keep track of all these changes. It is therefore appropriate to allow the public a right to petition for new standards whenever there is a need.

Given the complexity of environmental issue, courts need the assistance of independent scientists to arrive at factual findings. Experts presented by parties may be biased. However, the interests of the environment require that courts must have competent and independent technical input in arriving at their decisions. Permitting courts to appoint independent experts and to compensate them for the assistance given would be a useful legal reform. Even if the Court had such a power, the choice of appropriate experts would be a difficult matter. One possible approach is to allow the courts or the Ministry of Justice to maintain lists of screened and competent experts. Evaluating potential experts would still be difficult in such a scheme. Another approach is the one adopted by the American Association for the Advancement of Science (AAAS).[132] Amending the law and giving power to the Sri Lanka Association for the Advancement of Science or the Ministry in charge of science is a practical alternative approach. Courts also need assistance from environmental agencies such

[132] In 1998, AAAS started a demonstration project called "Court appointed scientific expert" (CASE) the project assisted federal district judges in locating highly qualify independent scientific and technical experts to serve as court appointed experts. Since 2001, the AAAS has been responding to request from judges. Two handbooks have been published for the guidance of judges and experts. For more details see the web page http..//www. Aaas.org/spp/case/case.htm

as the CEA, Forest Department and local government agencies in deciding when and how to abate environmental public nuisances. Courts must be able to fashion a remedy that involve the regulators in future prevention, monitoring and enforcement by adding regular monitoring and licensing conditions in the final abatement order. Amending the law to allow courts to seek such assistance and directing agencies to assist will help improve the current law.

The lack of appropriate environmental law is not a major problem. But there is significant public dissatisfaction about poor environmental law enforcement. Citizens' enforcement by far outstrips that of regulatory agencies. Citizens' actions usually take the form of public nuisance abatement, judicial review of agency actions or inactions, actions for damages, declarations and injunctions and complaints of fundamental rights violations. Affected individuals and groups file the majority of these actions. But the law places many obstacles in the way of genuine citizen actions. These range from high litigation costs to complicated procedure and court delays. Reforms that allow public interest litigants to recover costs of litigation would allow disadvantaged and public spirited citizens groups to gain greater access to environmental justice.

Enforcement by regulatory agencies tends to be politicized. Environmental delinquents boldly carry on polluting and damaging the neighborhood and environment because they feel secure with political protection. Reforming is necessary to allow citizens to complain of agency inaction and bias in enforcement and to allow court-supervised direct citizen enforcement. The citizen suit provisions found in the Clean Water and Clean Air Acts of USA are good models to follow.[133] These laws allow a citizen to bring an action to enforce environmental laws after giving the agency concerned a mandatory notice. The agency then has an option to enforce the law itself or allow the citizen suit to proceed and have the Court supplement and not supplant agency-enforcement. Reforms introducing citizen suits

[133] Federal Water Pollution Control Act 1972 ("Clean Water Act'), 33 U.S.C. $ 1365 (a) and Clean Air Act, 42 U.S.C. $ 7604 (1988 & Supp. V 1993) of USA.

are long overdue. First, they will modernize the many forms of citizens' litigation now taking place in the courts. Second, they will make agencies and regulated entities more accountable. Third, they will reduce corruption and politicization of agency enforcement. Fourth, the public and the environment will benefit.

In the face of a conflict between protective law and personal or commercial interest, it appears that the law ends up the inevitable loser. Therefore, a strong regulatory framework with requisite checks and balances is an imperative for the effective and meaningful application of any conservation law. Continued tolerance of violations not only renders the law nugatory but also encourages a level of lawlessness. As the Supreme Court in the judgment of *Wattegedara Case*[134] has pointed out

> 'A law is not only for the law- abiding citizens and it is the function of the enforcement officials to ensure that the spirit of the law is enforced and honored by all. Failure to do so will lead to a level of degradation with disastrous impacts on the present and future health of the nation.'[135]

There is urgency in the case of environmental problems, as neglect can lead to augmentation of such problems with every second with the passage of time. The abate procedure in the Code of Criminal Procedure Act, for instance, is also appropriate in problems involving public nuisances. The judiciary, through this system of preventive justice too can help to protect human health and the environment.

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134 SC (FR) Application No. 118/2004 decided on 05.04.2007

135 *Ibid.*

SCHEDULE 1

UN Conventions on Human Rights & International Conventions on Terrorism signed, ratified or acceded to by Sri Lanka as at 31st December 2009 *

(37 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

Cartangena Protocol on Bio Diversity

Acceded on 26 July 2004

Convention on Biological Diversity

Acceded on 23 March 1994

Convention Against Corruption

Acceded on 11 May 2004

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* The consent of a State to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect. In many instances, the parties may agree either in the text of the agreement or in the negotiations accompanying the 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 Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Acceded on 3 January 1994

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 International Trade in Endangered Species of Wild Fauna and Flora

Acceded on 4th May 1979

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

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

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 18th February 1982

Kyoto Protocol to the Framework Convention on Climate Change
Acceded on 3 September 2002

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)
Ratified on 15 January 2003
15 Oct 2002 acceded

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, Booby-traps 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

The Ramsar Convention on Wetlands
Acceded on 15 October 1990

United Nations Convention Against Transnational Organised Crime
Signed on 15 December 2000

United Nations Convention on the Law of the Sea
Acceded 19 July 1994

Vienna Convention on Consular Relations
Acceded on 4 May 2006

Vienna Convention for the Protection of the Ozone Layer
Acceded 15 December 1989

SCHEDULE 1I

ILO Conventions Ratified by Sri Lanka as at 31 December 2009

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 (Agriculture) Convention, 1921*	*29.11.1991*	*Denounced*
C11	*Rights of Association (Agriculture) Convention, 1921*	*25.08.1951*	
C15	*Minimum Age (Trimmers & Stockers) Convention, 1921*	*25.04.1951*	*Denounced*
C16	*Medical Examination of Young Persons (Sea) Convention, 1921*	*25.04.1950*	
C18	*Workmen's Compensation (Occupational Diseases) Convention, 1925*	*17.05.1952*	
C26	*Minimum Wage Fixing Machinery Convention, 1928*	*09.06.1961*	
C29	*Forced Labour Convention, 1930*	*05.04.1950*	
C41	*Night Work (Women)Convention (Revised), 1934*	*02.09.1950*	*Denounced*

No	Convention Name	Ratified Date	Present Status
C45	Underground Work (Women) Convention, 1935	20.12.1950	
C58	Minimum Age (Sea)Convention (Revised), 1936	18.05.1959	
C63	Convention concerning Statistics of Wages and Hours of Work, 1938	25.08.1952	Denounced
C80	Final Articles Revision 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	
C98	Rights to Organise and Collective Bargaining Convention, 1949	13.12.1972	
C99	Minimum Wage Fixing Machinery (Agriculture) Convention, 1951	05.04.1954	

No	*Convention Name*	*Ratified Date*	*Present Status*
C100	*Equal Remuneration Convention, 1951*	*01.04.1993*	
C103	*Maternity Protection Convention (Revised), 1952*	*01.04.1993*	
C105	*Abolition of Forced Labour Convention, 1957*	*07.01.2003*	
C106	*Weekly Rest (Commerce and Offices) Convention, 1957*	*27.10.1983*	
C108	*Seafarers' Identity Documents Convention, 1958*	*24.04.1995*	
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 Convention, 1961*	*26.04.1974*	
C131	*Minimum Wage Fixing Convention, 1970*	*17.03.1975*	
C135	*Worker's Representatives Convention, 1971*	*16.11.1976*	
C138	*Minimum Age for Admission to Employment, 1973*	*11.02.2000*	
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*	

SCHEDULE 111

Humanitarian Law Conventions Ratified by Sri Lanka as at 31st December 2009

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

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

SCHEDULE IV

Some Human Rights Instruments NOT Ratified by Sri Lanka as at 31st December 2009

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity - 26 November 1968 (date of adoption), 11 November 1970 (entered into force)

Convention on the Political Rights of Women - 20 December 1952(date of adoption), 7 July 1954 (entered into force)

Convention on the Rights of Persons with Disabilities - 13 December 2006 (date of adoption), 3 May 2008 (entered into force)

Convention Relating to the Status of Refugees - 28 July 1951 (date of adoption), 22 April 1954 (entered into force)

Hours of Work (Industry) Convention – 1919 (date of adoption), 1921 (entered into force)

ILO Convention 168 concerning Employment Promotion and Protection against Unemployment – 1988 (date of adoption), 1991 (entered into force)

ILO Convention No 102 concerning Minimum Standards of Social Security- 28 June, 1952(date of adoption), 27 April 1955 (entered into force)

ILO Convention No 122 concerning Employment Policy- 1964 (date of adoption), 1966 (entered into force)

ILO Convention No 141 concerning Organisations of Rural Workers and their Role in Economic and Social Development – 1975 (date of adoption), 1977 (entered into force)

ILO Convention No 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service- 1978 (date of adoption), 1981(entered into force)

ILO Convention No 154 concerning the Promotion of Collective Bargaining – 1981(date of adoption), 1983(entered into force)

International Convention for the Protection of All Persons from Enforced Disappearance
New York, 20 December 2006 (date of adoption), 23 December 2010 (entered into force)

Optional Protocol II to the International Covenant on Civil and Political Rights (ICCPR) – 15 December 1989 (date of adoption), 11July 1991 (entered into force)

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2002 (date of adoption), 2006 (entered into force)

Optional Protocol to the Convention on the Rights of Persons with Disabilities - 13 December, 2006 (date of adoption), *3 May 2008* (entered into force)

Promotional Framework for Occupational Safety and Health Convention - 2006 (date of adoption), 2009 (entered into force)

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)- 1977 (date of adoption), 1979 (entered into force)

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11)- 8 June 1977 (date of adoption), 7 December 1978 (entered into force)

Protocol to the Convention relating to the Status of Refugees - 16 December 1966 (date of adoption), 4 October 1967 (entered into force)

Rome Statute of the International Criminal Court (ICC) – 17 July 1998 (date of adoption), 1July 2002 (entered into force)

SCHEDULE V

Fundamental Rights (FR) Cases Decided during the year 2008/2009

Article 10 – Freedom of Thought, Conscience and Religion

Ven Ellawala Medanada Thero and six Others v. *Sunil Kannangara, District Secretary, Ampara and 64 Others* SC (FR) Application No 178/08, SC Minutes, 06/01/2009

Article 11 (– Freedom from Torture and Inhuman or Degrading Treatment)

Anthony Michael Emmanuel Fernando v. The Superintendent of Welikada Prison and Others SC (FR) Application No. 128/2003, SC Minutes 14.05.2008

Bandula Samarasekera v. OIC,Ginigathhena Police Station and Others SC (FR) Application No. 107/2007, SC Minutes 14.09.2009

MD Nandapala v. Sergeant Sunil and others SC (FR) Application No 224/2006, SCM 27/4/2009

Meegasdeniya Kankanamge Gunathilake v. Sub-Inspector of Police, Tangalle Police Station and Others SC (FR) Application No. 123/2004, SC Minutes 27.05.2008

Pitakandalage SC (FR) Application No. 157/91, SCM 12.01.1994

Ratnasiri and Another v. *Devasurendran and Others,* [1994] 3 Sri L.R. 127

Romesh Cooray v. Sub-Inspector of Police, LAS Jayalath, Crimes Division and Others SC (FR) Application No 663/2003, SC Minutes 2/7/2008

Uduwa Athukoralage Chandrasena v. OIC, Baduraliya Police Station and Others, SC (FR) Application No. 258/2007, SCM 13.05.2009

Article 12 (1) – Fundamental Right to Equality

Arjuna Ranatunga v. Gamini Lokuge, Minister of Sports and Public Recreation and Others SC Application No 51/2009, SC Minutes 25/5/ 2009

Deepthi Kumara Guaratne and two others v. *DayanandaDissanayake, Commissioner of Elections*, SC (FR) Application No 56/2008, SC Minutes 19/3/2009

Devundara Narayanage Sanath Ravindra v. *Mahinda Pathirana, OIC, Police Station, Kochchikade and Others* SC Application No 485/2004, SC Minutes 16/12/2008

Dr Ariyawansa v. DrMendis and others, SC (FR) 49/2008, Appellate Law Recorder (ALR) 2008 (2), page 5

MD Nandapala v. Sergeant Sunil and Others SC (FR) Application 224/2006, SC Minutes 27/4/2009

RF Rasquinho and others v. *Sri Lanka Land Reclamation & Development Corporation and Others* SC Application No 455/2007, SC Minutes 19/11/2008

Senarath v. Chandrika Bandaranayake Kumaratunga SC Application 503/2005, SC Minutes 3/5/2007

Sirimasiri Hapuarachchi and two Others v. DayanandaDissanayake, Commissioner of Elections SC (FR) Application No 67/2008, SC Minutes 19/3/2009

Sugathapala Mendis and Raja Melroy Senanayake v. Chandrika Bandaranayake Kumaratunge and others SC Application No 352/2007, SC Minutes 8/10/2008.

TA Ananda Dhamadasa and others v. Ariyratne Hewage, Secretary, Ministry of Education and others SC Application No 206/2006, SC Minutes 9/1/2008

Ven Thiniyawala Palitha Thero and others v. AHM Fowzie and others SC (FR) Application No 536/2008

WKH Wegapitiya v. *AHM Fowzie and others* SC (FR) Application No 535/2008

Article 13 (Freedom from Arbitrary Arrest, Detention and Punishment)

Amal Sudath Silva v. *Kodituwakku* [1987] 2 Sri L.R. 119

Ansalin Fernando v. *Sarath Perera and Others* [1992] 1 Sri L.R. 411

Bandula Samarasekera v. *Vijitha Alwis, OIC, Ginigathhena Police Station and Others SC Application No 107/2007, SC Minutes 14/9/2009*

Mallikage Padma Wijesooriya and M. Christie v. *GWRG Thilekaratne and others SC Application No 298/2005, SC Minutes 25/1/2008*

MD Nandapala v. Sergeant Sunil and others SC (FR) Application 224/2006, SC Minutes 27/4/2009

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Romesh Cooray v. LAS Jayalath, Sub-Inspector of Police, Crimes Division and others SC Application No 663/2003, SC Minutes 2/7/2008

*Suranjith Hewamanne*v. *Gayan Christhantha, Jail Guard and others* SC Application No 128/2003, SC Minutes 14/5/2008

Uduwa Athukoralage Chandrasena v. *Sub-Inspector Buddhika and Others* SC Application No 258/2007, SC Minutes 13/5/2009

Article 14 (1) (h) –Freedom of Movement

Article 14 (1) (g) – Freedom to engage in a profession, trade, business or enterprise

Devundara Narayanage Sanath Ravindra v. *Mahinda Pathirana, OIC, Police Station, Kochchikade and others SC Application No 485/2004, SC Minutes 16/12/2008*

SCHEDULE VI

Cases Cited – Sri Lanka and other Jurisdictions

AG v. *AD de Silva 54 NLR 529*

Amal Sudath Silva v. *Kodituwakku, IP and others* 1987 2 Sri L.R. 119

AP Pollution Control Board v. Nayudu (1992) 2 SCC 718

Ashik & Others v. Bandula & Other SC FR Application No. 38/2005 decided on 09.11.2007

Bandara v. Premachandra 1994 1 Sri LR 301

Bandula Samarasekera v. OIC,Ginigathhena Police Station and Others SC (FR) Application No. 107/2007, SCM 14.09.2009

Bulankulame v. Secretary, Ministry of Industrial Development 2000 3 Sri L.R. 423 (Better known as the Eppawala Phosphate Case)

Christie v. Lachinsky [1947] AC 573.

Danube River Case (1997 General List N 92 25th September 1997 (ICJ) decided on 17.02.2006

E.P Royappa v. State of Tamil Nadu AIR 1974 SC 555

Edirisuriya v. Navaratnam 1985 1 Sri L.R. 100

Elal Jayantha v. OIC Panadura Police 1986 (1) Sri LR 334

Environmental Foundation Ltd v. Urban Development Authority & Others SC FR Application No. 47/2004 decided on 28.11.2005

Environmental Foundation Ltd v. Urban Development Authority and Others Case SC (FR) Application 47/2004 decided on 28.11.2005

Environmental Foundation Ltd. v. Central Environmental Authority and Others CA 1556/2004 (2006) 3 Sri LR 3. P 57 Decided on 31.07.2006

Environmental Foundation Ltd. v. The Land Commissioner and Others (1993) 2 Sri LR 42

*Environmental Foundation Ltd. v. Urban Development Authority of Sri Lanka SC (FR) Application No. 47/2004 (*also known as the *Galle Face Green Case)*

Faiz v. Attorney General [1990] 1 Sri L.R 372

Framji v. Secretary of State17 BOM L.R 100 (PC)

Gamaethige v. Siriwardena 1988 1 Sri LR. 385

Geethani Wejesinghe v. Minister of Environment and Others SC FR 87/2007 (popularly known as the air pollution case)

Gomez v. University of Colombo 2000 1 Sri L.R. 273

Greena Fernando v. Teckla Saparamadu 1990 (1) Sri LR 270

Gunaratne v. Homagama Pradeshiya Sabha and Others [1998] 2 Sri LR 11

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Ram Krishna Dalmia v. *Justice Tendolkar AIR 1958 SC 538*

Rani Fernando SC (FR) Application No. 700/2002, SC Minutes 27.07.2004

Rasquinho case SC (FR) Application No. 455/2007. decided on *19.11.2008*

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Rowlands v. AG7 2 NLR 385

Royappa v. State of Tamil Nadu AIR 1974 SC 555

Senthilnayagam v. Seneviratne [1981] 2 Sri L.R. 187

Shaul Mohammad Nilam and Others v. K Udugampola and Others SC (FR) Applications Nos 68/2002, 73/202, 74/2002, 75/2002, 76/2002, SC Minutes 29.01.2004

Sinna Guru v. Inspector of Police , Karavanella (1957) 61 NLR. 186.

Siriwardhena v. Geological Survey and Mines Bureau Case: SC (FR) Application 84/2004 (popularly known as the Sand Mining Case)

Sriyani Silva v. Iddamalgoda [2003] 2 Sri LR 63.

Suranganie Marapana v. *The Bank of Ceylon and Others (*1997) 3 Sri L.R. 156

Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others [2003] 1 Sri LR. 74.

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