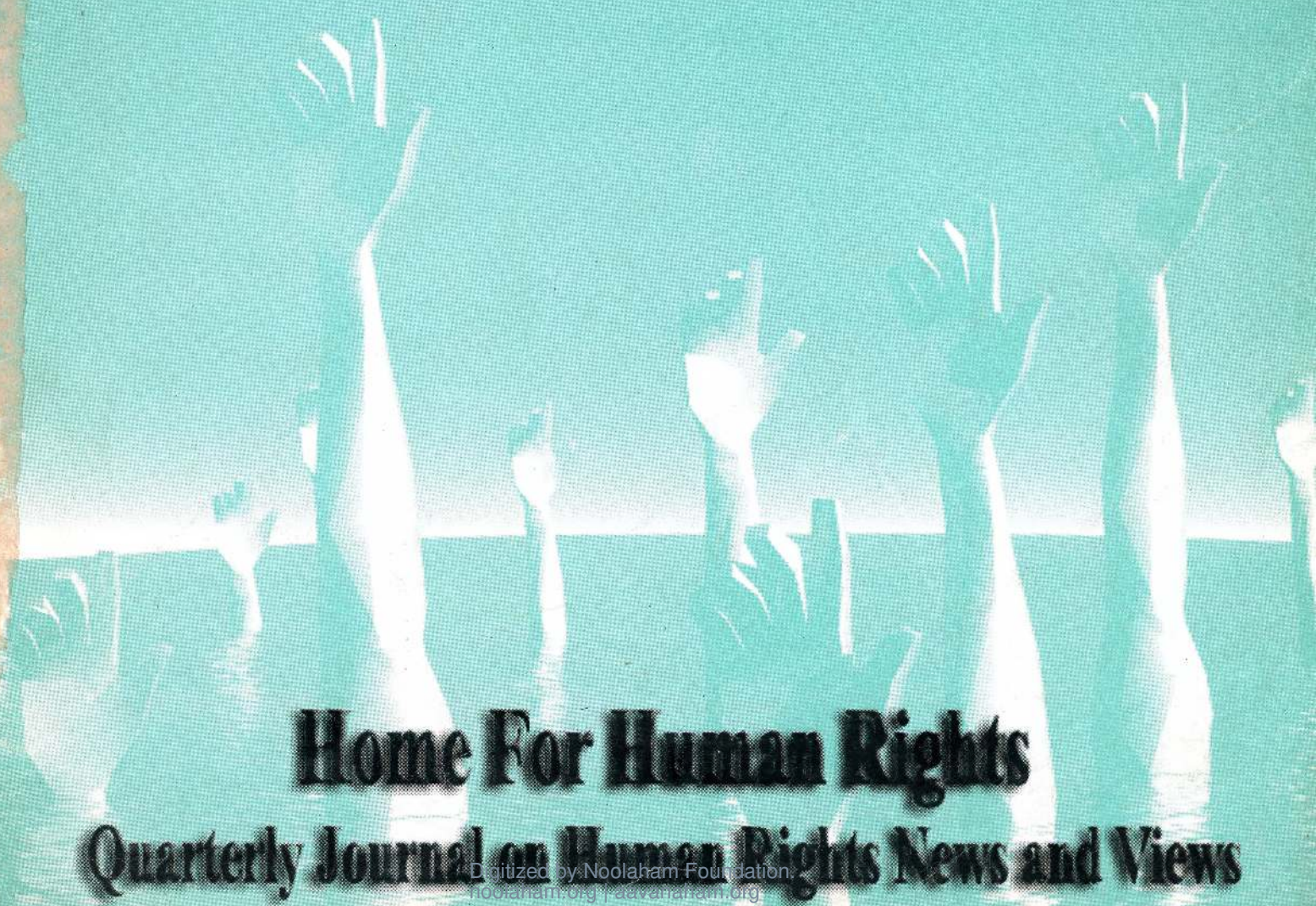
BEYOND THE WALL

JANUARY - MARCH 2004



Home For Human Rights

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BEYOND THE WALL

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The views expressed in the articles in this volume are those of their authors and do not necessarily reflect the views of the editorial board.

Beyond The Wall *welcomes contributions from those involved or interested in human rights. The subject matter is restricted to news, views and academic papers on human rights issues. In addition to papers and articles, we will welcome critical comments and letters to the editorial board.*

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EDITORIAL

Human rights: unfinished business and gloomy prospects

It has to be acknowledged that ever since the signing of the Ceasefire Agreement in February 2002, there has been a significant reduction in the levels of fear from what was experienced by Sri Lankans during the two decades of the ethnic conflict.

This is due to the partial restoration of human rights standards, and, at least to a point, the rule of law. While entertaining no doubt that the ceasefire was not the product of the goodwill of anyone but the hard, cold reality of a military balance achieved between the Sri Lanka government and the LTTE, it has to be acknowledged that certain standards of human rights and rule of law that were written into the Ceasefire Agreement have been rigorously upheld. It has also got to be admitted that in certain areas there have been grievous shortfalls.

An outburst of enthusiasm on the part of the UNF government soon after the Ceasefire Agreement was signed was manifest through the reopening of roads that had been closed during the war years and the suspension of the pass system that had restricted travel between the northeast and south. This led to the freedom of movement, which had been curtailed due to the conflict, being re-established up to a point. Similarly, the military vacated places of worship and public buildings in the northeast, thereby allowing the Tamils of the region a degree of ease in using public establishments.

However, the UNF's initial enthusiasm ground to a halt soon. When it came to vacating areas that the military perceived as detrimental to its strategic interests, the government steadfastly refused to comply with the provisions of the Ceasefire Agreement. That is why areas in the northeast known as high security zones – the most notorious of them being in Vadamaratchi – remain firmly in the hands of the Sri Lanka army, despite protests by the Tamil public and their political representatives.

Similarly, rights of fishermen remain ambiguous with no restrictions on their going out to sea put down on paper, but all types of limitations circumscribing their rights existing in practice. Agriculture is also affected in the high security zones with farmers denied the opportunity to cultivate due to the zone being declared out of bounds. Those who tested whether the stipulations were serious incurred the wrath of the military for having tried.

While restrictions on Tamil residents plying their trade or using public amenities are serious qualifications on the environment the Ceasefire Agreement was expected to usher in, what goes to the very core of the problem is that nothing has been done to dismantle the apparatus of terror that had been appropriated by the Sri Lankan State over the past two decades. They continue to impinge on the security of the Tamils making them feel potentially very vulnerable despite the two-year long Ceasefire Agreement.

The deleterious effects these structures, which have been evolving from the time Sri Lanka first plunged into an ethnic war with the Tamil militants, have been recorded in some of the contributions to this issue of Beyond the Wall.

An active encouragement for the continuation of authoritarianism and state terror in Sri Lanka has been through the promulgation and execution of national security laws, which have cast a long shadow on the legal architecture of this country. V. S. Ganesalingam has outlined the effect the Prevention of Terrorism Act (PTA) has had in curbing and derogating the rights of Sri Lankan citizens, especially the Tamils, and how they could be defined as being instruments of state terrorism.

He also asks very pertinent questions about the efficacy of national institutions such as the Human Rights Commission of Sri Lanka that was established with the express intention of redressing human rights violations, but which chooses to remain dumb about politically sensitive issues such as the PTA, either because it is conniving with the state, or because it is too timid to carry out it constitutionally defined duties.

K. N. Tharmalingam in his article on the bouts of violence suffered by the Kurawar community in the Amparai District delineates the horrendous trauma of a community caught up in the throes of an ethnic war. He goes on to say that national security laws gives licence to the police, army and home guards to indulge in systematic human rights violations with impunity because they know the law is there to protect the perpetrators and not the victims.

Ronnate Asirwatham in her contribution, which is excerpted from a much longer study asks the question as to how ex-political prisoners, nearly all of them arrested, detained and tortured by the police and military under the PTA, could reintegrate with rest of society when they feel terrorised by the atmosphere of potential violence, which prevails despite the ceasefire. She argues that low levels of reintegration will be a serious threat to long-term peace, and restorative justice is vital for ex-detainees if the peace process is to have any meaning for them.

Ever since it was first published, Beyond the Wall has argued ceaselessly that obnoxious legislation such the PTA be struck off the statute books of this country, because its presence only invokes terror in the minds of a section of Sri Lanka's citizens. It should however be remembered that at the very first press conference addressed by former Prime Minister Ranil Wickremesinghe, soon after he assumed the office in late 2002, he categorically refused to repeal or even substantially reform the PTA.

It has also to be recalled that Wickremesinghe's entrenched position was never challenged by civil society, which in theory is the watchdog against an over-mighty state. In other words, a regime that was perceived as peace-friendly, was loath to dismantle the structures that had once unleashed terror both against the Tamils as well as the Sinhalese in various periods in Sri Lanka's contemporary history.

As this editorial is being written a new government is in place and there is no certainty as to whether the ceasefire agreement will hold or if war-mongering groups in Sri Lanka's polity, which have won handsomely at the elections, will clamour for the recommencement of armed hostilities.

This publication fervently hopes for the continuation of peace, but wishes to reiterate a point it has always stated: In the event of renewed hostilities, nearly all the oppressive core structures that were wrought to stamp out Tamil aspirations in the past by employing any means possible – legal, political, military – are still in the statute books and could be re-summoned at will. That indeed is very frightening thought.

A close look at SL's labour laws in the age of globalisation

By K. Wijayaratnam (Former Deputy Commissioner of Labour)

A changing market creates a demand for flexible employment systems based on the principle that companies and the employers cannot give job security to their employees, and that only the customers can, which indicates that the success of the market place is crucial for job security.

Labour law consists of all rules that govern labour performed by a person under the authority of another for financial remuneration. It is susceptible and influenced by socio-economic developments.

Globalisation and liberalization that started about three decades ago have had a profound effect on the political, social and economic systems of almost every country in the world. They have brought about new forms of work arrangements that either redefine or transform the nature and quality of work, as well make the traditional labour systems obsolete. They have caused radical changes in economic structures, in the environment, in the marketplace and in technology. You cannot stay aloof and adopt a protectionist stance in such a global environment. As Dr. Gamani Corea the former Secretary General of the UNCTAD said, "those who fail to get on board the train (globalisation and liberalisation) will find themselves left behind and marginalized by the world community and in the world economy." (Keynote address at the workshop on 'Globalisation and its Impact on Industrial Relations,' 16 November 1996 at Hotel Galadari, Colombo)

It is unthinkable for any country to stand aloof and in isolation from the onslaught of the forces of globalisation and liberalization. We would only delude ourselves if we refused to recognize that the world is changing. The world is changing and continues to change as it always has and no matter how unpleasant the problems and disruptions, there is no going back. The challenge is coping with this change and how to guarantee fair treatment and protection for those who are most vulnerable.

A changing market creates a demand for flexible employment systems based on the principle that companies and the employers cannot give job security to their employees, and that only the customers can, which indicates that the success of the market place is crucial for job security. In order to meet the challenges of a competitive economy there is the need today to rationalise labour, upgrade technology and skills, increase productivity and reduce costs of production. These would require changes in the existing labour legislation.

Labour reforms are sensitive issues that worry governments in all parts of the world. Any attempt at labour reform is bound to create problems in the country. The replacement of a system of absolute control by a system marked by its very absence, would give rise to severe political and social problems. It may be even be political suicide for the government trying to change the laws. Attempts at labour reforms have led to some of the worst forms of worker agitation in certain countries. The fear of wounding the working class, who constitute the bulk of the electorate, has compelled some countries to hold back proposed reforms while others like the United Kingdom were able to introduce the reforms in spite of the opposition, and yet make progress. Any reform must however be in the interest of the public rather than in the interests of a narrow section of the community.

The challenge is to reconcile the objectives of economic growth with social protection of the labour force. Sri Lankans are by nature averse to change. The working class, indoctrinated for several decades by the Marxist propaganda

New laws to regulate practices of management and workers needed to curb strikes

that capitalism is the bane of the working class, is suspicious of any attempt at changing the existing labour laws even if they are in their best interests. Security is found in what they have experienced in the past and what is new, is shunned because they are not prepared to take any risk. They reject it without giving it a fair trial.

In Sri Lanka, trade unionism has had an adverse public perception because of its regular links with politics. Politicians have used trade unions to become manipulated extensions of political activity and thwart any attempt at reform when they are in the opposition. In practice, it has not been pure trade unionism at all on most occasions. There is multiplicity of unions; centralised decision-making; ad hoc management strategies; external, over-aged, personalised and power-oriented leaderships; confrontational attitudes; non-existent second tier leaderships and negligible gender representation.

An adversarial spirit between management and the trade unions leads to confrontation and not to collaboration. Social partners lacking a representative character add to this problem. Organised labour represents less than 10% of the working class, while only a fraction of the employers are members of the Employers' Federation of Ceylon. These institutions have to be strengthened if there is to be meaningful social dialogue towards a better relationship between the social partners and development.

Experience had shown that countries, which have strong tripartite relations, have experienced industrial harmony and grown faster. Industrial relations system will have to be evolved on the basis of partnership between the shared responsibility, equity and mutual respect for each other. There is a need for coordinating action by all the stakeholders, first to survive and thereafter to move ahead together. The greatest challenge towards achieving this, as stated in November 2001 by the president of N T U C, Singapore, at the Regional Symposium of the ICTUF on UN Global Compact is "to change the mindsets and then change the way we are doing things."

Labour policies should attract investment, enhance productivity, promote labour market flexibility and cost consciousness, but also ensure dignity of labour, quality of work life, and industrial and social progress. To ensure labour market flexibility, safety nets should be established for laid-off workers for them to have reasonable time to look for work. There is also the need for devising an unemployment benefit scheme, besides introducing the concept of severance payments as in the Republic of Korea. Social safety nets are also relevant for workers in the informal sector. The present pension schemes for farmers and fishermen have also to be strengthened.

The role of trade unions also needs to be redefined in this changed situation. "Trade unions in South Asia have to come to terms with the effects of globalisation and internal competition." (Decent Work ILO Geneva 1999) They on their part must be good and responsible partners facing up to national and global issues to develop not only their members, but also the country as a whole, with a socially and economically just world the objective. The challenge facing social partners today in all countries of the world – both developed and undeveloped – is to change to a wage system, which fosters greater productivity, skill development and enhance economic performance, while rewarding the employees in an equitable manner. There is also the need for the employer to balance the workers' desire for employment security with the constant pressure from the market to adapt quickly and efficiently to changes in technology and trade.

In introducing such changes, the state should ensure they are in conformity with ILO standards as "no policy or practice in the field of labour relations can be successful if it denies the workers their fundamental rights." Greater priority should be given to develop a bilateral mechanism, which could be used to establish "a framework for managers, workers and trade unions to pursue improved productivity and flexibility on a participatory basis, while providing appropriate protection and share on the benefits to the workers." This social dialogue can involve all relations between workers and employers at work places, negotiations, collective bargaining, conciliation processes, and tripartite cooperation among workers, employers, governments at national, regional and international levels.

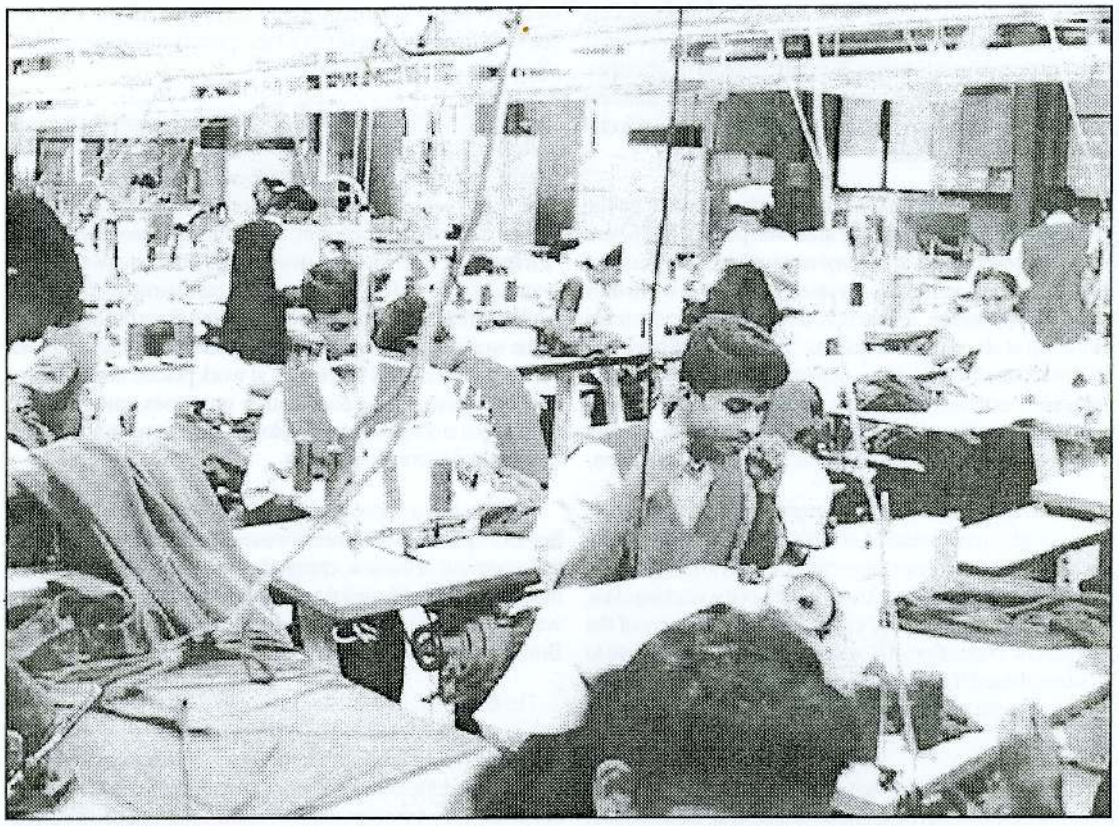
We have in our statue books nearly 45 laws relating to labour. Some of them have been there for over a century and are obsolete and irrelevant in the new, changed economic situation. Most of them were enacted during the era of the closed economy, or when we were essentially a plantation-based economy under direct British colonial rule.

The laws pertaining to 'Indian coolies' and 'tulicans' are no longer relevant as there are no 'Indian coolies' working in the plantations at present. Further, the words "coolie" and "tulican" are not only demeaning, but also cast aspersions on the dignity of labour. They are discriminatory and are in violation of Article 12 of the Sri Lankan Constitution and should be repealed. The Service Contracts Ordinance (Chapter 59) provides that a variable contract for the hire of a servant except in the employment of a casual nature unless otherwise expressly stipulated, be deemed to be a month's contract for hire and service and stands automatically renewed unless terminated through one month's notice by either side. It stipulates that contracts for longer periods – the maximum of which should not exceed five years of employment in the service of the government and three years in the case of other employment – shall be in writing and be attested by a magistrate or a J.P. It provides that if a servant is incapacitated due to sickness while in service that the person is entitled to food, lodging and medical care at the expense of the employer during such incapacity subject to certain conditions.

These provisions are irrelevant in the present economic situation and are not observed either by employers or employees. The Ordinance provides for speedy recovery of wages due to the servants and provides penal sanctions for breach of contract and for such matters as giving false information by the servants about their previous employment or about themselves. Most of these provisions have become redundant in the face of subsequent legislation like the Wages Board Ordinance. The Ordinance makes it an offence for the servant to neglect or refuse to work or for journeyman engaged to go on a journey, to decline or neglect to go on the journey without a just cause. This would make strikes, work stoppages and other forms of trade union action illegal and offences under the Ordinance. Most of the provisions in the Ordinance are in favour of the employer and it is in the interest of the employees to get the Ordinance repealed.

The Estates Labour (Indian) Ordinance (Chap. 133) No. 13 of 1889 too speaks of "Indian coolies" whose names are bourn in the register and of "tulicans." As stated earlier, the word "coolie" is a demeaning term, used during times of the British Raj to denote the labourer who worked in the plantations. The

There is also the need for devising an unemployment benefit scheme, besides introducing the concept of severance payments as in the Republic of Korea. Social safety nets are also relevant for workers in the informal sector. The present pension schemes for farmers and fishermen have also to be strengthened.



Mass production in the age of globalization

The Registration of Domestic Servants Ordinance should either be amended or repealed, and a new law enacted to make it mandatory for every employer of domestic workers to register with the Commissioner of Labour and the penal sanctions made more severe for failure to do so.

provision relating to recovery of wages in the Ordinance is superfluous in view of the more stringent provisions found in the Wages Board Ordinance No. 27 of 1941. The provision relating to six days work found in the Ordinance is hardly adhered to by employers while the requirement that the worker who quits employment should posses the discharge ticket prevents the freedom of movement of the worker and reminds us of 'bonded' labour that exists in some parts of the sub-continent even today. It would be also be a violation of ILO Convention 29, which Sri Lanka had ratified. Provisions regarding housing in the Ordinance are not observed and as such the Ordinance is redundant and may be repealed.

The Indian Immigrant Labour Ordinance No. 1 of 1923 (Chap. 132) and the Diseases Among Labourers Ordinance No. 10 of 1912 (Chap. 225) are also obsolete laws as they relate to Indian labour and serve no useful purpose and could be repealed. The Indian Immigrant Labour Ordinance provided a fund for use of transport of "much needed Indian Immigrant labour to Ceylon" and is irrelevant today as Sri Lanka no longer imports labour from India to work in the plantations.

The Medical Wants Ordinance No. 9 of 1912 (Chap. 226), which applies to estates of more than 10 acres cultivating tea, rubber, coffee, cardamoms, cocoa, pepper or cinchona, casts an obligation on the superintendent of the estate to maintain the 'line rooms' in his estate and their vicinity in a "fair and sanitary condition." In addition, the Superintendent is obliged to ensure that all children under the age of one year resident in the estate receive milk as prescribed by regulations made under the Ordinance. As the required regulation has not been prescribed, the law is observed in the breach.

The Ordinance also requires the superintendent to provide workers resident on the estate with proper dwelling facilities, sufficient clearing around the dwelling places and proper drainage to the satisfaction of the director of health services. The superintendent is also required to provide sufficient potable water to his labour force. Since the dwelling places – better known as 'line rooms' – are no worse than cattle sheds and the living conditions of the workers on the estates are abominable, the Ordinance does not help the worker and no harm will befall if the Ordinance is repealed. The existing sanitation and public health laws could be applied to the estates.

The Chauffer Regulations Ordinance No. 23 of 1912 and the Registration of Domestic Servants Ordinance No. 28 of 1871 (Chap. 173) were enacted to help the employers, than to protect the workers. They, together with the Tundu Prohibition No. 27 of 1927 Ordinance No. 43 of 1921 (Chap. 163), and the Minimum Wages (Indian) Ordinance (Chapter 135) should be repealed as they are obsolete and have no relevance today as they refer to "Indian labour" and as the Wages Board Ordinance (No. 27 of 1941) provides better safeguards to employees.

The Registration of Domestic Servants Ordinance should either be amended or repealed, and a new law enacted to make it mandatory for every employer of domestic workers to register with the Commissioner of Labour and the penal sanctions made more severe for failure to do so. Isolated from care, love and medical attention, domestic servants are often made to work long hours, mostly without rest and under terrible conditions for meagre or no pay.

They have little or no savings and often no one to care for them in their old age. Getting employers to register their domestics with the Commissioner of Labour will help to regulate the terms and conditions of work of domestic workers and obtain for them superannuation benefits such as EPF, ETF and gratuity.

Some of the following laws enacted by the State at various times to provide relief to workers have no relevance today and may be repealed:

- Interim Devaluation Allowance of Employees Act No. 40 of 1968,
- The Budgetary Relief Allowance of Workers Act No. 1 of 1978,
- The Budgetary Relief Allowance of Workers Act No. 48 of 1978,
- Supplementary Allowance of Workers Act No. 65 of 1979,
- The Fuel Conservation Five-day week Act No. 11 of 1978.

The Fuel Conservation Five-day Week Act is both discriminatory and not in keeping with the needs of the new millennium. It discriminates between establishments carrying on similar business and is not observed by many organisations including state banks. The Fee Charging Employment Agencies Act (No. 37 of 1956), which was repealed by the Foreign Employment Agencies Act may be reviewed and reintroduced to monitor employment agencies that have sprung up like mushrooms in recent years to deal with local employment. The Employees Council Act No. 32 of 1977 that provided for establishment of Employees' Councils in state enterprises "to promote worker participation" has failed in its objective and there are today hardly any Employees' Councils functioning in any of the state corporations. With the shrinking public sector, the Act has no useful purpose and may be repealed.

The Trade Union Ordinance No. 14 of 1935 (Chap. 174) The present Trade Union Ordinance was proposed by our colonial masters and thrust on the workers in defiance of the protests from trade unions of the day. It provides for any seven members to register a trade union. This has led to extreme fragmentation of the labour movement and the emergence of a large number of weak and small trade unions. Collective bargaining requires a strong and an independent trade union movement Unfortunately due to politicisation and the multiplicity of trade unions, our trade union movement is weak to force any collective bargaining. It is in the interests of the trade union movement that the Ordinance is amended to prevent multiplication and to strengthen the movement. The law should be amended to shut out external influence on the decision-making of trade unions and to make trade unions accountable for their actions. Attempts in the past at reform have met with strong resistance and ended in failure. The law may be also amended to make it obligatory for trade unions to act democratically and without intimidation, in taking decisions (such as mounting strike action).

Present laws governing trade unions have caused more harm than good to the working class. Oligarchies have resulted through the non-interference by the state when trade unions formulate their constitutions, or where the outgoing committee nominates the incoming committee and the majority of the membership having no voice in the election of new office bearers. There is an absence of democracy and transparency in most actions of most trade unions. The accounts of the union are rarely subject to audit, while a single individual holding two or more of the important positions in the executive committee, controls some unions. The annual returns submitted by most of the unions (if submitted at all) often do not reflect the actual membership, nor do they give the actual expenditure incurred on trade union work. Reforms must be aimed at strengthening the trade union movement and having more transparency and democracy.

- The Trade Union Ordinance may be amended to raise the minimum number of members required for registration, from seven to 100 or 10% of the workers in the trade or in the enterprise (in the case of enterprise unions).
- As the Sri Lankan government has ratified ILO Convention 87, the provisions restricting public servants' unions from federating should be reviewed.
- The minimum age of membership in a trade union should be made to conform to the minimum age of employment (14 years) and the law be amended accordingly.

The Wages Board Ordinance No. 27 of 1941 The Ordinance provides for setting up of tripartite boards for trades to decide on terms and conditions of employment for employees in a particular trade. Wages are too important an item to be left purely to the collective bargaining process between the employer and the employee, especially when there is an oversupply of labour. A National Wages Council as in Singapore would be an ideal body to regulate wages whose functions may also include (a) the regular survey and review of wages, salaries, and benefits structures, in the country, (b) providing guidance to participants at the bargaining table, (c) providing guidance to Wages Board members, arbitrators and to the Industrial Court, and (d) providing guidance to employers and employees on what could be a realistic wage for any period and thereby limiting extremes.

With globalisation and liberalisation, outsourcing and subcontracting have become important for industries to remain in competition in the world market. Section 59A of the Ordinance stipulates that a contractor who is employed to do any work for a commercial purpose or by way of a trade and who in turn had employed workers for the execution of that work can be directed by the Commissioner of Labour to desist from having the work executed under the contract. Although in the 60 years the law has been in operation the Commissioner has not exercised this function, nevertheless it remains a threat to any employer giving work on contract (work that cannot be performed at the workplace) even to an independent contractor.

- It is suggested that this section (59A) be repealed.
- Employers are also agitating for repeal of Section 45A of the Ordinance. The section casts the liability on the principal employer for statutory dues, when the sub-contractor fails to comply with the law. They say it is unfair to fault them for the default of a third person. This request may be considered provided adequate safeguards are provided in the law for workers working under subcontractors
- The anomaly in the system of calculating weekly holidays between the employees covered by the Wages Board Ordinance and the Shop and Office Employees Act also needs consideration.

The Industrial Disputes Act No. 43 of 1950 (Chapter 152) is in existence for nearly five decades and had been the main instrument for resolution of industrial disputes in the country. Experience shows that it had failed in its objectives of (a) bringing speedy settlement of industrial disputes, (b) by being an expensive mode of granting redress, and (c) of being devoid of technicalities.

It is in the interests of the trade union movement that the Ordinance is amended to prevent multiplication and to strengthen the movement. The law should be amended to shut out external influence on the decision-making of trade unions and to make trade unions accountable for their actions.

Conciliation is slow, arbitration goes on for years and the labour tribunals have a backlog of over 15,000 cases. It is hoped that the recent amendments to the Act would remedy this situation. A legal framework that promotes cordiality and peace in the workplace, protects the legitimate interests of employees and the industry, promotes industrial harmony, leads to increased production and productivity and improves the quality of lives of the employees, is an urgent necessity.

The following amendments to the law are suggested:

- The definition of 'workman' in the Act be expanded to include rural workers (rural workers constitute the majority of workers in the country), landless farmers, peasants, tenants, sharecroppers, and many others who have no regular work and no regular income. "Extending labour law into these new areas where the most number of workers live and where the most urgent social problems are awaiting solutions may be the greatest contribution the country can make to the evolution of labour law."(Labour Relations in Asia – Johannes Schergle, UNDP/ILO -1979). (Extension of labour law into the rural areas poses difficult problems of application and enforcement including the establishment of labour administration machinery in those areas).

- The law may be amended taking recourse in compulsory conciliation and arbitration procedures in industrial disputes before calling a strike. The Freedom of Association Committee of the ILO in its 119th Report (Case No. 611 paragraphs 97, 98, 374 Page 75) had held that such legislation would not be an infringement of the right to Freedom of Association.

- A grievance procedure be incorporated in the Act, and made mandatory for all establishments to follow the procedure laid down in the Act. Since grievances at the plant level are the main cause that leads to disruption of work, a system of grievance procedure for speedy settlement of disputes at the source will help to promote industrial harmony in the workplace. In this era of competition it is vital that disputes should not disrupt services or supply of goods to customers and that the employers should adopt proactive strategies both internally and externally to settle the problems at early stages.

- The Act may be amended to include the necessity of trade unions to give notice of strikes and a notice period be stipulated in the Act. (The ILO Committee on Freedom of Association in its 4th report (Case No. 5, paragraphs 27/378 and page 76) had emphasised the legal obligation of the trade unions, to give prior notice to employers before calling a strike.

- Regulations to be made under the Act formulating a schedule of essential services. This would help to prevent wildcat strikes in vital industries.

  Workers/trade unions and employers to be permitted to prosecute for violations of the collective agreement and Section 44F be amended accordingly. (As it is, only the Commissioner of Labour is empowered to file action.)

- The Act be also amended to define 'probation period' and stipulate the maximum period an employee can be kept on probation as many an employer abuses the provision to keep employees on 'probation' for long periods without giving any reasons.

- The Act may be amended to incorporate a section on suspensions/ interdictions from employment and stipulate the maximum period an employee can be kept on suspension/interdiction.

- Termination of employment of individual employees should not be referred to settlement by arbitration by the minister concerned with the subject of labour. The legislature in its wisdom has created a forum in the form of labour tribunals where an individual workman is free to seek redress regarding his dismissal. Where the law provides redress, it would not be proper for the minister to circumvent the law for such cases; neither would it be appropriate for the minister to refer the termination to an arbitrator appointed by him. Section 4 of the Act be amended accordingly.

- Regulations be framed under the Act laying down the procedure to be followed by the labour tribunals in conducting their inquiries. It would help labour tribunals to follow a uniform procedure. Guidelines regarding the award of compensation should also be also laid down. "It would be most useful to the Labour Tribunal and the Appellate Courts if the maximum that may be awarded as compensation is laid down by statute (as in countries like the U.K, India, Pakistan, Malaysia, Philippines etc.), in relation to easily discernible criteria such as years of service and monthly salary. (S. N. Silva in Sri Lanka Cement Corporation vs. Rajes Pereira CA. 519/87)

- The Act may be also amended to create a Special Enforcement Labour Tribunal for the enforcement of all labour tribunal orders as it is said there are delays in the magistrate's courts in this matter. The powers of the Special Labour Tribunal may be gradually expanded to include all cases relating to labour. It would not be appropriate to vest the present labour tribunals with the power of enforcement of their orders, as there can be abuse. It would be a travesty of justice to make the same person judge and the executioner. Unlike the magistrate whose orders are constrained by the Penal Code, the Labour Tribunals have "too large a discretion." The Industrial Disputes Commission in its Report (Sessional Paper XIV of 1968) said that "vesting of unbridled power in recipients ill-fitted by temperament and outlook carries with it dangers of abuse." A Special Labour Appellate Court may be also created to hear appeals on decisions on all labour cases from the lower Courts.

- The Act be amended in Section 48 to exclude employees drawing remuneration of Rs.25,000 and over from the jurisdiction of labour tribunals as they can afford to have recourse in civil courts,

- The Act may be amended to incorporate a section on "unfair labour practices" by trade unions/workers. The law must be fair by both parties. It would not be fair to let one party to commit all the offences and not penalise it, while penalising the other for the slightest offence. If collective bargaining is to be developed into an effective tool promoting stability and harmony in industrial relations, it is imperative that it be viewed as a two way process with rights and obligations attached to both, the employers and trade unions /workers, alike.

It is said that the Termination Act vests in the Commissioner with too much power and that there is an absence of a clear criteria and transparency in the Commissioner's orders on the quantum of severance pay or compensation ordered to be paid by the employer.

Many obsolete laws relating to the plantation sector needs repeal

The UNCTAD Investment Policy Review on Sri Lanka states that over-regulation and unpredictable administration of labour severance was, by far, the most serious negative factor for foreign investment.

The Termination Of Employment of Workmen (Special Provisions) Act No. 45 of 1971 states that protectionism, which impinges on the economy, violates a liberal economy. If the private sector, described as the "engine of growth," has to survive in a competitive economy, it is necessary to rationalise labour, upgrade technology, increase productivity and reduce costs of production. Rationalisation and reorganisation resulting in reduction of employed personnel or even transfer of surplus staff to another organisation belonging to the same employer, which is a different legal entity, is hampered by the employer having to get the written consent of the employees involved or getting the prior approval of the Commissioner of Labour. Even temporary lay offs of workers due to unforeseen circumstances – a breakdown in the machinery, oversupply of goods in the market etc. has to be with the prior written approval of the Commissioner of Labour or with the written consent of the employees.

Termination of services of an employee who is a habitual absentee whose absence is supported by medical certificates, or that of an employee who is unable to fulfil the terms of his employment contract and continue in employment due to some illness that has no bearing on his occupation, are hampered by the employer having to seek the permission of the Commissioner, go through the process of an inquiry, or to get the written consent of the employee. It is said that the Termination Act vests in the Commissioner with too much power and that there is an absence of a clear criteria and transparency in the Commissioner's orders on the quantum of severance pay or compensation ordered to be paid by the employer.

Compensation payments in most of the countries range from 10 days' pay to 30 years' pay per year the employee has worked in the establishment under the particular employer (For a study of compensation payments in the region see Labour Gazette Vol. 53 No. 4). The compensatory award in the United Kingdom is subject to a monetary limit fixed by regulation under the Employment Act of 1980. In 1993 it was 11,000 sterling pounds. In the neighbouring India, the amount is one month's salary for each year of service (this includes gratuity).

The ILO mission which visited Sri Lanka in January 2000 on the invitation of the then government to report on developing a standardised formula and uniform criteria to calculate compensation for the employees at the stage of involuntary separation, commenting on the unpredictability of compensation under the Act, said "the legislative provisions governing termination of employment at the initiative of the employer in Sri Lanka are unusual when compared with international standards and law and practice of most countries." The Report said "that the most unusual feature of the law is the granting of absolute discretion to the Commissioner of Labour to decide whether or not an application to retrench will be accepted and to fix the compensation package to be paid to the workers whose termination have been approved." As a result of this discretion it

is said that the "labour costs are very much higher than those of the potential competitors in an increasingly globalized economy."

The UNCTAD Investment Policy Review on Sri Lanka states that over-regulation and unpredictable administration of labour severance was, by far, the most serious negative factor for foreign investment. The UNCTAD Report suggests that the employers be made to contribute a sum equal to 10% of the wages to a gratuity fund, which could be used to provide for severance payment upon involuntary separation and retirement and gratuity. It is said that one of the most costly systems of severance pay is offered in our country (Robert Holzmann, Kripa Iyer and Milan Vodopivec of the World Banking Severance Pay Programs around the world).

The Act may be amended by:

- Laying down compensation formulae and guidelines to follow in case of involuntary termination of employment.
- Excluding absenteeism, and permanent incapacity due to sickness, accident and inefficiency from the coverage of the Act. "The law which prevents unfair dismissals must not be used to impede the efficient management of business by compelling employers to retain incompetent employees. (Cook vs. Thomas Cinnal and Sons Ltd. (1977) ILR 770, (1977), IRLR 132, 121TR330).
- The Act may be also amended to enable employers to lay off workers for a period not exceeding three months, in a continuous period of 12 months on the payment of 50% of the wages without having to make an application to the Commissioner but with the proviso that in case of malafide layoffs the Commissioner to intervene (malafide lay offs to be defined)
- Employees holding executive positions over a specified salary per month (Rs.25,000) be also excluded as they could always seek relief elsewhere.
- The Act be amended to exclude employees over 60 years of age from the coverage of the Act. The Shop and Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (Chapter 145) by regulation prohibits female employees working over eight hours. This is discriminatory as employees covered by Wages Boards are permitted to work overtime beyond eight hours. The suggested amendments to the Act are:
- Regulation 2 (1) of the Act be amended to permit females to work overtime. (Today even state institutions violate this regulation). Section 10 (2) (b) be reviewed with adequate safeguards. Night work also to be permitted on conditions.
- Discrimination in calculating overtime between corporation employees and private sector employees regarding payment for overtime work be removed. (Corporation employee who is in receipt of a consolidated salary, the initial point of which is not less than Rs.6720 per month, is not entitled to claim overtime pay)
- The section requiring maintenance of attendance (Form E) and remuneration records be amended to accommodate computer records,
- There cannot be any justification for the different methods of calculation of maternity benefits in the case of women workers covered by the Maternity Benefits Ordinance (Chapter 157) and the employees covered by the Shop and Office Employees Act in granting nursing intervals. These anomalies be rectified by amending the Maternity Benefits Ordinance and the Shop and Office Employees Act.

The business community has for many years asked successive governments to rationalise holidays because it affects productivity and costs.

The Holidays Act No. 29 of 1971: Sri Lanka is said to have the most number of holidays next to Macao in China when it was under Portuguese rule. The business community has for many years asked successive governments to rationalise holidays because it affects productivity and costs. We have 12 Poya (full moon) holidays, eight mercantile holidays and most of the establishments observe a five-day working week. Employees covered by most of the collective agreements enjoy 42 days leave and two-and-a-half days as additional mercantile holidays (Boxing Day, half-a-day before Christmas and 1 January) in addition to the eight mercantile holidays. Employees covered by the Shop and Office Employees Act enjoy by law 21 days annual leave, in addition to the 12 Poya days and eight mercantile holidays. Employees covered by the Wages Boards have 14 days holidays.

If we calculate the number of working hours of a person employed in the mercantile sector covered by a collective agreement, which provides for 42 days leave per year, or an employee in the banking sector, he would be working only about 1210 hours a year {compared to 1,889 hours by Japanese and US workers in 1989, 1,731 hours by British workers in 1997, 1,689 hours, by workers in Denmark and 1,560 hours in Germany in 1996 [ILO "World of Work magazine No. 31 (September/October 1999)]} The normal working hours of employees covered by most of the Wages Boards are about 1627 hours (365-78-14-20 =253 days or 36.14 weeks x 45 hours =1626.42 hours) and where it is a five-day week it would be 1408 hours. While accepting the need for maintaining certain national and religious holidays, the changed economic circumstances demand the pruning of the holidays to a reasonable level. The workers may accept the change if it is rewarding. It is recommended that employees who are willing to work on holidays be employed on the holidays and their leave purchased. This is a very sensitive issue and the government has to act carefully when trying to rationalise holidays.

The then government that fervently hoped the private sector would help in training apprentices and find them employment introduced the Employment of Trainees (Private Sector) Act No. 8 of 1978. However, hopes have not been realized, while on the other hand the Act is used to employ labour at cheap rates. It is recommended that this Act be repealed, as it has not served the purpose for which it was introduced.

In conclusion I would like to state that our industrial system is inundated by a plethora of laws and would suggest that a careful survey of our labour laws be done, deleting what is obsolete, amending where necessary and codifying them in one corpus so as to represent a coherent, consistent, clear and enforceable expression of the country's labour policy and objectives in the context of the recent social and economic developments. "The Code should be simple and accessible, logically arranged, harmonious, certain and definite." Investors, the local business community, trade unions and workers would welcome such a code.

UN drafts regulations to try crimes against humanity

By I. Francis Xavier

This is the second part on a series of articles on genocide. The first part appeared in Beyond the Wall Volume I, Issue 1.

Events, episodes and historical facts associated with genocide are as old as human beings. In the passages of history there is plenty of evidence of religious, racial and ethnic groups, as well as national minorities being destroyed and exterminated by those in power and authority.

There is historical evidence that humanitarian intervention as a matter of right was considered and acted upon as part of international law. In 1827, England, Russia and France intervened in the Greco–Turkish war. The French intervened in Lebanon on behalf of the Christians who were persecuted and massacred by the Muslims. The massacre of the Armenians by the Turks prompted the French, Russians and the English to intervene to save the Armenians.

The heinous crimes committed by the Nazis during World War II excited the indignation of all nations. This led to a number of moves to prosecute the offenders. The Charter of the Military Tribunal was created by the Four Powers (USA, UK, USSR and France) to bring individuals who had committed crimes against humanity to trial. This was known as the Nuremberg trials. The Nuremberg Charter specified three types of crime falling under the jurisdiction of the Nuremberg Tribunal.

Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation for slave labour, or for any other purpose, of civilian populations of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; persecutions on political, racial or religious grounds; of execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The word 'genocide' gained recognition in the context of the Nuremberg trials. There was a wave of appeals from among intellectuals and human rights activists to make genocide a crime under international law.

During the first session of the United Nations, the General Assembly affirmed by resolution 96 (1) of 15 December 1945 that genocide was is a crime under international law. "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

"Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

"The punishment of the crime of genocide is a matter of international concern."

The General Assembly therefore:

"Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;

"Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;

"Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end;

"Requests the Economic and Social Council (ECOSOC) to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly."

After utilizing resolution-drafting, pre-consultative mechanisms at a special committee in the General Assembly of the UN, ECOSOC and the UN Secretary General's Office drafted the convention. The Convention on the Prevention and Punishment of the Crime of Genocide became part of international law in December 1948. It was approved and proposed for signature and ratification of accession by the General Assembly through Resolution 260A of 9 December 1948. It entered into force on 12 January 1951 according to Article XIII of this Convention.

Article 1 stipulates the contracting articles two and three are the core of the Convention. They define the crime and its elements.

There was a strong move to include political groups under Article 2, but because of the strong opposition from the USSR, a veto wielding power in the UN Security Council, this was omitted from the convention. There was also strong lobbying to include cultural genocide but this too was omitted to draw in the consent of the majority of the UN membership. The General Assembly and ECOSOC devoted substantial attention to the subject of the genocide. Though the Secretary General as well as the Ad Hoc Committee included it, the General Assembly rejected it.

Both draft provisions included acts such as prohibiting the use of a language and destroying or preventing the use of libraries, music and places of worship or other cultural institutions or objects. But to bring a consensus among nations of the UN the General Assembly rejected it.

(To be continued)

HRC indifferent to atrocities committed under PTA

By V. S. Ganesalingam

This paper was presented at the Asia Pacific Human Rights Network (APHRN) consultation in Kathmandu, Nepal on 16 February 2004 on the theme 'National human rights institutions' role in monitoring the use of national security legislation.' The Sri Lankan experience was presented by the author who is a senior human rights lawyer working for Home for Human Rights (HHR).

Many of the offences under the PTA are already offences under ordinary law and what they provide for is increased punishment and making certain safeguards for the detainee under ordinary criminal law inapplicable.

There are basically two enactments in Sri Lanka that deal with national security – the Public Security Ordinance No. 25 of 1947 and the Prevention of Terrorism (Temporary Provision) Act No. 48 of 1979.

The Public Security Ordinance, which was passed by the State Council in 1947, with its subsequent amendments is deemed to be a law enacted by parliament both under the 1972 and 1978 constitutions. This Ordinance empowers the President of the Republic to make emergency regulations (ER), which has the legal effect of overriding, amending or suspending the operation of any law except the provisions of the constitution. These regulations have to be approved by the national legislature monthly, and lapsed on 4 July 2001 because they were not presented to parliament for approval, since the government of the day was not sure of its majority in the House.

These regulations provide for indefinite preventive detention, with no provision for a substantial judicial review of the detention. They also confer sweeping powers of arrest to the police and security forces on suspicion, and for detention for a maximum period of 90 days to complete investigations, without the detainee having to be produced before any court.

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended by Act No. 10 of 1982 and No. 22 of 1988 (PTA) suspends important legal safeguards guaranteed in the Constitution of Sri Lanka and recognized in international human rights instruments such as ICCPR. The PTA was initially introduced as temporary law but was made part of permanent law by the amendment of 1982.

Under Section 6 of the Act any police officer not below the rank of an ASP or any other police officer not below the rank of sub inspector authorized in writing by the ASP could arrest any person suspected of involvement in any unlawful activity. The police could detain a person so arrested for a period not exceeding 72 hours. The magistrate before whom the suspect is produced thereafter, has to remand him till the conclusion of the trial if further detention is necessary, on an application made to that effect by a superintendent of police vide Section 7 of the PTA.

The ER and the PTA have all the salient features of the Indian security law TADA (which has now been repealed). Many of the offences under the PTA are already offences under ordinary law, and what they provide for is increased punishment and making certain safeguards for the detainee under ordinary criminal law inapplicable. The right to be produced before a judicial officer within 24 hours of arrest has been taken away and the power of the magistrate to refuse remand application or to grant bail are severely curtailed. Confession made to the police is admissible in trial and the burden of proving that it was not voluntary lies with the accused. There is no minimum standard to govern conditions of detention, and the provisions allow incommunicado detention and restrict access to lawyers and relatives. These are derogations that are not permitted under Article 4 of ICCPR

These provisions create an environment that is conducive to torture, deaths in custody, disappearances and extra-judicial executions, as borne out by the wide scale human rights violation that have occurred in the recent past. The arbitrary powers given to the police by the PTA are justly described as amounting to 'state terrorism,' which are clearly counterproductive as it feeds the flames of terrorism.

It is here the role of the Human Rights Commission (HRC) gains importance. Various provisions in the national security laws that permit the derogation of rights recognized by international law and the constitution that have lead to human rights violations, could be referred to the HRC. Quite correctly, the HRC in its annual report 2000/2001 states, "In the prevailing situation in Sri Lanka, the Commission gave highest priority to the protection of rights under the ER and PTA and regarded it as one of its major responsibilities to minimize the derogation of rights that had occurred."

Let us analyze whether the Commission "gave the highest priority to the protection of rights under the ER and PTA."

Act No. 21 of 1996 by which the Commission was established, in addition to the powers of a general nature conferred by Section 11 of the Act, has by Section 28, given special powers to the Commission in respect of the PTA and ER.

Section 11 provides that for the purpose of discharging its function it may exercise any or all of the following powers:

- Investigate into infringement or imminent infringement of fundamental rights
- Appoint sub-committees at provincial level to exercise the power of the Commission

- Intervene in any court proceedings relating to the violation of fundamental rights
- Monitor the welfare of persons detained by regular inspection of places of detention
- Take steps on matters referred by the Supreme Court
- Undertake research and promote human rights awareness
- Award cost of complaints made to the Commission
- Do all such other things as are necessary or conducive to the discharge of its functions

Section 28 of the Act states as follows;

(1) "Where a person is arrested or detained under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or a regulation made under the Public Security Ordinance (Chapter 40), it shall be the duty of the person making such arrest or order of detention, as the case may be, to forthwith and in any case, not later than forty-eight hours from the time of such arrest or detention, inform the Commission of such arrest or detention as the case may be and the place at which the person so arrested or detained, is being held in custody, or detention. Where a person so held in custody or detention is released or transferred to another place of detention, it shall be the duty of the person making the order for such release or transfer, as the case may be, to inform the Commission of such release or transfer, as the case may be, and in the case of a transfer, to inform the Commission of the location of the new place of detention.

(2) Any person authorized by the Commission in writing may enter at any time, any place of detention, police station, prison or any other place in which any person is detained by a judicial order or otherwise, and make such examinations therein or make such inquires from any person found therein, as may be necessary to ascertain the conditions of detention of the persons detained therein.

(3) Any person on whom a duty is imposed by subsection (1), and who willfully omits to inform the Commission as required by subsection (1), or who resists or obstructs an officer authorized under subsection (1) in the exercise by that officer of the powers conferred on him by that subsection, shall be guilty of an offence and shall on conviction after summary trial by a Magistrate, be liable to imprisonment for a period not exceeding one year or to a fine not exceeding five thousand rupees, or to both such fine and imprisonment

Among other factors, it was the government's concern about reported cases of custodial torture, disappearances and extra-judicial killings following arrest, which pushed it to make it mandatory for the arresting authority to report arrests to the HRC within 48 hours, to give unrestricted power of inspection of detention centers to the HRC, and to make the failure to comply with the above a punishable offence.

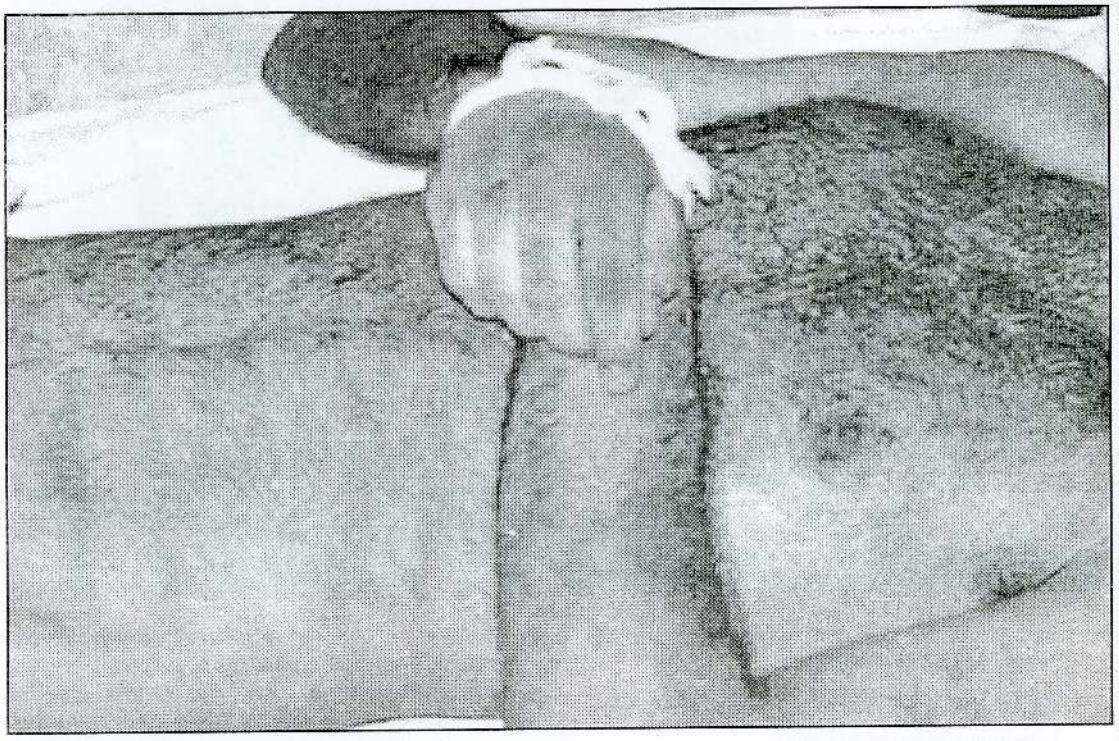
Monitoring conditions of detention

The HRC in its latest report (2000/01) states "Regular and prompt reporting of arrests followed up by visits by HRC staff is one of the best deterrents of torture, unlawful arrest and disappearances."

The question arises whether the HRC, in the exercise of the powers conferred by Section 28, had taken action against those who had failed to report arrests and had made regular visits to the places of detention. The HRC, which admits continuation of lapses and delays in reporting arrest, without taking action in terms of Section 28 (2) of the PTA, has satisfied itself that the lapses were less frequent and that on the whole the Commission had received the cooperation of the armed forces and the police. If the lapses in reporting are less frequent, it is not understood as to why the HRC has not yet been able to prepare and maintain a central register of arrests and detention.

It is our view that the HRC has failed in its duty to make regular visits and to monitor conditions of detention, and had it carried out its duty diligently, several violations could have been detected, reported and the perpetrators brought to justice. Interestingly, there is hardly any instance of a violation detected during such visits and the HRC either making recommendations or referring the matter to the appropriate court. All the cases of custodial torture filed in the Supreme Court were those that arose out of the lawyers attached to the NGOs or working independently visiting the places detention. I give below few such cases.

The arbitrary powers given to the police by the PTA are justly described as amounting to 'state terrorism,' which are clearly counterproductive and feeds the flames of terrorism



It is our view that the HRC has failed in its duty to make regular visits and to monitor conditions of detention, and had it carried out its duty diligently, several violations could have been detected, reported and the perpetrators brought to justice.

Anthonipillai Napoleon a young, Tamil IDP, who was a betel seller in the Vanni went missing from 5 August 1996. His mother who was in the habit of showing the photograph of her son and inquiring for him from those who were released from prison, on 05 January 2002 accidentally met someone released from Kalutara remand prison who confirmed that a person similar to the one in photograph was in Kalutara. He also said the individual was psychologically disturbed.

Following this information, the mother visited the prison on 7 January 2002 and having recognized the individual as her son sought the assistance of an NGO to have him released. When the mother met him, he could neither speak nor communicate with her in a conventional manner. Only tears were rolling from his eyes. The mother states that at the time of disappearance her son was in perfect health and it is due to torture that he had become psychologically disturbed and lost his power of speech.

The NGO handling this case found from his committal that his name was given as "Napolean" alias "Anna" and that he was arrested in October 2000 and was remanded on 27 November 2000 on the orders of the Polonnaruwa magistrate. On an application made by an attorney the Polonnaruwa magistrate ordered that he should be produced before a psychiatrist. Consequent to the filing of FR No. 317/02 he was discharged on 5 August 2002 and the court awarded him Rs.40000 as compensation.

The Polonnaruwa police arrested a 23-year-old unmarried Tamil woman, a casual attendant at the general hospital, Polonnaruwa, while she was on duty on 24 November 2001. She was subsequently indicted on the basis of a confession under the PTA in three High Court cases. Today, she has been discharged in one case but the other two are pending. She is on bail.

In her complaint to HRC filed in the form of affidavit on 20 November 2002 she states that after arrest on 24 November 2001 she was put in a jeep and assaulted, kicked with boots and was handed over to CID who took her to a room, undressed her completely, assaulted her with clubs and ropes, trampled her body with their boots and burnt all over her body with cigarette buts.

Twelve persons, one after the other, all of whom smelled of liquor, then raped her. She fell unconscious. She was given a cup of tea when she regained conscious. A CID personnel threw water mixed with chillie powder on her face and when she shouted in pain they gagged her with pieces of cloth.

Thereafter, under the threat of further torture, they recorded a statement in Sinhala and forced her to sign it. The same 12 persons raped her again by about 10 p.m. the same night. She was then produced before the Polonnaruwa magistrate who made an order of remand till the conclusion of trial under the PTA. She was initially held in remand at Anuradhapura and later transferred to Welikade prison. While in detention and remand no HRC official met her. When her case came up before High Court, Batticaloa, torture was disclosed and on the orders of the court she was examined medically and the medical report was in support of her allegations of torture and rape.

She made a subsequent complaint to the HRC by affidavit of 8 February 2003 stating that on 7 February 2003, while she was on her way to an NGO, at Sorruvil security point she was stopped by a policeman whom she identified as one among those who sexually abused her during her detention.

He wanted her to come to the CID office behind the court and offered Rs.20 as persuasion. When she declined to accept the money he pulled her purse and forcibly inserted the money and warned her that if she did not respond she would be arrested again. He also inquired as to the whereabouts of her twin (sister).

The complaint is pending for the last 10 months before the HRC. (Complaint No. BC/02-11/04)

The instances cited above raise issues of efficacy of the various mechanisms said to be in force to protect the rights of detainees, most importantly, the regular visits of the HRC officials to places of detention. It is not understood as to why the HRC officials during their regular visits did not come across these detainees, especially when they had been in police stations and prisons for considerable periods of time. Was this arrest reported and if not,

why was action not taken on the failure to do so, especially when one victim had become psychologically disturbed through torture and another subjected to rape and torture? The purpose of producing the victim before a magistrate and quantum of damages awarded by the Supreme Court was for detention, and for psychological damage due to torture. But what happened to the several appeals to the ICRC, HRC and the Committee on Missing Persons?

Referral to Courts

Under Section 15 of the HRC Act, if any infringement or imminent violation of fundamental rights is disclosed during investigations the commission could:

a) Recommend to the appropriate authorities to prosecute, or make such other recommendations it thinks fit

b) Refer the matter to any court

c) Recommend that the act or omission that gave rise to the violation be reconsidered or rectified.

Among the several complaints where the HRC failed to make recommendation or to refer to court after inquiry, I refer below to three cases.

(i) Complaints from the IDPs on high security zones (ii) Complaints about the restriction imposed on travel for the Tamils traveling from the north, (iii) Complaints of disappearances in Jaffna after the army took control in 1996 (iv) Custodial torture and rape.

In these cases, the victims were members of the Tamil minority and the HRC could be accused of discriminating against the minority in violation of Article 12(1) of the constitution and Article 27 of ICCPR

Internal Displacement and the High Security Zone

Since 1983 there had been systematic, forced evictions of Tamils living in the northern and eastern provinces through military operations. Following the MOU between the LTTE and the government, the displaced were willing to return to their original places of habitation. However, the security forces are preventing 26,378 families consisting of 130,000 persons from resettling in their original places of habitation in 69 villages in Jaffna, on the grounds that the areas are high security zones and resettlement cannot be permitted. According to security forces, there are14 high security zones covering a land area of 160 square kilometers out of Jaffna's total land area of 880 square kilometers. The displaced continue to live elsewhere hoping for the day they could return.

At the inquiry held by the regional coordinator of the HRC on the complaints received by him that the security forces had no legal basis to declare high security zones and to deny the right of resettlement, army officials claimed that they did have the power to do so under the regulations. Despite forced evictions and denial of the right to return constituting a violation of a series of rights recognized by international human rights law and guaranteed by the constitution, the HRC has not pursued the matter either by making recommendations or referring it to the appropriate court.

While avoiding action to address the core right of the IDP's – the right to resettlement, – which is recognized in the Deng Principles, the HRC is working on a UNDP-funded project to protect the rights of the IDPs and on a UNHCR project to protect the property rights of the IDPs.

Freedom of movement

Despite freedom of movement being constitutionally guaranteed, several restrictions, not authorized by law, were imposed only on the Tamils from the northern province stipulating they had to obtain passes from the police at Vavuniya, which is issued at the discretion of the police, to travel to other parts of the country. There were as much as 13 categories of passes. The legality of the pass system and the denial of the freedom of movement were no doubt inquired into by the HRC. And in its report it claims it inquired into this problem and had discussed the matter with the Ministry of Defence where it had impressed on the ministry that the pass system had no legal validity. However, it had deemed the matter as unfit to be referred to the Supreme Court. In a separate application filed by an attorney, the Supreme Court had held that the pass system was invalid.

Jaffna Disappearances

Following the military takeover of Jaffna in 1996 well over 600 Tamils disappeared following arrest, allegedly at the hands of the security forces. The disclosure by Corporal Rajapakse who was charged with the killing of Krishanthi Kumaraswamy, one among the 600, that mass graves in Chemmani existed, led to the exhumation 15 human skeletons at Chemmani. This confirmed that the disappeared had indeed been killed and buried by the army. The government ignored the request for an independent commission and instead proceeded with an inquiry by officials of the Ministry of Defence under whose orders the military operation was undertaken. Even though several requests were made to HRC, followed by demonstration before its regional office in Jaffna, it remained silent.

However, without announcement, in December 2002, after a lapse six years, the HRC appointed a three-member committee under Section 11 (b) of the Human Rights Commission Act to inquire into 327 complaints received. However, the committee investigated into only 281 excluding those who could not be reached or had failed to respond to its summons. A summary of its report has been released and the publication of a detailed report is awaited. The committee had done commendable work and come out with some excellent recommendations. So far there is no response from the government to the recommendations.

Custodial Torture and rape

A Tamil woman, 27, was arrested by the police on 21 June 2000 and was detained in police custody till she was remanded by the magistrate under PTA and sent to Negombo Prisons on 20 September 2000. On a complaint made to the HRC on her behalf by an attorney on 31 October 2000, one of its officers recorded her statement at the Negombo prison in which she complained of torture and rape. Since no action was taken by the HRC, lawyers attached to an NGO filed a fundamental rights application in the Supreme Court alleging torture and rape and the victim was awarded Rs.250,000 as compensation and released.

While the HRC failed to refer this violation to court, the Supreme Court commented upon it as "barbaric, savage and inhuman." The HRC also failed to comply with the order of court to submit court the statement recorded by its officer from the victim. (S C.FR No.186/2001).

It is not understood as to why the HRC officials during their regular visits did not come across these detainees, especially when they had been in police stations and prisons for considerable periods of time.

HRC adopts strategic plan to streamline activities

By N. Selvakumaran (Member, Human Rights Commission, Sri Lanka)

Although in the past the Commission was well supported by international donor agencies, the Commission was of the view that the priorities and direction must be set by the Commission itself and the funding bodies can decide to support the Commission if its plans fit into the mandate of the donor agencies

The eighth annual meeting of the Asia Pacific Forum of National Human Rights Institutions was held at Kathmandu, Nepal, in February 2004. A brief report on the activities of the Human Rights Commission of Sri Lanka in 2003 was presented to the forum.

The term of office of the former members of the Human Rights Commission came to an end in March 2003 and the new Commission took office in April 2003. Two members of the former Commission were reappointed thus providing for continuity in the membership of the Commission. It is hoped that this will become a tradition and be practiced in the future as well.

One other salutary aspect of the new Commission relates to its composition, which represents a welcome gender balance. Out of the five members, three are women including the chairperson. The ethnic balance is also reflected in the composition.

After assuming office the new Commission decided to draw up a three-year strategic plan to give direction and purpose for the work of the Commission. It took some time in coming up with the strategic plan as it followed a consultative process in finalizing the plan. The draft was presented to stakeholders – NGOs, INGOs, regional committees, the Ministry of Finance of the Sri Lanka government, other funding agencies etc. Although in the past the Commission was well supported by international donor agencies, the Commission was of the view that the priorities and direction must be set by the Commission itself and the funding bodies can decide to support the Commission if its plans fit into the mandate of the donor agencies. This is being done now.

While the strategic plan was being drafted and finalized, the Commission undertook an assessment of its human resources with a view to strengthen and promote the efficiency of its functioning. This is being streamlined now.

These actions complemented the initiatives taken by the Parliamentary Select Committee on the Human Rights Commission to enhance and strengthen the standing and functioning of the Commission. This Select Committee, which has been established and functioning in a bipartisan manner, received written and oral representations from various stakeholders, including the Commission itself. The Select Committee was about to submit its interim report containing valuable recommendations to parliament, when the latter was dissolved in February this year. We learnt that the Select Committee had incorporated a majority of the Commission's suggestions and proposals. It is hoped that the new parliament when elected will continue with the work of the earlier Select Committee and ensure that the progressive recommendations, which came out of time and energy of many, will not go waste.

It is to be noted that the Commission was facing challenges from the Ministry of Finance and another parliamentary sub-committee namely Committee on Public Enterprises with regard to its financial independence. The Commission has resisted unwarranted intrusion by these bodies into its financial dealings. While the Commission accepts the fact that it has to be accountable to parliament, the Commission does feel strongly that it cannot be and should not be treated as another public enterprise.

The activities of the Commission last year could be presented in three parts: complaints (investigation and inquires), awareness and capacity building (education and training), and advisory.

Complaints: The Ceasefire Agreement signed between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam in February 2002 continued to hold in the year under review. As such, the number of complaints that were received by the Commission during this period was fortunately lower compared with the number received during the times of violent conflict. The Commission, however, continued to receive a lot of other individual complaints – on an average around 500 per month. Although most of these complaints fall within the mandate of the Commission, majority of them are complains by the members of the public service relating to their service conditions such as promotions, transfers, disciplinary control etc. Some of the others relate to school admissions, land alienation and acquisition plan approval etc.

Although the Ceasefire Agreement minimized the number of complaints emanating from the war zone, the Commission received quite a number of complaints against the police in other areas. These relate to unlawful arrest, detention, degrading treatment, torture, and deaths in custody. The Commission takes serious note of these complaints and has decided to set up a special unit to deal with these issues expeditiously. At a meeting with the police, the Commission made it clear that inquiry into complaints of torture will commence within 24 hours of the receipt of complaints, and in the

case of deaths in custody, the officer-in-charge of the police station will be, prima facie, held responsible. The Commission caused the police to introduce many measures that go to prevent or reduce the opportunity for torture and abuses of rights of suspects held in police custody. Apart from inquiring into the individual complaints, the Commission also held three public hearings in three different areas where complaints of torture were made.

Along with these, the Commission continued to be engaged in inquiring into violations of the rights of internally displaced persons (IDPs). Due to their vulnerability, the IDPs, in particular the woman-headed families and children, face continued and further violations of their rights in makeshift camps and welfare centers. The Commission established IDP desks in seven places where the IDPs are predominant residents to address their rights violations. Two of the major complaints of these people relate to i) property rights as IDPs have been dispossessed of their property, which had been taken over by other private parties who are not the owners; ii) the issue of the armed forces occupying privately owned property after declaring areas as high security zones. In many cases, this has been done without any or due compensation or rent to the owners.

The Commission coordinated a study of the issues relating to property rights arising due to violent conflict and displacement. Similarly, with regard to the question of high security zones, which encompass a large number of private premises, the Commission is in the process of finding an external expert to study and report on the issue from a human rights perspective.

While it is conscious of the fact that security considerations may legitimately warrant the continued occupation of private properties by the armed forces, the Commission is of opinion that the issue demands a variety of considerations and informed decision-making. With this in mind, the Commission is in the process of seeking independent expert advice from a human rights perspective to deal with the question.

There were many complaints made by members of the public relating to disappearances of their close relatives alleged to have occurred in the hands of the security forces and armed groups during 1990–1995 period. The Commission appointed a committee of inquiry with a mandate to go through these complaints and make its recommendations. The findings have been received and individual complainants have been written to.

Recently the full Commission visited certain areas from where it had received a substantial number of complaints of human rights violations alleged to have been committed by state and non-state actors. Its report on the status of human rights in those areas as seen by the Commission will be out soon.

The Commission also appointed an expert to study the issues relating to religious freedom after a spate of attacks on certain religious institutions perceived to be allegedly involved in unethical conversions. Similarly, the Commission has engaged another group of experts to study and report on the health services in hospitals in a particular area as reports of a denial of right to health of the people of the area were received.

The Supreme Court continued to refer cases to the Commission for inquiry and report.

***Awareness and capacity building*:** The Commission is also engaged in creating awareness amongst various groups of people of their rights and duties. This is being mostly done amongst groups, which are vulnerable and suffering the most, as well as where the potential for violation is high. Similarly, the Commission has taken steps to train its staff in various aspects of human rights in order to make them function efficiently and effectively. The investigation officers and regional coordinators of the Commission underwent a training program on investigation methods under a group of experts, courtesy the APF Secretariat.

The Commission recognized the necessity to target certain parts of Sri Lanka for capacity building and that is being done. Under its capacity building project, the Commission has the services of two UNVs who have been serving two of its regional offices.

***Advisory*:** The Commission has been earnestly engaged in is the review of all existing laws in order to ascertain whether they are consistent with the fundamental rights chapter recognized in the Sri Lankan constitution, as well as with the international human rights norms and standards. In the discharge of its advisory function, the Commission will be forwarding its findings and recommendations to the government for necessary action.

This function is carried out in order to make the laws compliant with fundamental human rights in the Constitution. This exercise, which commenced in July 2002, is continuing.

Apart from its contribution to the Parliamentary Select Committee on the Human Rights Commission, the Commission gave its recommendations on the question of contempt powers enjoyed by the courts of law when invited by to do so the Select Committee of Parliament on Law Relating to Contempt of Court. This apart, the Commission, on its own initiative, conveyed its views to the speaker of parliament on the question of re-implementation of the death penalty when there was an attempt to lift the suspension of the implementation now in force.

The Commission will be setting up a Bills Watch Unit so as to monitor all bills presented to parliament. The main purpose of this Unit will be to study the bills, make recommendations as to their potential consistency or otherwise with fundamental human rights to relevant authorities and, if necessary, to move the Supreme Court to determine their constitutionality.

It is hoped that the strategic plan that has been adopted and put into operation from January 2004 will enable the Commission to prioritize its activities and give direction towards achieving its objectives.

At a meeting with the police, the Commission made it clear that inquiry into complaints of torture will commence within 24 hours of the receipt of complaints, and in the case of deaths in custody, the officer-in-charge of the police station will be, prima facie, held responsible

No regional human rights protection body in Asia Pacific – APHRN

The Asia-Pacific region currently exists as the only continent without a regional human rights mechanism to adjudicate over the protection of human rights by member states. All efforts taken to establish such a mechanism, most notably perhaps through the annual workshops arranged by the UN Office of the High Commissioner for Human Rights, have been hampered by traditionalist concepts of state sovereignty emphasizing the schism between 'western' and 'non-western' values. Ordinarily, these regional co-operation workshops follow the pattern adopted by the 1998 Tehran 'Framework for Regional Technical Cooperation in the Asian and Pacific Region' by discussing national capacity building, human rights education, the role of national institutions, and economic, social and cultural rights.

Whilst these are commendable issues, the framework, intentionally or otherwise, has driven a trench between the above issues and addressing the question of establishing a permanent regional mechanism for human rights. Beyond the guise of a 'step-by-step,' 'building blocks' approach, these developments have heightened the suspicion that the UN annual workshops are instead a means for states to *avoid* establishing any such permanent arrangement under the pretext of appearing committed to the ideal.

The latest in the series of workshops ended Qatar on 4 March 2004. The conclusions adopted by the state parties at the twelfth workshop on Regional Cooperation for the Promotion and Protection of Human Rights are brilliant in their sophistry and attempt to obfuscate real issues.

The fact that 20 years of round-table discussions have produced no tangible results in this regard signifies that any expectations of a regional mechanism comparable to that of the European or Inter-American Courts on Human Rights are unrealistic. Attempts at drafting non-official Asian Charters for Human Rights have invariably failed, being inconsistent with the obligations of international customary or conventional law, or hijacked by self-appointed enforcing authorities such as the Association of Asian Parliaments for Peace. Accepting a 'building blocks' approach as the agreed means towards progress, and "mindful of the vastness of, and diversities within, the Asia-Pacific region," the Asia Pacific Human Rights Network (APHRN) reiterates that attempts to set up a regional human rights arrangement must be shifted towards those institutions already functioning in the Asia Pacific region and capable of moving incrementally towards such an undertaking. One possibility is through enhancing the work of the Asia Pacific Forum of National Human Rights Institutions (APF), and particularly, its Advisory Council of Jurists (ACJ).

The APF constitutes the most cohesive regional human rights body in the Asia-Pacific region. Under the limited but useful guidance of the Paris Principles, the APF intends to co-ordinate the functioning of national human rights institutions in accordance with international best practice. Unlike in Europe or the Americas, which have adopted regional human rights conventions and courts that arguably surpass the protections afforded by the UN international bill of rights, national human rights institutions still represent the best means to monitor, investigate, and seek redress for human rights abuses in Asia. As the organization charged with the task of ensuring that these national human rights institutions meet international standards of independence and competency, the APF is the best-positioned intermediary in the region between individual state policy and/or behavior and their respective monitoring bodies.

In order for the APF to operate in the manner of a regional human rights mechanism, a strengthening of its mandate and operating powers are required. The mandates of national institutions in the Asia Pacific region have largely been determined by the political context in which they are created, and thus an imperative must firstly be placed on establishing a centralized and uniform policy binding on all national institutions, plus a system of assessment for effective implementation of the Paris Principles. Whilst these principles only exist as a 'lowest common-denominator,' their provisions are yet rarely adhered to by respective national institutions. This problem is compounded by the fact that the APF permits such concessions in its rules of membership. This allows for less than perfect institutions to gain membership. This also damages the legitimacy of the APF as a forum concerned with independence, transparency and accountability, all fundamental prerequisites of a regional human rights body, and needs to be quickly rectified.

Most importantly the APF must take initiatives beyond the Paris Principles to stress the role of the quasi-judicial capacity of national institutions. As mere commentators on human rights, national institutions' capabilities are severely weakened, but as investigative bodies they serve as a vital connection to any regional sphere. To date, Asia-Pacific national institutions have been deficient in recognizing their role in the international arena. A broader mandate adopted by the APF, which would not only specify national institutions' spheres of competence and jurisdiction but also encourage them to intervene in relevant court cases, would empower the APF to address human rights violations as an independent regional adjudicator.

The ACJ was established following its endorsement at the Third Annual Meeting of the APF held in Jakarta, Indonesia, in September 1998. It acts as "a specialist advisory body to provide, on request, jurisprudential guidance to the Forum and its member institutions." Its jurisdiction is to "provide comment, opinion and advice on the interpretation and application of relevant international human rights standards, upon request, having regard to settled principles of international law and the treaty obligations of the concerned states." Requests may be taken from national institutions that are members of the Forum, provided the subject relates only to their national jurisdiction, yet it has no jurisdiction to receive requests from individuals, organizations, domestic judiciaries or governments.

APHRN proposes that the Terms of Reference of the Council be extended to strengthen its judicial capacity, for the purpose of establishing the ACJ as an Asian-Pacific referral body with quasi-judicial powers akin to a UN human rights treaty monitoring body, with concomitant powers of regional interpretation or consultation. The Asia-Pacific region at present lacks any higher means of appeal of legal decision-making beyond the highest national courts, thus protecting national sovereignty from the scrutiny of international law.

A recent case in hand is that of the *People's Union for Civil Liberties v. Union of India*, which challenged the legislative competence of India's Prevention of Terrorism Act. The Supreme Court upheld the constitutionality of POTA in every instance, thus closing the door on the subject in India. However, NGOs remain united in their condemnation of the Act as an insidious and retrogressive attempt to rid India of all fundamental legal safeguards pertaining to due process and fair trial. The decision by the Supreme Court has likewise been dismissed as a "concession" to a "panic-stricken state unable to handle terrorism through the normal legal process."

In this instance, no recourse may be taken to any higher appellate court in Asia to challenge the Supreme Courts decision from the standpoint of India's obligations under international customary and treaty law. It is in cases such as these that national institutions could immediately refer the issue to the Advisory Council. Whilst it is unrealistic in the current political climate to expect Asian states to cede sovereignty to a body whose judgments would be legally binding, a referral body which may issue authoritative observations and recommendations would offer a firmer regional means of human rights protection than any that currently exist. Also, an appeal of a Supreme Court judgment on the basis of international obligations offers an alternate means of redress, as opposed to questioning such a judgment on the basis of former national jurisprudence.

Requests to the ACJ may also be made at the unanimous decision of the APF on

any issues of common concern, and it is this capacity that the ACJ have been most productive thus far. APHRN is of the view that collective responses present the most viable solutions to regional and global problems, and that the recommendations of the ACJ should be respected and acted upon by all States concerned. The matter of cross-border adjudication is intrinsic to the success of a regional arrangement for the Asia-Pacific region.

To date, the ACJ has published detailed reports on trafficking, child pornography, use of the death penalty in Asia, and the rule of law and terrorism. To take one example, the report on trafficking explains the significance of the UN Trafficking Protocol 2000, and urges states to ratify in order to "prevent and combat trafficking, to assist the victims of trafficking and to promote cooperation among the party States to achieve these objectives." It also outlines the sources and methods of international law and other recommended principles. The January 2004 update of the report on the rule of law and terrorism presents a critical cross-examination of the inconsistency of Asian anti-terrorist legislation and its impact on human rights, challenged from the perspective of international obligations and safeguards. Unsurprisingly, few Asian countries can be congratulated on their present performances.

These are notable contributions aimed at establishing a uniform regional approach to human rights concerns, and are commended by APHRN as such. However, a strengthening of the judicial capacity of the ACJ, as recommended above, would add considerable persuasion to their recommendations. Otherwise, as with all the examples given in this report, the Asia-Pacific region will continue to exist as the poor cousin of the international community in the protection of universal human rights.

Human Rights Features

India fails international compliance test

On paper, the Indian Government's commitment to the human rights standards enunciated in several key international instruments is exemplary. It has acceded to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), indicating its willingness to be bound by the treaties in international law.

However, the reality of India's human rights record reveals that this formal affirmation of human rights is deceptive. The fundamental rights that the State has pledged to protect in the three aforementioned treaties continue to be routinely violated through the application of particular laws and the actions of State authorities. This disparity between the rhetoric and practice of the Indian Government is disturbing. It calls into question whether the Government's ratification of the ICCPR, the ICESCR and the ICERD is motivated by a genuine commitment to human rights, or the need to divert international scrutiny from the plight of its citizens.

The Caste System

Caste-based discrimination remains endemic in Indian society. The groups occupying the lowest echelons of the caste system, particularly the Dalits or the Scheduled Castes, are regularly denied basic political, economic, social and cultural rights. The range of abuses to which they are subjected include torture, restrictions on their freedom of movement, and forced participation in such degrading tasks as manual scavenging.

In spite of the fact that this constitutes a clear derogation from the provisions of the ICCPR, the ICESCR and the ICERD, the Indian Government has sought to frame caste-based discrimination as a social issue of purely domestic concern, rather than a human rights problem warranting international attention.

The Rights of Indigenous Peoples

The rights of indigenous peoples are enshrined in various provisions of the ICERD, the ICCPR and the ICESCR. In particular, the right of all peoples to self-determination is recognised in Articles 1 of both the ICCPR and the ICESCR. Contrary to these provisions, the Indian Government has acted to suppress even peaceful movements for self-determination. Although the Indian Government ratified the ICCPR and ICESCR with reservations in respect of those Articles, this does not diminish the seriousness of the abuses systematically inflicted upon its indigenous populations.

The tribal people of Northeast India, for example, have suffered economic deprivation, social and cultural oppression and have been the victims of a discriminatory application of emergency laws such as the Armed Forces (Special Powers) Act. Section 4(a) of the AFSPA provides that any commissioned officer or a person of equivalent rank in the Armed Forces is empowered to shoot to kill after giving such due warning as he may consider necessary.

The Rights of Religious Minorities

Instances of the complicity of State agents in the persecution of religious minorities in India continue to undermine the Government's purported commitment to the protections contained in the ICERD.

In the aftermath of the Gujarat riots in early 2002, overwhelming evidence emerged implicating members of the police force in the violence against Muslims. Furthermore, collusion between police and Government officials to protect the perpetrators of the violence from prosecution was reportedly widespread.

The uncertain predicament of religious minorities in India is also apparent in the passage of anti-conversion laws in the early 1990s. Although ostensibly secular in purpose, the laws in fact operate to reinforce the dominance of the Hindu majority. The Special Rapporteur on Religious Intolerance shared this conclusion, reporting in 1992 on the forced conversions of Christians to Hinduism in the state of Madhya Pradesh, led by the Bharatiya Janata Party, which governed the state at the time. The same trend is apparent in more recent legislation enacted by the Jayalalitha Government in the state of Tamil Nadu and the controversial Government of the state of Gujarat.

Rights in a State of Emergency

Although Article 4 of the ICCPR allows for the suspension of some of the rights contained in the Covenant in times of 'public emergency', it does not allow derogation from designated fundamental human rights under any circumstances.

Several pieces of legislation enacted by the Indian Government clearly fall foul of this provision, including the AFSPA, the National Security Act and the Prevention of Terrorism Act. None of these Acts were enacted in an officially proclaimed emergency. Of greater concern, however, is the authorisation of measures such as arbitrary detention and other infringements upon fundamental human rights standards expressly prohibited by the ICCPR.

Conclusion

A cursory glance at India's human rights record exposes the Government's failure to translate its rhetoric in international fora into concrete domestic safeguards for human rights. India's most vulnerable citizens, principally the poor and ethnic and religious minorities, continue to suffer from human rights violations that impinge upon the whole spectrum of their rights - political, economic, social and cultural.

The Indian Government must dedicate time and resources to the implementation of its human rights obligations. Otherwise, its ratification of international treaties will continue to be regarded as little more than a disingenuous exercise in international diplomacy.

(APHRN)

Home guards murder *Kurawar* and despoil Xavierpuram

By K.N. Tharmalingam

Blatant discrimination is evident here. The Veddahs whose settlements were submerged got absorbed into the Gal Oya colonisation program, while the Kurawar, perhaps due to their ethnicity and claims of being Dravidian-speakers (Telugu stock) were deprived of their land and denied their wish to settle in the valley

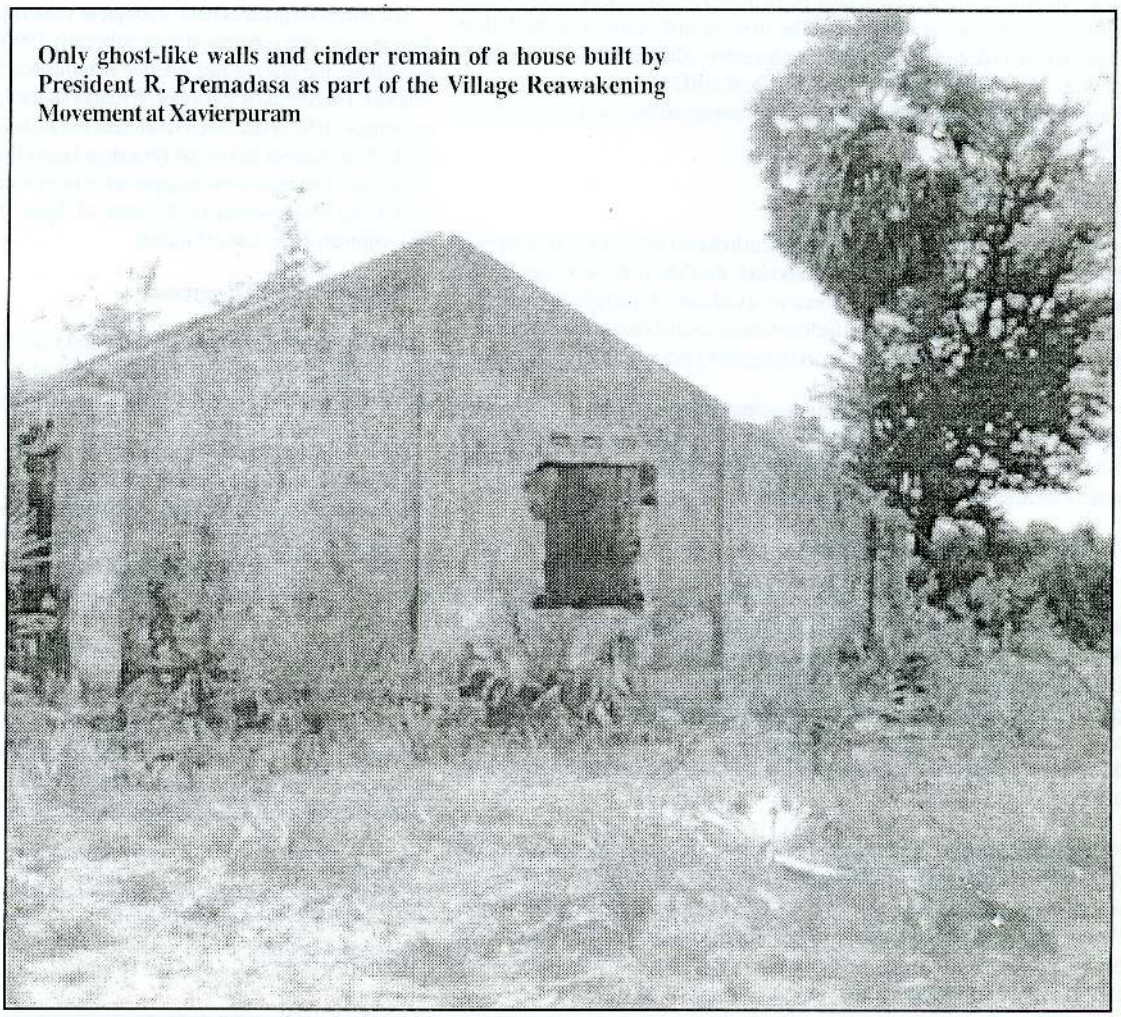
His Lordship Glennie, Bishop of the Diocese of Batticaloa–Trincomalee, named their colony Xavierpuram. It had about 65 families in 1961. Xavierpuram in the Amparai District is the name of the settlement where the 'Kuravar' tribe lived from 1950. It is now under the divisional secretariat of Alayadivembu, Akkaraipattu.

Kuravar are mistakenly called gypsies. They are not a wandering tribe, and therefore, not gypsies. Ancient Tamil literary works speak of their glamour and valour in flowery language. The hoary Tamil Sangam, (the academy of eminent poets) of the pre-Christian period has references to the Kuravar, and one such is the 'Malai Padhu Kadam.' This idyllic work speaks of the bravery and beauty of the Kuravar tribe.

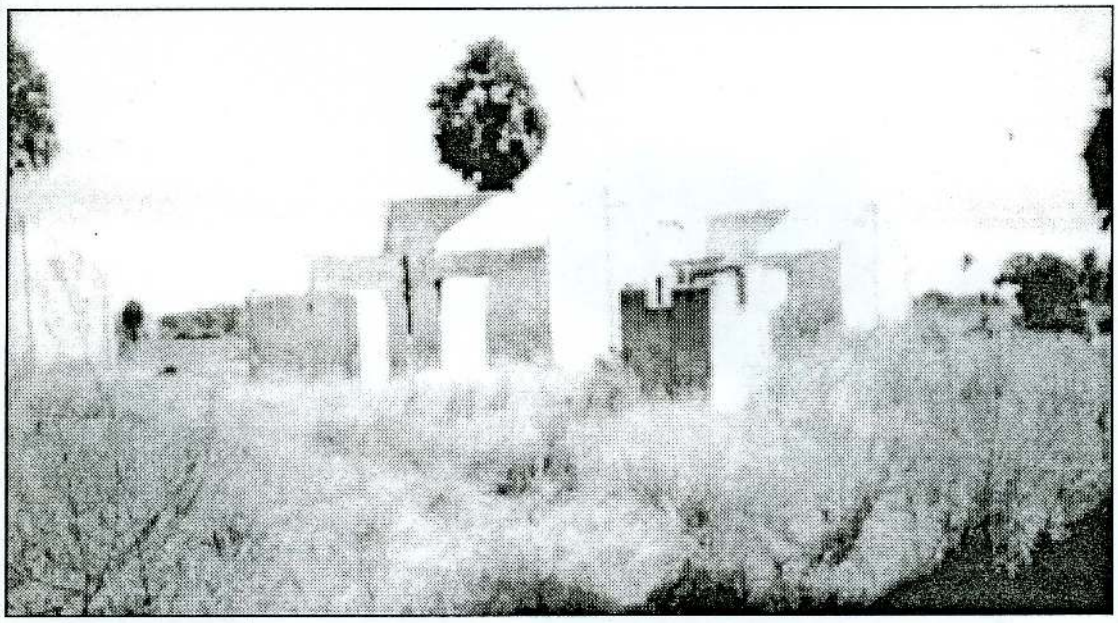
The 'Silapathikaram' acknowledged as "one that captivates the imagination" and judged as one among the 'five great works' in Tamil, (composed 2000 years ago) speaks of the Kurawar as dwellers of the mountainous region, worshipping Murugan and the Goddess Pathini.

The Sacred 'Kandapuranam' of Kachchiapper Swamigal and 'Thiru Murugatupadai' composed by Poet Laureate Nakeerar, support their antiquity and describe them as belonging to the "Kurinchy land."

In 1946, Professor M. D. Raghavan, the first head of the Department of Anthropology, University of Madras, and later the ethnologist in the Department of National Museums, Ceylon, held that the Kurawar, a peaceful tribe, have a history extending over to two million years. The Kurawar in Amparai District are a distinct tribe, and, the descendents of those Kurawar referred to in the Tamil literature.



Only ghost-like walls and cinder remain of a house built by President R. Premadasa as part of the Village Reawakening Movement at Xavierpuram



More destroyed houses

Studies on the ethnicity of the Kurawar in the Amparai District are fascinating. It is now established that the Kurawar in the district do not belong to the 'Ahikuntakaya' tribe, although there appears to be some link between both. Under such circumstances, ethnologists opine that the Kurawar in Amparai District cannot be regarded as gypsies.

True to the traditions revealed by the ancient Tamil works, the Kurawar in the Amparai District were mountain dwellers and belong to the genre of Kurinchy Thinai. They lived in the 'Naadhu Khadu' mountain region in Amparai until they were forced to leave the area.

A sworn statement by Parisary Miniakkah, an aging woman belonging to the Kurawar tribe and a resident of Xavierpuram, complained of several violations of human rights affecting her tribe. She confirmed that they were not a wandering tribe, but had been permanently settled for generations on the outskirts of Uhana, (Ampara) before being driven away, when work on the Gal Oya valley settlement scheme began.

Miniakkah said, "While at Naadhu Khadu my tribe owned a large herd of cattle and received gold coins from Muslim traders in exchange for the cattle the Kurawar sold. The cattle were sold on the express condition that the animals would be used only in agriculture and road haulage. It was a time when there were no motorcars, lorries or the railway, and the bullock cart was the only means of transport."

"The tribe (Kurawar) maintained friendly relations with the Veddahs occupying Ratugala, Mullegama, Henniwatta and Mahiyangana, but never contracted or, established, matrimonial alliances. Owning large herds meant the need for a vast expanse of land for pasture and adequate water for the animals, which were available at our settlement. We were never nomads. There were seven divisions in our tribe, and each division pursued different activities. Some of our women were expert astrologers."

She said, 'Kutrala Kuravanchy' was a beautiful Tamil literary work that describes the encounter of a lovelorn lass and a Kurawar palmist. The lass contemplating on her lover goes deadly pale. The Kurawar women-palmist reads her palm, describes her early life and forecasts an early union with her lover that brings consolation to the troubled heart. The Kurawar woman palmist is the chief character.

Miniakkah, a grandmother says, "What my people regarded as their wealth in those days – 1949/50 – was soon lost. When work on the Gal Oya project began, officials came to our settlement and started surveying the land. We were asked to vacate, and heavy machinery moved into the area clearing the forests. They made paddy fields out of the forestland, cut channels, built cottages for the colonization program."

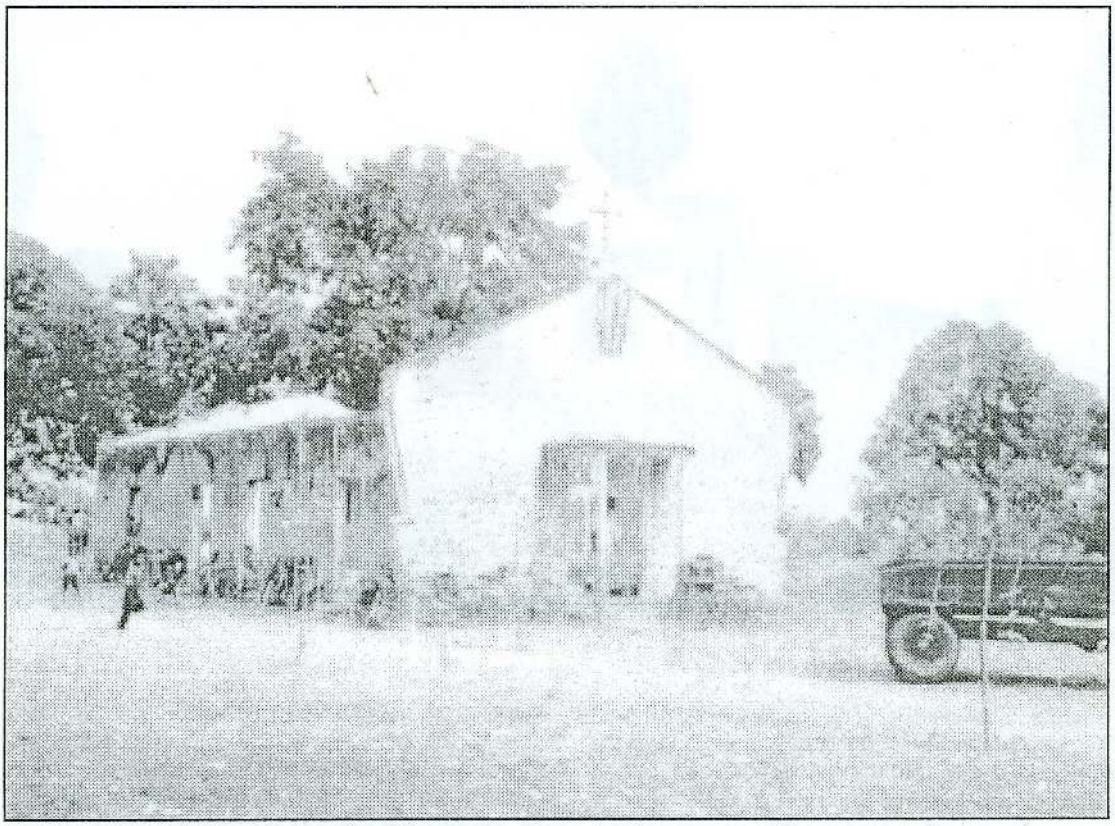
At this point let us take our thoughts back to those days in 1949 when the government got the Gal Oya Development Board Act passed by parliament and began their work on the project.

The river now called Gal Oya was known in the earlier times as 'Patti Pazha Aru.' It is a word derived from Tamil. 'Patti' means livestock, 'Pazha' denotes fruit and 'Aru' refers to a river. Taken together they mean indigenous farmers with their livestock prospered by the waters of the river. It was "pazhum palamamum" – all milk and honey. The river brought prosperity, their herds multiplied and produced more milk, and the yield from their crops was better than they hoped for. The Pattipazha Aru, coursing 62 miles, empties into the sea on the east coast.

The Gal Oya project envisaged the construction of a reservoir capable of impounding 982,700 cubic feet of water and to open up 125,000 acres of jungle for paddy cultivation and colonisation. The river was dammed at Inginiyagala. When the reservoir was built, it was found that several Veddah villages were in danger of being submerged. The Veddah tribe was taken to be colonists and were provided

The Kurawar who had been worshippers of the ancient Hindu pantheon, decided to embrace Christianity and in 1961 Bishop Glennie baptized all of them and their settlement of 226 acres of land, hitherto known as Alikambay, came to be known as Xavierpuram

But in August 1990 the community of Kurawar were attacked, their homes burnt, their youths shot dead, men and women tortured and the church, school and community hall, all symbols of their newly-attained status, destroyed by home guards who led the gang of marauders.



St. Xavier's church whose roof and doors were burnt and sacramental ornaments destroyed

houses, land for paddy cultivation, and other incentives.

However, the Kurawar who were also affected by the project were discriminated against and given only a single option: to leave the land in which their forefathers had lived for many generations. When they left the area, they sold their herd for a song and everything else they could not carry. They founded a new settlement in Sammanthurai.

Sammanthurai however could not accommodate them for long. The development of Sammanthurai began few moths later. So the Kurawar left Sammanthurai too and trekked towards the southeast and reached an area in the jungle known as Alikambai.

Soon this community was on the streets, begging for its survival. They had no income, no food, clothing or shelter. They were the lowest of the low. They had become untouchables.

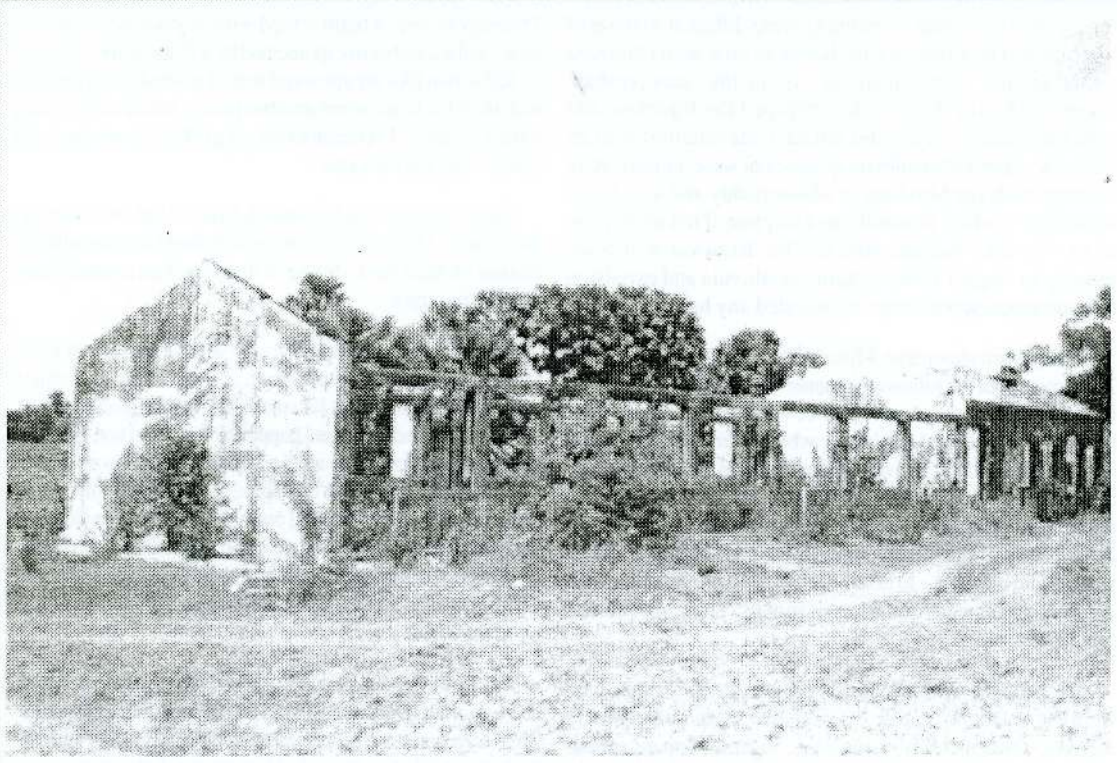
It will be interesting and illuminating to note the United Nations General Assembly, then in its infancy, proclaimed to the world on the 10 December 1948 the Declaration of Human Rights. In 1949, the Kurawar were driven away by a statutory board appointed by the government of a newly independent country – Ceylon. Both the government and the Gal Oya Development Board did not respect the human rights of the Kurawar.

Article 7 of the UDHR proclaimed by the UN states: "All are equal before the law, and are entitled without any discrimination to equal protection." However, the Kurawar did not get equal treatment and protection, which the Government extended to the Veddahs. Article 17 (2) of the UDHR exhorts, "No one shall be arbitrarily deprived of his property." But the Kurawar were deprived of the land they had possessed for centuries.

Blatant discrimination is evident here. The Veddahs whose settlements were submerged got absorbed into the Gal Oya colonisation program, while the Kurawar, perhaps due to their ethnicity and claims of being Dravidian-speakers (Telugu stock) were deprived of their land and denied their wish to settle in the valley. Second, they were not given the freedom to reside in an area where their forefathers had lived and died. Third, the Gal Oya Development Board without compensation appropriated their land; and fourth, they were driven to the streets to beg for their existence. All these happened after the Universal Declaration of Human Rights was proclaimed to the world.

In sworn statements furnished, glowing tributes are paid to the German Jesuit priest, Rev. Fr. Godfrey Joseph Cook S.J., who is credited with having brought the displaced Kurawar together at a place now known as Xaviepuram (Alikambai in earlier times). He is held as a great benefactor and apostle of humanism. It is appropriate that at this distant date we remember with gratitude the humane services rendered by the late Rev. Fr. Cook to a community of people who were treated so atrociously. Rev. Fr. Cook made them regain their dignity and honour.

A note on this great humanist is appropriate for the present generation to discover his disposition and inclinations. Rev. Fr. Godfrey Joseph Cook was born in Germany on 13 January 1902. He had two sisters younger to him. He entered the Jesuits on 14 August 1917 at the



Remains of Roman Catholic school Aligambai TMS

tender age of 15. He was ordained on 27 July 1930, and came to the then Ceylon's Eastern Province in 1944. He served as pastor at several parishes in the Batticaloa and Ampara districts until he breathed his last on 15 June 1995 at the ripe old age of 93.

Rev. Fr. Cook was moved by the pathetic plight of the Kurawar and went on to rehabilitate them. The parents of Rev. Fr. Mariyadas gave him all the support. A suitable place was identified, and 50 Kurawar families were initially settled. The settlement was named Xavierpuram. Assistance was extended to each Kurawar family to build a hut.

The Kurawar tribe spoke Sinhala and Tamil. But they also had a language of their own, which they called Telungu. The adults could neither read nor write as they had never attended a school and the children followed their parents in this respect. Rev. Fr. Cook wanted the Kurawar children to study and proceeded to establish a private school with three teachers. The teachers were given an attractive salary as they had to trek a fair distance on foot along a jungle path.

Rev. Fr. Cook managed the school until it was taken over by the late S. Thanikasalam who was the Director of Education (EP) in 1958.

The Kurawar who had been worshippers of the ancient Hindu pantheon, decided to embrace Christianity and in 1961 Bishop Glennie baptized all of them and their settlement of 226 acres of land, hitherto known as Alikambay, came to be known as Xavierpuram.

Rev. Fr. Dias who took over the settlement and parish from Rev. Fr. Cook, continued the good work in later times. Rev. Fr. Philip, Rev. Fr. Noel and Rev. Fr. Mariyadas continued to do work bringing material prosperity to the community. The Kurawar, whose members were all illiterate, through the efforts of Rev. Fr. Cook and his successors, gained entry to the higher portals of education. Many children won scholarships to continue their studies in popular schools like St. Michael's College and the convents in Batticaloa town.

Prime Minister Ranasinghe Premadasa visited the settlement and donated 100 liveable houses to the families. The settlement was declared a model village in Amparai. Another village established in the Amparai District was Sennel Gramam for Muslims in Sammanthurai. His Lordship Kingsly Swampillai, Bishop of Batticaloa-Trincomalee made a donation of 10 more houses to accommodate the entire village.

Thanks to the enthusiasm of the Catholic clergy and laity, a community of Kurawar who were once begging on the streets were now fastidiously engaged in agriculture. They owned land on which they worked with diligence. Beggars had become tillers of the soil.

But in August 1990 the community of Kurawar were attacked, their homes burnt, their youths shot dead, men and women tortured and the church, school and community hall, all symbols of their newly-attained status, destroyed by home guards who led the gang of marauders.

There was no provocation for such an attack on the Kurawar. The attackers were identified as Muslim home guards. When I asked the more responsible persons among the Muslims for the motive, an allegation was made that the LTTE had established contact with the Kurawar.

With discerning frankness Tamil militants told me that they did not have anything to do with the Kurawar since

The more painful tragedy is that several of the Kurawar committed suicide later by swallowing insecticides or eating poisonous fruits, as they could not bear the losses inflicted on them during the attack.

the aspirations of that community were different to those of the Tamils. The Kurawar tribe had at no time been interested either in the 'Tamil struggle,' or in the 'satyagrahas' organised by the TULF. They enjoyed the franchise and voted at elections. They did not have the remotest contact with any of the Tamil militant groups, but were, indeed, more friendly with the Muslims in whose paddy and sugarcane fields they worked. Hence it was a surprise, if not an enigma, as to why the Muslims attacked the Kurawar with such ferocity in August 1990, bringing death, ruin and expulsion to a community, which never intended any harm.

Any responsible government should have taken action against those accountable for these crimes, but tragically nothing was done against anybody, despite several complaints to the authorities.

In her sworn statement, Miniakkah describes the attack on Xavierpuram in the following manner: "It was about 11 o'clock in the forenoon of 7 August 1990, when some people were having their first meal for the day while others were preparing it when the attackers arrived. Along Neethai Road 18 tractors came one behind the other, carrying a large number people armed with guns, knives, sticks, clubs and axes. They stopped at the centre of the village, and called out the people – men, women and children – to assemble before them. The attackers, carrying guns, were in military fatigues. Their appearance foreboded evil.

"The people of Xavierpuram became excited. The men who were eating stopped eating, washed their hands and rushed to the place where men with guns stood. Together with my spouse and the two children, my son and daughter, I went to the place where we were asked to assemble. We were able to identify the men in uniform as home guards (Muslims) and the others from the Akkaraipattu area who had accompanied the home guards."

Erna Pethasinnawan, a young man of the Kurawar tribe was married and had one child. He was eating and his wife, holding the baby, was serving him the frugal meal. They did not know either of the arrival of the armed gang or heard their call.

Two Muslims entered the home of Erna Pethasinnawan and swung their sickles at the couple. Both were injured. But not killed. Perhaps the infant in the hands of the mother saved their lives. The milk of human kindness swelled in the breasts of the attackers perhaps!

Let us pause now to look back and remind ourselves of the provisions in the ICCPR and the ICESCR, which has some relevance to the attack on the Kurawar. Sri Lanka had ratified the ICCPR as early as 1980, but 10 years later a few home guards employed by the state to protect lives and properties, going on a marauding spree killed people and burned their homes. This attack on Xavierpuram is a gross violation of the principles declared and recognized in the ICCPR and the ICESCR.

The home guards that spearheaded the brutal attack on the village have yet not been punished for the crimes of murder and arson. One wonders whether these international covenants have become dead letters.

An affirment said, "While we stood before the Muslim home guards and the hooligans who accompanied them, they (home guards) seized my only son and began torturing him. Another seized Jayaraja who was also a youth from my community and continued torturing both.

"My spouse could not bear to see his only son being brutally tortured. He sprang up and protested and I too raised cries. Thereupon, one of them armed with wooden pestle dealt a blow on the chest of my spouse and he fell down unconscious; he fell down like an uprooted tree. I rushed to my spouse and lifted his head, when another person struck on my head with a weapon. I remember blood gushing from my head before I fell unconscious."

Those who survived the attack fled to Tirukovil carrying the injured. They carried nothing with them and ran with the clothes on their back. Some of them had had no meal from the previous day.

The affirmant continued, "Later when I opened my eyes, I found myself on a hospital bed, along with several others from my village. It was late in the afternoon, around 4 p.m. I tried to recollect what had happened but could not. Anxious relatives came to see me and I asked for my family members. I was told that a number of people were killed by the home guards and the Muslims and our houses was set on fire with petrol and kerosene. All the people had fled from the village, but some were preparing to go back to Xavierpuram to perform the last rites for the dead whose mortal remains were lying scattered.

"Something urged me to return with the crowd to Xavierpuram. Despite my weak condition, I left the hospital ward, traced my spouse who was equally in pain, and together with about 20 men, travelled in a tractor, belonging to one member of our tribe. I was petrified when I saw my son's body lying near the channel with bullet wounds. There were two other bodies beside his; the other bodies were strewn around.

"The eerie calm of the destroyed village with the burnt houses sent terror through me. The charred remains of the houses reminded me of ghosts. We made a quick return to Tirukovil."

On the day the home guards attacked the Kurawar settlement of Xavierpuram, the following 10 persons were killed: Erana Alphonesus, manager of the MPCS and a community leader who was seized by the home guards and stabbed to death; S. Palkudyan, Sinnawan Muthulingam, Dassan Sunderam, Ranganathan Anandan, (who suffered gunshot injuries and died on admission to hospital) Laxman Pethappu, Jayarajah, Krishnapillai, Ramasamy Sinnamutha and Sinnathamby Kandasamy.

Several were grievously injured. A sword cut Rasappu Bhagadas' head so that his brain bulged out. He escaped death is but unable to function normally. The other injured were: Erans Pathasinavan and his wife Ariyamalar, Nediya – Podiyan Vadivel, Muthusamy Erana, Muniyandhi, Vakkannah, Sangaran, Sinnathamby Rasammah, Samithambi Lawrence, Thumpar Dassan, Parisari Minniakkah and Rasappu Thummannah.

Massana, another victim of the attack is an ageing woman of the Kurawar tribe living in Xavierpuram. A grandmother, she said that she knew most of the attackers. Some of them were paddy cultivators in the area around where she lived. She said that the attackers had not harmed her community alone but God himself. "They have got to answer on the Day of Judgment," she said. They not only killed, maimed and injured people, but also destroyed the church, the school and homes of a peaceful community, many of whose members worked on the paddy fields of the Muslims.

What is left of the pilgrim's rest at the temple of the Goddess Meenachchiammal, Sengalpadai

The more painful tragedy was that several of the Kurawar committed suicide later by swallowing insecticide or eating poisonous fruits, as they could not bear the losses inflicted on them during the attack.

From the reported incidents, it is obvious that certain youth, followers of Islam, possessed of sound mind and discretion who were employed as home guards and attached to the Akkaraipattu police station to protect the public, were issued with a new set of arms and ammunition on the 6 August 1990. It was explained that they wanted to test the efficiency of their new weapons by attacking the innocent public at Xavierpuram and led a gang in 18 tractors with the common intent of destroying people, their properties and institutions – chiefly the school, church, the community hall and the cooperative shop. They sought to eliminate all traces of the Christian Kurawar, by destroying the 110 houses built by the government and the church.

A witness said that Prime Minister Premadasa had built 100 houses, but seven years later, during his tenure as President, fundamentalists destroyed those houses. The atrocities committed by the home guards and their accomplices shocked every civilised human being. Any responsible government should have taken action against those accountable for these crimes, but tragically nothing was done against anybody, despite several complaints to the authorities. It only proved governmental involvement in the violence did not merely amount to violations of human rights, but to acts of felony as well. The failure of the State to take action against the criminals suggests betrayal of faith by the government in the performance of its duty by the citizens.

A state is expected to protect the life and properties of its subjects. There is a saying, that "Pygmies can destroy in a minute what giants took centuries to build." That is what happened at Xavierpuram. Over 40 years of toil and sweat of humanists to lift a backward community were destroyed in a matter of an attack lasting for over two hours. They began the attack by about 11.15 a.m. and the settlement was reduced to ashes by 1.00 p.m. That was the brutal side of the attack on the Christian Kurawar, inflicted by the 'oft claiming peaceful followers of Islam.'

The Catholic priests had left no stone unturned to develop the people. Highland of up to 106 acres was alienated for dwelling and 110 acres were alienated among 43 persons for the cultivation of paddy. The officials of the River Valley Developmrnt Board (RVDB) particularly S. Devaratnam, the CO and Mr. Allawattugoda the land officer and Mr. Kamaladasan of the survey department were helpful. The families stood at the 200 when the attack was mounted against them.

Now the question is, whether the then government supported the attack on the Kurawar tribe? Some say "Yes" because the home guards were under the control of the Akkaraipattu police. They are under orders every day to account for and hand over their weapons and ammunition. If so, were the weapons examined and the spent cartridges accounted for on the day of the attack 7 August 1990? To whom were those guns issued? What action did the police take on the complaints of the murder, arson and looting?

Twelve years after the attack, the persons displaced by the attack were brought back to Xavierpuram and the EHED is trying to help them resettle. This is a story of man's avaricious attempt to grab the land owned by the Kurawar. Let me quote the famous lines from an anonymous author:

"...Make the Mind the Mosque, and

The abode of all kindness,

In it spread your Prayer–Mat of Faith,

And, as you read the Quoran,

Think of what is Just and Lawful,

Let righteous conduct be your Kaaba,

And truthfulness your Spiritual guide."

Over 40 years of toil and sweat of humanists to lift a backward community was destroyed in a single attack lasting for over two hours.

Reintegrating ex-PTA political prisoners: Fear is the key

By Ronnate Asirwatham

This is a section of a much longer study on the question 'How does the reintegration of ex-political prisoners affect peace building?' which also draws in the Irish and South African experiences. The fieldwork for the study was done in Sri Lanka with the help of Home for Human Rights, which is gratefully acknowledged. Names of ex-political detainees whose experiences are recounted here have been changed to protect their identity.

An integral part of "the near dictatorial powers vested in state to use freely against anyone who openly challenged the government's authority", is the Prevention of Terrorism Act of 1979 (PTA)

This section will examine the lives political prisoners arrested under the Prevention of Terrorism Act of 1979 after their release, and analyze the manner in which they could best be rehabilitated in order for lasting peace to be achieved in country.

The country's early history is as contentious as its present political environment, as historians and politicians alike have used various versions of history to ferment and legitimize one ethnic group's hegemony over another. Some scholars use the Mahavamsa, which indicates that Prince Vijaya arrived from Northern India in about 500 B.C to found the Sinhala race (De Silva, K.M, 1977: 32). While there is no evidence in the Mahavamsa of dates of the Tamil settlements in the country, the epic relates that there were Tamil rulers in parts of the country as early as 237 B.C. Politicians, historians, scholars and fundamentalists point to a war between the Tamil King Elara and the Sinhalese King Dutugamunu as a indication of the early roots of ethnic conflict in the country and the inherent hegemony of the Sinhalese over the Tamils (De Silva, C.R, & Bartholomeusz, Tessa 2001: 2) Those who ascribe to the Mahavamsa version of Sri Lankan history view the Tamils as an ethnic group originating from South India - very distinct from the Sinhalese of Northern India

Other historians believe that people whoa re now labeled as Sinhalese and Tamils are both part of a Megalithic culture that emerged in the proto-historic period (900 B.C) in peninsular India and began moving southwards (Sittrampalam, S. K. 1988). "The ancestors of present day Sinhalese and Tamils were essentially from the same stock" (Gunewardene, 1994: 35). Therefore, the labels of Sinhala and Tamil are largely cultural. In other words, a strong conjunction of ancient evidence shows Tamil habitation and labor near the seat of Sinhala kingship. "From this we can begin to understand how deeply intertwined are the historical roots of Tamil and Sinhala populations in Sri Lanka. Not only do the ancient kingdoms' inscriptions reveal how much the spheres of Tamil and Sinhala intersected, but also how such intersections merged even those borders traditionally separating religion and commerce" (Theva Rajan. A: 1988: 4).

"Hindu temples co-existed with Buddhist temples throughout Sri Lanka as in South India and people approached different gods for different needs," (Gunewardene: 1994, 35). The practice of Buddhists worshipping at Hindu shrines still exists in Sri Lanka today. During the tenth century A.D militant Hinduism grew in South India, persecuting many Buddhists almost to the point of extinction. At this time the Chola Empire extended to Sri Lanka. Their 70-year rule however, was pragmatic and they continued the tradition of civil works and patronage of Buddhism. "However, Buddhism in Sri Lanka would have found itself more isolated. There was thus a logical need to incorporate greater numbers into the Sinhalese identity as the natural guardians of Buddhism. The transition of the word 'Sinhalese' from a dynastic term to an ethnic term was underway," (Gunewardene, 1994: 35).

Located in the heart of the Indian Ocean and being blessed with several natural harbours, the country was a magnet for travelers and explorers. Accounts of the civilization of Sri Lanka are found in writings of Greek travelers, the Chinese Buddhist scholars Fa-hien and Tsuan Sang in about the middle of the first millennium B.C, Marco Polo the Italian, and many travelers from the Islamic world (De Silva, K.M, 1977: 31). The first Europeans to conquer the island were the Portuguese in 1505, who set up trading posts on the coastal lowlands and converted a large majority of the coastal population to Roman Catholicism. Mission schools providing education in the local languages were also established by them during this time.

In 1658 the Dutch arrived and ousted the Portuguese. The Dutch interest was mainly commercial which was to enhance the revenue of the Dutch East India Company by establishing cinnamon plantations in Sri Lanka and introducing the Roman-Dutch law to facilitate trade in the country with other states. The British arrived in 1796, and first ousted the Dutch from the maritime provinces; later in 1815 they conquered the whole country and ruled it as a part of the British Empire.

During British Rule, the English public school system was transplanted into this country and education in the native languages was limited beyond Buddhist or Hindu temples. At this time in history there were four main ethnic groups, the Sinahalese, the Tamils, the Muslims and the Burghers. This English education allowed the rise of the elite in the country from all ethnic groups. (De Silva, C.R 1977: 407). In the 1920's when the British decided to give limited political authority to the island, it further exacerbated divisive ethnic identities as it appointed members to the Council of Ministers based on an ethnic ratio.

Sri Lanka gained its independence in 1948 from the British, who had instituted a parliamentary system in the country. Although Independence was achieved relatively easily, with little bloodshed, ethnic divisions were brought to the forefront when politicians

could not deliver economic prosperity and the peasant masses were putting pressure on the local political elites of the country for a share in the economic pie through social and educational advancement.

Soon after independence "the potential spoils from ethnic outbidding transformed elite attitudes in both major Sinhalese parties, - the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP), (DeVotta, 2002: 86)". In May 1944 the head of the SLFP, S.W. R. D Bandranaike said in a State Council debate that "it would be ungenerous on our part as Sinhalese not to give due recognition to the Tamil language," (DeVotta, 2002: 86)". But realizing the political expediency of switching to an nationalist track to garner votes away from the UNP, Bandaranaike changed his stance in 1956 and campaigned on a strictly Sinhala nationalistic platform for the 1956 general election. He swept into power and two days later passed the "Sinhala only" act, which made Sinhala the only official language of the country, marginalizing the Tamils socio-economically as the state was the largest employer (Thambiah 1986: 85). This it effectively stripped the Tamil and Burgher ethnic groups of their traditional vocations in the government and civil service within 24 hours of the "Act" being passed.

The Tamils had no way of redress because they had only won less than 30 seats in a parliament of 95 seats (Thambiah 1986: 85). This led to the first ever, ethnic riots in the country. After which, Bandaranaike and the head of the Tamil Federal Party S. J. V Chelvanayakam reached an agreement (Called the B-C pact) that was meant to reverse the rising ethnic antagonisms. Nevertheless, within group ethnic outbidding over-rode the national interest. The UNP, a coalition of Buddhist monks and Sinhalese nationalists protested the agreement and Bandaranaike for fear of losing his support base never implemented it. The UNP had opposed the 'Sinhala Only' Act. The party leader J.R Jayawardene had condemned the act say that "was a way to sow the seeds of a civil war, (Wilson, 1988: 124)."

However, a year later he condemned the B-C pact saying it would "reduce the Sinhalese race to a minority," – "thus the 1960 elections went forward where Sinhalese chauvinism with each of the two major parties trying to convince the Sinhalese voters that it alone was best equipped to secure and extend its dominance," won the day (DeVotta 2002: 88). These actions polarized the country and "the relative deprivation that the Tamil population experienced and the inability of their politicians to secure meaningful reforms radicalized many young Tamils..." ultimately leading to a secessionist movement in the country (Devotta 2002: 88).

In order to downplay "the numbers game" of the parliamentary system where the majority ethnic group ruled, a presidential system modeled after the semi-authoritarian "Gaullist system" of France was introduced in 1978 (Wilson 1992: 153). "First there was a search for executive stability" and "secondly there was an anxiety to create and maintain consensual politics, which were both intended as devices to pull the country out of its political morass, (Wilson 1992: 153)". However these twin goals were not achieved mainly due to the constitution giving the president near dictatorial powers, which was used freely against the separatists and "anyone – Sinhalese and Tamil – who openly challenged the UNP government's authority," (Devotta 2002:91).

An integral part of "the near dictatorial powers vested in state to use freely against anyone who openly challenged the government's authority", is the Prevention of Terrorism Act of 1979 (PTA). This Act was "enacted to deal with elements or groups of persons or associations that advocate use of force to accomplish governmental change," (Ganeshalingam 2002: 22). While the PTA has been deemed to violate several internationally accepted fundamental rights instruments (the right to be informed of the reason of arrest, right to legal counsel before trial, and the right to freedom from torture amongst others) the Supreme Court of Sri Lanka did not strike down the PTA because "when the PTA bill was referred to this court, the court did not have to decided whether or not any of those provisions constituted reasonable restriction on Articles 12(1), 13(1) and 13(2) permitted by Article (15)(7) (in the interests of national security etc) because the court was informed that it had been decided to pass the Bill with two-thirds majority. The PTA was enacted with two-thirds majority and accordingly in terms of Article 84, PTA became law despite many inconsistencies with constitutional provisions," (Opinion of Justice Mark Fernando, Weerawansa Vs. Attorney General & others, 2000).

Given the arbitrariness of the legislation, it is safe to say that this alone has done much to fan the fires of the protracted conflict – "it is not surprising that such regulations (PTA and emergency regulations) together with a situation combining some of the worst aspects of both ethnic conflict and guerrilla war produced extensive violations of human rights. The press, scholars and several human rights organizations have portrayed practices that ... depict the security forces as practicing indiscriminate mass arrests and detention of Tamil young men, frequent systematic torture of such detainees and reprisal killing of Tamil civilians covered by either denial of the arrest or reports of encounters with terrorists," (Rubin, 1987: 27).

The following case studies illustrate how such laws as the PTA have fermented political, socio-cultural, and economic discrimination within the political prisoner community even after their release. In 1996 Kathiravelu, who owned a grocery store in a town in the east was arrested by the STF while transporting biscuits, soap, sweets etc. to replenish stocks in his grocery store. He was charged with taking supplies to the "Tigers" (Liberation Tigers of Tamil Ealam – LTTE), for not giving information about them and not revealing the identity of members of the LTTE visiting his shop.

Kathiravelu was taken to the Special Task Force (STF – an elite group of the police trained specially for counter terrorism) camp manacled and thrown from the lorry he was transported in. He was kicked in the stomach and beaten with poles. His genitals were trampled by boot-wearing STF personnel. He was repeatedly lowered, head first, into a tank of water till he choked. All this was to obtain a confession from him that he was guilty of the afore-mentioned crimes.

He was remanded at Magazine prison for one-and-a-half years. He was then transferred to Kalutara prison and released in 2001. He was not tortured while in prison except for an occasional beating. Before this he was arrested twice – 1990 and 1992, on both occasions by the STF. He was detained for one month in 1990 though not tortured much; but the second time when he was kept for six months, he was suspended from a beam and beaten on his heels several times and given the 'water tank' treatment.

The bouts of torture he suffered caused unbearable spasms pain in his stomach, bleeding from his mouth and in his urine and disfigurement of his knuckles. The wound in his stomach became a cist for which he underwent surgery in 2002. Though he seemed cured, the symptoms have returned and he might have to be operated again. He has recurring pains in the chest and thinking about his condition makes him feel dizzy. Due to circumstances (see below) the grocery was closed; he does not have capital to hire people to work for him. Today he has no job and lives on the benevolence of

The story of Dharini exemplifies that even though in theory the provisions of the PTA does not operate after once the detainee is released, discriminatory social practices such as the attitude of her neighbors and the cavalier attitude of the police have put her in a position where she and her family are economically disadvantaged as well.

The story of Vijitha illustrates the difficulty in differentiating between victim and perpetrator. Nobody, including herself denies that she was guilty of her crime, however the fact remains that even though she did her time in prison, her rights were not restored to her after she was released.

his wife and her family with the prospect of another surgery of his stomach looming.

While Kathiravelu was in detention his wife Poomani was running the grocery. In December 1997 the STF came looking for her. Since she was not at home the visitors asked her to come to their camp. When she went there she was ordered to go inside. She refused and the STF set upon her assaulting her with T-56 gun butts, batons and kicking her. The beating was so severe that she fell unconscious and had to get her sister to take her on a bicycle pillion home.

Since she was bleeding continuously she was warded for some days in hospital and discharged. Her nightmare had not ended however. In 1999 the STF came again in search of her. Though she is not sure, she believes it was because her husband and sisters were in detention (see below). Fearing that if she remained she too could be arrested, Poomani fled to a place in the LTTE-controlled area, leaving her children aged seven and four with her mother.

Though the LTTE-controlled areas were secure, Poomani could not find proper medical treatment. When she returned home after the Ceasefire Agreement was signed in 2002, the grocery was closed because there was nobody to run it and there was no money. What is more, neither she nor Kathiravelu can do hard work due their physical condition. Her only source of income today is selling string-hoppers, with which she has to fend for two children and also look after Kathiravelu's medical wants.

Stepping back in time to take up the thread of this story, Poomani has two sisters: Malar and Geetha. In May 1999 the Counter Subversive Unit (CSU) came one afternoon asking for them. Malar said her sister was in school. After assaulting Malar's parents accusing them of hiding arms, the CSU told Malar to come with them. She refused on the plea there was no policewoman in the arresting party. They were told her father could come along. The jeep went to the school and asked for Geetha who was then only 18. She too was bundled into the jeep. The vehicle then went to the town, searching for Poomani because the CSU believed she was staying there.

When their father was unceremoniously dropped off on the road the jeep sped to the police station. There the two sisters were stripped to their underclothing and beaten on their backs and hips with S-lon pipes filled with cement. Each was threatened with rape in the presence of the other. They were not allowed to talk to each other and kept in a lighted room, which was closed whenever senior police officers came to the station. After a brief separation when one of them was detained in another police station, they were both held in a remand prison together for two years. Their case came up in the Sri Lankan High Court where lawyers were able to prove the prosecution had forged a document stating the sisters were not tortured. The case collapsed and they were released in 2001.

This tale of relentless tragedy has yet another episode. One day when Geetha's matter had come up in court her fiancé, Ragu, had been present to watch the proceedings. He was arrested when a 'spotter,' who was allegedly an ex-LTTE member working with the CSU, identified him. He was charged with being in possession of bombs to attack a training camp. He was held altogether for six months in detention, of which 40 days were spent in the CSU, where he was tortured.

He was beaten by thick plastic pipes filled with cement and batons; placed naked on the ground and hammered on his chest, buttocks, and stomach. Unable to withstand the torture he agreed to confess to concealing information when the LTTE robbed a tailoring shop making army uniforms. A human rights organization filed a Fundamental Rights application for which the CSU failed to appear in Court on two days. On the third day the attorney general said he was withdrawing the indictment. Ragu was free.

Ragu married Geetha later. Ragu, Geetha and Malar still bear the scars of their torture. Ragu's palms and buttocks were swollen after the whipping and the wall of his stomach has been damaged permanently. Today he cannot sit over a long period of time because he gets stomach cramps. He now lives on Geetha's meager income from a grocery store she has managed to start.

Geetha complains of bleeding even now and the psychological trauma of being humiliated in front of her class prevented her from returning to school. Though only 30 Malar bleeds from her mouth, has backaches and her foot hurts when she walks long distances. Though she is a skilful seamstress she cannot help the family because her foot swells and hurts when she operates the pedal of the swing machine. She says the CSU took away her GCE Ordinary Level (High School Certificate) results sheet, so that she has no documents to even apply for a job. She now helps out with a Non-Governmental Organisation (NGO).

Despite the above trauma, this family considers itself lucky. At least one of the family members has found permanent employment after detention, while another has managed to open a grocery store. "Even though we are now poor, I am not useless and I can try to pay back some of the debts my family incurred because of our arrests," said Malar. Geetha, even after her spell in detention, got married and therefore is not completely shunned by a culture where the standing of women in society is determined by their marital status.

The story of Dharini is different. At 22 she was working as a nurses' aid in a government hospital. The job was salaried which meant her financial future was secure. Her only dream was to provide her brother and younger sister with an education that she did not have because her father was a poor farmer in the war zone. However, in 2001 while on her way to work the she was accosted at one of the many checkpoints that are ubiquitous in the North and East of Sri Lanka. As her identity card declared that she had been born in an area that was now controlled by the LTTE, the police arrested her. Later she was charged for 'supplying goods to the LTTE,' and 'supplying information to the LTTE' and detained for over one year. She was beaten with pipes and had chili powder thrown on her face, into her eyes and mouth. Her face was also submerged in a plastic bag that had been dipped in gasoline. After one year she was released, with a verdict of "not guilty" by the high court, because the state could not press charges due to the lack of evidence.

Although she had been released, the trauma she underwent in prison was just the beginning. Her father had mortgaged his farm in order to visit his daughter in prison. The prison was located in a different district, which meant that the trip to and fro was very expensive. Therefore now his family is impoverished and he is working as a laborer for a daily wage whenever he can find work. Since Dharini's arrest, work has been hard to come by because the Sinhala villagers in her hometown believe that she is guilty and thereby refuse her father work, while the Tamils believe she was raped in custody and therefore "unclean" and want nothing to do with her family. Her mother is suffering from severe psychological depression after Dharini's arrest because she fears her daughter is stigmatized and there is no hope of marriage for her.

As the court has exonerated Dharini, the law states that she could return to her government job, once she gets a police report.

"I went several times to the police station, but they kept telling me to come on another date. Finally, when my father angrily demanded the police report, they threatened to re-arrest me. I never returned to the police station," she said. Dharini suffers from headaches and dislikes being away from her home therefore her brother and younger sister have given up their schooling and try to find some work to increase the family income. Dharini, said she is afraid to even contemplate the future, "I have thought about committing suicide several times, however because the stigma of a suicide will mar my sister's future, I desisted."

The above two stories illustrate how the released detainees suffer discrimination and also how those immediately related to them are discriminated against as well. The story of Dharini exemplifies that even though in theory the provisions of the PTA does not operate after once the detainee is released, discriminatory social practices such as the attitude of her neighbors and the cavalier attitude of the police have put her in a position where she and her family are economically disadvantaged as well.

Vijitha is a 60-year-old mother of two. She was arrested in 1990 at her home. She was held at different police stations for a year and a half before she was charged, during which time she was tortured. She was tied to a tree and whipped. Water was poured down her nose repeatedly and she was beaten on the head with plastic pipes resulting in a blood clot, which later had to be operated on. She was charged with providing food to the LTTE. "I am guilty," she said, "My son was in the movement and I have fed him." The courts returned the verdict of "guilty" but because she had already been detained for two years (at the time of the verdict) and because of her torture during custody, she was only fined Rs.7500 ($75) and released immediately. Right after Vijitha was arrested, the army took her to her daughters' school to identify her. Her daughter who was studying to take up her GCE Ordinary Level examination at the time of Vijitha's arrest had dropped out of school after this incident because she was afraid that the police would come after her in school. Vijitha's son had died in action during her detention.

However, even after her release the army had continued to visit her home and beat her husband and herself several times. Once they had beaten her husband so badly that he could not return to work husking paddy for a week. "After the army came the first time I sent my daughter to my sister in the city – there she will be safe," said Vijitha. She has not seen her daughter since. "I am afraid to leave my house, whenever I see a man in uniform I start shaking in fear," she said. Vijitha used to make a living selling string – hoppers however now she cannot make string hoppers because her hands quiver too much (she attributes it to the blood clot). Although her husband does have seasonal work they are heavily in debt, as she had to borrow money to pay for her hospital expenses (to remove a blood clot sustained during torture) and to send her daughter to the city.

The story of Vijitha illustrates the difficulty in differentiating between victim and perpetrator. Nobody, including herself denies that she was guilty of her crime, however the fact remains that even though she did her time in prison, her rights were not restored to her after she was released. She still is afraid to move about freely and has been denied a livelihood.

Even to those who have not been arrested these detainees are seen as an "example" of what could happen to their children. Vasuki, is employed at an NGO in the eastern province, she has never been detained she says because her father is a Sinhalese. She has lived in the eastern province for most of her adult life and has seen her father been assassinated by a Tamil paramilitary group. She is married to a Tamil. She said, "I have small children now, when I see these detainees, I fear if that would be the future of my children. If I am to know that peace has come this fear must be removed." In this manner the lives of the detainees have affected those who live around them as well.

The above section demonstrates that the released detainees are politically discriminated not only by the law but also the implications of their encounters with the law. For example, detainees could seek legal redress for the arbitrary actions of the police beatings in their own homes and the confiscation of documents etc after their release. However, the detainees do not seek such redress because they perceive that all law is biased against them and questioning the law will only lead to their detention again. Such a de-legitimating perceptions of the rule of law in a country, could lead to chaos and conflict.

The case studies illustrate that the ex-detainees are socio-culturally and economically discriminated because of societal norms and loss of skills. Employers do not want to hire anyone who has been released because they fear that either the government will regard them (the employer) suspiciously or that the ex-detainee will be re-arrested again or will not be as productive as someone who has never been arrested, due to the physical and/or psychological problems suffered by the ex-detainee. The case studies also determined that not only are the lives of the detainees and their families affected but those who live around them. Such a fear of what the government could do breeds suspicion within communities. Scholars have determined that such a suspicion within communities tears at the fabric of society and inhibits the ability of its individual members to work toward reconciliation and reintegrate into a post-conflict society

The following section of this study will attempt to quantify the above qualitative data, by looking at the levels of fear of government by the ex-detainees, the level of employment after their release and the level of education of the ex-detainees children.

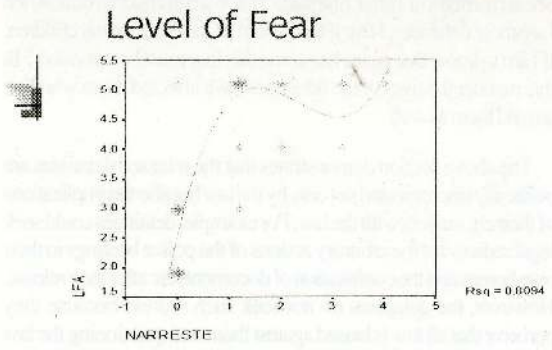
Findings

This study decided to look at variables such as the level of fear of government by the released detainees, their level of unemployment and the level of the education of their children, because these variables measure the different type of discriminations detailed in this study. For example, scholars find that low levels of fear of government augur well for a post–conflict country as it shows that the population perceives the government's action as legitimate and is not likely to rebel against it (Horowitz 1985). A comparison of the levels of unemployment between the ex-detainee and non-detainee population indicates the level of economic inequality between these two populations. A comparison between the level of education of the children of these two populations shows if are educational inequalities within these two populations. The following section will present the findings of this study through the above three variables.

Level of fear

This study found that there was a positive correlation between the level of fear of government and number of arrests of a detainee.. As shown in Figure 1.0 right after the first arrest the level of fear increases dramatically. However there is a slight dip in the level of fear after around the third arrest. While the lowering of fear is not significant, what is more dangerous is that it is in this area that most detainees are afraid enough of the state to feel threatened by it but will not be submissive to the state. (What this means is that because the level of fear is so high – people don't leave their houses, they don't go to their jobs, they don't go shopping/or see their doctor or take any part in their communities as they feel threatened. They exclude themselves

She said, "I have small children now, when I see these detainees, I fear if that would be the future of my children. If I am to know that peace has come this fear must be removed." In this manner the lives of the detainees have affected those who live around them as well.



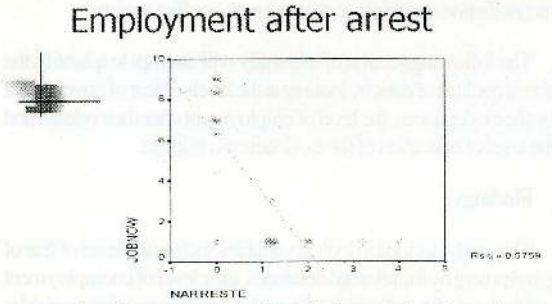
As the number of arrests increase the level of fear increases.
•THIS MEANS – The prisoners are excluded from society

The findings point out that the three concepts of justice – legal justice, reparatory justice and distributive justice have not touched the lives of these former political prisoners and their families. This study will analyze the implications of its findings in the conclusions

from society and are also excluded by society, which leads to an increased marginalization.

Level of employment

Figure 2.0 shows the relationship between the quality of employment/income and the number of arrests. As the number of arrests increase the quality and income of employment decreases. There are three reasons for this decline, one is the fear explained in figure 1.0, the second is the stigma where employers don't want to employ ex-detainees because they were arrested, and the third is because they are disabled because of the torture they suffered in custody.



As the number of arrests increase the quality/income of employment decreases.
•THIS MEANS: Former prisoners live in poverty leading to frustration against society

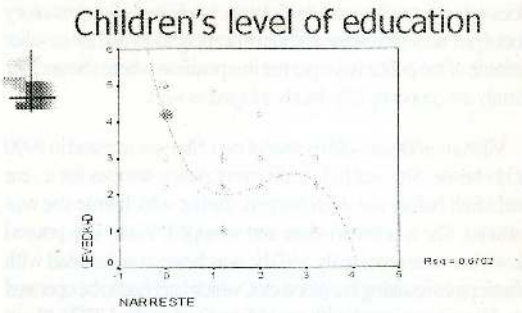
The former detainees were employed in a wide range of jobs but now they find it difficult to support themselves resulting in severe frustration, which has negative impact on the economic integration of these former prisoners. The drop in their monthly income is approximately from the range of Rs.4000 - Rs.1000 to Rs.2500 – Rs.500. What this means is that former prisoners live in a chronic state of poverty which leads to feelings of frustration against society.

Children's level of education

As figure 3.0 illustrates after the first arrest of the parent there is a severe disruption in the education of the child. After the second arrest of the parent the drop levels out because the mechanisms set during the first arrest is in place and in some instances parents or other relatives of the child feel it is safer to send their children abroad for safety. With each subsequent arrest however the children's education levels are lower than the rest of the country.

According to the Global IDP database the rate of student drop out in the North East is 15%, almost 4 times the national average. However the rate of student dropout within the ex-detainee population is 42%. There are two reasons for this high drop out rate, one the parents' fear children will be arrested, especially if they have to pass through checkpoints on the way to school, so they prefer that the child stays at home, secondly because of the extreme poverty the children are required to either stay at home to look after one parent (if parent is disabled after arrest) and the younger siblings so that the other parent (generally the mother) can go to work or the children are required to go to work themselves.

The end result of this present situation of an extremely high drop out rate is that the next generation is marginalized and uneducated.



As parents arrests increase the children's level of education decreases.
THIS MEANS: Next generation is marginalized and uneducated.

For instance, illustrating all three factors above is the case of Razi a Muslim and his wife Rani, a Tamil. Both of them were arrested twice. Just after the second arrest n 1992, because both parents were arrested and the children were technically orphaned the relatives living in the village collected money and sent the four children, the youngest of whom was 10 at the time, to India. Razi and Rani have not seen their children since, even though they were released in 1995. Rani is physically and mentally disabled from the torture suffered in custody. As Razi's house was mortgaged to pay bills during their first arrest, they could not recover it, and had to move. His new neighbors are very suspicious of him because he has been arrested so they do not help out with his wife and he has to take care of her all by himself. Razi who was once a salaried skilled laborer of a prominent private corporation now does odd jobs only when time permits him to be away from taking care of Rani.

The above findings point out that the three concepts of justice – legal justice, reparatory justice and distributive justice have not touched the lives of these former political prisoners and their families. This study will analyze the implications of its findings in the conclusions.

Conclusion

The results of this study show that there are barriers to the social and economic integration of these former political prisoners. These former detainees are still marginalized by society even though there has been a ceasefire for two years in Sri Lanka. At the present time, the prisoners themselves have no means of removing the ethos of fear because of the presence of the military, the prevalent draconian security laws and political instability, leading to an increase in the feelings of victimhood among the prisoners. Such feelings are resulting in frustration against the state as scholars have found that "fear is the ... pivotal element... of ethnic warfare," (Horowitz, 2001; 558). If the fear is not

eliminated or reduced then there is the potential for the prisoners to riot or take up arms because "the violence of desperate people may not be well inhibited by fear," but "the recurrent fear of being swallowed by those who are more adept at manipulating the external environment points to the utter helplessness underpinning the violence of those who feel backward," (Horowitz 2001: 149 & 182). Therefore, it is essential that the factor of fear be eliminated or reduce in order for the peace-building process to be strengthened.

The finding that there are greater rates of unemployment within the detainee population when compared to the non-detainee population shows an economic disparity. This economic disparity interplays into the detainee psyche as an injustice and form of discrimination because they feel that the reason they cannot get a job is because of their former detainee status. Their status as former detainees is perceived as being the fault of the state. Therefore, continued unemployment ferments frustration against the state.

Gurr, in his work assessing risks for future ethnic wars states that economic discrimination and grievances prompt mobilization and mobilization leads to political action (Gurr, Ted: 2000; 229). In other words, "such perceptions of relative deprivation generate demands for a better deal which if not responded to leads to violence," (Brown, David: 1988; 52). At the time of writing, there are very little meaningful reintegration strategies to provide employment and/or skill development for these prisoners in Sri Lanka.

The poor levels of education within the political prisoner population, marginalizes the next generation. This is especially dangerous in Sri Lanka where education is highly valued and educational marginalization was one of the initial causes of war (Horowitz, Donald: 1985; 664). The distributive injustices of unemployment and education taken together increase the "collective fears of the future," and "collective fears of the future is most often the causal factor of intense conflict" (Lake & Rothchild: 1996; 41). There is also very little awareness of the issues of political prisoners for society to understand their needs.

This causes society to fear former political prisoners and marginalize them, creating a cyclical process where fear breeds fear, which could lead to violence. As found in this study the concept of fear is heightened in society because the former political prisoners have not been reintegrated.

As fear, economic and socio-cultural discrimination are causal factors of war,[21] this study concludes that unless the element of fear of government is removed, and unless economic disparity is mitigated and socio-cultural barriers are removed within this population, the causal factors of war will remain. Therefore the country will suffer serious trans-generational consequences and the consolidation of peace in the country will be slim.

In order for peace building to be effective, the peace-building prescription of the three concepts of justice – legal justice, reparatory justice and distributive justice must take place in the country. Reintegration of former political prisoners will be one building block of delivering these concepts of justice to society. Therefore, if these political prisoners are not reintegrated then a key element of peace building is missing and consolidation of peace will be threatened.

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The results of this study show that there are barriers to the social and economic integration of these former political prisoners. These former detainees are still marginalized by society even though there has been a ceasefire for two years in Sri Lanka