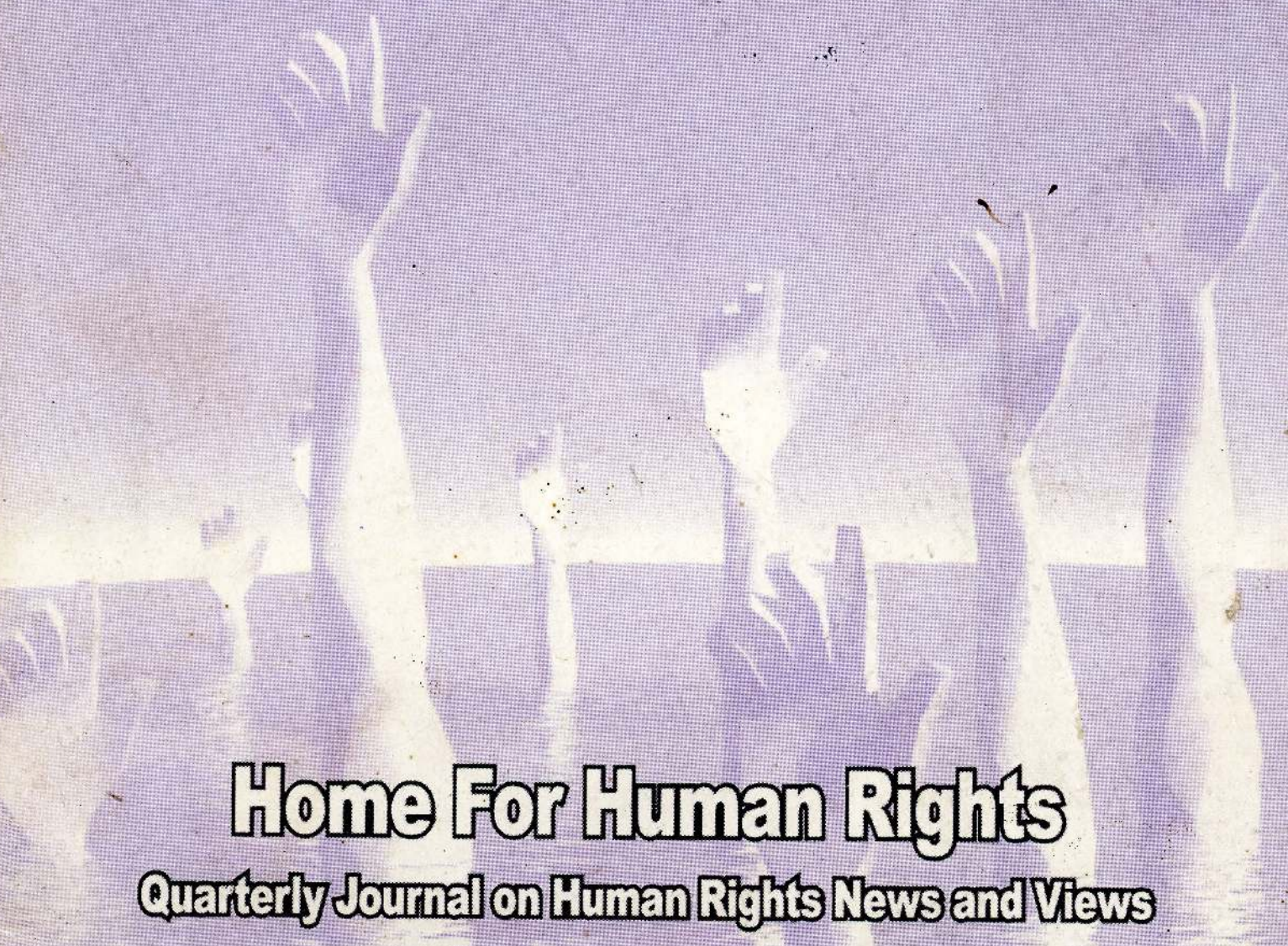
BEYOND THE WALL

April - June 2005



Home For Human Rights

Quarterly Journal on Human Rights News and Views

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.*

All correspondence should be addressed to:
Beyond The Wall, C/O Home for Human Rights
14, Pentreve Gardens, Colombo 3, Sri Lanka

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Home for Human Rights,
14, Pentreve Gardens,
Colombo 3, Sri Lanka

TRIBUTE

Dharmaretnam Sivaram (Taraki): He epitomized the freedom of expression

By I. Francis Xavier

The untimely death of Dharmaretnam Sivaram, renowned journalist of international repute, has caused great concern in Sri Lanka and overseas. He was abducted and murdered on Thursday 28 April 2005 in Colombo and his body was found in the High Security Zone within the precincts of the Sri Lankan Parliament.

Dharmaretnam Sivaram

On a personal level, I knew Sivaram from the mid-eighties. I recall meeting him with Mr. Fernando the brother-in-law of the late JVP leader, Rohana Wijeweera. Mr. Fernando was hiding in Chankanai, Jaffna as he was 'wanted' in connection with the JVP insurrection in the South. At the time, Sivaram together with the late Dr. Rajasundram and Mr. Eswaran, was actively involved in the Gandhian Movement. The movement helped settle many people who were internally displaced by the ethnic war.

In the late 80s I was once again able to renew my friendship with Sivaram, when he visited Geneva, Switzerland. We had a mutual friend at Rue De Laussane who was interested in the Palestinian struggle as well as the Sri Lankan ethnic conflict. I remember being a passive participant their nightlong and often, intense discussions on the struggle for freedom. I also reminisce how fascinating it was to listen to them discussing the intricate details and methodologies of a freedom struggle. Sivaram's vast knowledge ranged from the Palestine uprising and the Kurdish problem, to the struggle for independence in Burma. And of course, he was passionate about espousing the cause of the Tamils of Sri Lanka.

It was after the Indian Peace accord in 1987 that Sivaram came into the open from hiding. At the time, he was the political leader of PLOTE but later he took to journalism. In 2002 he became one of the editors of the journal, 'The Northeastern Herald'. It was during this time that I became close friends with him.

In our conversations I was the listener while he was the debater, having a storehouse of knowledge on almost every topic he spoke on. But his knowledge was not gained in the lecture halls of some prestigious University; instead it was earned from the University of life amidst the struggles and conflicts, poverty and adversity of the people. I remember when HHR conducted educational programmes in the hill country for the estate workers, Sivaram was often called upon as a resource person to speak on the social rights of the marginalized workers of the plantation sector – a task he fulfilled magnificently. With his thorough knowledge on the subject, he was able to enlighten his audience on the historical background of the misconceived theory of bonded labour of the plantation worker. In his view many of these workers were sadly, still working for the 'British Regiment'.

He had an in-depth knowledge of matters relating to the struggle of the Tamils and as a writer and journalist, endeavoured to share that knowledge with his readers. His experiences as a warrior enriched his analyses about the battlefront and earned him a prominent place among military journalists. He was also tremendously knowledgeable about the historical background of Batticaloa and the political dimensions of the conflict in the Eastern Province and many were the intellects, academics as well as ordinary people who were captivated by his analytical writings.

It maybe said that Sivaram had that rare combination of being a political analyst and commentator as well as also being an expert on the ancestry and anthropology of the Eastern Province. And though he condemned regionalism he wrote on the prestigious past of the East and the valour of the Batticaloa Tamils – a subject, no doubt, closest to his heart. His knowledge on the Kudi system, Mukkuwa clan, and Mukhuwa Law was also undisputable. In fact, he was paid a high tribute by Professors Mark Whitaker of the University of South Carolina and Patrician Lawrence of the University of Colorado when they said that Dharmaratnam Sivaram was the highest authority they had consulted on the early history of the Tamils.

Known in political circles as SR, he was committed to the Tamil struggle in both words and deeds. But he was an independent thinker and believed in the freedom of expression. Unafraid to castigate the LTTE he was equally vociferous in condemning the Sri Lankan Government for the military strategies of its Security Forces. In less than 24 hours before his death, in an article in the Daily Mirror, he criticized the craftiness of the JVP. He had also sent open letters to Karuna condemning him for his treacherous act that destroyed Tamil unity.

Now, after his death, there are many who speak about his journalistic talent and his analytical writings. But only few had the privilege to get to know his complex mind, to listen to him, and to share his worries and aspirations for the Tamil people. However, his best friends and admirers were Sri Lankan journalists particularly Sinhalese, with some of whom he spent his final moments. And though many of them did not agree with what he said, he and they insisted that they would defend the other's right to say and stand for what he or she believed in.

So through the untimely demise of Dharmaratnam Sivaram, the East has lost a genius, the Tamil struggle has lost a committed advocate and we have lost a friend who opened a window to the freedom of expression and the concept of unity amidst diversity in Sri Lanka.

Establishing the ICC: Historical success amidst doubt and fear

The International Criminal Court was established on July 17, 1998 by the United Nations General Assembly. After prolonged debates, discussions and consultations for an independent and effective international court that could prosecute and punish those who participate in genocide, war crimes and crimes against humanity, the International Criminal Court was finally promulgated. International Criminal Court is a separate legal entity from the United Nations and according to Article 4(1) of the Rome Statutes; The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its function and fulfillment of its purpose.

Ever since the creation of the League of Nations, there has been a strong move to establish a Criminal Court that would prosecute crimes covered under international human rights law. However, it could also be said that the inclination to persecute those who perpetrate crimes against peace and security, existed since about the century.[1] The first Hague Convention for Pacific Settlement of Disputes in 1899 initiated the contemporary idea to have an international court with jurisdiction to try war crimes. Then in the immediate aftermath of WWI there was an attempt to try the Emperor of Germany, Kaiser William, for crimes under the provisions of the Treaty of Versailles. This attempt failed because the Netherlands gave him sanctuary and refused to extradite him. The League of Nation also failed to work out an effective remedy to try war crimes and its attempt to model an international criminal court failed to materialize.

Following the end of WWII, the Allied Powers adopted the London Charter to set up the international military tribunal at Nuremburg. The Nuremburg Tribunal had no geographical limitation and provided a forum for the prosecution of major war criminals. At the same time another tribunal was set up in Tokyo to try war criminals in the Far East. These two tribunals were ad hoc in nature and set up to persecute specific war criminals, who had committed specific crimes in specific periods. In strict terms, the tribunals did not amount to an International Criminal Court.

In 1947 the UN General Assembly set up an International Law Commission with authority to formulate a draft code under international law to prosecute offences against peace or the security of people and to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crime".[2] In 1950, relying on the resolution and recommendation of the International Law Commission, the General Assembly established an International Committee on International Criminal Jurisdiction to prepare a proposal for an International Court. The Law Committee prepared a statute but unfortunately due to variance of opinion on the definition of aggression, this was a failure.

During the Cold War years, due to conflict and confrontation between the great powers, the idea of establishing an International Criminal Court was kept in abeyance. Only in 1982, the International Law Commission re-mobilized for the establishment of an International Criminal Court. The reason for this rethinking maybe attributed to the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973. Again in 1989 there was an attempt by Latin American States to establish an International Criminal Court mainly to punish narcotic and drug related offences. But because of the non-cooperative attitude of the Western Powers, this too failed to materialize.

The hesitation to implement the proposals for establishing the International Criminal Court was based on the reluctance of many States to compromise their "national sovereignty" and also the predominance of domestic criminal law within the Nation State.

Nonetheless, the General Assembly urged the International Law Commission to continue its work on this topic. It maybe said that the hesitation to implement the proposals for establishing the International Criminal Court was based on the reluctance of many States to compromise their "national sovereignty" and also the predominance of domestic criminal law within the Nation State.

Finally, world events in the nineties changed this negative attitude. That is, the horrors reported from Yugoslavia as well as the mass killings, 'ethnic cleansing' and genocide in Rwanda and Kampuchea gave an impetus for rethinking the necessity of a permanent International Criminal Court. And in 1993, the Security Council decided that an International Tribunal should be established.[3] Hence after establishing an International Tribunals for former Yugoslavia and Rwanda, the General Assembly took steps to form an ad hoc committee to review the whole issue of establishing a permanent International Criminal Court. It recommended a preparatory committee open to all UN members with a mandate to draft a statute text, which could be discussed among the member States.

The preparatory committee held several sessions and produced its final draft in 1998. The conference was held in Rome from June 15 to July 17 that year – and though there were intricate maneuvers by many states, particularly India and the United States to soft peddle the issue – the conference ended in historic success with the establishment of the International Criminal Court (ICC).

Jurisdiction

Part two (Article 5) of the ICC Statutes, deals with the jurisdiction of the Court. Accordingly, the relevant sections states as follows:

1) The Jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes.

a) The crime of genocide;
b) Crimes against humanity;
c) War crimes;
d) The Crime of aggression.

2) The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Articles 6 to 8 extensively deal with the definitions of the crimes of genocide, crime against humanity and war crimes. The preamble of the Statute explains the basic principles and purpose of the Rome Statute.

The philosophy underlying the Statutes of the International Criminal Court is to confer upon the Court, jurisdiction over the most severe crimes of all individuals and the international community. The drafters took this attitude to give the Statues a broad acceptance with the idea to enhance its credibility and moral authority. The three crimes that Court will have jurisdiction over are genocide, crime against humanity and war crimes. The Statute also envisioned the addition of another crime – the crime of Aggression. This however was not included in the Statute because of differing opinion of some member states. Discussions on what amounts to aggression, is continuing among the preparatory commission that meets periodically in New York.

A notable feature in the ICC Statute is the inclusion of the elements of the crime. Though the ICC Statute contained detailed definition of the crimes, the drafters were forced to define the elements of the crime to appease certain states who insisted that the definitions were not precise. Particularly, the United States was of the view that the definitions were not adequately precise to meet the principles of legality. Accordingly, the US felt that an element-by-element list of what the prosecutor must prove was required.[1] Therefore the draft document known as the elements of the crime was adopted by consent on June 30, 2000 in the ICC preparatory commission. In a way, by the adoption of the elements of the crime, certain inconsistencies in structure and terminology were eliminated, while further enhancing an opportunity to obtain universal agreement on the definition of 'crime'.

Trigger Mechanism

The trigger mechanism is one of the most important areas of the ICC Statutes and is dealt with in Article 13 as follows:

Article 13

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:

a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State party in accordance with Article 14;

b) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

Also Article 14 states that:

1. A State party may refer to the prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring to the situation.

Thus it may be seen that Article 14 deals with situations that can come before the Court for investigation and prosecution and the mechanisms in which such matters maybe investigated are (i) referrals by state parties, (ii) referral by the Security Council and (iii) investigation initiated by the prosecutor himself. Though (i) and (ii) were acceptable, the third mechanism, investigation and prosecution by the prosecutor, met with severe opposition. That is, many states did not appreciate the independent role conferred upon the prosecutor. However this proposal was actively promoted by Non-governmental Organisations and developed in the preparatory meeting for two reasons: (a) There was concern that the interstate complaint mechanism would not function effectively and (b) there was a fear that the Security Council could become paralyzed and unable to refer matters to the ICC because of the Veto powers of its member states.[2]

Complimentarity

Another feature of the ICC Statute was the principle of complimentarity. According to the Statutes, the ICC is intended to act as a complement to the exercise of jurisdiction by individual states, which have a duty and obligation to take effective action against perpetrators of the serious crimes defined in the statutes.

Thus according to the preamble to the Rome Statutes:

"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."

In the Rome Statute this principle is covered in Articles 17 to 19. According to Article 17;

"1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

c) The person concerned has already been tried for conduct

which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice;

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

Article 19 deals with the challenges to the jurisdiction of the Court or the admissibility of a case as follows:

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17.

2. Challenges to the admissibility of a case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court may be made by:

a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58;

b) A State which has jurisdiction over a case, on the ground that it is investigation or prosecuting the case or has investigated or prosecuted; or

c) A State from which acceptance of jurisdiction is required under Article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under Article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on Article 17, paragraph 1 ©.

5. A State referred to in paragraph 2 (b) and (c) shall make challenges at the earliest opportunity.

6. Prior to the confirmation of the changes to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-trial Chamber. After confirmation of the charges they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with Article 82.

7. If a challenge is made by a State referred to paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

a) To pursue necessary investigative steps of the kind referred to in Article 18, paragraph 6;

b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the prosecutor has already requested a warrant of arrest under article 58.

9. Making of a challenge shall not affect the validity of any act performed by the prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under Article 17, the prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen, which negates the basis on which the case had previously been found inadmissible under Article 17.

11. If the prosecutor, having regard to the matters referred to in Article 17, defers an investigation, the prosecutor may request that the relevant State make available to the prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place."

According to Customary International Law, universal jurisdiction is available with regard to many of the crimes included in the Rome Statutes but member states have most of the time been reluctant to exercise it.[3] The criteria for the ICC to take up

A notable feature in the ICC Statute is the inclusion of the elements of the crime. Though the ICC Statute contained detailed definition of the crimes, the drafters were forced to define the elements of the crime to appease certain states who insisted that the definitions were not precise.

these crimes was because states often failed to act in good faith. Furthermore, there was also an unwillingness and/or inability on the part of the state in question to investigate and prosecute. However, Article 17 (2) makes it clear that at least one of the criteria in the section must be present.

The principle of complimentarity as evidenced by the Rome Statutes was much criticized by many states including the United States. The underlying reasoning was that this principle was seen to contravene the sovereignty of states as well as interfering with the investigation and prosecution by the national states.

The Rome statute gave adequate protection to calm these fears. In the case of investigation by the prosecutor, the prosecutor must determine that there is predominantly a sound basis for initiating the inquiry and investigation. Then the prosecutor must get the authority from the Pre-trial Chamber. Article 15 of Statutes also mentions that the Pre-trial Chamber must decide there is a prima face case that falls within the jurisdiction of the Court.

Another safeguard is contained in Article 18, which creates a mechanism where the states that could have jurisdiction must be notified of a pending investigation. Then the state could request the prosecutor to defer investigation on the basis that it intends to investigate the crime.

Therefore, there is little doubt that the Rome Statute if implemented with good intention will serve humanity at large.**(IFX)**

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End Notes

1 In Naples Italy, there was the trial of Von Hagen Bach for tampering with the laws of God and man. See "International law as applied by International Court," Schwarernberg 1965.

2 Establishment of an International Law Commission by G A Resolution 174(11) UNDOC A 519 (1947).

3 Definition of crime (article) by Daniel Robinson, Department of Foreign Affairs.

4 Article by John Holmes (Department of Foreign Affairs) and the International Criminal Courts Trigger Mechanism Complementarity and lecture series Jan. 20. 2002 at York University Toronto.

5 See Follow up to Rome by William A Schabas, Human Rights Law Journal 1999.

Whither justice for the victims of Bindunuwewa?

• A Statement by the Asian Human Rights Commission

On 25 October 2000, more than 25 young Tamils at a rehabilitation centre in Bindunuwewa near Bandarawela in the south-central part of the island were attacked and killed by a Sinhalese group. Who were the actual culprits? Who were their masterminds? To these questions Sri Lanka's justice system has no answers.

Likewise, after nearly five years the survivors of this massacre and the relatives of the dead are still left with these questions unanswered. This most horrendous act of killing young people, who were in a rehabilitation centre, which was under the protection of the Sri Lankan government, has proved only one thing; that the Sri Lankan system of justice is guilty of ensuring immunity for offenders.

Forty-one persons were charged with participating in the massacre. However, the Sri Lankan courts have gradually acquitted all these persons on the basis that there was no evidence to convict them. The last of these acquittals came on 27 May 2005 when the Supreme Court acquitted the remaining accused on the basis that the evidence against them lacked merit.

That the massacre took place killing 27 detainees and injuring 14 others is not in doubt. That the modes of killing were so ugly and cruel is also not in doubt. That the Sri Lankan government was responsible for the protection of these detainees is also well established. However, just who the actual perpetrators of this heinous crime were, the Sri Lankan justice system has been unable to resolve. Was this deliberate, or was it merely a case of negligence and incompetence on the part of investigating officers? Perhaps this will also never be known. However, that the Sri Lankan State is responsible for the failure to provide justice in this instance is blatantly clear.

The primary responsibility for this failure lies with the Sri Lankan police who had the legal responsibility to investigate into this matter and to provide all evidence that was necessary to secure a successful conviction. Obviously the investigators failed in their task. Will there be an investigation into the failure to conduct proper investigations by the police? Given the magnitude of the crime, such an investigation is imperative. Who will initiate such an investigation? The obligation lies with the Inspector General of Police and with the government itself. The failure to properly investigate such a massacre is a serious breach of trust by the police service in Sri Lanka. If the Inspector General of Police and the government do not conduct a thorough investigation into the issue, significant credibility will be lost in regards to the policing system as well as the Sri Lankan government's claims to ensure justice and respect for human rights.

This most horrendous act of killing young people, who were in a rehabilitation centre, which was under the protection of the Sri Lankan government, has proved only one thing; that the Sri Lankan system of justice is guilty of ensuring immunity for offenders.

There is clearly also a failure on the part of the prosecutors in Sri Lanka; a failure that lies with the Attorney General's Department itself. The department should not have filed indictments against persons if they did not have sufficient evidence to prove a case successfully before a court. To the accused, it is a great injustice to bring them before a court without sufficient evidence. To the survivors of the massacre and the relatives of the dead, such prosecutions amount to deception. And for the public, who would have wanted justice, this is also a betrayal of their trust.

When viewing this case, it is not surprising to learn that there is only a 4% success rate for prosecutions in the country. The judges, the prosecutors and the government have deliberated over and over on this fact. However, how can there be successful prosecution without a criminal investigation system that is able to conduct professional and thorough inquiries before proceeding to court? Further, how can there be successful prosecutions without a prosecuting system that thoroughly measures the evidence before prosecutions are filed? The reason for the low rate of success for convictions is thus the defective police investigation system and the prosecution system themselves.

There is a lobby in Sri Lanka that protests continuously for victim's rights. Leading judges, prosecutors and also high-ranking policemen are constantly talking about victim's rights. Yet, where are the victim's rights in the case of the Bindunuwewa massacre? Are not these victims the same as victims of any other crime? Is it not hypocritical on the part of this lobby if they do not question the denial of victim's rights to the victims of this massacre?

Some Tamils might say that the massacre, as well as the failure to conduct a proper investigation, is part of a scheme to deny justice to them. However, the truth is that in present day Sri Lanka, justice is denied to almost everyone. This massacre was not the first of its kind, and it will certainly not be the last. Where, when and for what purpose other massacres will happen remains unknown. But they will happen and there is little in the Sri Lankan legal system to suggest that they will be dealt with any more competently than the Bindunuwewa episode. At present Sri Lanka has neither the capacity to properly investigate such crimes, or to prevent them. Indeed, justice in Sri Lanka is in deep peril.

If there is hope in these circumstances it lies with the people. It is time to condemn and to revolt against a system of misadministration of justice that is destroying the capacity of Sri Lanka to survive as a decent society. It is the people who can bring to trial the criminal investigation and prosecution system in the country. If the people fail to intervene to save their system of justice, Sri Lankan society is destined to join those other nations, who have already lost their capacity to survive.

Sri Lanka refuses to comply with UNHRC decision; invokes domestic laws in defence

In the last issue of Beyond The Wall, the ruling of the Human Rights Committee of the High Commission for Human Rights,Geneva (UNHCHR) on the case of Nallaratnam Singarasa was highlighted. Today we publish the Government's reply to the recommendations of the UN Human Rights Committee.

Response of the Government of Sri Lanka in respect of decisions of the UN Human Rights Committee in Communication Nos. 1033/2001, 950/2000 and 909/2000.

General:

As a re-affirmation of its commitment towards the promotion and protection of human rights, Sri Lanka acceded to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) in October 1997, despite challenging circumstances posed by terrorism. However, the Government of Sri Lanka has noted with concern that several recent decisions made by the Human Rights Committee with regard to certain communications received from individuals claiming to be victims of violations of human rights, have been taken

without paying due attention to the Constitutional provisions and the prevailing legal regime in Sri Lanka. In order to maintain the confidence of Governments it is imperative that the Committee give due weightage to the above factors and also ensure that the process to which the Government has made a commitment in good faith is not abused by interested parties for their own ends.

Communications:

(1) In the communication filed by Mr. Nallaratnam Singarasa (Communication No. 1033/2001), the Committee found that the State Party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation.

The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convicted person after his conviction is affirmed by the highest appellate court, the Supreme Court of Sri Lanka. Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The Government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka. However, with a view to complying with the decision of the Human Rights Committee, the concerned legal authorities of Sri Lanka could recommend to the President of Sri Lanka, the exercise of the sovereign power for the grant of a pardon by virtue of powers vested in her under Article 34 of the Constitution of Sri Lanka. It must be appreciated however that the question of the grant of pardon is a matter of unfettered sovereign discretion for the President of Sri Lanka. In exercising the above power, the Constitution only empowers the President to grant a pardon or respite of the sentence but does not empower the President to revoke a conviction passed by a competent court.

Since Mr. Singarasa's conviction of serious criminal charges, such as murder of innocent civilians including Buddhist monks by the High Court, has been upheld by the Court of Appeal and the Supreme Court of Sri Lanka, it is not possible under the laws of Sri Lanka for the State to pay compensation to a person convicted in criminal proceeding. Any attempt to do so would tantamount to an interference of the independence of the judiciary.

2) In the communication filed by Mr. Jegathiswara Sarma, (Communication No. 950/2000), the Committee found that the States Party is under an obligation to provide the author and his family with an effective remedy, including effective investigation into the disappearance of the authors son, and adequate compensation for the violations suffered by the author's son, the author and his family. The criminal proceedings against the accused charged for the abduction of the author's son is pending before the High Court of Trincomalee. The Attorney-General has on behalf of the Government of Sri Lanka informed the court to expedite the trial. The Government of Sri Lanka will thereafter refer the case to the Human Rights Commission of Sri Lanka to make recommendations on the question of payment of compensation including the determination of the quantum of such compensation.

(3) In the he communication filed by Mr. Victor Ivan (Communication No. 909/2000) the Committee has found that the State Party is under an obligation provide an effective remedy including payment of compensation to Mr. Ivan. The Government of Sri Lanka will refer the case to the Human Rights Commission of Sri Lanka to make recommendations on the question of payment of compensation, including the determination of the quantum of such compensation.

The State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The Government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka

Prevention of Terrorism Act

The Government of Sri Lanka has also noted the reference that has been made to the Prevention of Terrorism Act (PTA) in the above quoted decisions of the Human Rights Committee and wishes to clarify to the Committee that the PTA was introduced only as temporary legislation due to the extraordinary security situation that prevailed in the country, with a view to preventing acts of terrorism and other unlawful activities, which caused tremendous destruction to human life and property in the last two decades in Sri Lanka.

Under the provisions of the PTA, if a suspect is detained under a detention order section 9(1), such a person should be produced before a Magistrate not later than 72 hours from the time of the arrest. However, a person can only be detained in police remand custody for a maximum period of 18 months, during which investigations relating to the suspect must be concluded.

After the signing of the Memorandum of Understanding (MOU) between the Government of Sri Lanka and the LTTE in February 2002, all criminal investigation or arrests are carried out under the normal law of the land, which is the Criminal Procedure and not under the PTA.

Since the singing of the MOU, approximately 1000 Indictments of the PTA detainees have been withdrawn. In addition, 338 persons who were in detention pending charges were discharged at the end of 2003. As of January 2004, there are 62 cases pending in the Special High Court, established with a view to expediting such trails. These cases were filed before the MOU was signed and were not withdrawn by the Attorney-General due to the seriousness of the offence.

Sri Lanka must comply with its treaty obligations

The following are comments submitted in response to the Sri Lankan State's submissions of 2 February 2005 in respect of the decision of the UN Human Rights Committee in the cases of Singarasa v. Sri Lanka, Communication No. 1033/2001 and Sarma v. Sri Lanka, Communication No. 950/2000.

The Applicants, Mr. Jegatheeswara Sarma and Mr. Nallaratnam Singarasa, respectively, are assisted in this communication by Mr. Velupillai Sittampalam Ganesalingam, Legal Director of Home for Human Rights, 14, Pentrive Gardens, Colombo 03, Sri Lanka and INTERIGHTS Lancaster House, 33, Islington High Street, London N1 9LH, United Kingdom. All communication should be directed to Mr. Ganesalingam, Home for Human Rights, 14, Pentrive Gardens, Colombo 03, Sri Lanka.

Singarasa v. Sri Lanka, Communication No. 1033/2001

1. The government's response wholly fails to reflect the appropriate relationship between domestic and international legal obligations. It is a primordial principle of international law that a state cannot rely upon its domestic legal order as an excuse for non fulfilment of its international obligations, including under the ICCPR (see e.g. article 27 Vienna Convention on the Law of Treaties; Human Rights Committee General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 4).

2. Part of the obligations assumed by the State on ratifying the ICCPR is to ensure that effective remedies are available under domestic law. The lack of such provision in national law cannot be relied upon as a basis for not implementing the Committee's decision. The Applicant's conviction was so fundamentally unreliable and itself a violation of his rights that the only appropriate remedy is, as the Committee has noted, release or retrial. The State is already afforded some discretion to determine how best to give effect to this obligation, but there can be no doubt that it should give effect to it, and adopt any legal or other measures that may be required to enable it to do so.

Part of the obligations assumed by the State on ratifying the ICCPR is to ensure that effective remedies are available under domestic law. The lack of such provision in national law cannot be relied upon as a basis for not implementing the Committee's decision.

3. Contrary to the government's suggestion, it is hardly an interference with the independence of the judiciary to take steps, including granting compensation, when the judiciary violates human rights. To find otherwise is to shield the judiciary from the oversight of the ICCPR and its protective mechanisms, which would be antithetical to the purposes of the Covenant.

4. This position finds support in the General Comment on article 2 adopted on 29.03.2004, which provides:

"All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2 paragraph 2, allows State Parties to give effect to Covenant Rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."

5. Furthermore, the Applicant contests the assertion that there is no constitutional authority to implement the decision by reference to article 27(15) of the Sri Lankan Constitution, providing that the State "endeavour to foster respect for international law and treaty obligations in dealing among nations." Justice Mark Fernando in interpreting this article in Weerawansa v. Attorney General and others [(2001) 1 Sri LR 409)] noted that:

"Article 27 (15) requires the State to "endeavor to foster respect for the international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes."

Even if it were accepted that there are no specific provisions under the prevailing legal system to give effect to the

recommendations of the Committee, under article 2(2) of the ICCPR the State Party clearly has a treaty obligation to adopt such laws or other measures as may be necessary to give effect to the rights in question.

Recommending a Presidential pardon cannot substitute for the provision of an effective remedy. As the Committee has noted: "With respect to the State Party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee reiterates its previous jurisprudence that such pardons constitute an extraordinary remedy and as such are not an effective remedy for the purposes of article 5, paragraph 2(b) of the Optional Protocol"(emphasis added).

Sri Lanka — Communication No. (CCPR/C/81/D/1033/2001) [2004] UNHRC 42 (23 August 2004), para 6.4; see also Saint Vincent and the Grenadines — Communication No. (CCPR/C/70/D/806/1998) [2000] UNHRC 35 (5 December 2000), para 8.2 "The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case."

It is submitted that the State must ensure the remedy advanced is capable, and has the effect, of setting aside the conviction, which, in the circumstances of the present case, cannot be allowed to stand as a matter of law.

6. The fact that domestic law does not provide specifically for compensation to be made to 'a person convicted' is irrelevant. Such compensation is due to the Applicant as a person whose rights have been violated. As noted above, the State is obliged to be in a position to pay such compensation, as part of its broader obligations to provide a remedy under article 2(3).

7. Finally, in light of the government's statement concerning measures adopted to respond to the 'circumstances posed by terrorism,' it is worth noting that the rule of law does not cede to the challenge of terrorism, as has been repeatedly reiterated in recent years by, among others, the Security Council, General Assembly and the Committee itself.

Security Council Resolution 1456 (2003), adopted by the Security Council at its 4688th meeting, S/RES/1456 (2003), 20 January 2003, para 6; General Assembly Resolution 58/187, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/RES/58/185, 22 March 2004; General Assembly Resolution 57/219, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/RES/57/219, 27 February 2003; Secretary-General Kofi Annan, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, SG/SM/9757); Concluding Observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY (2002), para. 6.

In light of the government's statement concerning measures adopted to respond to the 'circumstances posed by terrorism,' it is worth noting that the rule of law does not cede to the challenge of terrorism, as has been repeatedly reiterated in recent years by, among others, the

8. While not material to the issue at hand, the Applicant wishes to note that the government's statement that the Applicant was convicted of serious criminal charges including murder of innocent civilians including Buddhist monks is factually incorrect. The complaint to the Committee concerned his indictment in case No. 6825/94 — on 30 September 1994, together with several other named persons and persons unknown — on five counts. These covered charges of having conspired by unlawful means to overthrow the lawfully constituted government of Sri Lanka [under section 23(a) of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988] and having attacked four army camps (at Jaffna Fort, Palaly, Kankesanthurai and Elephant Pass, respectively, with a view to achieving the objective set out in count one, under section 2(2)(ii), read together with section 2(1)(c), of the PTA). Likewise, in another two cases, which were withdrawn by the government, he was not charged for attack on the civilians or on Buddhist monks.

9. In relation to the Prevention of Terrorism Act, while the government refers to the fact that it was introduced as 'temporary legislation', it is recalled that it was subsequently converted into permanent law applicable to the country as a whole and at all times, as explained in the Applicant's submissions in the Singarasa case.

See "Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, certified on 20.07.1979, Section 29 of which provides that this Act shall be in operation for a period of 3 years from the date of its commencement. Section 29 was then, through Act No. 10 of 1982 (certified on 15.03.1982), made part of the permanent law of the country.)

Despite the government's statements in respect of the Memorandum of Understanding and measures taken pursuant thereto, it is noted that the Prevention of Terrorism has not been formally rescinded and measures taken thereunder have not been fully revoked. In this respect the Committee is referred not only to its findings in relation to the incompatibility of Section 16 of the PTA with the right to fair trial in the present case, but also to the Committee's 4th periodic report in relation to Sri Lanka:

"The Committee is concerned that the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (arts. 4, 9 and 14) ... The Committee is also concerned that the continued existence of the PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sect. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sect. 9). There is no legal obligation on the State to inform the detainee of the reasons for the arrest; moreover, the lawfulness of a detention order issued by the Minister of Defence cannot be challenged in court. The PTA also eliminates the power of the judge to order bail or impose a suspended sentence, and places the burden of proof on the accused that a confession was obtained under duress. The

Committee is concerned that such provisions, incompatible with the Covenant, still remain legally enforceable, and that it is envisaged that they might also be incorporated into the Prevention of Organized Crimes Bill 2003." (Report of the Human Rights Committee to the Fifty Ninth session of the General Assembly, A/59/40 (Vol. I).

The Applicant also notes that, despite the government's assertion in relation to the release of detainees many have, in fact, been indicted on the same charges since the Memorandum of Understanding took effect.

10. The Committee is urged to follow up with the State to ensure that the Applicant is released or retried in accordance with the Covenant and the Committee's decision. It is asked to liaise with the State to verify the doubtful assertion that 1,000 cases filed under the PTA having been withdrawn and that 388 persons have been discharged. It is asked to urge the State to revoke the Act or make its provisions fully compatible with the Covenant.

Sarma v. Sri Lanka, Communication No. 950/2000

In respect of the State Party's contentions as to the 'prevailing legal regime' and the challenge of terrorism in Sri Lanka, the Committee is referred to the comments submitted above.

The State Party has failed to explain its failure to provide the Applicant and his family with an effective remedy and to conduct a thorough and effective investigation into the disappearance of the Applicant's son. It has furnished the author with no information resulting from the investigations it purports to have carried out. The Applicant in his submissions had named the army personnel who were on duty during the roundup and arrest of his son, the names and addresses of those army personnel who were on duty at the Plantain Point Camp where the author's son was detained thereafter, and the names of civilians who could testify to the arrest and subsequent detention (as reproduced in the views of the Committee at page 5). However, the State Party has as yet failed to indicate to the Committee or the Applicant, whether those named were called for investigations.

The government refers to the case against Corporal Sarath in the High Court of Trincomalee. The Applicant notes that this case is only one (albeit significant) part of the broader investigation required. Even in respect of this case, however, of the eight persons who were highlighted by the Applicant as material witnesses, the Hon. Attorney General has cited only two of them — the Applicant and a Mr. Krishnapillai. As stated in the submissions of the author, the evidence of others, including Santhiya Croos and P. Naminathan who have seen the author's son subsequent to the arrest, have still not been taken. This could only lead to the conclusion that the State Party has not concerned itself to investigate and prosecute the case thoroughly and satisfactorily.

The case against Corporal Sarath in the High Court of Trincomalee has been pending for the last three years without the State Party taking any interest to prosecute. While the statement by the State Party that the Attorney General has informed the court to expedite the trial, is welcomed, it is noted that there is nothing in the case brief to indicate that any such request has been received by the court, still less acted upon.

There is a clear recommendation of the Committee that the State Party should provide adequate compensation for the violation suffered by the Applicant's son, the Applicant and his family. Regrettably, the government in its response has not accepted that such compensation should be paid.

The compensation, which the Committee recommends, relates to violations by the State, in respect of which redress is long overdue. It is therefore not accepted as reasonable or appropriate that the State Party defers consideration of compensation until a future uncertain date, such as the conclusion of criminal proceedings. This is particularly so where delays to date suggest that, regrettably, this may result in avoidance of the issues of compensation by the State altogether.

The State Party has failed to explain its failure to provide the Applicant and his family with an effective remedy and to conduct a thorough and effective investigation into the disappearance of the Applicant's son. It has furnished the author with no information resulting from the investigations it purports to have carried out.

It is submitted that the State Party has failed to give effect to the decision of the Committee in that it has:

a) Failed to investigate all those responsible even though their particulars were made available by the Applicant to the State Party;

b) Failed to trace and interview the potential witnesses whose names and addresses were disclosed to the State Party and whose evidence could cast light as to the whereabouts of the author's son, and failed to cite them as witnesses for the prosecution in the case against Corporal Sarath;

c) Failed to pay compensation, deferring consideration of the payment of compensation to the conclusion of the said trial, which, in light of experience, is likely to lead to further inordinate delays if it does not lead to the question of compensation being deferred indefinitely.

In conclusion, the State Party's current response represents both a misunderstanding of international obligations and/or a failure to take those obligations and the role of this Committee seriously.

The State Party should be urged to demonstrate the genuineness of the good faith it professes, and to give meaningful effect to its commitment to respect for human rights, by implementing the Committee's decision without delay. The Committee is urged to follow up with the State Party to ensure that its decision is implemented fully and promptly.

Respectfully submitted on the Applicant's behalf,

Helen Duffy

Legal Director (INTERIGHTS)

11 April 2005

If treaties were signed, respect them

By V.S. Ganesalingam, Home for Human Rights

Responding to the decision of the UN Human Rights Committee, in three of the individual Communications submitted by three Sri Lankan citizens under the Optional Protocol of the ICCPR, the government of Sri Lanka charged that: "several recent decisions made by the Human Rights Committee with regard to certain Communications received from individuals claiming to be victims of violations of human rights have been taken without paying due attention to the constitutional provisions and the prevailing legal regime in Sri Lanka." The State has thus made it understood that it would not be giving effect to the Committee's views.

Since the Optional Protocol to the ICCPR entered into force for Sri Lanka on 3 January 1998, 13 individual Communications were found admissible by the Human Rights Committee, which has published its decisions (referred to as Views) in 5 Communications.

In Communication No. 916/2000 – the Jayalath Jayawardena case — the author alleged that publication and dissemination of statements made by the Head of the State acting under immunity, put his life at great risk and the failure of the State to protect his life resulted in a violation of the author's right to security of person. Accordingly, the Committee held that the State Party had violated article 9(1) of the Covenant.

In Communication No. 909/2000 – the Victor Ivan case – the Committee found that the pending nature of three indictments for criminal defamation, served on the editor of 'Ravaya' newspaper, for several years was in violation of article 14 paragraph 3(c) of the Covenant viz. the right to be tried without delay. Also regarding the nature of the author's profession and other circumstances, the indictments for criminal defamation for several years, left the author in a situation of uncertainty and intimidation and had a chilling effect on his rights to freedom of expression. Thus a violation of article 9 read with article 2(3) was also found.

Communication No. 950/2000 – the Jegatheeswara Sarma case — was filed by the father of a person who disappeared at the hands of the Army. The Committee while rejecting the argument that abduction was an independent act of an army corporal held that the government is responsible for the disappearance and found a violation of the rights to liberty, security and freedom from arrest (article 9) in respect of the son and also a violation of article 7 in respect of both the victim and his parents.

In Communication No. 1033/2001 – the Nallaratnam Singarasa case – the author is currently serving a jail sentence of 35 after being convicted solely on the basis of a confession alleged to have been made under torture while in custody. Here, the Committee found a violation of article 14 (3)(g), read together with article 2(3), and article 7. What is significant in Singarasa's case is that the Committee directed the government of Sri Lanka to amend the sections of the Prevention of Terrorism Act (PTA) that were incompatible with the guarantees of fair trial under the Covenant and also directed that the author be either retried or released with compensation.

Finally in Communication No. 1189/2003, the author Anthony Michael Fernando had been summarily convicted of contempt of court by Sri Lanka's Supreme Court and sentenced to one year's "rigorous imprisonment". The Committee concluded that the author's detention was arbitrary, in violation of article 9(1) of the Covenant. Also that in accordance with article 2(3) the State Party was obligated to provide the author with an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future.

What is significant in Singarasa's case is that the Committee directed the government of Sri Lanka to amend the sections of the Prevention of Terrorism Act (PTA) that were incompatible with the guarantees of fair trial under the Covenant and also directed that the author be either retried or released with compensation.

Response of Sri Lanka

The response of the Sri Lanka to the decisions of the Committee in the aforementioned Communications contradicts the often-repeated commitment of the State to respect and ensure the rights recognized in the international human rights Covenants in respect to all subject to its jurisdiction. More recently the Minister of Foreign Affairs in his address at the 61st session of UN Commission on Human Rights reaffirmed Sri Lanka's commitment to respect UN efforts to protect and promote human rights. He particularly referred to the fact that keeping in line with constitutional and international

obligations Sri Lanka is a party to seventeen international human rights instruments including all seven major human rights conventions and treaties.

The response of Sri Lanka also questions the competence of the Committee and quality of its decisions. However article 28 of the ICCPR requires that the members of the Human Rights Committee,

"shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience." And they serve in their personal capacity.

In its 25 years of existence, the Committee has made important contributions to the interpretation of the substantive provisions of ICCPR, and its views on individual Communications can truly be termed as international human rights jurisprudence. It is also well accepted that of the four existing complaint procedures, the one under the Optional Protocol of the ICCPR has become by far the best established and also the most authoritative. The decisions of the Committee and the knowledge of its members of national legal systems have earned international respect; and its highly valued views are now being referred to as ratio decidendi in judgments of national tribunals. For instance, the Supreme Court of Zimbabwe and the judicial committee of the Privy Council did so in 1993 on issues relating to the execution of capital punishment.

In responding to the recommendations of the Committee in Singarasa's case that the government of Sri Lanka is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial with compensation, and that Sri Lanka should ensure that the impugned section of PTA are made compatible with the provisions of the Covenant, the government states as follows;

"The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convicted person after his conviction is affirmed by the highest appellate court, the Supreme Court of Sri Lanka.

Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trail. The government of Sri Lanka cannot be expected to act in any manner, which is contrary to the Constitution of Sri Lanka.

However, with a view to complying with the decision of the Human Rights Committee, the concerned legal authorities of Sri Lanka could recommend to the President of Sri Lanka, the exercise of the sovereign power for the grant of a pardon by virtue of powers vested in her under Article 34 of the Constitution of Sri Lanka. It must be appreciated however that the question of the grant of pardon is a matter of unfettered sovereign discretion of the President of Sri Lanka.

In exercising the above power, the Constitution only empowers the President to grant a pardon of respite of the sentence but does not empower the President to revoke a conviction passed by a competent court."

Binding nature of international treaties

This position reflects some fundamental misconceptions of the State about the nature of international law in the domestic legal system and obligations flowing from it. The argument that the State does not have the authority to execute the decision of the Committee is untenable and contrary to the principle articulated in the Constitution of Sri Lanka and in the Vienna Convention on the Law of Treaties. If a State signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for violation. Mere talk of rights and formal ratification of international agreements has little meaning. Instead, rights are given meaning only when they are implemented locally.

The argument that the State does not have the authority to execute the decision of the Committee is untenable and contrary to the principle articulated in the Constitution of Sri Lanka and in the Vienna Convention on the Law of Treaties.

Sri Lanka is not only a party to the ICCPR but has also accepted the competence of the Committee under it. In so doing, the State made a declaration that it;

"...recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date."

After having made this solemn declaration, subsequently retracting from the obligations flowing therefrom amounts to a violation by the State of Sri Lanka of the principle articulated in article 26 of the Vienna Convention on the Law of Treaties that requires the State Parties to give effect to the obligations under the Covenant in good faith.

The binding nature of international treaty obligations is now well settled. The obligation of the State Parties towards individuals arises from the fact that individuals are rights-holders under the Covenant. Under article 2(1) each State Party undertakes to respect and to ensure to those under its jurisdiction the rights recognized by the Covenant without discrimination and article 2(2) provides for the practical implementation of human rights. It states that if there is no provision in the existing legal system to fulfil the above obligation, the States undertake to adopt laws and other measures necessary to give effect and (c) to provide effective remedy in the event of violation. This flows directly from the principle contained in article 27 of the Vienna Convention on the Laws of Treaties, according to which a State Party 'may not invoke the provisions of its internal laws as justification for its failure to perform a treaty'. Therefore if the prevailing legal regime does not provide the State to give effect to the

recommendations, article 2(2) of the ICCPR requires Sri Lanka to adopt such laws and measure with its constitutional process to give effect to the recommendation.

If the considered view of Sri Lanka is that a decision affirmed by the highest appellate court, the Supreme Court of Sri Lanka, is final and unalterable by the decision of the Committee, it could well have made a reservation to that effect at the time of ratifying the Covenant. This is a concession given to State Parties under International law in acceptance of the concept of national sovereignty of State Parties.

Directive principles of state policy

The answer to the assertion by the government of Sri Lanka that it cannot be expected to act in any manner contrary to the Constitution, could be found in article 27(15) of the Directive Principles of State Policy in Sri Lanka's Constitution of 1978 that mandates the State to endeavour to foster respect for international law and treaty obligations in dealing among nations. Article 27(1) of the Constitution states that:

"The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society"

It is my view that the manner in which this country's Supreme Court has responded to the Directive Principles makes it possible for the State to take the necessary steps required to give effect to the decisions of the Committee. Accordingly, in delivering an opinion on the constitutionality of the Provincial Council Bill and the 13th Amendment to the Constitution Chief Justice Sharvananda pointed out:

"true, the principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their values as protecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation"[1]

Again in Seneviratne vs. UGC Justice Wanasundara observed:

"It is a settled principle of construction that when constructing a legal document, the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a Constitutional provision is under consideration and, when relevant, this must necessarily include the Directive Principles .....(and) .... the Courts must take due recognition of these and make proper allowance for their operation and function'[2]

If the considered view of Sri Lanka is that a decision affirmed by the highest appellate court, the Supreme Court of Sri Lanka, is final and unalterable by the decision of the Committee, it could well have made a reservation to that effect at the time of ratifying the Covenant.

Then in Sriyani Silva vs. Channa Iddamalgoda a widow of a person who died in police custody as a result of being tortured made an application before the Supreme Court claiming compensation. Under the local Constitution, though the widow did not have locus standi to make such an application in court, interpreting article 14.1 of the Convention against Torture, the Court held (decision of Justice Mark Fernando) "the interpretation that the right to compensation accrues to or devolves on the deceased lawful heirs an/or dependents, brings our law into conformity with international obligation and standards, and must be preferred"[3].

It seems there is another misconception on the part of the State when it claims that the Committee — by recommending retrial or released with compensation, despite the Supreme Courts order of affirming the conviction – expects Sri Lanka to act in a manner contrary to its Constitution. In fact, what the Committee expects from the government is to take necessary steps in accordance with its constitutional process, in keeping with the undertaking given under article 2(2), which reads as follows:

" Where not already provided for by existing legislative or other measures, each State Party to the Covenant undertakes to take the necessary steps, in accordance with its constitutional process...."

Binding all state organs

The obligation of the Covenant in general and article 2 in particular are binding on every State Party as a whole. The recommendation of the Committee binds all organs of the government, be it the executive, legislative or the judiciary and at all levels whether national, regional or local, which is in a position to discharge the responsibility of the State Party. Usually it is the executive branch of the State that represents the State Party internationally and signs treaties; under the Sri Lankan Constitution it is the President.

Most interestingly however, the government has seen fit to relieve the President of the Republic of Sri Lanka – who is the Head of the State and the Head of the executive – from the obligations of giving effect to the decisions of the Committee. And the writer of the response seems to be under the misconception that the treaty obligation of the State does not bind its Head. In its response the government states only that, "concerned legal authorities of Sri Lanka could recommend to the President of Sri Lanka to exercise the unfettered sovereign discretionary power of pardon."

Facts must be credible

Furthermore, in order to maintain the confidence of the treaty bodies, it is imperative for the State Parties, to supply credible and authenticated information in their submissions and reports. The States should not suppress facts that are material for the consideration or supply information that are factually incorrect.

However, in Singarasa's case the government in its submission on the admissibility of the author's Communication

told the Committee that under article 34(1) of the Constitution "the President may in the case of any offender convicted of any offence in any Court within the Republic of Sri Lanka (a) grant a pardon, either free or subjected to lawful conditions ...". However in its response to the Committee's decision it states, "the Constitution only empowers the President to grant or respite of the sentence but does not empower the President to revoke a conviction passed by a competent Court".

Simultaneously there are also matters mentioned in the response that are factually incorrect. Accordingly the State contends that Singarasa was convicted by the High Court of serious criminal charges such as the murder of innocent civilians including Buddhist monks. However the complaint to the Committee is specifically concerned with the conviction in Case No. 6825/94 in which author was convicted on the charge of conspiracy to overthrow the government and for having attacked 4 army camps with a view to overthrow the government. He was neither charged nor convicted for killing civilians or Buddhist monks.

In relation to the Prevention of Terrorism Act the government says it was introduced as "temporary legislation" and had suppressed the fact that it was subsequently converted into permanent law applicable to the country as a whole and at all times. This is despite the concern expressed by the Committee when it considered the 4th Periodic Report of Sri Lanka, that Sri Lanka retains its "PTA with several provisions that are incompatible with articles 4, 9, and 14 of the Covenant".

Also the government's assertion that since signing of the MOU with the LTTE approximately 1000 indictments has been withdrawn, is highly improbable in the light that some of those said to have been released stand charged again for the same offence. Interestingly some among those so discharged and who had left the country under the impression that they are free, are being tried in absentia under the PTA.

Compensation

The assertion of the government that any attempt to pay compensation to a convicted person is tantamount to an interference of the independence of the judiciary, does not make much sense. This is because the Committee recommended compensation after having found the State to have violated the right to fair trial and freedom from torture of the author. Both under domestic and as well as under international law, the State is bound to pay compensation for violation of rights.

In Sarma's case, on the question of compensation, the government's response was that after the trial of the suspect in the High Court case, "it will refer to the Human Rights Commission of Sri Lanka to make a recommendation on the question of payment of compensation including determination of the quantum" In Victor Ivan's case as well it is the Human Rights Commission of Sri Lanka that will decide on the compensation.

What seems obvious is that the government has decided not to accept the finding of the Committee on the question of compensation. Most interestingly instead it is the Human Rights Commission that is to decide not only the quantum but in fact whether compensation is payable or not under the ICCPR. In other words the Human Rights Commission of Sri Lanka will sit in revision over the findings of the Committee's experts of international repute.

What seems obvious is that the government has decided not to accept the finding of the Committee on the question of compensation. Most interestingly instead it is the Human Rights Commission that is to decide not only the quantum but in fact whether compensation is payable or not under the ICCPR.

'Naming and shaming'

Furthermore, the contractual dimension of the treaty coupled with UN Charter obligations to promote universal respect for and observance of human rights, jointly and severally makes it obligatory on every other State Party to a treaty to show interest and concern in the observances and compliance with its undertakings under the treaty by any other State Party.

Accordingly the General Comments of the Committee on Article 2 (dated 29.03.2004) states: " Committee commends to State Parties the view that violation of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States and call them it comply 'with their Covenant obligation should, far from being regarded as an unfriendly act, to considered as a reflection of legitimate community interest".

Sri Lanka, like few other governments, seems to have made use of the absence of any power of enforcement of decisions by UN Human Rights treaty bodies, to ignore the Committee's findings. The question arises as to what options are available to the Committee to have its decisions given effect. The most effective weapon currently available to the Committee is to give publicity in UN reports and academic journals, to the State's failure to comply with Committee findings. It could also resort to the often-used method of "naming and shaming a government into compliance". The Human Rights Committee and Committee on the Rights of the Child have adopted more effective methods such as publishing 'black lists' of uncooperative States in their annual reports.

End Notes

1 1987 (2) Sri L.R. at p 326.

2 1978-79-80 (1) Sri L.R. at p 216.

3 2003 (2) Sri L.R. at p 63.

Human Rights: Is Lanka's commitment mere external diplomacy?

In its oral submissions to the UN Human Rights Commission, the Asian Legal Resource Centre (ALRC) said that it appreciated the statement of the Foreign Minister of Sri Lanka, who, in his address to the Commission reaffirmed Sri Lanka's commitment to respect the United Nations efforts to protect and promote human rights. The Foreign Minister had specifically referred to Sri Lanka's ratification of the UN Convention against Torture in January 1994 and accession to the Optional Protocol of the ICCPR in October 1997.

While appreciating these measures taken by successive Sri Lankan governments, the Asian Legal Resource Centre pointed out that the benefits of such ratification and accession had not yet accrued to the Sri Lankan people due to certain deficiencies in local mechanisms of implementation. The Centre also highlighted the case of Nallaratnam Singarasa (Human Rights Committee Communication No. 1033/2000) in which the Human Rights Committee was of the view that the facts before it disclosed violations of Article 14 paragraphs 1, 2, 3(c) and 14 paragraphs (g) read together with Articles 2, paragraph 3 and 7 of the Covenant. Furthermore, the Committee stated that the State Party is under the obligation to provide the author with an effective and appropriate remedy including release or retrial and compensation. The Sri Lankan government in its reply G/SO 215/54 SRI (5) dated 6 August 2004, stated as follows:

The position of the Sri Lankan government indicated that the State Party considered the views of the UN Human Rights Committee, with respect to violations of rights by the domestic courts — i.e. denial of fair trial — as having no relevance to Sri Lanka.

"The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convicted person after his conviction is affirmed by the highest appellate court the Supreme Court of Sri Lanka. Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The Government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka."

The operative word here is that the State does not have the legal authority to execute the decisions of the Human Rights Committee to release the convict or to grant retrial. The ALRC was of the opinion that this position negated the obligations undertaken by the State Party when acceding to the Optional Protocol. The State Party has also not yet introduced into the local legislation and implementation procedures, the decisions made by the Human Rights Committee, the ALRC said.

The ALRC also said that the above position of the Sri Lankan government indicated that the State Party considered the views of the Human Rights Committee, with respect to violations of rights by the domestic courts — i.e. denial of fair trial — as having no relevance to Sri Lanka. In effect, the State Party considered the courts and judiciary as falling outside the obligations of the State Party when acceding to the Optional Protocol of the ICCPR. In this manner the very purpose of accession can be defeated by such exclusions and failure at implementation the ALRC said. Therefore the State Party should enact legislation to demonstrate its respect for the Optional Protocol; otherwise such accessions would be purely an exercise in external diplomacy with little meaning for the protection and improvement of human rights.

According to the ALRC these same principles applied to the ratification of other relevant Covenants and Conventions. For example, the ratification of the Convention against Torture, though followed by an Act in the Parliament that brought the Convention into operation, still has limited effect in the country. That is, the lack of local procedures in dealing with implementation hampered the implementation of this Convention.

In fact, inadequate local legislation could endanger the very torture victims who are seeking redress under the legal provisions based on the Convention, according to ALRC. For example, in one of the best known cases in Sri Lanka, Gerald Perera, who was severely tortured under arrest on mistaken identity, was later assassinated seven days before he was due to give evidence in a criminal trial against the alleged perpetrators who were all policemen. Now, several persons have been arrested by the government for this murder, which was allegedly committed for the purpose of preventing the torture victim from giving evidence in court.

The ALRC also noted that there are many other instances where torture victims who complain against the violations of their rights have been tortured for a second or third time for the purpose of preventing them from giving evidence in criminal cases on torture. Though complaints have been made in this regard hardly any protection has been provided. Thus, the absence of a witness protection law and any procedures for actual protection negates the very purpose for which the Convention against Torture had been ratified and enacted as a law in Sri Lanka. The Deputy Solicitor General of Sri Lanka in a recent statement claimed that witnesses in 85 % of criminal cases do not come to court due to the fear of reprisals from the alleged perpetrators.

Meanwhile, there is also consensus on the fact that there are extraordinary delays in courts that virtually negates the possibility of effective action being taken to protect rights. A criminal case may take an average of five to seven years or more to come to trial before a court. The result is that the complainants of such cases have to suffer through intimidation and threats for a long period of time before the trial is finally heard. This is worse when the alleged perpetrators are state officers who in the local social context wield enormous powers, the ALRC said.

Thus, while the ratification of Covenants and Conventions and accession to the Optional Protocol to the ICCPR are important, these are of minimum practical use unless the domestic law and domestic procedures are developed to implement the obligations undertaken by the State Party. It is the duty of the State Party to create authorities that can draft laws and procedures to be approved and adopted by the legislature. It is also the duty of the State Party to allocate adequate funds for investigation, prosecution and the judicial proceedings relating to crimes in general and gross human rights violations in particular.

It was revealed recently that the law enforcement agencies do not have a proper finger printing facility, which is estimated to cost about 1.5M Euros, and facilities for DNA investigations that is estimated to cost around US$ 300,000. The lack of funding for training and upgrading of the investigating, prosecuting and judicial authorities also remain a major obstacle for the discharging of obligations by the State. Therefore the ALRC has urged the Sri Lankan government — which constantly affirms its allegiance to the UN Human Rights mechanisms — to take necessary steps namely, implementing the requisite laws and allocating the necessary funding, to realise its international obligations.

ISGA: *The real situation makes it legitimate*

By S. Muthu Cumaraswamy

Some southern politicians today argue that the Post-Tsunami Operational Management Structure (P-TOMS) is the spur to restart the peace talks between the GOSL and the LTTE. However, they quite forget that the peace talks stalled around one set of proposals - the Interim Self Governing Authority (ISGA). This author revisits the ISGA and explains its significance. He illustrates that peace talks must begin on comprehensive proposals such as the ISGA in order that the rights of the Tamil people are secured beyond emergencies such as the Tsunami.

The Liberation Tigers of Tamil Eelam (LTTE) have advanced the proposals regarding the creation of an Interim Self Governing Authority for the NorthEast of the island of Sri Lanka so that an effective administration could be set up in that area. The aim is to ensure that the ISGA would be able to meet the urgent humanitarian needs of the people of this war-ravaged area. The carefully crafted instrument approaches the matter without any rancour and in a professional manner, dealing only with issues necessary for the restoration of normalcy to the area.

The basis of the proposals lies in the fact that the LTTE presently controls a substantial extent of the territory in the NorthEast. This territory has been described as constituting the "traditional homelands of the Tamils" in documents like the Indo-Sri Lanka Accord to which the Government of Sri Lanka is a party. The LTTE has already set up an effective administration in this area. It is axiomatic that legal consequences flow from the fact that a territory has a definite population within a well-defined boundary and is subject to the control of an administration other than that of the state of which, it was earlier a part.

The LTTE has, in fact, claimed less than what it could claim on the basis of this factual situation. It has merely focused on the urgency of the situation that calls out for the establishment of an administration that is seen as legitimate by the international community so that the much-needed task of reconstruction and rehabilitation could take place. The provisions of the ISGA make this abundantly clear. They focus on the tasks of reconstruction and rehabilitation, dispensing with any rhetoric about separation or secession. The legitimacy of the ISGA, though quickly secured through the acceptance of the proposals through negotiations with the GOSL, may be established through other means. If the GOSL, consistent with past patterns of Sinhalese governments, is not willing to negotiate on the basis of the ISGA proposals, other avenues of legitimacy to establish the ISGA have to be explored.

It is evident that international law has now evolved to accept the fact that, in such situations as existing in the NorthEast, legitimacy attaches to the transactions that have to be made in the course of ordinary life. Thus, commercial transactions that are made in such territories have been considered legitimate and enforceable. Likewise, ordinary transactions such as marriages and the making of wills are recognized by foreign courts. As Lord Wilberforce put it in the Carl Zeiss Stiftung case, both in English and American law, "the courts may, in the interests of justice and common sense, give recognition to the actual facts or realities found to exist in the territory in question." (Carl Zeiss Stiftung v Rayner and Keeler Ltd [1967] 1 AC 853) Likewise, an American court stated in Upright v Mercury Business Machines 213 NYS (2d) 417 (1961) that an unrecognised government could nevertheless have "an existence which is cognisable." There have been many cases decided by English and American courts approving such propositions.

It is evident that international law has now evolved to accept the fact that, in such situations as existing in the NorthEast, legitimacy attaches to the transactions that have to be made in the course of ordinary life.

The theory of the law in this area has advanced by leaps and bounds, giving a sufficient status to the entity in control of the territory to set up an administration in the territory on the basis of the pure necessity to do so, as the interests of the people in the territory necessitate such a course. Legitimacy of such an administration does not depend on recognition by other governments or states, but proceeds from the actual reality of an existing administration and its effectiveness. The gap between reality and the legal position is quickly filled through the recognition of the real situation as legitimate.

The proposal for the establishment of an ISGA in the NorthEast is stronger by far than in other similar cases. Its strength proceeds from the fact that events that gave

rise to it are propelled by the doctrine of self-determination. A people have a right to decide their future for themselves. In the case of the Tamils, who had lived in a separate state prior to conquest by the British, decolonisation should have resulted in the restoration of their pre-colonial status. Instead, they were left in a united state in which they were a suppressed people, subjected to discrimination and violence by the government of the united country. The denial of equality and the protracted violence gives rise to a right to secession. The Canadian Supreme Court, in the Quebec Reference clearly stated this proposition, when it recognised that in situations of discrimination and oppression and the refusal to address the situation through measures of internal self-determination, a right of secession could mature. The longer the GOSL prevaricates on the ISGA proposal, the clearer becomes the case for secession, for it demonstrates that the GOSL is not even prepared to discuss the possibility of a settlement that is based on the existing reality. This is so, particularly in view of the fact that the LTTE has already announced that a solution in the context of a united Sri Lanka would not be ruled out in the negotiations.

The ISGA, it must be reiterated, is not based on secession. The LTTE has announced that it is willing to consider solutions within the context of a united Sri Lanka. What the ISGA seeks is an interim solution that meets the humanitarian urgency of the situation in the NorthEast. Since the previous UNP government had announced that it would negotiate on the basis of the ISGA and Mrs. Kumaratunge has off and on made similar announcements, it must be taken that there is sufficient support for the ISGA on both sides. In any event, as the LTTE has control and effectiveness of the large part of the NorthEast, it has the legitimate right to establish an administration in the NorthEast.

Therefore, where the GOSL stalls a negotiated settlement of the ISGA, pending a final settlement, it would be proper in legal terms to establish an administration on the basis of the ISGA Proposals. It is evident that Mrs. Kumaratunge has engineered a situation that ensures her grip on power and prolongs the ethnic crisis, on the basis of which the Bandaranaike clan and other ethnic entrepreneurs have been able to maintain their hold on power. The people of the NorthEast should not have to suffer as a result of such capricious politics. As the necessities involved in the situation require action, the LTTE would be fully justified in setting up an administration on the basis of the ISGA Proposals – either that it would be approved in the future or on the ground that its control of the territory legitimizes the setting up of such an administration. As much as it has set up an administration in the NorthEast at present, it can alter that administrative set-up so that it accords with the ISGA Proposal.

The ISGA does not seek to give the LTTE anything more than what they already have in their control. Technically, in terms of the law, they could establish any administration they please and maintain it by force of arms. To their credit, that is not what the LTTE seeks. The LTTE has demonstrated that it has the necessary wherewithal to deal with any type of GOSL government. History demonstrates that the type of war that is taking place in Sri Lanka cannot be won by the government, certainly, not against such a formidable entity as the LTTE. Yet, the LTTE seeks peace. The opportunity must be taken. Sinhalese leaders have lost other opportunities so that their own careers and those of their progeny could be advanced. For once, it is to be hoped that they will seize this opportunity for peace. Otherwise, for generations to come, an unhappy island will be mired in strife from which only the few entrenched families and military bigwigs will profit.

As indicated, the LTTE has the right to set up the ISGA unilaterally. It is best for the island, as a whole that the process should be negotiated, for the two communities have to cooperate for peace to be established. One can only hope that the Sinhalese people are not continuously misled by their leaders into a precipitous course towards war and that they ensure that the way to peace that the LTTE has shown, is accepted. This will enable a lasting negotiated solution to be reached.

The theory of the law in this area has advanced by leaps and bounds, giving a sufficient status to the entity in control of the territory to set up an administration in the territory on the basis of the pure necessity to do so, as the interests of the people in the territory necessitate such a course.

The international community, in turn, should accept the ISGA, even if it is not achieved through a negotiated process. If unilaterally created, the ISGA will still have legitimacy. The unilateral establishment of the ISGA would be unlike the unilaterally created regime of the white supremacist government of the old Rhodesia, which was decried by the whole of the international community. It is unlike it simply because it has the approval of the vast majority of the Tamil people in the NorthEast, who have voted time and time again for processes that seek to establish self-government. Its legitimising force is the principle of self-determination, which is a basic organizing principle of the international community. By denying a legitimate proposal of the LTTE, the GOSL has demonstrated that it continues to flout the right to self-determination of the Tamil people.

The international community is clearly beginning to accept this position. The existing administration in the NorthEast is already visited by ambassadors of different states who have explored a variety of situations with representatives of the LTTE. The changing norms of international law justify the making of such contacts and the extending of the hands of the international community to any existing structure of effective government in the area so that the people in the territory could be provided much-needed assistance.

The World Bank and other international institutions also proceed on this basis. The law has rapidly changed on these matters. If the GOSL wants to continue to have a meaningful role and prevent the exercise of the ultimate right of secession, it would be wise to participate in the process of setting up the ISGA. The longer it delays, the greater would be the justification in terms of law for the LTTE to set up the ISGA on its own. The LTTE already has an administration. All that it has to do is to make that administration conform to the ISGA Proposals. If this were to happen, the schism between the two communities on the island will widen further. It is best that, before this happens, the GOSL cooperates with the LTTE in setting up the ISGA.

(Courtesy: Illangai Tamil Sangam. U.S.A)

Horror on a holy day

• The devastating effects of the tsunami on the east coast

Photo's and text by K. N. Tharmalingham

On 26 December 2004, the gigantic waves of the tsunami struck the east coast of Amparai with devastating impact and little warning, leaving in its wake, death, destruction, ruin and misery to tens of thousands of people.

It was a Sunday morning, the day after Christmas – Palan Pirantha Naal – and the seasonal spirit of festivity was still lingering in the air. This fateful day was also a day of great piety and the church devoted to St. Joseph was packed to its capacity to celebrate Holy Family Day. Not only Christians, but Hindus too were present in church, to mark this day and share the joy of the season. As it was the 9th day of 'Tiruvemba', devout Hindus too were seen going to their temples from around 4 in the morning. Schoolchildren who were to sit for their A/L examinations in April the following year, were enthusiastically attending their tuition classes held at the Thambiluvil Madhya Maha Vidyalaya. And the Sunday fair held at the Central Market at Thambiluvil – and thronged by large crowds consisting of both buyers and sellers – was no different this day. Then suddenly, when most people both young and old were busy with their Sunday chores, the tsunami struck the people of Tirukovil.

'Jala piralaya'

Thambirajah Mahendiran was a small-scale trader at the Thambiluvil Central Market. He lived at Tirukovil, near the famous temple dedicated to Lord Murugan that drew a large number of devotees for its daily poojas. The following is an eyewitness account of Mr. Mahendiran who survived the deadliest catastrophe of our times:

"It was around 4 a.m. when the gates of the kovil were opened and the devotees began to pour in. The choir of singers, who went round the villages singing Tiruvasagam, Tirupalli, Elluchchi and Tiruvemba came into the temple, worshipped and went away to perform their sacred duties, carrying their musical instruments with them. The pooja began at 5 a.m. and was over by 6, to enable the devotees to engage in 'purana padippu'. When the pooja was over, the devotees began their recital of 'Tiru Vaathavoorar Puranam' and this continued until 8.30 am. Thereafter, most devotees left for their homes. However a few stayed back with the temple priest including myself, the treasurer of the temple, an aged man and a sick woman who had come to receive the holy ash.

A house that was destroyed

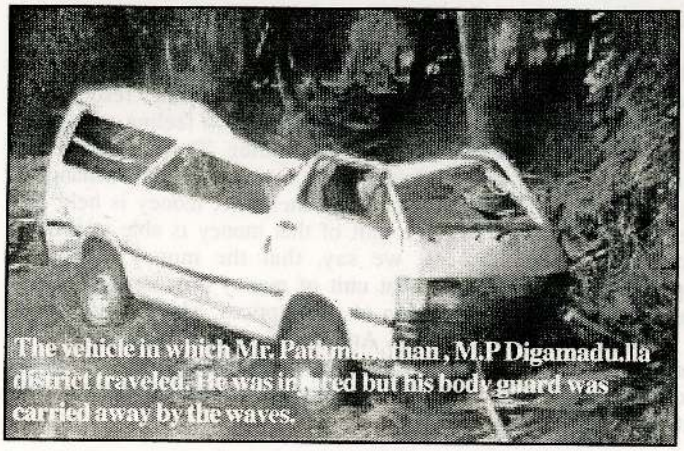
"Within five minutes of the worshippers leaving the temple, we heard a thunderous explosion from the direction of the sea. The sound was of a magnitude we had never heard before, and it made us tremble with fear. We were shocked and we were startled. And we even wondered whether the ceasefire agreement (between the government and the LTTE) had been broken and fighting resumed. So we rushed out of the temple to see what had caused the explosion and where it came from.

"I looked out at the sea and I froze with fear. I saw a humongous wave – tar-black in colour and rising to a massive height of about 30 feet – moving towards the land at a terrific speed. The first thought that crossed my mind was whether this was the 'jala piralaya' (great deluge) apocalypse that was said would bring about the end of the world. I was benumbed with fear and I could not utter a single word. Then an old man, who was standing by me, brought me to my senses. He urged us to run away as fast and as far as we could from the fearsome wave. So we ran back towards the temple went behind it and climbed into the inner thick wall of the temple. There we hid while the wave – in fact a series of waves – rolled over us with terrific intensity."

Strewn bodies

Shiva Shri Angusanatha Kurukkal, the priest at the famous Sri Sithira Velayutha Swamy Kovil described his encounter with the tsunami as follows:

"On hearing what sounded very much like an explosion, I rushed out to see what was happening. I was horrified when I looked at the sea opposite the temple, for I saw a massive wave advancing towards our village. The wave was of a height I had never seen before. As I looked on with terror and fear, the wave suddenly collapsed and flooded the entire area. Fishing boats were tossed away; the tall walls surrounding the temple were crushed and soon the seawater was advancing towards the temple at great speed. I ran into the temple, shut the front door, and escaped through the door at the north side. As the waters gushed into the temple, I climbed the wall behind the kovil, together with four others who were with me. Perched on the wall, we saw the temple being struck by the devastating force of the tsunami. I told those with me to meditate upon the Lord and to chant His name. And when the wave struck the wall we managed to climb the tree beside the wall and save ourselves. The floods receded in about ten minutes and I praised the Lord for saving us. But when the water pulled away, it took with it, the treasurer of the temple, who was also perched on top of the tree with the rest of us.



The vehicle in which Mr. Pathmanathan, M.P Digamadu.lla district traveled. He was injured but his body guard was carried away by the waves.

"After the waters receded, I got down from the tree and looked around me. I saw that the waves had smashed most of the houses situated near the temple. There was also no indication of human survival. So I ran home, where my aged father, mother, spouse and only son lived. To my utter horror and grief I found my home destroyed and no one to be seen. With a heavy heart I went to search for the members of my family. I found my mother in hospital and was told that my son had been carried by the waves. Soon my mother too departed from us forever.

The extent of the tragedy gradually unfolded before my eyes when I saw the bodies that were strewn all around and when more bodies were dug out from under the debris. From the Periya Kalappu lagoon alone, 139 bodies were recovered at Panankadu. I was told that a further 140 bodies were discovered at the western end of the lake and that most of the unfortunate victims had been women and children. Later I also received the sad news that a former Akkaraipattu South VC, Vice Chairman, Mr. V. Selliah, together with some of his children and grandchildren had been washed away when the tsunami waves battered their newly built house. I also lost six close relatives to the tsunami.

But the biggest tragedy occurred at the temple of Lord Shiva at Manalkaadu in Second Division, Tambiluvil. Here the officiating priest, his wife and several worshippers at the temple were carried away by the waves. The remains of the dead when recovered were stacked one upon the other and buried at Sagamam. I was also informed that Mr. K. Suntharamurthy, a social worker of great repute in the area and who accompanied Mr. Pathmanathan (MP) to Akkaraipattu, had been carried away by the tsunami at Tampattai."

Another sad story comes from the village, Tampattai

Tampattai had a very old history, beginning from the 2nd Century BC. The people at Tampattai belonged to the caste of Kovil priests called 'Kurukkal' most were vegetarians and they grew vegetables and cereals. Some were dairy farmers, and a few were priests at nearby Hindu temples. Tampattai is surrounded by water – the sea on the east, and the lake called Periya Kalappu on the other three directions. The village suffered severe belting from the tsunami, which cause a large number of deaths and destruction to property. When the villagers saw the sea rising to terrific heights, they fled to a place known as Semannpulai, but many were carried away by the waves whilst on their flight to safety. Most people of Tampattai who survived the catastrophe are now held in three welfare camps – Kavudapitty, Kannagi-puram, and Akkaraipattu in the Aalayadivembu division and others are housed at Semannpulai, near Sinnamuhathuwaram.

On the 11 January 2005, the Government Agent of Amparai reported that 29,097 houses had been destroyed in the District of Amparai and that the human toll amounted to 9030 precious lives. The fate of another 2207 persons who were reported missing was not known. Around 108,091 persons, who lost their houses and most of their lives' possessions, were accommodated at nine welfare camps. Also, 50 schools and 82 places of worship had suffered destruction. The tsunami had belted the east coast severely destroying several miles of roadways, bridges and culverts. And with the roads and bridges being washed away or severely damaged, getting the much-needed relief viz. food, clothing and shelter to the victims, was an extremely arduous task.

Interfering with Mother Nature

It has now been reliably established that though the tsunami struck a deadly blow, the most devastation occurred at places where man, out of ignorance or arrogance destroyed Mother Nature. Here we are reminded of a wise saying, 'the evils that men do, live after them'.

During the years of the civil war and after, mangroves, sand dunes and other modes of natural protection against calamities of this nature were extensively destroyed along the coastal areas. Extensive sand mining along the beach and the destruction of sand dunes was definitely a contributory factor for the massive damage caused by the tsunami in the Tirukovil division. The sand removed from the sea beach with the approval of the Divisional Secretaries was used by 'developers' who used them for filling low-lying land and marshes. It seems, people paid dearly for the follies of administrators who did not understand the laws of Mother Nature, and the law of the land.

The destruction of mangroves at the height of the civil war maybe attributed to the folly of the armed forces who thought they were destroying the might of the Tamil militants by destroying the mangroves. However such mistaken beliefs, undoubtedly contributed to the destruction caused to life and properties in Tirukovil, when the tsunami struck the coast.

Humanity at its best

Just as the tales of tragedy were numerous, so were the stories of human compassion in the aftermath of the tsunami. The immediate humanitarian response was remarkable with numerous reports of people of all walks of life responding to those in need by supplying food clothing and shelter. What was amazing was that, those who previously fought on the grounds of language, race religion or region magnanimously forgot their differences and rushed to provide assistance to the needy. The milk of human kindness prevailed and the first to respond to the wants of the Tamils were the Sinhalese and Muslims. The Pirivena the policemen and the Sinhalese people of Amparai supported 12,000 refugees from Akkaraipattu. The Sinhalese in Amparai also supplied food, clothing and medicines to those who fled to Veeramunai from Karativu. The Muslims provided food and clothing to the displaced people at the RKM College, Akkaraipattu. Then there was the Special Task Force (STF) who saved many lives and supplied medicines. The cadres of the LTTE too responded magnificently to serve the people. The Parish Priest at the Roman Catholic Church, Rev. Rajeevan was another who rendered significant service to the people. And as a result a good number of people were saved from sure death. These beneficent actions find expression in the Dhammapada, which said, "Hatred is never appeased by hatred, it is appeased by non-hatred". Humanity was at its best at this hour of human suffering.

Then there were the numerous non governmental organisations, the ICRC, the TRO, the Hindu Seva Sangam of Malaysia, the ZOA, CARE International, UNICEF, Sewa Lanka, as well as the FCE, World Vision, Friends From Europe, FORUIT and the many arms of ECHO, who rushed to provide humanitarian help to the victims no sooner the roads were made passable. Contrarily however, the State's response to the tsunami victims' plight was painstakingly slow and uncoordinated and came under strictures from the victims themselves.


TRO is seen constructing an emergency shelter

The NGOs also engaged in providing essential psychosocial services. For instance, the Catholic Church under the guidance of the EHED, and, the Hindu Sewa Sangam of Malaysia conducted several camps to look into the psychosocial needs of those displaced by the tsunami. Prof. Dr. Raghavan a psychiatrist from the US spent several days in the District, assisting people with a history of psychiatric ailments while the Malaysian Swami Ramaji, and the parish priest of Tirukovil, Rev. Rajeevan were a source of inspiration in this regard. Also young girls from Alayadivembu ably assisted these people in carrying out their work and earned the appreciation of the people.

Facing the future

Let us for a moment take a look again, at the extent of destruction wreaked by the tsunami. When World War II fought over five continents ended in May 1945, it was found that the war had destroyed half a million houses. But the tsunami destroyed 62,533 houses in Sri Lanka, in a matter of minutes. The magnitude of the tsunami wiped away human lives and possessions — homes and gardens, farms and livestock places of worship, work, and learning. Farmers lost the good crop of paddy — the reward for their hard work. And the surviving young and old, men and women found themselves cramped into hastily set up welfare centres. It was all a frightening experience and the severity of the impact, disrupted the social structure of the community. As a result, some survivors were finding it impossible to adjust to life after the tsunami.

The survivors of the tsunami, who lost their loved ones and had been exposed to the catastrophic event, required special projects, to get them back on their feet. Victims, though belonging to various social and economic strata, prior to the tsunami, now came to be identified under one category, viz. 'tsunami victims. NGOs – both International and local – were seen engaged in activities that have minimum impact upon promoting the education, training, employment and economic growth of the people. Instead around 45 International NGOs and an equal number of national NGOs were engaged in rebuilding the battered District, providing purified water, transitory camps, medical aid and food. These services while vital in the immediate aftermath of the disaster are alone inadequate in the long term to restore the lives and livelihoods of the people.

What is the role of the government in the process of rehabilitation and reconstruction? Should not the government have a concrete plan towards achieving these goals? A government needs to be responsible and act with a vision for the future. But people of the region have little hope: they lack social security; they want a minimum income because money without purchasing power is worthless to them. Some see monies in the hands of a few NGOs as simply contributing to the misery of the people.

Economic progress and economic security are two pressing needs of the country at this juncture. Thus we cannot afford to continue with the present method of dispensing tsunami assistance. We instead need to make efficient use of our manpower and other resources to improve the conditions. But, generally there is a feeling among the people that the value of their money is falling. The usefulness of a thing is determined on the basis of its acceptance for the exchange of a quantity of goods and services, and therefore, money is held as a medium of exchange. When a unit of that money is able to procure more goods and services, we say, that the money's value is appreciating. Vice-versa, if that unit of money procures less goods and services, there is a situation of rising prices, which is referred to as a fall in the value of money. And this is what is happening in the east coast of Amparai now. Prices of most essential goods have soared, and those people with a fixed income find it extremely difficult to cope with the rising prices.

This situation of rising prices reminds us of an economic theory called "the quantity theory of money", which is that an increase in the supply of anything tends to reduce its value. There is more money in circulation and thus chaos in the post tsunamic reconstruction programme with more luxury vehicles and people eager to catch fish in troubled waters, dominating the scene. But the unfortunate ones in the welfare camps are seen selling their packets of milk, tubes of toothpaste, cakes of soap as well as their rations of rice, dhal, mosquito nets, and bed-sheets to raise some money. And many are slowly despairing.

Lotus Eaters

Speaking about despair, I am also reminded of the poem I learnt fifty-six years ago. Lord Tennyson (19th Century), in his "Lotus Eaters", describes Ulyxes' (Odysseus) warriors, who went to War against Troy and then having landed at Lotophagi, taste the Lotus fruit and refuse to go back to their country and homes. They, in a chorus say...

"All things have rest, why should we toil alone, ...
There is confusion worse than death,
Death is the end of life,..
Trouble on trouble, pain on pain,"

Some persons, from Tirukovil, like the warriors of Ulyxus, are gripped with a sense of pessimism, in the aftermath of the tsunami. They remind me of the Lotus Eaters, when they whine to me that they are destined to live in the camps forever. Most of the time, I have found them to be intoxicated; they shun all forms of labour but somehow find the money for their daily quota of drinks. I am also told that Arrack is freely available in most welfare camps. Peddlers of liquor, who have little consideration for the well being of the people, are frequent visitors to these camps. The police at the camps seem not too worried about the illicit sales of liquor at the camps. It is said that as much as 200 bottles of Arrack are being transported into the area each day and that a bottle is bought at 210 rupees and sold at Rs. 280. Hence 200 x 70 is a substantial profit, making the trade a rather lucrative and popular business with many takers. And who shares the profit? We await the Day of Judgment.

When paddy fields waiting harvesting were not harvested for want of workmen, I invited some of the men in the welfare camps to come help harvest the fields. But one asked me indignantly, "Why should we work?" This reminded me of the lines of Lord Tennyson, "All things have rest, why should we toil alone."

In conclusion, the devastation by the tsunami is now over and the country is faced with a formidable task ahead viz. to restore the damaged infrastructure, the homes and livelihoods for the many tens of thousands, now sheltered in their temporary homes – the tent. The foreign aid and the loans cannot be wasted; it must be invested properly for the ultimate benefit of the suffering masses. It is a golden opportunity to rebuild the country. The question however is, will we grab at this opportunity or squander it?