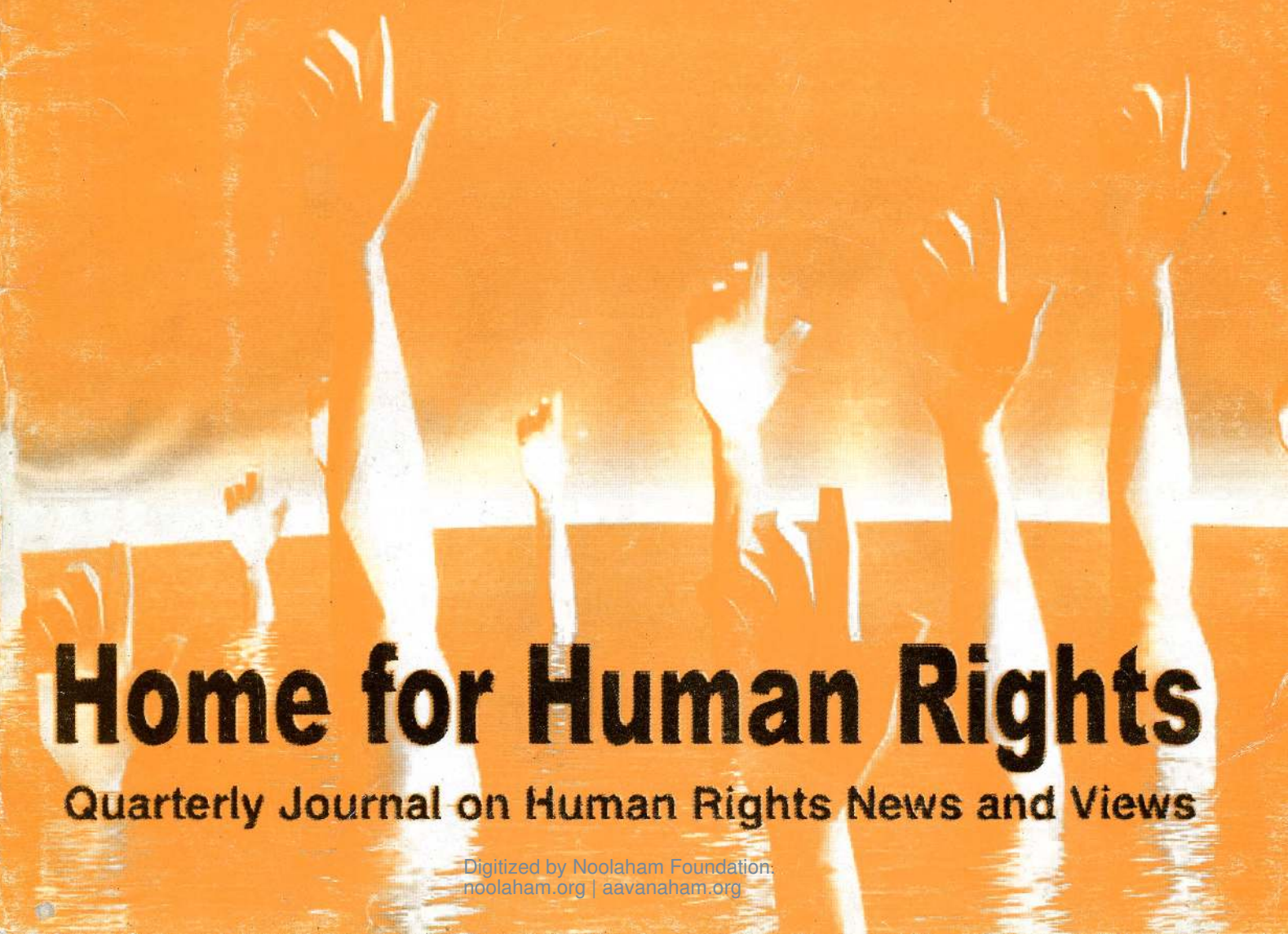
BEYOND THE WALL

April - June 2004



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.*

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EDITORIAL

End the involuntary return of Tamil refugees to the south of Lanka – HHR tells govt.

The Ceasefire Agreement and the signing of the Memorandum of Understanding that came into effect in Sri Lanka almost three years ago seemed to augur well for the achievement of peace in the Island. However, subsequent events – such as the withdrawal of the LTTE from the peace talks and the inability of the new government to form a consensus with the opposition concerning future negotiations – have shown that peace is still far away, making it unsafe for refugees to return to any region of the country.

That the situation in the North and East of Sri Lanka is far from normal is clear to all. The Sri Lankan army is occupying a majority of the region and is currently augmenting its forces in the North, where restricted high security zones cover over one-third of the Jaffna peninsula, preventing around 200,000 from returning to their homes. In the East, assassinations have become commonplace, claiming the lives of well over 40 prominent academics, journalists, and politicians since 2002.

As the United Nation's High Commissioner for Refugees (UNHCR) observed in May this year, "conditions are worsened by the level of destruction of habitable property and infrastructure; concerns regarding right to ownership and occupation of property without a sufficient mechanism to resolve them; the presence of landmines... and the lack of adequate basic services (potable water, health, education, sanitation and non-discriminatory access to the law)." The government has also increased unemployment and weakened the administration of these areas by preventing local youths from entering the state services.

But what about the situation in the South of Sri Lanka, say in a place like Colombo? Many Western governments, seeking to rid their territories of the refugees they are obliged to protect under international law, argue that the South is an acceptable alternative to the refugees' original homes in the North and East. Familiarity with the situation on the ground makes it obvious that this line of reasoning is conveniently ignorant of reality.

When returned Tamil refugees come to Colombo, they often face greater difficulties than when they were forced to resettle in foreign countries. Government agencies, for instance, operate in Sinhala and employ mainly Sinhalese staffers, turning the simplest bureaucratic need into an enormous hardship.

The education system further disadvantages returning Tamils; in fact, official educational discrimination introduced in the 1970s was one of the primary causes of the conflict. The war then destroyed or damaged many schools in the North. Consequently, Tamil children flooded Colombo's Tamil schools, all of which are now overcrowded, thus hampering these students' educations and putting the future of an entire generation at risk.

The government, of course, is not keen on improving Tamil schools any time soon because the long term effect of this would be to prevent or curtail the entry of Sinhalese students to the universities. In responding to a national shortage of teachers, for instance, Parliament recently added educators to Sinhalese schools at the expense of Tamil schools, so that the former now have an excess of 8,000 teachers while the Tamil children still lack 9,000 teachers. In the Hill Country, meanwhile, the government has shut down the only teacher's college available to that region's Tamils after violently cracking down on student protests against a decision to admit Sinhalese students, who have many other colleges available to them.

Soon, returning refugees may not be free to practice the religion of their choice either. Two bills were recently presented to the Parliament, one titled "Prohibition of Forcible Conversions Bill" and the other titled "Act to Protect Religious Freedom". The overall purpose of both is to prevent conversions due to "allurement", "force" or "fraudulent means." Christians believe that if the bills are passed they will greatly hinder their works of charity and even the practice of their religion, for anyone found guilty under these acts can be sentenced to jail and forced to pay heavy fines.

Even the major Tamil parties oppose the bills, while the Supreme Court has called parts of them downright unconstitutional. Clearly, the Buddhist state's commitment to pluralism and open-mindedness is minimal at best, as is also evidenced by the damage caused to over 1,200 temples and churches in the North and East. It should come as no surprise, then, that the Deputy Minister of Defence is also Minister of Buddhist Affairs.

The most important problem facing Tamils in Colombo and the rest of the South, however, is the impunity of – and resultant abuses by – the security forces. Arbitrary arrests, disappearances, torture, and overzealous policing have not ended with the ceasefire. The Hill Country in particular is a hotbed of communal violence, despite the common perception that this region avoided the bloodshed of the North and East. When a private dispute escalated into an interethnic riot in Kandapola, for instance, the police shot over 10 Tamils, killing two, thus tacitly supported the Sinhalese mob.

In Bulanthsinhala, meanwhile, a mob of well over 500 Sinhalese attacked 300 Tamil residences, forcing 1,000 people to flee in search of safety and putting 11 Tamil tea estate workers in the hospital, where they were attacked once again. In Kanchirakuda, STF officers shot over 20 peaceful protesters, killing seven. And following parliamentary elections in Ingiriya, tea plantation laborer's residences came under attack by Sinhalese thugs, resulting in several injuries and the decapitation of one man. The

authorities have taken no action to bring the perpetrators to justice in any of the recent cases.

Lately, there have also been many killings allegedly connected to Tamil militants, such as the suicide bombing at the Colpetty police station, where apart from the suicide bomber herself, three police personnel were killed and some others were injured. Then there were the murders at Athurugiriya, where seven Tamil militants were killed. Lastly, former Tamil militants turned army informants are assassinated on busy downtown streets.

As a result of these unfortunate incidents, security has been tightened in the South, with grave consequences for innocent Tamils. Take for example the case of Velupillai Kandasamy, who was born in Chawakachcheri (Jaffna District) in 1952 and had migrated to Germany, where he became a German citizen. His father died recently and, wishing to take part in the traditional funeral rite as the eldest son, he landed at the Katunayake International Airport on 22 May this year. He was arrested upon arrival and detained without cause for seven days, thus missing his father's funeral. If this could happen to a German citizen – simply because he was born a Tamil – what of the numerous Tamil citizens of Sri Lanka in Colombo?

Sri Lanka, of course, is a unitary state, so that the discriminatory access to the law reported by the UNHCR in the North occurs in the South as well. UNHCR, therefore, wisely argues that: "conditions in the country are not yet conducive to any large-scale, organized return of Sri Lankan nationals.... [R]eturn with dignity, physical safety, legal safety and material safety cannot be assured. As such, UNHCR is not encouraging... return at this time." After all, if the South had *ever* been a place of refuge for Tamils from the North and East, they would have fled there rather than leaving en masse to unfamiliar countries such as India and Holland, not to mention the squalid IDP (Internally Displaced Person) camps.

The former Norwegian Ambassador to Sri Lanka, who was instrumental in initiating the peace process, has himself recently stated that it will take about 30 years for peace to dawn in Sri Lanka. The transition from war to peace is not an easy step and foreign governments should not be under the impression that this phase is anywhere near completion.

Once the peace has been won in Sri Lanka, the victims of its war will happily return to help rebuild their homeland. For the time being, however, governments must adopt a "wait and see" approach if they are to fulfill their duty to protect the lives of people whom the authorities admit had a well-grounded fear of persecution when they fled Sri Lanka for safety abroad. Unfortunately, that persecution has not disappeared over the years, unlike countless men, women and children.

CHA challenges the government to end displacement by 2006

By Roberta Cohen

In its recently published *Practitioner's Kit for Return, Resettlement, Rehabilitation and Development*, the Consortium of Humanitarian Agencies (CHA), a Sri Lankan non-governmental organization, calls upon the Government and other major actors to make 2006 the national target date for ending internal displacement.

Now that Sri Lanka's 20-year civil war is over, writes the CHA, the Government should help find lasting solutions for the displaced. First and foremost, it should build upon the 2002 ceasefire agreement and finalize the peace process so that there is "a final solution to the original cause of the displacement." This should pave the way for the returns of Sri Lanka's large number of internally displaced persons (IDPs) and refugees.

More than 750,000 Sri Lankans were forcibly uprooted inside the country by the civil war while several hundred thousand more fled abroad. Since the ceasefire, an estimated 49 percent of Sri Lanka's IDPs have returned to the north and east and thousands of refugees have returned as well. However, the mere act of return has not guaranteed the end of displacement. Indeed, the successful and lasting reintegration of the displaced is far from assured. Many returning IDPs and refugees have found their former houses destroyed or occupied by others and have had to cope with heavily damaged schools, roads, health systems and infrastructure in their new communities. Indeed, many returning refugees have become internally displaced because they cannot immediately return to their home areas.

IDPs and refugees cite "landlessness" as the major reason for their not returning home. They also point to the occupation of their homes by others. In the Jaffna Peninsula, for example, 60,000 to 70,000 Tamils have been unable to return because their homes are occupied by Security Forces in "high security zones." Other obstacles are "joblessness," heavy mine infestation and safety issues. Minority Muslims, for example, have been asking for security guarantees before returning home. Other families want assurances that their children will not be recruited by the Liberation Tigers of Tamil Eelam (LTTE). For women heads of household, income-generating programs are needed so that they can avoid

exploitation and poverty.

The *Practitioner's Kit* was designed to help the Government take on the enormous challenge of reintegration of the displaced. The 45-page booklet was the result of consultations with all the major stakeholders — Government officials, non-governmental groups, international organizations, the Tamil Relief Organization, and displaced persons themselves. It urges the Government to move forward to address the needs of the displaced in a holistic way, pointing out that simply providing emergency relief and then some development assistance will not heal the profound wounds that have resulted from the civil war. Relief and development aid will have to be closely integrated and in addition there must be mechanisms for prevention, protection of the human rights and safety of the displaced, sustainable and safe reintegration, and political reconciliation. "Return," it underscores, "can be as traumatic as displacement." The remedies designed should seek to prevent the conditions that caused the conflict and displacement in the first place.

To guide the Government, the *Practitioner's Kit* puts forward the actual steps it should take to end displacement by 2006, based on international human rights and humanitarian standards contained in the *United Nations Guiding Principles on Internal Displacement.* By adapting these standards to the Sri Lankan experience, the *Kit* shows how returns or resettlement should best take place.

To begin with, returns must be voluntary, which means that IDPs should not be forced or induced to return home; they must have the right to choose whether to return or resettle based on informed decisions about conditions in return and resettlement areas. The returns must take place in safety and dignity with the displaced given the opportunity to participate in the planning and management of their returns. They should have access to public services, enjoy equality before the law, and not be considered or treated as "enemies." They should have the right to recover their property and possessions or receive compensation or another form of just reparation and be assisted, to the extent possible, in transporting to their areas of origin assets required for their livelihood. In the case of refugees, the NGO Refugees International has urged UNHCR to provide ship transport so that the returnees can bring home more than the 20 kilograms of belongings allotted to them by air transport.

The *Practitioner's Kit* highlights the specific areas that will require greater attention if displacement is to be successfully ended. Most notably:

- Access to land, especially agricultural land, must be assured so that returning IDPs and refugees can sustain themselves. A Commission on Land, Housing and Property Rights should be established to resolve legal and other disputes concerning land titles, housing or property. The displaced should be informed about these laws and provided with access to legal assistance, if needed, to reclaim property.
- Expedited programs to replace lost documents, in particular birth certificates and property titles, with greater clarity about which government office is responsible and the setting up of mobile registration units in areas of return.
- Greater priority to children going back to school, with every effort made to provide displaced children with the books, supplies, uniforms, and transportation needed to enable them to attend school and catch up sessions introduced to help them make up the classes they missed.
- Accelerated de-mining efforts with more mined areas marked and greater awareness raised among returning populations to landmines and unexploded ordnance.
- Minority protection, to include monitoring the treatment of minority groups, preventing their further displacement and interceding with authorities when protective action is needed.
- Uniformity in assistance to the displaced so that none is marginalized or discriminated against when it comes to receiving financial support or compensation, or penalized for having been displaced at an earlier time.
- Inclusion of IDP women in decision-making, providing them with social and economic opportunities, protecting them from sexual exploitation and violence, and introducing programs to integrate widows and female-headed households in areas of return.
- Establishment of a coordinating body at the district level to be accountable for return, resettlement and rehabilitation, including mediation and reconciliation initiatives between returning displaced persons and local residents, and skills development for IDPs so that they can find employment and self-reliance.

Making the reintegration of displaced populations a national priority will mean the development and strengthening of partnerships between national authorities, local government officials, the non-governmental sector, displaced communities, the media and the international community. In the case of international agencies, the *Practitioner's Kit* underscores the importance of their being accountable not just to their funders but to the people of the country and to their supporting local capacity and institution building as the foundation of sustainable reintegration.

The CHA also calls upon the LTTE to assume certain responsibilities, in particular signing a separate agreement with the Government on laying mines, providing assistance to displaced persons, reporting military recruitment of minors, and helping address the needs of vulnerable children, including former combatants.

The Practitioner's Kit, although light enough to carry around, bears a heavy message. It should help lead the way as the Government and all other actors search to find the right solutions to ending Sri Lanka's mass displacement.

Minority protection will include monitoring the treatment of minority groups, preventing their further displacement and interceding with authorities when protective action is needed

Constraints on human rights advocacy in Sri Lanka

By Michael Keller

"Our lives begin to end the day we become silent about the things that matter."
Martin Luther-King, Jr.

The unfortunate side of this tranquility is that it makes it easier for outsiders to believe that human rights violations are being committed by unavoidable bad apples rather than by a unitary Buddhist state trying to impose its will upon a sizeable minority

No man (or woman) has ever ventured to say that human rights work is easy. And though worse (or at least more widespread) abuses exist in other countries, human rights work in Sri Lanka is just about as arduous as it gets. Former British journalist turned Georgetown University human rights professor Iain Guest correctly observes, "Getting regular information out is the best and first way to do human rights advocacy." Yet Sri Lanka is doubly disadvantaged: getting accurate information out is a challenge, but finding a receptive audience is getting to be even more problematic. Its people remain stuck in that undesirable place between all-out government repression and thorough respect for the inalienable rights of man.

Why should any outside government or individual care about the fate of a minority on a tiny island that does not treat its people quite badly enough to attract the attention upon which human rights work is based? Are their resources not better spent on effecting change in a country like China, populated by over a billion people who face jail terms even for meeting privately to discuss democratisation? And is it not true that the peace process is improving conditions? These are tough questions that must be confronted head-on if human rights organisations wish to have a genuine impact on the freedoms available to the Sri Lankan masses. Two complimentary actions are required to convince the world that it should indeed care about human rights on the island. One is to increase the availability of truthful information. The other is to frame that information in such a way that it may have the greatest possible impact upon its recipients.

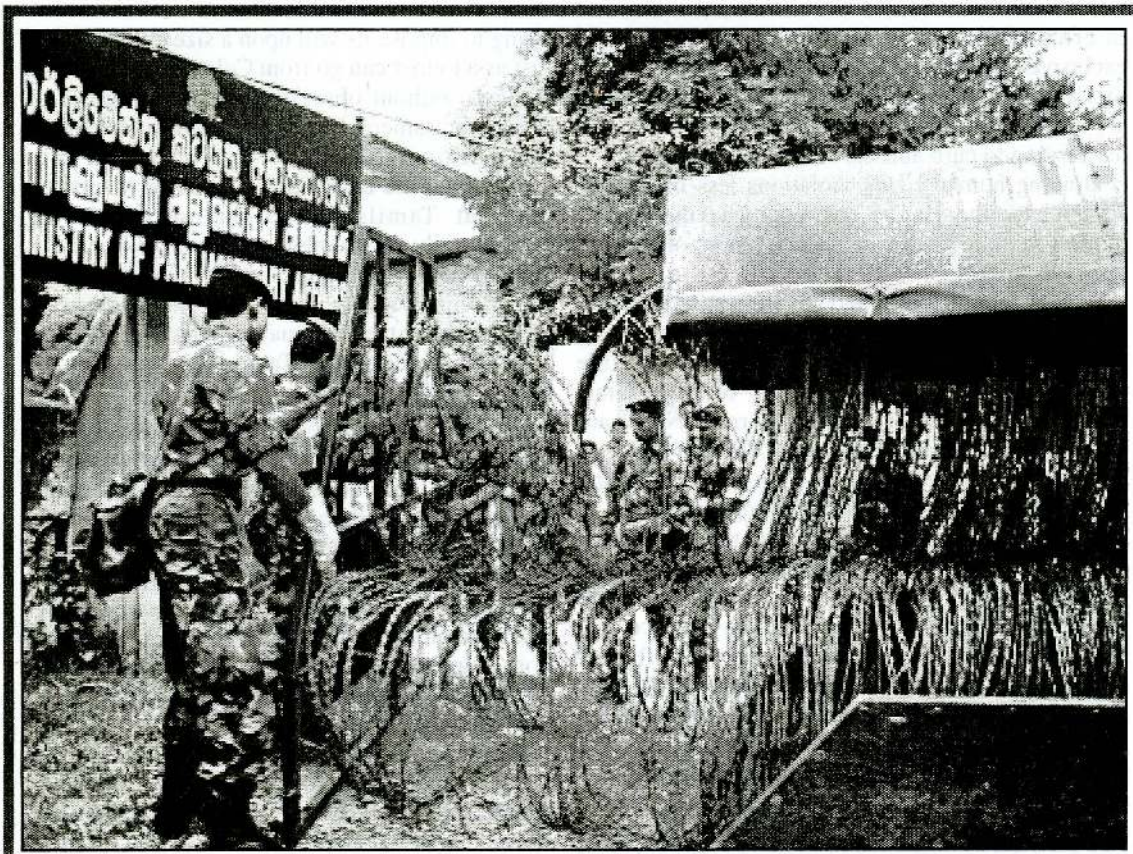
Challenges

Both these duties face serious obstacles in the Sri Lankan context. For any local activist, gathering and then disseminating information on human rights abuses is a major challenge on this island. The most visible obstruction comes in the form of brazen violence by warring parties against human rights workers. Organisations such as Home for Human Rights are all too familiar with these strong-arm tactics. Its luckiest leaders have survived interrogations, death threats, arbitrary detentions and exile, the bombing of one office and the shelling of another. The less fortunate have "disappeared," never to be heard from again.

Once the information *has* been gathered, disseminating it is no easy task either. Even though outright government censorship is a thing of the past (and, perhaps, of the future), Sri Lankan newspapers' biases are unambiguous. While Tamil and Sinhala newspapers lean heavily towards support of the rebel and government viewpoints, respectively, newspapers in English – a language with the potential to act as a bridge between the ethnic groups – are also more supportive of the Sinhala perspective. Thus, the primary avenue by which a human rights organisation can attract attention to abuses and call for reform is blocked. Working with the Tamil media, after all, would amount to preaching to the choir, or – worse – inciting greater hatred of the government.

Not all the impediments to communication with the public are external to Sri Lankan non-governmental organizations (NGOs), however. The human rights NGOs are also internally constrained both by the need to ensure client confidentiality and by their obligation to protect beneficiaries who possess information that is potentially harmful to the government. HHR, for instance, was recently approached by a man claiming to have escaped from virtual slavery in the home of a government official after having been "disappeared" over three years ago. Even more astonishing is his allegation that his wife and child are still being held by another former official. Unfortunately, despite the tremendous amount of international pressure that HHR could surely generate by publicising details of the case, doing so may in fact do greater harm than good to the witness and the forgotten captives, who would be better off dead in the eyes of a cornered government.

In addition to the confidentiality aspect, two more internal constraints may keep NGOs from effectively disseminating information on human rights violations in Sri Lanka. First, inertia dictates that they continue operating as they have in the past. Any organisation that has survived through war and intimidation from up to three warring parties understandably and justifiably views itself as highly capable and in need of little improvement. It has functioned successfully during times when advocacy work was severely limited, so why bother changing its methods now? As the Director of HHR



State repression, a potent constraint to human rights advocacy

once stated, "We have survived for 25 years; we know how to do things here."

Second, a Sri Lankan human rights NGO is likely to fear accusations that it is biased towards the views and objectives of a single ethnic group. Rather than lose its credibility as an impartial force in Sri Lankan civil society, an NGO can avoid such accusations entirely by not publicly exposing any human rights violations at all, no matter how many are perpetrated by a single party. A less extreme stance is for an NGO to publicise information on violations without framing an entire party as the perpetrator and/or without painting the victims as representatives of their ethnic group. It may plausibly believe that the facts speak for themselves and do not require the assistance of any political or 'propaganda' work, which is exactly what human rights groups are formed to offset.

The greater challenge to human rights work in Sri Lanka, however, is not the gathering and dissemination of information, but the inability to direct that information to the attention of organisations, governments, and individuals capable of influencing the authorities responsible for the majority of abuses. As mentioned above, mobilising a domestic audience is difficult given the biases of the media. Moreover, the majority Sinhalese – after experiencing years of brutal attacks against their innocents – are understandably cool to the idea that Tamils (whom many perceive to be entirely supportive of the LTTE) are deserving of more rights.

Human rights NGOs themselves are not always free of bias, particularly in their efforts to seek out an audience. Because of its support of the Sri Lankan government, for instance, a strong anti-U.S. bias has developed within the Tamil community. Rather than attempt to persuade the superpower to rethink its position, some primarily Tamil human rights organisations have simply turned their backs on the U.S.A, which, in turn, reinforces its views by relying primarily on information from the government. By taking Washington out of the picture, these NGOs ignore one of the most influential (and easily lobbied) governments in the world.

The remaining potential allies for human rights workers are not easy for Sri Lankan civil society to influence, especially given the country's relative unimportance in world affairs. Though they may not explicitly or consciously support Colombo, foreign governments and NGOs too tend to focus on the abuses committed by the LTTE – such as recruitment of children – while overlooking similar abuses by the authorities. It is a tough era, after all, in which to be labeled a terrorist organisation.

In addition to the potent terrorism factor, outsiders are misinformed by a number of other elements with which human rights workers must compete. First, it is no secret that the Sri Lankan government has mastered the game of appeasing the international community. Whether through the ratification of the Convention Against Torture, the establishment of the inquiries into disappearances, the recent presidential apology for the government's role in the 1983 bloodshed, or the creation of the Human Rights Commission, the Sri Lankan government has proven its skill in duping the

The world must understand that progress has not been enough, that the LTTE is not representative of all Sri Lankan Tamils, and that aid money for poverty-alleviation will cause greater harm than good if it is not accompanied by the development of human rights

Without progressing from passive dissemination of limited information to self-driven lobbying, the battle for the truth will almost certainly be won by the government, leaving the human rights community with few steadfast allies on which to rely

international community by moving forward exclusively on paper. Though no one believes that Sri Lanka's human rights situation is perfect, outsiders *are* left with the impression that the government is at least trying to curb abuses, thus rendering reports of continuing human rights violations less important. After all, the international community has the greatest interest in believing in the effectiveness of its own coercive powers.

Second, foreign NGOs and governments are further deceived by the peace negotiations. The prevailing attitude is very optimistic, so much so that while the West European governments are forcing Tamil refugees to return to Sri Lanka, the relief NGOs are heading in the opposite direction. USAID's Office of Transition Initiatives has set up shop in Colombo, and the development agencies are buying real estate on Jaffna's Temple Road, all as though the persecution of the past has somehow dwindled along with the sound of gunfire. This goes on despite the indefinite suspension of the peace talks, frequent violence, and rising anxiety at the highest levels over the prospect of a looming war. By convincing itself of the near-inevitability of success in the peace negotiations, the international community has also assured itself that the human rights situation is destined to improve. Why, then, should it pressure a government that is on the verge of winning the peace, a goal which will always be of greater geo-strategic importance than that of engendering respect for Sri Lankans' rights?

Third, regardless of the appalling lack of respect for human rights, the international community is and will continue to be satisfied by any improvement upon the previous situation. The civil war was one the world's most brutal, and making the slightest progress worthy of praise. From an outsider's perspective, then, there is no need to complain when – relative to the past – things are getting better. Furthermore, now that it is perceived to be a post-conflict country, Sri Lanka just attracts less attention. Its civil war put this small island on the political map; without that conflict, its problems can recede from the global consciousness and Sri Lanka can join the forgotten ranks of countries like Cambodia and El Salvador.

The deceptive calm in Sri Lanka is the result of more than just government propaganda, peace talks, and the end of the war. A fourth element is the nature of Sri Lankan society itself. Lanka's supposed 'ethnic' conflict is not on par with those of ex-Yugoslavia, Israel/Palestine, Afghanistan, and dozens of other regions. It has no ancient roots, and it has not torn Sri Lankans apart from one another. Naturally, animosity exists, but most citizens, whether Sinhalese, Tamil, or Muslim, consider the conflict to be a political affair: no more politicians, no more problems. A foreigner is more likely to hear local stereotypes while vacationing in Switzerland than in Sri Lanka; there are no shouting matches in the streets, no whisperings about "them" and their sinister intentions.

The unfortunate side of this tranquility is that it makes it easier for outsiders to believe that human rights violations are being committed by unavoidable bad apples rather than by a unitary Buddhist state trying to impose its will upon a sizeable minority. Just as a tourist can go from Colombo to Kandy to Nilaveli without observing a single instance of police-harassment, torture, or arbitrary detention, international observers can be lulled into overlooking the dark side of paradise when they see that Tamils and Sinhalese are living harmoniously in Colombo and elsewhere. Ironically, then, by not drawing frequent attention, the lack of commonplace communal violence is partly responsible for the continuation of less visible state-backed violence against Tamils.

What could be done

Though outsiders are correct to observe that respect for human rights in Sri Lanka now is much higher than it has been over the past two decades, this progress is still not enough. Tens of thousands of victims of past violations have yet to gain redress for the crimes committed against them, the Prevention of Terrorism Act (PTA) could be re-instituted at any time, and a peaceful future is far from guaranteed. Human rights NGOs must do more to preserve the dignity of Sri Lanka's inhabitants, and they must do so now.

The abovementioned obstacles are not as daunting as they may seem, and plenty can be done to counteract them. Government intimidation and violence against human rights workers, for instance, can never be fully restrained, but they can be rendered riskier. The case of Myanmar's Aung San Suu Kyi is a good example. By relentlessly seeking allies in the international community and constantly keeping them informed of her situation, her supporters have helped spare her from certain imprisonment or death. Myanmar's despotic rulers would not dare to harm her because they know that the world is watching. Some may argue that she – as one of the world's most recognized and honoured human rights activists – is an exception. However, the same advocacy efforts that keep her alive today are what made her a household name, and there is no reason to believe that other equally dedicated human rights workers cannot draw similar attention to their causes.

Yet, this protective function of advocacy does not apply to VIPs only. A few international allies can go a long way in keeping human rights workers from further harm. In Nepal, for instance, a leading human rights activist and coordinator of the Collective Campaign for Peace (COCAP), Dinesh Raj Prasain, was recently beaten in his home by Nepalese authorities. His primary contact in the U.S., an NGO called The Advocacy Project, mobilised its own members and supporters to express their disapproval to Kathmandu and petition the government to investigate the case. With the knowledge that over 750 individuals representing three NGOs are now closely watching the government's response, it is doubtful that it will try the same tactic again.

Another discouraging challenge for Sri Lankans is the newspapers' bias. Though this partiality is unlikely to subside in the near future, the newspapers

are clearly lethargic and news-starved, and they frequently resort to filling space with verbatim press releases about such mundane subjects as changes in visa application procedures at the US Embassy. Perhaps they still refuse to report on press releases put out by human rights organisations, but the effort to supply them with such information is not being made either.

NGOs can at least try to establish relationships with press contacts; persistence may pay off, and if it does not, nothing is lost. The media's bias, however, does not make it *completely* blind, and it is not uncommon to see newspapers report in detail on particularly atrocious violations of human rights. Similarly, human rights activists should not ignore the Tamil media either. Though it reports extensively on the abuses of the government, the extremist views it espouses are not helpful in spurring reform. NGOs can therefore use the Tamil media as an avenue through which to call on Tamils to work peacefully towards reform by encouraging them to avoid violence and peacefully pressure the government through letter writing, protests, etc.

The inertia that prevents some NGOs from taking advantage of modern developments in information dissemination should also be overcome. The age of typewriters, telegrams, faxes and complete control over civil society has passed, and advocacy efforts that sufficed in the 1990s are no longer adequate in 2004. Human rights NGOs have more space in which to maneuver now than they have had over the past two decades; they no longer have an excuse not to use the many tools available to any modern human rights NGO, which can now instantly communicate with thousands of people across the globe.

The second internal obstacle to NGOs' efforts to publicise human rights violations – the fear of engaging in partisan political work – is unfounded, imprudent, and poorly thought out. Unlike relief or even development efforts, human rights work is inherently political because in order for rights to be violated, there must be a human perpetrator. And when a perpetrator is backed by a sovereign state, the state must be confronted, and that brings an NGO into politics. If a human rights NGO sees itself as being "above politics," then the state is, in fact, not being challenged at all. When that is the case, what is the purpose of human rights work? To simply operate within the flawed system of justice that one is opposing in the first place, with full knowledge that the state is unlikely to grant redress to victims of its own violations? Respect for human rights will not be gained by playing by the rules of the perpetrator, and political leverage should be used wherever possible, both locally and internationally. Politics may be a dirty game, but it is one that a truly effective human rights organisation must play. NGOs such as HHR must therefore move beyond merely "educating the public" while hoping for the best and instead begin lobbying to achieve specific results.

Human rights NGOs must also take steps to ensure that the information they disseminate reaches the right audience in the right way. Ignoring the government's allies, such as the United States, is counterproductive. If a state adopts policies that are unfavourable to the improvement of the human rights situation, that should be all the more reason for NGOs to persuade it to revise its policies. Most organizations do not have the means to establish offices overseas; they do, however, have a worldwide Diaspora at their disposal. Tamil cultural, religious, and political organisations are already in place within states that could have the greatest influence on Sri Lanka's human rights policies. By enlisting these groups in the fight for justice back home, NGOs can hope to pressure the government to respect human rights out of fear of losing allies in the international community.

The targets of the government's misinformation – such as the U.N. and international human rights agencies – should also constantly and proactively be kept informed of Colombo's deceitful attempts to demonstrate that it is improving its human rights policies. The international community has failed in its efforts to spur reform, but it is not fully aware of this failure. A parallel stream of accurate information needs to complement government propaganda, including detailed explanations of the emptiness of reforms. The world must understand that progress has not been enough, that the LTTE is not representative of all Sri Lankan Tamils, and that aid money for poverty-alleviation will cause greater harm than good if it is not accompanied by the development of human rights.

Human rights organizations in Sri Lanka – as far advocacy is concerned – have been asleep at the wheel in recent times, thinking that international recognition of Sri Lankans' plight would continue forever if only they continued to operate as they had in the past. The government, meanwhile, has taken advantage of this complacency and evolved with the times to paint a different picture for the world to see. That image must be vigorously contested. U.S.-based Human Rights Watch, for instance, no longer seems to be very concerned with the most widespread human rights violations in Sri Lanka. Since the signing of the ceasefire, it has released only one statement on torture, compared with three on political killings and four on the use of child soldiers (mainly by the LTTE). A simple search for "Sri Lanka" on Amnesty International's website over the same period of time, meanwhile, reveals four news items on LTTE political violence, one on LTTE recruitment of children, one on state execution of criminals, and one lone urgent action appeal concerning the torture of a female detainee in Kandy District.

Clearly, the government has succeeded in shifting global attention to the LTTE's misdeeds and away from its own extensive human rights violations. Without progressing from passive dissemination of limited information to self-driven lobbying, the battle for the truth will almost certainly be won by the government, leaving the human rights community with few steadfast allies on which to rely.

Their primary means of effecting change, therefore, is not physical or legal; it is vocal. Without that voice, they are accepting the limits imposed upon them by the state

While Tamil and Sinhala newspapers lean heavily towards support of the rebel and government viewpoints, respectively, newspapers in English – a language with the potential to act as a bridge between the ethnic groups – are also more supportive of the Sinhala perspective

In addition to increasing their efforts to shed light on the government's abuses, NGOs should also present the world with a more accurate assessment of the peace negotiations' progress. The relative calm of everyday life in Sri Lanka since the signing of the Ceasefire Agreement makes it difficult for outsiders – who, as objective observers, naturally recognise the futility of the conflict – to consider the possibility of renewed violence. Those only marginally aware of Sri Lanka's struggle, such as asylum officers making decisions on refugees from a number of different nations, are easily convinced of the island's tranquility. Human rights organisations should make it their duty, therefore, to actively inform foreign governments (especially their refugee affairs personnel) and international human rights agencies of the precariousness of the situation, which the government has a clear and demonstrated interest in concealing.

The need for advocacy

If all of these measures require additional time and resources, why should Sri Lankan NGOs bother confronting the obstacles to advocacy at all? Advocacy is not a panacea; if it were, the world would be flooded with newsletters and urgent action appeals about every minor issue. However, it is often the only constructive tool available to human rights workers. The nature of their work does not permit them to stand between a gun and its target, between the baton and the torture victim. They are also unable to rely on a fair judicial system. Their primary means of effecting change, therefore, is not physical or legal; it is vocal. Without that voice, they are accepting the limits imposed upon them by the state. The benefits of advocacy, therefore, go beyond the aforementioned protection it can provide NGOs. By drawing attention to human rights violations, it can also serve a preventive function, rendering that voice even more powerful than the state.

This prevention comes in two forms. One is the desire of all states to avoid being embarrassed and ostracised because of the treatment of people under their care. The good behaviour induced by a state's knowledge that it is being watched is evident around the world. China watchers, for example, are already anticipating the positive effects that the 2008 Olympics in Beijing will have for China's human rights policies when it becomes the focus of attention for billions of individuals and dozens of governments. This powerful concept of 'saving face' should not be underestimated. Human rights NGOs, of course, cannot wait until Colombo is awarded the Olympics. International attention will not come to Sri Lanka that easily; NGOs must bring Sri Lanka to the attention of the world instead. This will not curb all violations; it will simply render them riskier to undertake.

Advocacy work can also result in a second form of prevention: individual deterrence. In more developed countries, it is state agents' knowledge that they can face serious consequences for their actions – rather than their inherent ethical superiority – that keeps them from abusing their power. If the Sri Lankan judicial system continues to neglect its responsibility to enforce such consequences, then civil society can do the next best thing by deterring further violations through the public shaming of perpetrators.

More importantly, it can publicise the rare cases in which the judiciary rules in favour of the victims. Earlier this year, for instance, civil society succeeded in obtaining the first conviction of a public officer under the Convention Against Torture Act, which has been in the books for 10 long and turbulent years. Unfortunately, the news was not publicised. Had it been brought to the attention of police and military officers across the island, they may have thought twice about whether or not they wanted to risk seven years of imprisonment the next time they considered torturing a helpless civilian.

As Basil Fernando, the chief of the Asian Human Rights Commission, notes, "The knowledge that law enforcement officers have of the weak nature of the law enforcement system in Sri Lanka gives them the assurance that their misdeeds will not be discovered and that to escape criminal liability is not difficult. The 'catch me if you can' game goes on all the time. Awareness of the difficulties that a victim will have in getting redress gives a police officer the psychological assurance necessary to continue to commit violence against the citizenry."

Thus, rather than jealously guard their documentation of violations, human rights NGOs in Sri Lanka should do everything possible to make it public. HHR, for instance, has always sought a maximum of secrecy for its extensive documentary evidence, dating back to 1977. Although there is certainly a danger of losing the documentation, once it has been electronically backed up an organization like HHR should consider heavily publicising the existence of its files. Presently, police officers and soldiers, operating in a "culture of impunity", have no reason to fear the state, while they are largely unaware of civil society's actions. Imagine the effect on those masses of uneducated state enforcers if they were to open up a newspaper and read that organisations like HHR have been meticulously tracking their activities for 27 years! What's more, they are continuing to do so!

Paradoxically, once publicized, such documentation should actually become safer. If government agents showed up at the headquarters of HHR tomorrow and burned its documentation section to the ground, who would notice? Only the people who know about HHR's work, and those friends are few. The government would be much less likely to take this sort of action if it were well known that HHR is the island's leader in documentation, for it would have to face the international and domestic outcry over having destroyed information that a lot of people would consider valuable... if they knew about it.

Sri Lanka is undoubtedly a difficult place in which to fight for the recognition of human rights. Clearly, though, NGOs seeking to make a difference and be true members of civil society rather than function as free legal/medical service providers must craft serious and concrete plans for advancing their goals through advocacy. Such plans should begin with the hiring of a full-time advocacy coordinator and then evolve to suit changing times and the needs of the NGO. Until the practice of communicating regularly with the public and the international community becomes as routine a habit as three o'clock tea, however, human rights activists cannot expect to have their voices heard as loudly as they would like.

Decimation of Vayaloor

By K.N. Tharmalingam

"For forms of Government, let fools contest,
Whatever is best administered is best"
— Alexander Pope

"My aim is to set up a clean government based on the precepts preached by Lord Buddha. My endeavour is to usher in an era in which every citizen could live in peace, prosperity, and happiness. We set ourselves a new goal - creation of a new society based on human and moral values..."
— J. R. Jayewardene during the 1977 election campaign.

"To all, life is dear ... Let one neither slay nor cause to slay"
– Lord Buddha (Dhamapada Ch. 10)

The government of a country has a duty to preserve the rule of law, which means three things.

- No one could be punished, or made to suffer physically, or be deprived of possessions, except for a definite breach of the law. A person cannot be punished arbitrarily.
- No one is above the law, which means that any official from the highest to the lowest is held responsible for any act done without legal justification. Under this principle, law compels officials, whoever it may be, to be tried by courts and are made liable in their personal capacity for acts done in excess of their official capacity and legal authority.
  Maitland – an authority on constitutions says, "Strictly speaking ministers are not responsible to parliament. But ministers are responsible before courts of law and before the ordinary courts of law. They can be sued or prosecuted there even for the highest acts of State." – *Substance of Politics*
- No one is to be deprived of his personal liberty.

A government must ensure that it meets the basic requirements of people for a decent human existence with dignity making facilities for education, employment, economic development, health and social progress with value and morality.

A government must create rights and privileges for the protection of its subjects, and the right to life is the most fundamental of all rights. It is held that this right to life is the foundation upon which the superstructure of all other rights is built. Constitutional authorities hold that the state should play an important role in safeguarding this right of its subjects. It is with this end that the state proceeds to punish those who attempt suicide. The rule of law prevents one attempting to kill another. The right to personal safety, the safety of his limbs, and his health leading to an uninterrupted enjoyment of life must be assured by the state, so that a citizen may not suffer assault, injury or imprisonment except by due process of law.

Happily these fundamental rights are contained in our country's constitution, but regrettably these provisions had not been translated into action when it concerned the Tamils. It appeared that the government was bent on unleashing pogroms instead of extending the constitutional safeguards to a community struggling for equal rights. Thus the state stood naked showing its hidden agendas. The state, which ought to have protected the people -its own citizens - went to the extent of using its armed forces to wipe out the community.

Contrary to the greatly proclaimed Declaration of the General Assembly of the United Nations, made on the 10 December 1948, UDHR- (Article 3 and 23) the Sri Lankan state seems to have ordered the brutal and merciless killings of countless Tamils who fell to the bullets.

Upon directions and instructions of those holding political power who instructed the armed forces as to what to do and how to do it, the massacre of Tamils in the Ampara District started and spread out to every nook and corner in the district. State terror has no limitations. Destruction of property, deprivation of employment in agriculture, fisheries, trade and industry are some of the violations of human rights. Organised persecution and killings compelled several families to escape deaths by fleeing, leading to displacement. When people deserted their homes and sought protection in welfare centers more problems were created. People were thrown out of employment and could not pursue their economic activities. What is more amusing is that the leader who promised a 'dharmista' rule based on the Buddhist doctrine proceeded to bring misery to one section of the people. People found that the promised "peace, prosperity and happiness" was a mere pipedream.

The heart-rending tale of Vayaloor's destruction is a shame to those who ordered the operation on that settlement as later events unfolded. Vayaloor in Sagamam in the Tirukovil divisional secretariat was a colony of the landless poor who were settled in 1972 under the government's plan to give "the highest priority to the development of land for the production of food and other crops." To reach Vayaloor, one has to travel eight miles on foot as there is only a jungle path leading to the colony. Four-wheeled tractors and

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There were 200 families, which had no pure drinking water, no shops, and the nearest government dispensary was 10 miles away. Yet they continued to stay and cultivate crops like maize, kurakkan, manioc, yams and other vegetables, depending on rainwater.

bullock carts are used for the transport of inputs for agriculture and transporting the produce. The poor usually walk the distance, and they seemed to belong to the bullock-cart age.

Government of the day told the landless settled at Vayaloor that they were exempted from land tax and would be given permits and this promise was fulfilled when D. L. C. Jayasuriya held a land kachcheri to select settlers.

This was the time when people were asked to eat yam and kurakkan on Tuesdays and Fridays. Hotels were asked not to cook rice. It was during the period of food shortage that the settlement Vayaloor was established. There were 200 families, which had no pure drinking water, no shops, and the nearest government dispensary was 10 miles away. Yet they continued to stay and cultivate crops like maize, kurakkan, manioc, yams and other vegetables, depending on rainwater. Manioc was hardy plant capable of resisting droughts and yielding bountifully. Traders from distant places went there in bullock carts to collect agricultural produce from the chenas.

The people built their homes with poles and mud, thatched them with either coconut cadjan, or grass. They suffered from malaria and water-born diseases. Wild animals attacked their crops and livestock. Jackals and leopards stole their goats and fowls, while the wild boar destroyed their crops.

Despite their hardships, the people were happy. One of them told me in 1978 that they derived pleasure from listening to the rushing winds, music of the birds and leaves, the wild animals of the green forest. I was reminded of the Deserted Village of Oliver Goldsmith, for the land at Vayaloor gave its people "what life required but gave no more ... and their riches – ignorance of wealth."

It was such a community that was attacked brutally and when the army killed the people, the settlement was deserted and remains so to this day. The land has been taken over by the jungle. When people left Vayaloor, they did not carry any of their belongings. They fled with what they were wearing. They had lost all their possessions including their animals, crops, and savings. This reminds us of what happened at Manal Aru (Weli Oya) Tennamaravaadi and Amaravayal in 1984. The racial violence inspired by the state turned a new page in the East during 1984 and 1985.

When Vayaloor was attacked, there was a ceasefire between the government and the militants. It was intended to help the talks at Thimphu where J. R. Jayewardwne's brother was leading a delegation to talk with the TULF and the five Tamil militant groups - LTTE, PLOTE, EPRLF, EROS and TELO. The forces were made to wantonly massacre innocent Tamil civilians at a time when the delegation under the late H. W. Jayewardene was having talks.

The attack on the people at Vayaloor started in the early hours of 24 August 1985 as seen in the sworn affidavits furnished to Home for Human Rights. S. V. in the Alayadivembu Division, widowed by the Vayaloor attack, is a mother of five, three of whom are girls. She says, "My spouse died as a result of an orgy of killings carried out by the Sri Lankan army on the 24 August, 1985. We lived there at Vayaloor and cultivated a variety of crops – yams, cereals, vegetables and fruits. We had poultry and goats. But we did not have drinking water, hospital, shops and a school.

"It was about 6 o'clock in the early hours of the day; I was at the hearth trying to light the fire to prepare tea. All of a sudden I noticed that there were

a number of men in army fatigues carrying guns standing around our hut. I was terrified - much afraid of the visitors. I began to tremble.

"The soldiers found that I had seen them and observing my nervousness, approached me with a volley of questions, (in Sinhala), which I did not understand. Just then my spouse walked in and the soldiers spoke to him and, through friendly gestures and show of hands asked him to join them with the bucket we used for drawing water from the well. My husband was asked to follow them and I joined too. The soldiers rounded all the males above 18 years from the huts but allowed the aged, the sick and the weak to remain. They took all the able-bodied youths with them. Even women were taken along. We walked through the jungle path towards the East.

"The soldiers wanted the men to fetch some water for them to wash before breakfast. It was around 8 o'clock. The men obliged and the soldiers ate their food and we starved – did not even have a cup of plain tea."

"When their breakfast was over, they asked the people to accompany them on their journey but never told us as to where they were taking us to. We complied with their orders and proceeded along the jungle path when we met another group of soldiers, and the officer commanding that group found fault with the soldiers who had taken women together with men.

"The second group leader came up to the women and spoke in Tamil and said, 'Do not proceed further with the men. The soldiers are in an unfamiliar area. We need men. Wait there under the tree until noon and get back to your places and your men will return to you after showing us the way.' We remained at that place waiting for our men who went in the direction of Kumarankulam, but they did not return.

"The sun came vertically over our heads and there were no signs of the men returning. Since we had to prepare food for our children and for the men who had gone with the soldiers, we returned to our huts and busied ourselves cooking food that we did not eat.

"As we were waiting for the men to return, a message came of killing. The messenger, who himself had escaped death, spoke of remains of those killed were scattered in the Kumarankulam area. I could not believe the message but when the other women started going to the homes of relatives at Kolavil, Panankadu and Akkaraipattu in search of safety, I too left Vayaloor. I left everything behind as they were and went to my people.

"The elderly persons whom the army left in their chenas proceeded to the place where the men were slaughtered. Grief-stricken relatives went to Kumarankulam in tractor-driven trailers and brought the dead to our ancestral villages who were buried according to customary rituals. We lost all that we owned at Vayaloor."

In another statement K. Vallipillai alleged that her two sons, Kulanthavel Jeyakanthan, (22) and Rasalingam (25), her 30-year-old son-in-law Sinnavan Kanthasamy, father of a child, (married to her only daughter, Gnanammah) her elder brother Thambipillai (40), and, 60-year-old uncle Erambu were abducted from Vayaloor on that fateful day and presumably killed.

Thambipillai Janaki (b 1972) reported that her 60-year-old father Pathan Thambipillai, and her brother Yogendiran (15) were taken into custody by the army on that day and the two had disappeared after the arrest. The two were returning home with harvested paddy transported in double bullock carts. The cart was hired for bringing home the produce from the paddy field. The carter, the cart, the bulls and the produce too were lost, all disappeared with father and son.

Gabriel Kamalawathy, mother of five testified under oath that her spouse Peduru Ratnadurai was taken into custody by the SLA on 24 August together with eight others and they never returned. In a similar statement Mathew Sivamany complained that her son Thambirajah Ravindraraja, (22) disappeared at Sagamam on the same day.

A trader who went to Vayaloor frequently on business, Vyramuthu Kanagasabai, said, "I went to Vyaloor – Periyatalawe on the 23rd evening with the hired double bullock cart to bring goods for the Sunday fair at Tirukkovil. I spent the night and helped to uproot the mature manioc. As I was preparing to leave the area on the 24th, I found the entire settlement rounded up. I remained in a hut with the farmers. I was taken into custody, but released. I don't know what happened to the cart, the bulls and the carter I took to Vayaloor. I lost all the money I carried and the bicycle I used for my journey.

"When the soldiers asked me to run away, I went, but remained hiding a little away from Kumarankulam. A little after I left the farmers, I heard the gunshots. When the soldiers left in their vehicles, I went to the place and saw the men shot dead. However, there were two who were injured. One was shot through the mouth. He did not die and the other was one Nadarasa. I returned to Vayaloor and conveyed the fate of the men." Kanagasabai confirmed that as many as 40 were killed.

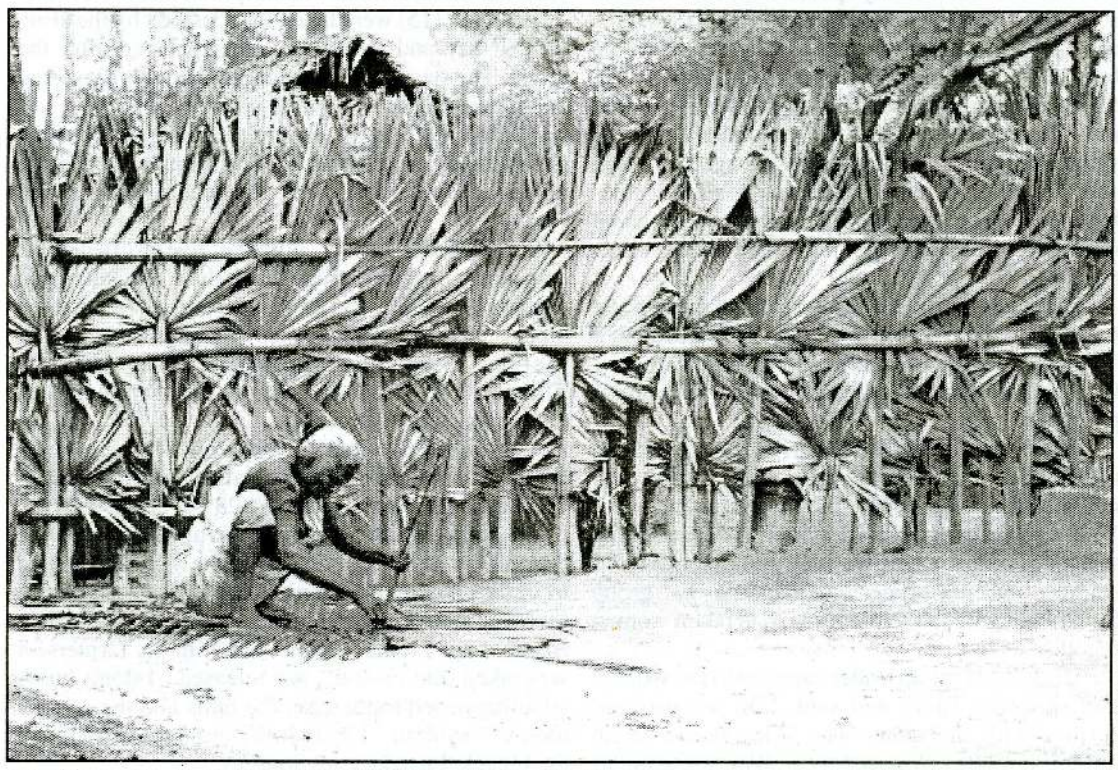
The murder of people at Vayaloor is a crime against humanity arising from sheer hatred and malice. It was not even an act of retaliation, because there was no immediate provocation. The state not only had no respect for the fundamental rights of the dead persons, but also did not probe the killings. The state failed to provide protection to citizens from danger to their lives and further, failed to take note of the serious violations of the provisions in the constitution.

The government failed in its duty to protect the civilians at Vayaloor. The fundamental rights of those people, including the right to life was denied to them. The killings of those colonists violated all known cannons of justice. The government of the day failed to preserve the rule of law and thus lost all claims to good governance. Either the government had abdicated its power and authority over the armed forces or aided and abetted in the commission of crimes against its own citizens. The failure of the government to bring the criminals before a court of law proves the second charge.

When people left Vayaloor, they did not carry any of their belongings. They fled with what they were wearing. They had lost all their possessions including their animals, crops, and savings.

Refugee law and exclusion clauses

By Sujith Xavier



An old woman at work outside a refugee welfare centre

This question would have a simple answer. If there is concrete evidence to show that the individual in question participated in the acts of violence, then the exclusion clauses would prevent them from being granted refugee status

The protection awarded to refugees within modern day realities is as crucial as it was during the drafting and ratification of the 1951 Convention relating to the status of refugees and the 1967 Protocol[1] by the Member States of the United Nations. The concept and principles enunciated therein are a reflection of ancient traditions of providing protection for those in need. The Convention reflects "a fundamental human value on which global consensus exists and is the first and only instrument(s) at the global level, which specifically regulate the treatment of those who are compelled to leave their homes because of rupture with their country of origin[2]. Within this dynamic concept of protection, the Convention as a whole is very humanitarian in nature where it tries to protect those in dire need.

Therefore it includes the notion of non-refoulement, through article 33 (1).[3] Lauterpacht and Bethlehem have succinctly defined this principle: "A concept which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his life or freedom would be threatened on the account of race, religion, nationality, membership of particular social group or political opinion."[4]

Conversely even at the time of drafting, the framers intrinsically knew that the broad protection awarded needed to be restricted, and thus included the exclusion clauses. These restrictions or rather the exclusion clauses go to the heart of the matter in that they restrict those who are undeserving based on serious criminal acts committed by the individual[5] claiming asylum. Thus can it be clamed that the exclusion from the refugee status under article IF of the 1952 Convention should not occur if the treatment the applicant would face if returned to his country of nationality would amount to persecution?

The appropriate response to this question requires one to evaluate a number of different areas within refugee law. Consequently, it is essential to briefly discuss the content of the definition of a refugee, the exclusion clauses and the notion of non-refoulement. Through this, it will be distilled that the principle of non-refoulement as enunciated through Article 33 (1) does not prevent exclusion. However, non-refoulement as incorporated within other international Human Rights Treaties and customary international law does prevent Member States of the United Nations from sending potential claimants back to their country of origin if they will likely face persecution.

The Convention

To substantiate the claim that the Convention does not allow the idea of non-refoulement to trump the exclusion clauses, it is imperative to examine the contours of the Convention, especially the definition afforded to a Convention refugee, the exclusion clauses and the most commonly used interpretation and the notion of non-refoulement.

The Refugee Convention has a human rights character where it tries to protect the vulnerable and weak experiencing severe hardships from their States. Given the current global context, it can be argued that the Convention is just as relevant as it was when it was drafted within the context of the aftermath of World War Two. Art. 1A (2) of the Convention and the 1967 Protocol defines who is a refugee, where it sets out the criteria that are necessary for protection.[6]

Article 1: Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 1 (1) and (2) of the 1967 Protocol amends Article 1A (2) of the Convention: Article 1 - General provision 1. The States parties to the present Protocol undertake to apply Articles 2 to34 inclusive of the Convention to refugees as herein after defined.

Article 1A (2) details the criteria under which individuals fleeing persecution (under the five grounds) from home country could avail themselves of protection in the country of refuge. Yet within the Article, the key concept is "owing to well-founded fear of being persecuted." These two notions are of relative importance and need to be discussed briefly in order to ascertain whether exclusion is subordinate to the idea of non-refoulement.

Within this definition, there are two important notions to consider - that of persecution and that of well-founded fear.

Persecution and well-founded fear

According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status,[7] "persecution" is vague term. "The subjective character of fear of persecution requires an evaluation of the opinions and the feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed."[8] Yet the non-defined definition should incorporate a threat to life or freedom, which ought to be "inferred" from Article 33 of the Convention. Also, the Handbook stresses that "various measures" ought to be pooled together with relevant factors to establish, the individual's state of mind to determine whether it amounts to persecution. It is also worth noting persecution should incorporate the human rights violations envisioned within the Bill of Rights and other human rights instruments.

This idea of well-founded fear is a cornerstone aspect of the Convention and a definitional requirement. There are subjective (fear) and objective (well-founded) elements, which must be satisfied in order for the individuals to avail themselves of the status. The subjective element requires that the "personal and family background of the applicant, his membership of a particular race, religion (etc)... his own interpretation of his situation, and his personal experiences... everything that may serve to indicate that the predominant motive for his application is fear" is taken into account.[9] The objective element on the other hand requires the applicant to establish that his or her continued stay within the country of origin would be unendurable based on the Article 1 A 2 definition. However, it is the role of the authorities to ascertain the veracity of the claim made by the applicant based on the prevailing conditions within the country of origin.

Article IF: The exclusion clauses[10]

Within the current global context, the existence of the exclusion clauses within the Convention enables States Party to distil those who are deserving from those who are not. For a contemporary example, one only needs to look at current news items to identify the significance of these clauses. The Rwandan government, in its efforts to grapple with the atrocities committed there 10 years ago and deal with the crimes has sought to create the Gacaca Courts. These courts must begin their daunting task of determining who was responsible for the slaughter of thousands in the Rwandan genocide. "Who killed, raped or looted during the three months of genocide when about 800,000 people, mainly Tutsis, were slaughtered across Rwanda."[11] Yet what would happen if one of these individuals responsible for the murders of a few or many hundreds were to seek asylum?

This question would have a simple answer. If there is concrete evidence to show that the individual in question participated in the acts of violence, then the exclusion clauses would prevent them from being granted refugee status. The rationale for the exclusion of certain would-be refugees hinges on the notion that certain crimes are so heinous in nature that the perpetrators must be excluded to preserve the legitimacy of the asylum regime.[12] In effect the drafters of the Convention had two aims for the exclusion clauses. Initially to deny undeserving claimants the status of refugee since their actions were so grave and monstrous. Secondly "to ensure that those who had committed grave crimes.... or other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape persecution."[13] Thus, in essence the drafters' conception of exclusion fits perfectly within the contemporary realities. Consequently, within the scope of this analysis it is pertinent to establish the curvatures of IF.

(a) Crime against peace, a war crime, or a crime against humanity

Section A of Article I F is multifaceted and tries to deal with crimes of a specific nature. These crimes, however, given their severity in most cases, must be committed by high-ranking officials and exclusion on this basis is rare. Alternatively, given the contemporary context, this might be changing. There are many international instruments[14] that offer assistance on the span of these international crimes.[15] As emphasized within the UNHCR Guidelines, even though the ICC Statute is the most recent attempt by the international community to define these crimes, it should not be used as the definitive interpretation. All of the instruments

Extradition treaties predominantly classify terrorist acts as non-political crimes: for a crime to be regarded as political in nature, it needs to be consistent with the notions of human rights and fundamental freedoms

The claimant, on the other hand, argued that if he were to be deported, he would then face a "real risk of torture". The Court accepted this argument and held that there was real risk of torture after having examined all the relevant evidence

should be used. "According to the London Charter a crime against peace involves the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the forgoing.'"[16]

War crimes on the other hand deal with breaches of international humanitarian law and encapsulate such act as "willful killing and torture of civilians, launching indiscriminate attacks on civilians, and willfully depriving a civilian or a prisoner of war of the rights of fair and regular trial."[17] The third component, crimes against humanity, includes such acts as genocide, murder, rape and torture. Yet one of its crucial features is that it should be "carried out as part of a widespread or systematic attack directed against the civilian population."[18]

(b) Serious non-political crime

Exclusion under 1 F (b) should occur if the individual has committed a non-political serious crime. However, the difficulty lies in determining what this entails since a distinction needs to be drawn between the notions of serious crimes and crimes that are of a non-political nature. Serious crimes describe a "capital crime or a very grave punishable act." According to the UNHCR Guidelines, the appropriate test for determining the serious nature of the crime is dependent on international standards and thus it enunciates certain key factors that need to be taken into consideration.[19]

Non-political crimes, on the other hand, are rather perplexing because the interpretations of them are linked to extradition laws. Extradition treaties predominantly classify terrorist acts as non-political crimes: for a crime to be regarded as political in nature, it needs to be consistent with the notions of human rights and fundamental freedoms. "Egregious acts of violence such as acts those commonly considered to be of a 'terrorist' nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective."[20] Yet there is no conclusive definition of terrorism in international law.

However, with the terrorist attacks on the Twin Towers, the United Nations "has come out much more strongly against terrorism, although without any definition of terrorism."[21] The U.N. Security Council Resolution 1373, Paragraph 3 F states that: "Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts."[22]

It should also be noted that 1 F (b) requires that the crime be committed outside the country of refuge unlike the other two. Within the confines of 1 F (a) and (c), the crimes could have taken place "whenever and wherever they are committed."[23]

(c) Acts contrary to the purposes and principals of the U.N.

Article 1 F (c) is rather controversial since it tries to exclude those who might have committed any acts contrary to the purpose and principals of the United Nations. Yet defining the broad scope of this article is rather cumbersome and the United Nations Charter "offers no guidance" because it does not provide a list of acts that may be included within this article. "The *travaux préparatoires* are also of limited assistance... but there is some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of a fairly exceptional nature."[24]

Ultimately it can be argued that this section was incorporated to exclude those who have participated in the commission of serious, sustained or systematic violations of fundamental rights within non-war settings. 1 F (c) will be pertinent where there is international consensus pertaining to a specific act as being contrary to the purpose and principals of the United Nations. As the Supreme Court of Canada noted in *Pushpanathan,*[25] there are two recognizable categories within this Article. Initially the acts that fall within the purview international agreements or U.N. resolutions and secondly where it can be deduced by the Court that the act is "serious, sustained and systematic violations of fundamental human rights."[26]

Non-refoulement:

Under the auspices of Article 33 of the Convention, States cannot expel or return *(refouler)* a refugee, in any manner whatsoever to territories where the refugee's life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. Yet this notion is restricted by the exception provided for in Article 33 (2).[27] What should be emphasized is the evident overlap between 33 (2) and the exclusion clauses. What is noteworthy is that even within the notion of non-refoulement, the framers of the Convention felt it pertinent to include exclusions. Nonetheless, issues surrounding this exception fall outside the purview of this discussion.

Interpretation

The crucial aspect within this discourse is the way in which the exclusion clauses are interpreted by the Member States and the United Nations High Commissioner for Refugees (UNHCR).[28] A predominant number of Member States are of the view that if the applicant can be excluded through I F, then they do not need to make an inquiry into whether the applicant falls within the purview of 1 A 2 and the notion of non-refoulement,[29] which has been reinforced by the Canadian Courts.[30] It is pertinent to mention that in *Sivakumar V Canada*[31], the Federal Court decided to exclude the claimant since "he was responsible for crimes against humanity committed by the Liberation Tigers of Tamil Eelam (LTTE) because of his leadership position within that organisation and his continuing participation in it."[32] Therefore, the Court did not even consider whether the claimant was worthy of Article 33 protection.

This line of interpretation within the Convention leads to the significant portion of the argument: that the exclusion clauses under I F of the Convention should not occur if the applicant were to face

persecution if returned to his or her country of origin. Within the Convention, if it can be clearly established that the claimants has committed crimes elucidated within the exclusion clauses, they cannot avail themselves of the protection guaranteed within 1 A 2. However, the notion of non-refoulement has seeped into other International Human Rights instruments and Customary International Law, which have the effects of binding the Member State from expelling those who wish to avail themselves of its protection. Each of these notions will be examined in turn.

International human rights treaties

Numerous legal academics (Shaw, Brownie, etc.) have articulated that there has been a shift in the way States act. The creation of the U.N. and its mechanisms (both treaties and charter organizations) and other regional rights regimes have legally embedded the notion of human rights in the way states conduct their affairs in the hope of protecting fundamental human rights. The words of the U.N. Secretary General captured this eloquently when he said "the protection of human rights must take precedence...."[33] Thus within this contextual dichotomy, there are numerous arguments that can be put forward to show that Member States are bound by the notion of non-refoulement, which falls outside the purview of the Refugee Convention.

Non-refoulement has been entrenched within three very important instruments that serve to protect human rights at its basic level.[34] The incorporation of this principle within these regimes dictates that Member States, when expelling asylum seekers based on the exclusion grounds, must bear in mind their obligation within these instruments. In order to substantiate the claim that non-refoulement protection restricts Member States' ability to expel individuals to a territory where they might face persecution, it is essential to examine each of the instruments and the relevant case law adjudicated through the bodies that monitor the effective implementation of these instruments.

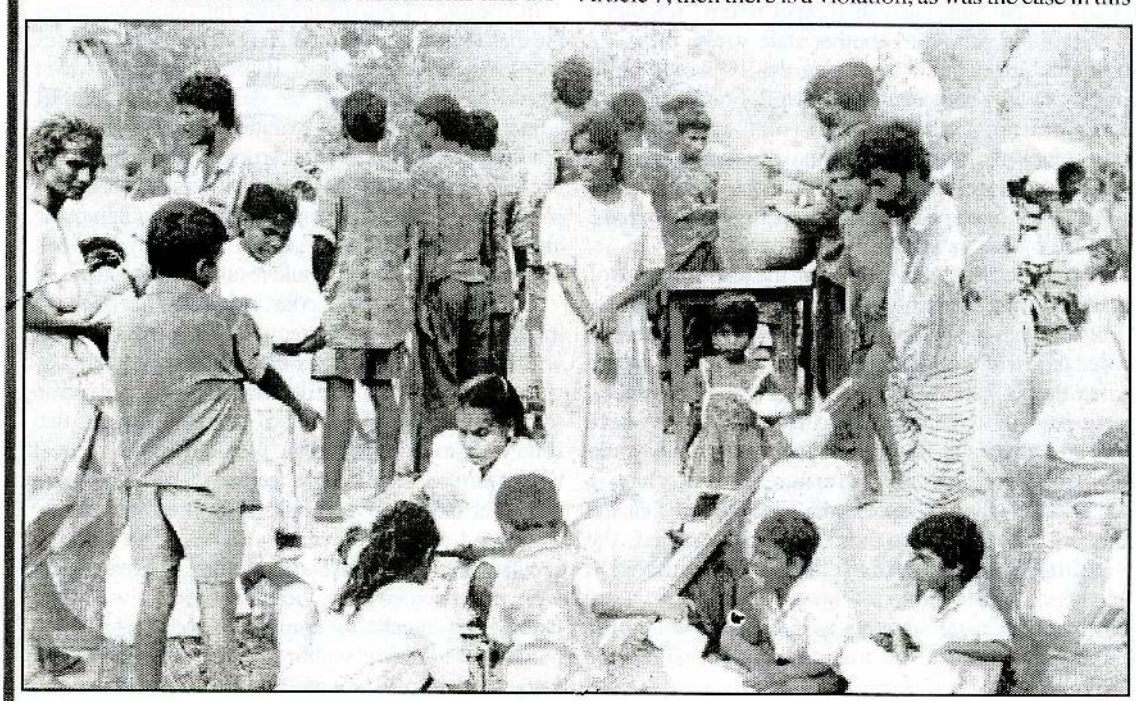
International Covenant on Civil and Political Rights (1976) (ICCPR)

The ICCPR, forming an integral part of the Bill of Rights instituted through the U.N., postulates the protection of civil and political rights. Within this instrument, Article 7 has been argued to be the incorporation of the notion of non-refoulement. Article 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation."[35]

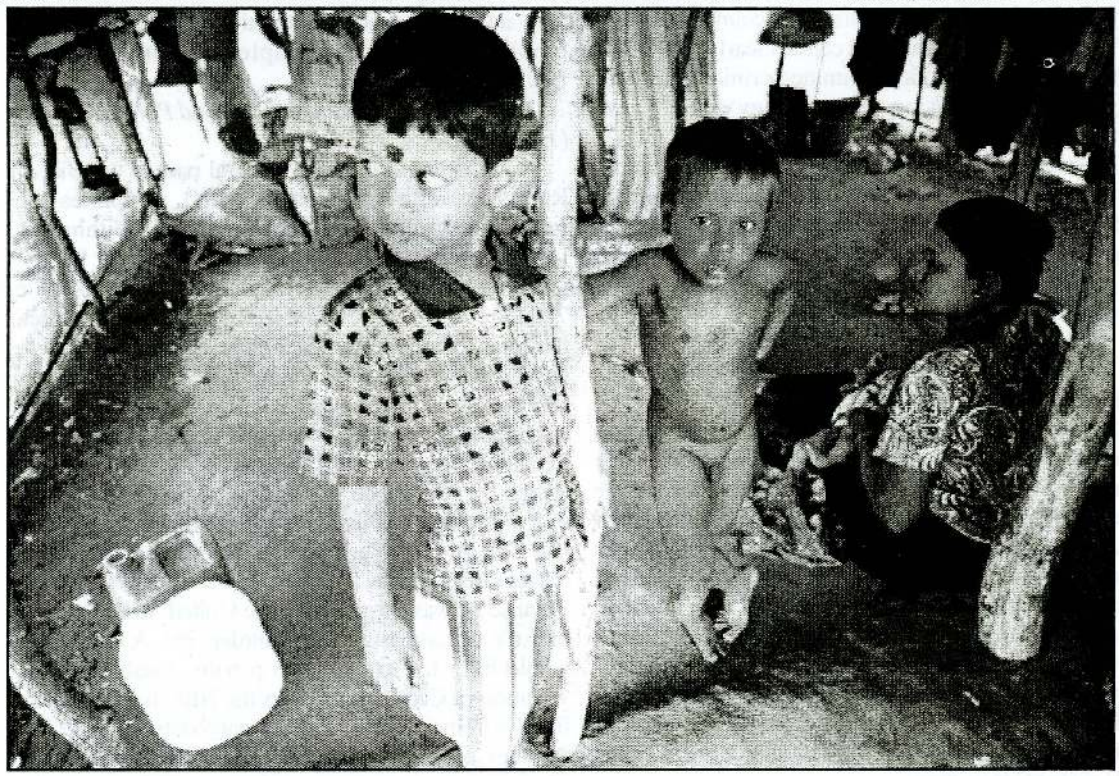
The monitoring body of the ICCPR, the Human Rights Committee has on numerous occasions dealt with the Article in relation to extradition of prisoners to face execution. In *Ng v Canada*,[36] the claimant alleged that the Canadian government had violated his rights (especially Article 7) enshrined within the ICCPR because he was extradited to the United States to stand trial for the commission of murders etc. A conviction would have led to the death penalty, resulting in the violation of Convention. Thus the HRC held: "...That follows from the fact that a State party duty under Article 2 of the Covenant would be negated by the handing over of a person to another state (whether a state party to the Covenant or not) where treatment contrary to the Covenant is certain, or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstance in which it was foreseeable that torture would take place."[37]

The jurisprudence of the committee is clear in interpreting Article 7 within similar confines as the notion of non-refoulement. If the applicant were to be extradited to a territory where he would face treatment falling within Article 7, then there is a violation, as was the case in this

For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstance in which it was foreseeable that torture would take place



Overcrowding and lack of privacy bedevils life in welfare centres



Displaced children, neglected, but often victims of political propaganda

The Canadian Supreme Court in a leading judgment in* Sursh vs. Minister of Citizenship etc. *concluded that, "In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm

instance.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) (CAT)

The CAT, on the other hand, explicitly outlaws the expulsion, return (refoulement) or extradition of anyone to a territory where they might be subjected to torture as defined by the Convention.[38] Article 3 clearly postulates the notion of non-refoulement and the ban is couched in similar terms to Article 33 of the Refugee Convention. It states: "1. No State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".[39]

This can be clearly distilled from the jurisprudence of the monitoring body of the CAT. In *Tahir Hussain v Canada*, the issue before Committee was "whether the forced return of the author (claimant) to Pakistan would violate the obligation of Canada under of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[40] After having examined all the evidence, which suggested that the claimant would in fact face torture if returned, the committee concluded that Canada had violated it obligations under the Convention. Consequently, the principal of non-refoulement as enunciated within the Refugee Convention has found protection within the CAT.

The European Convention on Human Rights (ECHR)

The protection awarded to the principle of non-refoulement within the ECHR is remarkably strong compared to the other two mechanisms. Article 3 of the European Convention on Human Rights stipulates an absolute ban on torture. The Court (ECtHR), the monitoring body of the Convention, has through the years developed strong pillars of protection for the rights guaranteed therein. Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[41]

In *Soering v United Kingdom,* the issue concerned the extradition of a German national to stand trial for murder in the United States. If convicted the claimant would have been given the death penalty. ECtHR adjudicated that if the UK extradited the claimant, then it would be in breach of its Article 3 obligations, not because of the death penalty but "it was the death row phenomenon which S (claimant) alleged was inhumane and degrading. For any prisoner any delay between sentence and execution would result in severe stress."[42]

In *Chahal v UK,*[43] the court made another decisive move in ensuring the protection of non-refoulement within its case law. This case concerned the UK government's attempts at deporting a suspected Indian terrorist. The claimant, on the other hand, argued that if he were to be deported, he would then face a "real risk of torture". The Court accepted this argument and held that there was real risk of torture after having examined all the relevant evidence. The national security arguments advanced by the UK government were not accepted since the risk of torture was more likely. Subsequently, the emphasis placed on the notion of non-refoulement within this regional instrument suggests that exclusion will be not be possible if the claimant is to face torture upon return to the country

of origin.

The incorporation of non-refoulement within the human rights treaties system is one of the means by which Member States are prevented from expelling would-be applicants facing torture upon return to their country of origin. However, as enunciated by academics and practitioners, this is not the only means. Customary international law is also relevant because non-refoulement has become a principle that is imbedded in custom and is binding on Member States, irrelevant of the ratification status of the Refugee Convention.

Customary international law

It can be clearly stated that the notions of non-refoulement have become entrenched within international law through custom. Therefore this limits the abilities of the Member States to expel applicants seeking asylum back to their country of origin if they are likely to face persecution. There are number of arguments that can be advanced to ascertain the veracity of this claim. First, it can be argued that Article 33 and the notion of non-refoulement are Customary International Law. Second, it can be purported that the incorporation of non-refoulement as an element within the prohibition against torture and ill treatment cement it further as custom. However, prior to delving further into the issue, it is imperative to have a clear understanding of the notion of custom.

Non-refoulement as customary international law

Article 38 of the Statute of the International Court of Justice (1945)[44] provides an exhaustive list of sources of international law. Article 38 (b) defines custom when it states: "international custom, as evidence of a general practice accepted as law."[45] According to the ICJ, "...While a very widespread and representative participation in a Convention might show that a conventional rule had become a general rule of international law.... As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law, ... it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt legally compelled to draw them in that way by reason of a rule of customary law. The cases cited were inconclusive and insufficient evidence of a settle practice."[46]

Lauterpacht and Bethlehem have extrapolated definitional themes from this ruling: fundamentally norm-creating character, widespread and representative state support, including those whose interests are specially affected and consistent practice and general recognition of the rule.[46] Overall, they have argued that non-refoulement is a well-established principle within international law.

According to these authors, non-refoulement has fundamentally acquired a norm-creating character. They point to the existence of this notion within many of the internationally recognized human rights instruments. Their view has been further supported by the various conclusions made by the Executive Committee[47], reaffirming the idea that non-refoulement "was progressively acquiring the character of a peremptory rule of international law."[48]

The second aspect requires that there be widespread and representative state support for non-refoulement to become part of customary international law. In support of this contention, one only needs to look at the number of states that have ratified the Refugee Convention, the 1967 Protocol and the various other conventions in which non-refoulement has been incorporated. Finally, the consistent practice and the general recognition of the rule can be corroborated through the arguments mentioned above. This can be further supported by looking at the instances where states incorporate the principle within domestic jurisdiction. A good example of this would the attempts made by the European Union to incorporate the principles of the Refugee Convention within its framework under third pillar rights.[49]

Non-refoulement as an element of torture and ill-treatment

As is clearly established within the second part of the analysis, non-refoulement has become an integral part of the absolute ban on torture and ill treatment as defined by various conventions and treaties. Yet, to further strengthen this line of argument, it is imperative to examine *Suresh v The Minister of Citizenship and Immigration and the Attorney-General of Canada*, where the Canadian Supreme Court engaged in this type of inquiry. After having embarked on the determination of non-refoulement from the Canadian perspective, the Court then turned its attention to the international obligation of Canada through the ratifications conventions and treaties.

The Supreme Court in this leading judgment concluded that, "In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture."[50]

The approach taken by the Canadian Supreme Court concurs with the argument purported above. The Court, being aware of the international obligations, recognized the principle of non-refoulement as being an intricate part of the ban on torture and ill treatment.

The Refugee Convention as a product of the experiences in World War Two affords the maximum protection to those fleeing persecution from their country of origin. Yet the protection awarded is restricted through the exclusion clauses, in order to ensure that those who are undeserving are not granted protection.

In conclusion, the underlying purpose was to determine whether the application of the clauses could be restricted through the principle of non-refoulement. It was argued that the non-refoulement principle, as enshrined within the Convention, does not trump the use of the exclusion clauses. However, Member States are restricted by other International Human Rights Instruments and Customary International Law from expelling claimants who will likely face persecution if returned to their country of origin. The protection awarded to those fleeing genuine protection from their country of origin is an important and vital tool in the preservation of fundamental rights. Nonetheless, given the current realities, a legitimate approach is needed.

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However, Member States are restricted by other International Human Rights Instruments and Customary International Law from expelling claimants who will likely face persecution if returned to their country of origin

Home for Human Rights: Past, present and future

The HHR is a unique organisation compared with many human rights organisations in that it has worked very successfully with authentic grassroots links over a period of 25 years and its record in this regard compares well with the best traditions of human rights organisations elsewhere in the world

For the first time in its 27-year history, a panel of three outside experts, including the chief of the Asian Human Rights Commission, evaluated Home for Human Rights (HHR), recently. Its report, a long-overdue document, should serve more than as a mere tool to satisfy donor requirements. Rather, it should be celebrated both for the valuable achievements it highlights, as well as for the constructive criticism it directs at an NGO that, understandably, is not perfect.

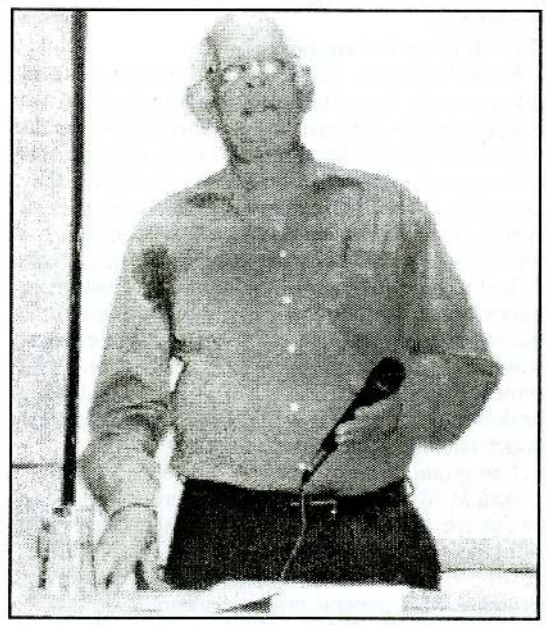
History and context

Before it can be praised or criticised, however, HHR needs to be understood, not just as an institution but also as an important player in a trying environment.

HHR started out as an informal association of three Jaffna lawyers in response to the massive 1977 communal riots. The riots created enormous hardships for people living in predominantly Tamil areas, and HHR's founders set out to document the human rights violations being carried out by the state in order to provide evidence to the government's Sansoni Commission, which was appointed to gain redress for affected persons. Working in the Northern Province, HHR collected affidavits, statutory declarations, and written statements from victims and witnesses.

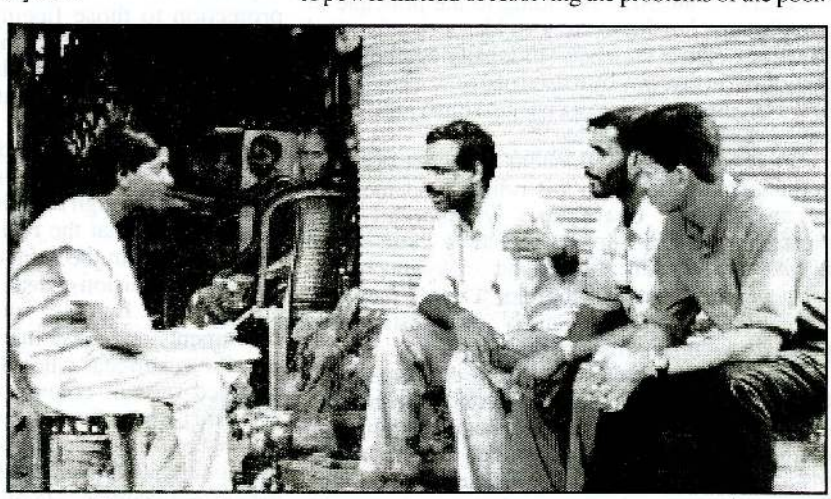
When it became an incorporated society in 1980, it was finally able to obtain external funding and extended its geographic reach and mandate to cover legal action in defence of those living in extreme poverty, who could otherwise not afford litigation fees. By 1990 HHR had become a charitable trust and grew to include – in addition to its legal aid programme and documentary work – a women's desk, an education programme, and medical aid and rehabilitation programme. From a three-man cause in the north to an island-wide NGO, HHR has grown tremendously over the past 27 years.

HHR's mission is to preserve, protect, and prevent the violation of, human rights in Sri Lanka, as defined by the U.N. covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. HHR uses two primary mechanisms to achieve its goals. One is through its appeals to various international bodies and UN agencies; the other is by the use of limited local instruments available to human rights defenders, such as municipal, regional, and national courts, and the National Human Rights Commission.



Mr. Francis Xavier, Director, Home for Human Rights

HHR firmly believes that development strategies that ignore threats to the country's democratic institutions will – even unintentionally – cause great harm to Sri Lankans by supporting a very dangerous form of authoritarianism. Assistance to the poor that is not accompanied by democratic reforms, a strengthening of justice institutions and the safeguarding of democratic rights will ultimately support corruption and the abuse of power instead of resolving the problems of the poor.



HHR officials speaking to clients

HHR staff on field visit in the Upcountry

Any attempt to deal with the period after the cease-fire as one in which human rights issues have become irrelevant or less important is a serious mistake and would lead to harmful consequences for people of all ethnic and religious groups.

The evaluation correctly points out the importance of Sri Lanka's civil war in HHR's development, which spans "the most traumatic period of Sri Lankan history." It is a conflict in which "civil rights were to become the greatest casualty." HHR's workload was amplified – while its activities were limited to the narrowest possible space – as a result of the draconian Prevention of Terrorism Act (PTA). At the same time, HHR's lawyers sought and found support within the international human rights community, with which it has had the good fortune of maintaining contact ever since. Up until the signing of the Ceasefire Agreement (CFA), HHR operated in an extremely dangerous environment. Frequent run-ins with authorities, the bombing and shelling of the Jaffna office, and the murders of two former workers left very little room for a human rights organisation to challenge the abhorrent practices of a state. Yet HHR did more than just survive during this period. Through "strong and dauntless lawyering" the organisation was able to secure the freedom of hundreds of wrongfully detained persons.

Since the beginning of the now-stalled peace negotiations, HHR's environment has changed. Though the "fear of a return to the old situation... hangs over everyone" and a permanent end to hostilities is not guaranteed, HHR is at greater liberty to defend the human rights of the Sri Lankan people than ever before. Not only has government pressure eased, but also detentions under the PTA have ceased altogether, and "this allows the organisation to explore many other avenues." Moreover, the technological advances now available to HHR improve its capacity to document violations and, more importantly, to rapidly disseminate information that can influence domestic and international public opinion, as well as the actions of the government.

Among the major challenges that HHR faces today are the collapse of an institutional framework of justice and the prevalence of lawlessness, a culture of impunity that protects state officers and their agents, a general loss of faith in the judiciary, and the physical destruction in the North and East, with its resultant loss of livelihoods.

Areas for Improvement

The evaluation, not surprisingly, is overflowing with praise for HHR. As its authors note, The HHR is a unique organisation compared with many human rights organisations in that it has worked very successfully with authentic grassroots links over a period of 25 years. It has had a victim-oriented, hands-on approach to the receipt of complaints and in attending to them. The massive amount of practical work done in a very difficult geographical area at a critical time is confirmed by the enormous amount of documentation collected over this period. The HHR's record in this regard compares well with the best traditions of human rights organisations elsewhere in the world.

The evaluation's purpose, however, is not to inform HHR's dedicated employees and generous donors of what they already know. Its suggestions for improvement, therefore, are many.

To start with, HHR is nothing without the work of its staff, and the evaluation points to several necessary changes on this front. Starting at the top – as is the case with "most NGOs in the country" – HHR needs a stronger second level leadership. This burdens the leaders with management tasks while also putting the entire organisation at risk in the future. With the inevitable passing of time, who will replace the men who have been building HHR since the beginning? The evaluation also argues that, despite HHR's progressive policy of gender parity among the staff, upper-management has been the exclusive domain of men.

Further down the chain of command, the authors suggest that "enhanced input from the branch offices could strengthen... linkages and give local level staff a greater stake in shaping the directions and organisational responses of the HHR," given the vast differences in the politico-military situations between the regions. A pervasive theme of this assessment is also the need to continually enhance the skills of the staff, particularly in the areas of gender awareness, torture, rehabilitation, and much-needed English skills. The evaluation concludes that HHR must "create a more conducive [work] environment so that staff are retained," by means of a health insurance scheme and self-development programmes.

In both budget preparation and program planning, HHR should adopt a more bottom-up approach in order to increase buy-in and ownership, not to mention efficiency. HHR is also found to be lacking in the area of monitoring and evaluation (M&E), so that it may quantitatively determine the effectiveness of its programmes, especially in the areas of women's rights and torture rehabilitation.

The crux of the evaluation, however, is without a doubt HHR's need to strengthen its lobbying capacity, which the authors describe as being "of paramount importance." Though it has been disseminating information to the international community for nearly three decades, HHR has not kept up with the pace of changing times. The assessment notes that "today it is possible for the human

The crux of the evaluation, however, is without a doubt HHR's need to strengthen its lobbying capacity, which the authors describe as being "of paramount importance"

Mr. Xavier and Mr. Mariyadasan of HHR's Batticaloa branch

HHR's role, then, should be to bring "to the notice of the public the information that they have painstakingly gathered," thereby adding an important dimension to an anti-war culture more concerned with forgetting than with reconciliation

rights organisation to reach vast audiences through proper arrangements of email facilities and with good relationships with international networks dealing with human rights," tools that will greatly enhance the organisation's capacity to obtain reparations and rehabilitation for its clientele. In addition to using these new means of communication, the content of HHR's interactions with outsiders must place greater emphasis on the importance of human rights as a part of – rather than as an afterthought to– development.

The authors make some specific recommendations concerning improvements in HHR's efforts to inform the world of Sri Lanka's human rights situation and advocate on behalf of victims. First, HHR must establish formal connections with other local and international human rights agencies. Occasional reports sent on request to Amnesty International and ad hoc arrangements with local NGOs are not enough. By formalising and standardising these linkages, rather than waiting for outside requests for information, HHR can exponentially increase its effectiveness.

Second, the torture rehabilitation programmes must do more than simply assist individual victims. Instead, they should seek to "create public awareness" of the problem and its solution, as well as put pressure on the government to "respect its obligations" as a sovereign body.

Third, the education programme needs to move beyond theoretical discussion of U.N. documents and assume an advocacy function as well. Because it already directly interacts with community leaders, this vital part of HHR can easily serve to inform Sri Lankans about their rights, about the national laws that are designed to protect them, and, more importantly, about the loopholes in those laws and the steps they can take to change the deplorable state of the justice system. At the same time, this programme should help to provide its participants with modes of protection against further government abuse via the establishment of solidarity groups and other similar measures.

Finally, HHR's documentation desk should form the foundation of a strong lobbying operation. Using the island's oldest and largest store of documentary evidence of human rights violations, HHR should loudly and aggressively hold the government accountable for its actions while also shaping public opinion in order to enlist ordinary citizens in its fight for change. This evidence should be "available for the use of persons concerned with the protection and promotion of human rights... as quickly as possible." Finally, the evaluators note that, "the peace movement in Sri Lanka has not yet tried to bring to focus the horrors of war." HHR's role, then, should be to bring "to the notice of the public the information that they have painstakingly gathered," thereby adding an important dimension to an anti-war culture more concerned with forgetting than with reconciliation.

Adopting Improvements

As a follow-up to the significant recommendations made in the external evaluation, the authors facilitated a three-day workshop for all HHR employees. No one seemed to note the refreshing irony of having three Sinhalese people explain to a staff of over 40 Tamil human rights workers how to better serve the victims of Sinhala oppression.

Though the participants focused more on the obstacles to their work (particularly the lack of political will within the Supreme Court, Human Rights Commission, and the Attorney General) than on concrete measures with which to overcome them, the primary facilitator attempted to steer the group towards possible solutions. Basil Fernando, head of the Asian Human Rights Commission, again praised HHR for its valuable work and noted that the government both feels and fears HHR's presence within the civil society landscape.

He said however, it needs to do more, particularly to bridge the gap between laws and their enforcement in Sri Lanka. He stressed the fact that HHR should not rely on the pressure being exerted on the government by the U.N. and NGOs such as Amnesty International, which have all been successfully misled by the authorities' façade of hollow measures. Besides working to persuade these organisations of the emptiness of government peace and reconciliation initiatives, HHR should actively influence the uninformed media through press releases – which past security concerns rendered unsafe – despite the heavy bias of the Sinhala and English press. Other measures that the facilitators repeatedly stressed included education programmes for police officers, urgent action appeals, public criticism of government institutions, and closer links with other organisations.

Inevitably, most of the suggestions met with approval, while a few – such as a Tamil version of HHR's monthly news bulletin – were ignored for practical reasons. However, HHR needs to move beyond verbal agreement with the evaluators' suggestions and formally commit to taking concrete steps to implement the recommendations, especially regarding advocacy efforts.

Students speak out on human rights

The Women's Desk of Home for Human Rights (HHR) conducted legal literacy seminars under the title 'Violence against Women and Children,' in many parts of the northeast recently. The project, which focuses on educating participants on concepts of justice, human rights, and the law in its application to women, has been held in Akkaraipattu, Batticaloa, Jaffna, Mannar and Vavuniya.

The project is undertaken to train trainers who would be able to facilitate others in the community to understand the problem of violence against women and children and how it could be dealt with. As such, the training of trainers programme focuses mainly on persons that come into regular contact with the public such the grama sevaka, NGO workers, midwives, caretakers in orphanages, teachers and student leaders.

HHR utilises its team of lawyers, personnel working on the Women's Desk, members of the National Human Rights Commission, as well as police officers as resource persons. This also enables the public to be familiar with the local people in the event they need to approach them with a problem.

At the seminar held at Chavakachcheri, Jaffna, on 22 and 23 July this year, HHR officers invited schools in the area to participate. High school student leaders from four schools in the Chavakachcheri area participated with teachers as well. A total of 20 students took part.

The students were very enthusiastic and HHR personnel conducting the training camp were highly impressed at the questions and motivation of the young participants. At the end of the first day of the seminar, the students were asked to write what they knew about human rights either as an essay, or in a few lines of verse. Beyond the Wall reproduces the poems written by these students in Tamil with a rough English translation.

மனித உரிமைகள்
- ஆக்கம் - கணேசன் நிஷானி

கல்விக் கூடத்தில் கண்ணி வெடி
சிறைக்கூடத்தில் கொலை வெறி
பாராளுமன்றத்தில அடிதடி
வீதியிலே மிதி வெடி
தொழுமிடத்தல் கசையடி - என்றால்
மனித உரிமைகள் எங்குள்ளது?

Where are human rights?
By Ganeshan Nishani

Land Minds in schools
Murderess fanaticism in prisons
Disruption in parliament
Several minds on the footpath
Whipping in the worship place- If so
Where do we have human rights?

மனித உரிமையின் பிறப்பு
அங்கம்- குமாரசாமி சிந்து

தாமமோ அழியுதம்மா
தாயகமே அழியுதம்மா
நெஞ்சமோ வெடிக்குதம்மா
உரிமையோ பிறந்ததம்மா
ஊமையே பேசுதம்மா

Birth of Human Rights
By Kumarasamy Siridha

Justice is ruined
Motherland is screaming
Heart is breaking
Love is lost –But
When the Rights are born
The dumb are speaking

மனித
அங்கம்தாஜன்

மனிதா!
உரிமை வேண்டும்
என்கிறேன்
நான்
பண்மையில் மட்டுமல்ல
மட்டுமல்ல
ஒருமையிலும் இல்லை
எமக்கு
உரிமை
ஐயகோ!
என் செய்வோம்

I demand rights!
By T. Gajan

Look! I am asking for rights
Not only for me – But
For all of us
We don't have rights
Oh! My god – what
Are we going to do?

உரிமைஆக்கம்
அங்கம்பஞ்சமூர்த்தி நவநிதா

சுதந்திரம் என்பது மனிதனுக்குண்டா?
பல கேள்வி தொடர்ந்தாலும்
விடை பகர இயலாத
இந்நிலை மாறி
மனிதன் மனிதனாக மதிக்கப்பட்டு
உணர்வுக்கு உயிர் கொடுத்து
உரிமை பெற்று சுதந்திரமாய்
வாழ வழி விடு

Winning rights
By Punniyamoorthy Navanitha

Does a man have freedom?
Though the questions are following
Non-answerable situation should be changed
Man's humanity should be respected
Feelings should be given life
Let us live freely with rights

இராணுவ
அங்கம்விதன்

மீறினாரோ அரசு
மனித உரிமை தனை
உடன் தஞ்சம் புகுந்திடு
உயர் நீதி மன்றில்
அதைத் தீர்வு காண்பர்
சட்டத்தின் தோழன்
சட்டத்தரணி

If the state violates our rights...
By V. Rathikaran

If the state violates our rights
Take refuge in human rights
In the Supreme Court
Will the our friend the lawyer
Find us justice

மனித உரிமை மீறல் அங்கம் P. நிரஞ்

வாருங்கள்
புரட்சி செய்திடுங்கள்
மனித உரிமை மீறலை
தடுத்திடுங்கள்
உங்கள் உரிமைகளை
வென்றெடுத்திடுங்கள்

Human Rights Violation
By P. Niranjan

Come! Create a revolution
Stop the violation of human rights
Reclaim your rights

புதைக்கப்பட்ட மனித உரிமைகள் அங்கம் அனிதா வீரசிங்கம்

வாயிருந்தும் ஊமைகளாய்
காலிருந்தும் நடைப்பிணமாய்
ஊரிருந்தும் அகதிகளாய்
இருப்பது தான் மனித உரிமைகளோ?
மனித உரிமை மனிதனுக்குள்
புதைக்கப்பட்டுள்ளது

Buried Human Rights
By Anita Veerasingham

Though with voice being a dump
Though with legs being a lame
Though with home made a homeless
Are these human rights
Human rights are buried within humanity

மனிதநேயத்தை நெஞ்சில்
அங்கம்நாகராஜா

இதைத்தடுத்திட வேண்டுமே
ஓர் மனம்
இல்லையேல் புரிந்திட
வேண்டுமே பல மனம்

Do we need this dilemma?
By Niranjana Theivendran

Do we need this dilemma?
To prevent it we need a strong mind
Or understand it,
Many minds

சீதனம் என்ற சீர்கேட்டால்
எத்தனை பெண்கள் தமது வாழ்வை இழந்திருக்கிறார்கள்
சீதனப்பேய் பிடித்த ஆணினமே – அதுவும்
பெண்ணினத்திடம் கைநீட்டி இலட்சக்கணக்காகப்
பணம் கேட்க வெட்கமில்லையா?
இப்படியாகத்தானா நீ வாழ்க்கை நடத்துவது?
ஆணினமே இறுதியாகக் கூறிவிடு
இதுவா உனது மனித உரிமை

Are these human rights?
By S. Jeevana

Cursed by the dowry system
How many women never lived?
Possessed by the devil of dowry
You, male chauvinist
Don't you feel ashamed?
To ask from women
Millions in dowry
Is this you call life
Tell me you Gentle-men
Is this your Human Right?

சுயசிந்தனையை வளர்த்து – அதை
பேச்சாற்றலில் மாட்டி
மனதைத் திடப்படுத்தி – மனிதன்
சுதந்திரமாய் வாழவும்
பெண்களினதும் சிறுவர்களினதும் - தேவையை
பூர்த்தி செய்ய வழிசெய்த
மனித உரிமைகளை – நன்றாக
என்றும் காப்பதன் மூலமோர்
காத்திரமான சமூகத்தை – ஆக்குவோம்
உறுதி எடுத்து

We will protect human rights
By S. Lavania

Facilitating the growth of self expression
Made it to shine through speech
Strengthened the mind for man
To live in freedom and
Fulfilling the needs of women and children
We will protect the Human Rights
For a stable society
With determination and courage

விழிப்புள்ள சமுதாயமே
துணிவுடன் குரல் கொடு
நொடிப் பொழுதில்
நீதிபான உலகமும்
சுபீட்சமான வாழ்வும்
கிடைப்பது நிட்சயம்
அடிமை வாழ்வை உடைத்தெறிந்து
வெற்றிப் பாதைக்கு அடியெடுத்து வைப்போம்
ஒன்றுபட்டுச் செயற்படுங்கள்
வெற்றி நிச்சயம்

Speak up for rights
By Ponniah Nivakini

Enlightened society
Raise your voice with courage
In a lightening moment
A world with justice
A life of prosperity
Is sure to come
Breaking the fetters of slavery
Let us take a step towards victory
When acting with a single mind
Victory is assured

பதுகாப்பு என்ற போர்வையில்
பாதிக்கப்பட்டவர்களுக்கும்
அரசு என்ற வர்க்கத்தால்
அடக்கப்பட்டவர்களுக்கும்
அவர்கள் கை விலங்குடைத்து
அநீதியை எதிர்த்துக் குரல கொடுக்கும்
மனித உரிமை இல்லம்

Home for human rights
By V. Gnanavarathan

For the broken people
A protecting blanket
For the oppressed by the state machinery
Breaking their fetters and
Raising its voice against injustice
It is Home for Human Rights

மக்கள் உரிமைகள் பலவிதம்

அவை மீறப்படுவதும் பலவிதம்
இவைக்குக் கடிவாளமாயும்
தந்தையாகவும் அமைந்ததாம்
மனித உரிமை இல்லம்

உரிமை
அம்மதேசனீர்

Home for human rights
By K. Selvakrishnan
The Rights of people are many
And their violations too are too many
You, Home for Human Rights
Is a restrainer of violators and
A Father to the promoters

நாடி நரம்புகள் தளர்ந்த போதும்
தனக்குள்ள உரிமை தளரக்கூடாது
நாளை நம் நாட்டு உரிமைக்காக
முடிவுகாணத் துடிக்குதே நெஞ்சம்

For the sake of rights
By T. Shalini
Even when the veins grow feeble
Struggle for Rights need not stumble
My heart is yearning
For the Rights denied in my country
To be restored in the morning

யுத்தமி அம்மஸ்அநல்லு

குண்டுமழை பொழியும்
யுத்தபூமியிலே
மனித உரிதை மீறல்கள் தான்
எத்தனை எத்தனை
வார்த்தைகளால
சொல்லிட முடியாத கொடுமைகள்
தான் எத்தனை

உன்னிந்அஅம்ம அஅம்மதத்தின

உள்ளத்தில் பொங்கி எழும்
உரிமைப் போராட்டச் சுனையை
மனித உரிமைகள் இல்லத் மூலம்

Land of War
By S. Arunja
In the midst of our land
Lavished by the rain of bombs and shells
How many are the violations of Human Rights
How many are the atrocities
No words are found for expression

குளிர வைக்கலாம் என உணர்ந்த
விநாடிகள் தொடக்கம்
என்னுள்ளத்தில் ஓர் ஆதங்கம்
ஏன் நானும்
பறிக்கப்பட்ட உரிமைகளுக்காக
பங்குகொண்டு மீட்டுக்கொடுக்கக்
கூடாதா என்று

மதுஉரிம அஅம்மகமேம்ன

எமது கல்வியினை இடை நிறுத்தி
கடும் உழைப்புப் பெறுவதனைத்
துல்லியமாய் எங்குமே
தடை செயது காப்பதுதான
மனிதஉரிமைச் சட்டமாகும்

நிழடு
அஅம்மசுதுஅம்

பயங்கரவாதத் தடை வந்த சபையில்
பயங்கரவாதம் தடையின்றி நிகழும்
சபை கொண்டதே எம்நாடு

படை, அடி, உதை அடிப்படை
உரிமை மீறல் மலிந்ததே
ஏம்நாடு

An emotional sentiment
By T. Dharshika
From the moment of awakening
Within my heart with the knowledge
Of Human Rights that there is a way
For asserting my Rights
An emotional sentiment tills my soul
Why not me
Be a partner in the struggle
For restoring the Rights
Taken away from us

Our rights
By K. Kokilan
Human rights
Protecting us from
Snatching our right to education
And earning a few rupees

Our country
By Suntharalingam
The assembly
That brought the prevention of terrorism
Became an assembly of terrorism
Is our country

Military assault and torture
Rape and violation of Rights
Sown all over
Is our country

What you could do...

The human rights situation in Sri Lanka is grave, and NGOs like Home for Human Rights are doing their best to change it. However, they are not the only ones who can make a difference. *Beyond the Wall's* readers too can contribute to the creation of a more just Sri Lanka by any number of means.

If you or anyone you know has a comment, opinion, or research on human rights in the Sri Lankan context that you wish to share, you may submit that work to *Beyond the Wall's* editors, who will publish it in their next issue and thus add another dimension to the debate.

You are equally encouraged to share *Beyond the Wall* and its contents with your colleagues, so that a wider audience may become aware of the daunting challenges faced by the inhabitants of Sri Lanka. Those interested in becoming new subscribers need only write to ifxavier2000@yahoo.com or the address listed on page 2.

Of course, *Beyond the Wall's* readers should not hesitate to report human rights violations or refer victims of such violations to HHR. For HHR, every willing person can be a human rights monitor.

Those of you who would like to make a more public contribution to the fight for justice can generate awareness among Sri Lanka's authorities that the world is watching them by writing to them directly.

HHR will be happy to provide you with the addresses of top government leaders and of people involved in the cases reported in *Beyond the Wall*.

Seeing as the international human rights agencies (such as Human Rights Watch and Amnesty International) have taken much less interest in the government's abuses since the signing of the Ceasefire Agreement, the effect that your letter can have may be greater than you think.

Letters to the newspapers and leaders of states that support the government are also encouraged.

Readers are also welcome to make use of (or refer others to) HHR's extensive documentation of human rights violations – dating back to 1977 – for their own research.

Finally, readers can support the work of HHR directly by making small donations and by referring potential volunteers or interns to HHR.

You are equally encouraged to share* Beyond the Wall *and its contents with your colleagues, so that a wider audience may become aware of the daunting challenges faced by the inhabitants of Sri Lanka

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2. *Tahir Hussain Khan v. Canada*, Communication No.15/1994, U.N.Doc
A/50/44 at 46 (1994)., para 12.1.

3. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, p.3 para 64-80.

4. *Soering v United Kingdom*, (1989)11 E.H.R.R 439.

5. *Chahal v UK* (1996) 23 EHRR 413.

6. *Pushpanathan v Minister of Citizenship and Immigration*, (1998) 1 SCR.

7. *Ramirez v. Canada* (Minister of Employment and Immigration), (1992) 2 F.C.306.

8. *Sivakumar v. Canada* (Minister of Employment and Immigration) (C.A), (1994) 1 FC 433.

9. *Suresh v The Minister of Citizenship and Imigration and the Arrorney General of Canada, (2000)* 2F.C.592.

Endnotes

[1] 1951 Convention relating to the Status of Refugees and 1967 protocol, Accessed no 03-04, http://www.unhchr.ch/htmlmenu3/b/o_c_ref.htm, hereafter referred to as the Convention and the Protocol.

[2] Turk and Nicholson , Refugee Protection in International Law: An Overall Perspective: opinion in Feller, Turk and Nicholson, Refugee Protection in International Law (CUP, 2003), p. 3.

[3] 1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion , membership of a particular social group or political opinion

[4] Lauterpacht and Bethlehem, The Scope and Content of the Principle of Non-Refoulement; opinion in Feller, Turk and Nicholson.

[5] 1 FA and C do not have temporal or territorial restrictions where as B does.

[6] Emphasis added, 1951 Convention Relating to the Status of Refugees and 1967 Protocol, *Supra*, Article 1 and 1.

[7] UNHCR Handbook on Procedures and Criteria for Determining Refugees Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, January 1st , 1992, p. 10.

[8] UNHCR Handbook, *Supra*, p.10.

[9] UNHCR Handbook, Supra, p.10.

[10] *Article IF: The provisions of this Convention shall not apply to any person with respect to whom there are seroious reasons for considering that:*

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime out side the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

[11] Walker, R., Rwanda still searching for justice, BBC online, accessed on 03-04, http://news.bbc.co.uk/hi/world/africa/3557753.stm.

[12] UNHCR Guidelines on International Protection No. 5:

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[13] Gilbert, Current Issues in the Application of the Exclusion Clauses, opinion in Feller, Turk and Nicholson, *Refugee Protection in International Law* (CUP, 2003) p. 429.

[14]These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and the 1998 Statute of the International Criminal Court, see footnote 15.

[15] UNHCR Guidelines on International Protection No. 5, *Supra*. p. 4.

[16]UNHCR Background Note on the Application of the Exclusion Clauses: Article IF of the 1951 Convention Relating to the Status of Refugees (4 September 2003), accessed on 29/03, http://www.unhcr.ch/cgi-bin/texis/vtx/doclist/+awwBmesuLb-wwwwnwwwwwwwxFqzvx8vsv.

[17] UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 11.

[18]UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 13

[19] UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 14. The nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime.

[20] UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 14.

[21] Feller, Turk and Nicholson, *Supra,* p. 444.

[22] http://www.un.org/News/Press/docs/2001/sc7158.doc.htm.

[23]UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 16.

[24]UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F, *Supra*, p. 17.

[25]*Pushpanathan v Minister of Citizenship and Immigration,* (1998) 1 SCR.

[26] *Pushpanathan, Supra,,* (1998) 1 SCR.

[27] (2) the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country, in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[28] Established by Resolution A/Res/428 (v), 14 Dec 1950 by the UN General Assembly and whose mandate is the international protection of those in need.

[29] Feller, Turk and Nicholson, *Supra*, p. 464.

[30] *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306.

[31] *Sivakumar v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 433.

[32] *Sivakumar, Supra,* [1994] 1 F.C. 433.

[33] Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials,* 2nd ed, Oxford: Oxford University Press, 2000, p. 134.

[34] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) (CAT), International Covenant on Civil and Political Rights (1976) (ICCPR), European Convention on Human Rights (1950) (ECHR).

[35] International Covenant on Civil and Political Rights (176) (ICCPR), accessed on 4-04, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

36 *Chitat Ng v.Canada*, Communication No.469/1991, U.N.Doc. CCPR/C/49/D/469/1991(1994).

[37] *Chitat Ng v.Canada, Supra*, paragraph 6.2.

[38] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), Article 1, accessed on 4-04, http://www.unhchr.ch/html/menu3/b/h_cat39.htm. "For he purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[39] Article 3 Convention Against Torture, *Supra*.

[40] *Tahir Hussain Khan v. Canada*, Communication No.15/1994, U.N.Doc. A/50/44 at 46 (1994), paragraph 12.1.

[41] European Convention on Human Rights, Article 3, accessed on 4-04, http://www.echr.coe.int/Convention/Convention%20countries%20link.htm#EUROPEAN%20CONVENTION%20ON%20HUMAN%20RIGHTS.

[42] *Soering v United Kingdom, (1989) 11* E.H.R.R. 439.

[43] *Chahal v UK* (1996) 23 EHRR 413.

[44] Statute of the International Court of Justice (1945), 1976 Y.B.U.N. 1052.

[45] ICJ Statute, *Supra*, Article 38.

[46] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p. 3, paragraphs 64-80.

[46] Lauterpacht and Bethlehem, "The Scope and Content of the Principle of Non-Refoulement"; opinion in Feller, Turk and Nicholson, *Refugee Protection in International law* (CUP,2003), p.143-147.

[47] UNHCR's Executive Committee (ExCom) is made up of 64 countries that meet every autumn and sets international standards with respect to the treatment of refugees and provides a forum for wide-ranging exchanges among governments, UNHCR and its numerous partner agencies.

[48] Feller, Turk and Nicholson, *Refugee Protection in International law* (CUP, 2003), p. 144.

[49] Peers, Steve, *EU Justice and Home Affairs Law*, European Law Series (London, Pearson Education Limited, 2000) p.106.

[50] *Suresh v The Minister of Citizenship and Immigration and the Attorney-General of Canada*, (2000)2 F.C. 592.

AG's double game with disapperarances promotes impunity in army

By T. Sittampalam

"You realise the enormity of the problem of disappearances in the northeast only when you list the number of agencies instrumental in abducting and killing people from 1979," says K. G. Sakkya Nanayakkara, president Organisation for the Parents and Families Members of the Disappeared (OPFMD).

He proceeds to list them: security forces personnel of the three armed forces; the STF, home guards and the police; the LTTE; paramilitary forces controlled by the PLOTE and EPDP; the Razik and Mohan groups as well as the Jihad and other Muslim organisations in the east; the terror outfit under Manikkadasan in Vavuniya and finally the Indian Peace Keeping Forces (IPKF).

Disappearances in the Batticaloa-Amparai area continued without a pause from almost 1983. The army, the STF, Muslim goon squads and home guards, as well as bouts of violence unleashed by the IPKF and Tamil paramilitary groups account for the bulk of the disappearances there. "There are over 3000 I think," Nanayakkara said.

Though the east might have suffered more due to large areas of it being contested terrain between the armed forces and the Tamil militant groups, where Muslim goon squads, home guards and others also made merry, it is the disappearances in Jaffna in 1995-1996, when the army after Operation Riviresa captured the peninsula that has drawn international publicity.

Soon after its capture the LTTE launched attacks on the army that was still consolidating leading to bitter, bloody fighting. The civilian population of Jaffna was ordered to move out of the city of Jaffna and its suburbs. The inhabitants took refuge in the less-populated outlying areas. But after a few months returned to Jaffna. What they returned to was a veritable war zone.

"The military was taking the brunt of the fighting. Further, in retaliation to what it suffered in the hands of the LTTE which overran Mullaitivu army camp about that time, the army took out from the civilians," said Nanayajkkara.

The outrage might very well have been erased from public memory if not for a stroke of good fortune. The PA government was caught on the wrong footed over the rape and murder of Jaffna schoolgirl Krishhanthi Kumaraswamy. The investigation led to arrest of five persons that included Lance Corporal Somaratne Rajapakse. During the trial the five accused decided to 'sing.'

Their statements under oath pointed to an entrenched, well-established network of killers in the army who systematically tortured and killed civilians. Rajapakse claimed he was but a minor functionary in the network, who only buried the dead victims. He named army personnel as the kingpins. What was more, he was prepared to identify the place where these covert burials took place. The trail led investigators to Chemmani, an open plain, with a scattering of paddy fields. Though the public expected a mass grave of extensive proportions, systematic digging at the points indicated by Rajapakse and his colleagues, revealed only 15 bodies, of which two were identified.

Rajapakse and his co-accused are now serving their sentences, but Chemmani opened up a can of worms. With names given and at least a few bodies exhumed, focus shifted to investigating as to what had gone on during those fateful months in 1995-1996. Though human rights activists had accused the army – which was under the overall command of Major General Lal Weerasooriya who was security forces commander Jaffna – of perpetrating genocide, the army was able to fob off such accusations. But the discovery of the 15 bodies leant credence to the story of abduction and murder of civilians. Confronted by the overwhelming evidence the government was compelled to investigate, at least to satisfy international opinion.

"All what the government has done up to now is fooling the public, absolutely nothing has happened to bring the perpetrators to justice," said a human rights activists who preferred to remain anonymous.

When Rajapakse named the officers involved, action was filed in the Magistrate's Court, Jaffna against the suspects by the attorney general. M. Illanchelliyan was additional magistrate, Jaffna, who both directed exhumations at Chemmani and at the end of it gave directions to the AG's department and the CID to assist with the court with the inquiry. It was going on satisfactorily till a transfer application was made through the Court of Appeal to have the case transferred out of Jaffna on the request of the attorney general to the Colombo magistrate's courts on the grounds that the accused military personnel's life was in danger since it was an operational area.

"That is how cases, which are heard in courts of the northeast and transferred out of there. They say it is because of security problems, but the real reason is that military personnel feel judges outside the northeast are more lenient," said the human rights activist.

The case was transferred to the Colombo chief magistrate's court; the attorney general followed this by filing charges. However the Colombo High Court granted bail to all the accused persons.

"The problem is that when the accused, especially military personnel are enlarged on bail, they can be very intimidating to the witnesses," said the human rights activist.

The CID also commenced an investigation into the

"My allegation that the state is playing a double game can be seen by the fact that the attorney general who is prosecuting a suspect in the case before the Colombo MC, is defending the very person in the habeas corpus!"

disappearances as far back as 1998. "The CID called up witnesses even last month. They are doing investigations six years after the crime became public," said the human rights activist.

Meanwhile, the exhumation and the revelations at Chemmani activated the civilians of Jaffna who, through their own investigations determined that around 600 persons had disappeared in 1995-1996. They formed themselves in solidarity fighting for the rights of the families of the disappeared of Jaffna known as the Missing Persons' Guardian Association (MPGA). While letting the law take its course they also sought to approach the government through the Ministry of Defence (MOD) to see how they could expedite matters. The thrust of the MPGA was that it did not want compensation from the state; it wanted justice. Justice in the form finding out what happened to the disappeared and who was responsible.

As early as December 1999 the MPGA realised there was reluctance on the part of the state to proceed with the case. Its members wrote to President Chandrika Kumaratunga that though the number of the disappeared in Jaffna during the period was around 600 only 15 skeletal remains had been discovered. They demanded to know what had befallen the rest. They stated, "We are perturbed by not being able to find out what happened to the others. If these persons are under detention in military camps or prisons please release them: otherwise tell us details of where they are."

In December 1999, the then secretary, MOD Chandrananda De Silva despatched letters to persons who claimed their family members had disappeared in that period. He said according to a committee appointed to trace these persons, 16 deaths were confirmed but there was no evidence of the whereabouts of the others.

Another scheme for identification put forward was that DNA testing could be done by comparing the remains of the exhumed bodies with whoever from among those who said they had lost their relatives was willing to come forward to give samples of his or her blood. This was all done, but the government has delayed taking action on it because on the pretext it is too expensive.

"That's nonsense; the real reason is they do not want to make any effort to implicate members of the armed forces in such crimes," said the human rights activist.

The MPGA however was dissatisfied and periodically met with officials both in Jaffna and Colombo to ascertain what become of their family members. The most senior member of the government they met was secretary to the former prime minister, Bradman Weerakoon. "They had explained to him what they required but nothing tangible came of it," Nanayakkara said.

In a letter written in December 2003 to then minister of justice W. J. M. Lokubandata the MPGA says, "In March 2002, our association had a meeting at the Prime Minister's Secretariat with the PM's Secretary and the Secretary to the Minister of Rehabilitation. The officials responded that they would take action on the MPGA members' missing kin, about whom nothing has been heard since their disappearance after being arrested or abducted by the SLA. But no action has been taken so far."

It was in the wake of this that OPFMD got an appointment with President Chandrika Kumaratunga in July 2003 where it was decided a set of documents on the case would be forwarded to her. The MPGA too was to meet the president on 31 December 2003, but the meeting never materialised.

Though close to 600 persons are alleged to have disappeared, fear, lethargy and a lack of concrete evidence led only around 234 persons to come forward convinced the armed forces had abducted their relatives. "The Ministry of Defence, anti-LTTE groups and even the president said that in the case of the others either they had gone overseas illegally, or were abducted and killed by the LTTE," said Nanayakkara.

He however said when inquiries were made by the OPFMD in Jaffna as to whether anyone was willing to come forward alleging that the LTTE had abducted these individuals, there was no one forthcoming.

It was when all these leads ended in cul-de-sacs that two lawyers – the indefatigable M. Remadious and V. Yogeswaran – realising that the only way whereby any forward movement could be achieved and interest revived in the Jaffna disappearances could only be through the filing of habeas corpus for those who had gone missing. At present 45 habeas corpuses have been filed, which are from among the 230 persons mostly from Ariyalai, and Chemmani areas that are prepared to come forward.

"My allegation that the state is playing a double game can be seen by the fact that the attorney general who is prosecuting a suspect in the case before the Colombo MC, is defending the very person in the habeas corpus!" said the human rights activist.

He said that one of the accused officers in the Magistrate's Court proceedings Captain Ajith Kumara has also been named as a first respondent in one of the habeas corpus cases that were filed in the Jaffna High Court. However, the attorney general is appearing for Ajith Kumara. In a curious twist however, Somaratne Rajapakse was named a respondent in this particular case.

Interestingly, Rajapakse has written to Jaffna High Court Judge K. P. S. Varatharaja. In that Rajapakse has urged that he not be cited as a respondent but as a witness. In the letter he has stated that he knew the details of this case and had communicated it to Illanchelliyan when the case was before the Jaffna magistrate's court. However after the case was transferred to Colombo he had not pursued the matter with the magistrate. He had also said he was surprised the Jaffna people had not agitated more to compel the government to take steps to grant them restitution. To date there has been no response to Rajapakse's letter.

Though the attorney general has decided to use the full weight of the law to defend alleged human rights abusers it is not going to be easy. "Many of these persons were arrested before witnesses and some of them very important officials in the village. This makes denying such stories difficult," the human rights activist.

For instance, on 19 July 1996 around 200 persons were rounded up in Jaffna of which all but 24 were released.

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counterpart at Chavakachcheri. Senior local government officials such as *grama sevakas* and divisional secretaries are on the list of witnesses to be called. "In many instances the armed forces have arrested people, many of them IDPs, after duly informing local officials as they should. This will be helpful in establishing the connection between the arresting authority and disappeared person," said Nanayakkara.

In one instance however, the army had got a GS to hand over a person for questioning. Later the person went missing. In the habeas corpus the GS has been named as the first respondent. His defence however was that the episode had taken place when emergency regulations were in place and that was not a position to refuse.

From the evidence that is transpiring much of the disappearances have occurred in places that come under the control of the army's 512 Division. The bulk of the disappearances are in the areas adjacent to Chemmani such as Navakuli, Ariyalai, Gurunagar and Chavakachcheri.

Following agitation by the MPGA the National Human Rights Commission appointed a committee to commence investigations into the Jaffna disappearances in December 2002. It was headed former Jaffna Government Agent Devanesan Nesiah. In its letter to the then minister of justice MPGA says, "The Human Rights Commission appointed a committee headed by Mr. Devanesan Nesiah to investigate the disappearances. This committee after meeting our members produced a report that was unjust and untruthful."

According to the Amnesty International report for 2003, the committee had investigated 281 cases of disappearances of which 245 were detained by the army, while 25 were detained by the LTTE. Amnesty says among the recommendations of the Committee were that the next of kin, the local magistrate and the HRC be informed whenever an arrest is made. Further, that officers with command responsibilities be held criminally liable for disappearances and that compensation be paid.

An allegation against the state is that in many instances compensation was not paid to those who wish to obtain it. The MPGA however has rejected compensation stating that the government believed that once compensation is paid adequate restitution had been made. "Unlike in the south, people in the north say they do not need compensation but in reality they do. The problem is that due to political interests some do not want claim it," said Nanayakkara.

He however drew attention to the discrepancy between compensation given to victims of disappearances in south (due to the JVP violence in the late 1980s) and what is given to the next of kin of the disappeared in the north. In the south the minimum (Rs.18000) was for victim below the age of 18. This went up to Rs.125000 for married government employees. In the case of the north the minimum compensation was Rs.100000.

"OPFMD has demanded and in fact the president accepted that a flat rate of Rs.200000 be granted to all," said Nanayakkara. This was included in a memorandum where 50000 had placed their signatures and handed over by the organisation to the president in December 2003.

Before compensation is paid however the death certificate needs to be obtained to state the disappeared person is deemed dead. But the government has been singularly tardy in issuing them. The recommendations OPFMD forwarded to the president also urge the government to expedite the issuing of death certificates. OPFMD has also called for exhumations of mass graves be done in a scientific manner unlike the ad hoc manner in which it was carried at Chemmani.

The human rights activist was very pessimistic about the punishment that could eventually be meted out for the perpetrators even if they are convicted. There is no provision in the Sri Lankan law to deal with disappearances. The perpetrator can be charged for murder under the criminal law only if his culpability could be proved beyond all reasonable doubt. "All we can charge them is for abduction. And if convicted, the perpetrators will get about a prison term for about two years."

However all these pale into insignificance in comparison to the central question of impunity, enjoyed by the armed forces despite being cited as a suspect in a disappearance. Hepitiwela an accused is now functioning from Palaly.

"Impunity breeds a culture of fear. It takes a lot of initiative to come forward and testify against a military or police officer. But due to the bail proceedings in Sri Lanka these government officials are enlarged on bail and are in a position to threaten the person who has testified against him," said the human rights activist.

Even Amnesty, which in its latest report has not taken the government to task as much as it has the LTTE said, "Despite progress in a small number of cases, there was still widespread impunity for human rights violations. According to the government, criminal action had been instituted against 597 security forces personnel, of whom 262 had been indicted in the High Court. Little or no progress was reported in these cases."

"There are number of western diplomatic missions who talk fat lot about human rights. But have they done about the disappeared of Jaffna. What is worse they did not figure very highly even in the deliberations between the government and the LTTE in the rounds of peace talks," said the human rights activist.

- Courtsey The Notrtheastern Monthly

UN H R Committee takes govt. to task on PTA

In a landmark decision on the Nallaratnam Singarasa case, the U.N. Human Rights Committee said that Sri Lanka's Prevention of Terrorism Act (PTA) violates international human rights norms and that the State Party (Government of Sri Lanka) should ensure provisions of the PTA, specially its Section 16, which allows confessions to the police be admissible in a court of law, are made compatible with the provisions of the International Covenant on Civil and Political Rights (ICCPR).

The opinion of the 18-member Committee, consisting of international human rights experts, came after taking up the individual communication made under the Optional Protocol of the ICCPR by V. S. Ganesalingam , attorney-at-law, Home for Human Rights (HHR), on behalf of Singarasa who is currently serving a 35-year sentence at Kalutara prisons.

The Committee also held that in accordance with Article 2 para 3(a) of the ICCPR, the Government of Sri Lanka is under obligation to provide Singarasa "with an effective and appropriate remedy, including release, or retrial and compensation."

Singarasa, from Batticoloa, was arrested by the Sri Lanka army on 16 July 1993 while sleeping at home during a village round up, along with 150 other Tamils. He was taken to an army camp and detained there; subsequently he was handed over to police custody. He alleged that while in custody he was forced to confess to crimes he did not commit under torture.

After 14 months in detention he was indicted in the High Court of Colombo in three separate cases solely on the basis of his confession to the police. In one case (No.6825/94) he was sentenced to 50 years imprisonment and the other case was pending at the time of submission.

The full text of the opinion of the Committee will appear in the next issue.