

LST REVIEW

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**The Human Rights Commission
on the Bindunuwewa Massacre**

**Abolish the Death Penalty
says Advisory Council of Jurists**

**Regulating Child Pornography
on the Internet**

LAW & SOCIETY TRUST

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Editor's note ...

The Human Rights Commission on the Bindunuwewa Massacre

On the night of the 24th/25th October 2000, 26 residents of the Bindunuwewa Rehabilitation Camp, in the central part of Sri Lanka, were killed. Several others were injured and hospitalised. This incident was followed by a wave of 'ethnic violence' in the central part of the country and resulted in heightened tensions between members of the Sinhalese and Tamil communities.

The Human Rights Commission of Sri Lanka, which was re constituted in March 2000, sent a fact finding team to the area soon after. In this month's issue we publish the interim report of the Human Rights Commission. The Commission finds that approximately 60 police officers were guilty of a grave dereliction of duty in not taking effective action to prevent the acts of violence which caused the deaths of the 26. The Commission also called for an impartial investigation and appropriate action to be taken against those responsible. The evidence that was recorded by the Commission suggested that the attack on the Centre was a premeditated and planned one. It was not a spontaneous attack as some reports claimed.

Advisory Council calls for abolition of the Death Penalty

The Asia Pacific Forum of National Human Rights Institutions (APF) set up an Advisory Council of Jurists to advise the Forum on human rights issues of substantial importance. The members of the Advisory Council consist of nominees of the national institutions of the member countries. At the Fourth Annual Meeting held in Manila in 1999 the following nominations were endorsed by the Forum:

Australia	Sir Ronald Wilson
India	Fali S Nariman
Indonesia	Professor Jacob Elfinus Saheptapy
New Zealand	Hon Justice Silvia Cartwright
Philippines	Sedfrey Ordonez
Sri Lanka	R.K.W. Goonesekere

Two issues were referred to the Advisory Council by the Forum: the Death Penalty and Child Pornography on the Internet. In August 2000 the Advisory Council released Interim Opinions on both these issues. In its opinion on the death penalty the Council observed that the justifications for the death penalty do not justify its retention for any

observed that the justifications for the death penalty do not justify its retention for any purpose. The Council saw the death penalty as an ineffective deterrent and observed that its imposition dehumanised the community and promoted the notion that the taking of life was morally legitimate.

In the case of Sri Lanka the Council noted with concern the possibility of the re implementation of the death penalty. The Council observed that the resumption of executions and the expansion of offences punishable by death would be contrary to the principles underlying a just and civilized society and contrary to the terms and spirit of the International Covenant on Civil and Political Rights, to which Sri Lanka is a party.

We also publish relevant extracts from the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention against Torture. In addition we publish the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty (**which Sri Lanka has not ratified**), the General Comment from the Human Rights Committee on the Right to Life, and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

Child Pornography on the Internet

In its Interim Opinion on child pornography the Council looked at the conflict between the best interests of the child and the rights of free expression, privacy and freedom of information. The Council also looked at a judgement of a court from British Columbia which had held that the right to free expression should be paramount. The Council concluded that the child's best interests should be given priority given the proven physical and emotional harm that pornography causes to the child. The Council offers some recommendations for regulating child pornography on the internet.

Legal Awareness by the Trust

We publish a short note on a legal awareness programme conducted by the Law & Society Trust in the deep south and the Trust's encounter with a small Muslim fishing community, leading an isolated existence in that area.

The Bindunuwewa Massacre

Interim report of the Human Rights Commission

The Sri Lankan Human Rights Commission sent a team to investigate the massacre that took place at the Bindunuwewa Rehabilitation Centre on 24 & 25 October 2000. This is the Interim Report of the Human Rights Commission.

Introduction

On the 25th of October 2000, Mr. Senaka Dissanayake, the Regional Coordinator of the Human Rights Commission assigned to the Badulla District, brought to the notice of the Commission, that in the early hours of that day there had been an incident at the Bindunuwewa Rehabilitation Centre, in the course of which several inmates had been killed and several others seriously injured. In response to this information, the Human Rights Commission decided to inquire into the matter and accordingly having informed Mr. T.E. Anandarajah, Acting Inspector General of Police and General Rohan Daluwatte, Chief of Defence Staff of the Joint Operations Bureau, Sri Lanka Army, the Commission visited Bandarawela on the 27th of October 2000.

We interviewed Mr. B.M. Premaratne, Senior Superintendent of Police, Bandarawala, Mr. Laxhman Seneviratne, Senior Superintendent of Police, Badulla, Assistant Superintendent of Police Mr. Dayaratne and Brigadier C. Gunasinghe, the Commanding Officer of the Diyatalawa Army Camp. On the material date, Mr. B. M. Premaratne, SSP Bandarawela had not been in his Division and ASP Mr. Dayaratne had been acting for him.

The three Police Officers concerned stated that they had no personal knowledge of any of the incidents and furnished us with such information as they said that they had been able to obtain in the course of their investigation. We thereafter visited the Bindunuwewa Rehabilitation Centre and made our observations. We also visited the Diyatalawa Army Hospital and interviewed 10 detainees who had sustained injuries. We recorded statements from nine of them as the other was not in a fit condition to make a statement. We also had the assistance of our Regional Coordinator.

As at the 24th of October 2000, this Centre came under the administrative control of the National Youth Services Council (NYSC), which now functions under the Ministry of Youth Affairs. The Officer in Charge of this Centre was Captain Y. P. Abeyratne who is a Volunteer Officer in the Cadet Corp. of the Sri Lanka Army. He had been employed in this capacity by the NYSC and had been in charge of the centre for about six years. He is reported to have maintained a satisfactory working relationship with the inmates. He was assisted by another Volunteer Officer namely Lieutenant P. Abeyratne who had been assigned to the Centre about two months back.

There were four other civilian officers attached to the Centre. There was a Police Post within the Centre manned by a Reserve Police Constable, a Grama Arakshaka and two Security Assistants, all of whom were from the Bandarawela Police. Three of these officers carried weapons namely two T56 firearms and a shotgun.

We have not yet been furnished with a record of the number of detainees as maintained by the officials attached to the Centre. According to the records maintained at the Regional Office of the Human Rights Commission, there were 46 detainees at the Centre as at the 15th of October 2000. At this point, it is pertinent to note that one of the functions of the HRC is "to monitor the welfare of persons detained by a judicial order or otherwise." Accordingly Mr Dissanayake, the Commission's Regional Coordinator in Badulla had regularly visited the Centre and inspected the conditions of detention. The Coordinator also received and recorded all information pertaining to new admissions to the Centre as well as releases from the Centre on the termination of rehabilitation. The detainees at the Centre consisted of young Tamil men who had been arrested or had surrendered as suspected members of the LTTE. They were undergoing rehabilitation and had been detained at the Centre for periods ranging from one to fifteen months, according to the information furnished to us from records available at the regional office of HRC.

According to the figures furnished to us by the Police officers we questioned, there had been 41 detainees at the time of the incident. Mr. Jayantha Seneviratne, HQI Bandarawela Police has furnished to our Regional Coordinator a list containing the names of 27 detainees who were fatally injured. The Police had informed the Coordinator that 14 other detainees had sustained injuries. Of the injured one had succumbed to his injuries yesterday. According to these figures given by the Police, the detainees accounted for as dead and injured aggregate to 41. However, there is a

discrepancy in regard to the precise number of detainees who would have been in the Centre on the day of the incident, when this figure is considered in the light of records maintained at the Regional Office of the Commission. Our Regional Coordinator is investigating this discrepancy.

The Version given by the Senior Superintendents of Police

According to the information furnished by the Superintendents of Police (SSPs), the OIC of the Centre had held the usual meeting with inmates in the evening at about 6.00 p.m. of the 24th of October. At this meeting some inmates had protested against what they alleged was the undue delay in releasing them from the Centre and had demanded their immediate release. In the course of the argument that ensued the OIC had been surrounded by some of the detainees.

One of the police officers on duty had fired in the air and thereafter the detainees had turned violent. They had forcibly entered the store-room, armed themselves with iron rods, poles and implements and had caused damage to the building. They had also set fire to some documents said to have been maintained at the Police Post and had destroyed the fluorescent lights, and caused damage to the furniture and the Police Post. They had also taken a gas cylinder and attempted to set fire to it but had failed. The Police Officers and the Assistant to the OIC had deserted the Centre as they feared that they were in danger of physical injury. Lieutenant Abeyratne, the Assistant to the OIC is said to have been attacked by one of the inmates and sustained a bleeding injury in his chest. He is said to have gone to a house in the neighbourhood to change his shirt which was allegedly blood stained and had telephoned the Bandarawela Police to inform them of the disturbances at Bindunuwewa. In the account given to us by the Police officers there was no suggestion that the inmates had taken any of the officers on duty at the Centre as hostage and were holding them.

We were unable to interview either the OIC or his Assistant as they were said to be at the office of the CID in Colombo.

On receiving a telephone message at the Station to the effect that there was unrest at the Centre and that an attempt had been made to snatch the weapons of the Police Officers on duty, Mr. Jayantha Seneviratne, HQI Bandarawela Police had set out at about 7.45 p.m., with a contingent of about 10 officers, all armed with T56 weapons and had arrived at the

Rehabilitation Centre at about 8.00 p.m. IP Karunasena, OIC Crimes is said to have set out shortly thereafter along with another contingent of Police Officers all of whom were also armed and arrived at the Centre.

According to SSP Premaratne there had been about 30 Police Officers led by the HQI and all carrying T56 weapons present in the vicinity of the Centre by about 8.00 p.m. The inmates had objected to the Police entering the Centre and the HQI had persuaded the detainees to permit him to enter the Centre without the other officers. They had agreed to allow him to do so provided he came in unarmed. The HQI thereupon entered the Centre by himself, unarmed, and spoke to the inmates and the OIC Captain Abeyratne. The inmates protested against the action of the Police Officer in firing a shot. The HQI had adopted a conciliatory tone and accepted the position that this had been an error and suggested to Captain Abeyratne that the Police should withdraw to avoid further unrest. Captain Abeyratne had welcomed this suggestion and stated that he would be able to maintain order within the Centre. By this time a contingent of soldiers from the Diyatalawa Army Camp had also arrived and were present in the vicinity of the Centre.

Meanwhile about 200 to 300 persons who were said to be villagers had gathered in the vicinity and were shouting. Upon observing their presence the HQI had inquired from Captain Abeyratne as to what action should be taken. Captain Abeyratne had informed him that he would look after affairs within the Centre and that the Police should prevent any outsiders from entering the Centre.

Thereupon the Police and the Army persuaded the crowd to withdraw and the HQI left at about 10.30 p.m. leaving the rest of the Police personnel in the charge of IP Karunasena and IP Jayaratne who remained along with the contingent of soldiers under the command of Captain Balasuriya. By about 11.30 p.m. the situation appeared to have returned to normal. In those circumstances, the Commanding Officer informed us that the army contingent withdrew at 1.15 a.m. having informed IP Karunasena. The Police personnel remained at the scene. Upon his return to the Station, the HQI had directed that Police personnel from the other stations in the division who had been instructed by the ASP to report to the Police Station at Bandarawela be ordered to proceed to the Centre. He had also received an inquiry from the ICRC, Batticaloa over the telephone as to whether there had been any unrest at the Centre and the HQI had informed the ICRC that the situation was under control. According to the HQI several Police Officers had left for the Centre in pursuance of the directive and there had been 69 Police Officers armed with T56

weapons gathered at the scene. However, there are no records by way of any official entries to substantiate this claim.

At about 6.45 a.m. (i.e on 25th) the HQI had received a message over the radio telephone from IP Jayaratne that persons were gathering in the vicinity of the Centre and that the Army had withdrawn. The HQI informed ASP Dayaratne of this development. He thereafter received a further message over the radio telephone from IP Jayaratne at about 8.15 a.m. stating that a crowd had entered the Centre and that the Centre was on fire. He had asked for reinforcements. The HQI had rushed to the scene and found that several persons had entered the Centre, the Police were also within the Centre and found several detainees dead and injured and the buildings on fire.

SSP Premaratne stated, that according to the information he had been given, in the early hours of the morning of the 25th the detainees had behaved in an unruly manner and damaged the buildings. Some of the detainees had indecently exposed their persons to passers-by and had pelted stones. By this time, a large number of villagers had gathered from all sides of the Camp and had started pelting stones towards the direction of the detainees. Thereafter the crowd had entered the camp and attacked the detainees with clubs, iron rods, knives, machetes etc. They had damaged the building and set fire to it. Detainees were murdered, maimed, badly wounded and injured. All this was done very swiftly and was over within 10-15 minutes. The crowd left the place thereafter. The SSPs stated that the police officers on duty had not fired at the mob nor tried to prevent them from entering the Camp even by firing shots in the air. The wounded were transported to the hospital by the Police later on. Both SSPs admitted that the inaction of the Police Officers was a grave lapse on their part.

The SSPs also observed that the soldiers should not have left the scene and even if they were leaving they should have informed the Police. They also complained that the army came very late when they were informed of the unrest in the morning of 25th. This was emphatically refuted by the Commanding Officer, who said that his men withdrew at 1.15 a.m. on the 25th. They had gone to assist the Police and had left only after they had accomplished the task given to them by persuading the villagers to leave the place. With regard to the incidents of the following day, the Commanding Officer said that it was he who received the telephone call from the Police and that it came to him at around 8.45 a.m. on the 25th. He immediately sent a platoon which reached the scene of the crime around 9.15 a.m. By that time, every thing was over and the mob had left the place.

The SSPs also reported on other connected matters. According to them, there had been opposition by the villagers to the camp being located in that site. SSP Premaratne stated that he had written to the higher authorities recommending that the camp be shifted to some other location. However, no action had been taken to implement the recommendation. They also mentioned that an inmate by the name of Anthony James who had been admitted to the centre recently had been agitating and attempting to incite the other inmates. However, when we inquired from the officers whether they had received any specific complaints against James, they replied that there had been no such specific complaints.

We questioned the SSPs on two other matters. We inquired about the action that had been taken immediately after the incidents of the 25th to investigate and arrest those who were responsible for the violence and killings. We also wished to know what action they were taking regarding the posters that had appeared in Banadarwela town inciting people to violence against the inmates of the Binudunuwewa Centre. Both SSPs stated that the attempts made by the HQI to arrest suspects was ineffective, as large numbers had been taken into custody for questioning indiscriminately. They expressed the view that the arrests seemed to have been made in a manner that had rendered the entire exercise meaningless and had the effect of thwarting proper investigations. In regard to the posters the SSPs denied any knowledge of the posters and stated that they were unaware that several posters had appeared in Bandarawela as stated by us. The Regional Coordinator who had seen the posters stated that they were still to be seen in the Bandarawela town.

Description of the Scene

Thereafter, the HRC visited the Bindunuwewa Centre accompanied by the SSPs. On our way we observed, a large number of posters that were displayed prominently in Bandarawela. The content of the posters which incited people to act in order to remove the camp and deal with the inmates, indicated that most of them had appeared before the incidents of the 25th. As alleged they could have appeared on the 24th night.

At Bindunuwewa, we inspected all the buildings in the centre. We were shown the damage inflicted by the inmates on the 24th. The Store did not show any signs of forced entry; the doors were intact and did not have any visible signs of damage. The glass panes of some of the windows in the office and officers' quarters had been broken. There

were a few charred pieces of paper and a small quantity of ash in the office that indicated that a few papers had been burnt. At the same time we noted that articles such as the television, radio, refrigerator had not been damaged by the inmates. It was evident that some damage had been caused by the inmates. But the account we had received had suggested that the inmates had gone round smashing up the buildings and causing extensive damage. What we observed of the damage caused by the inmates did not lend credence to that account.

We examined the premises for any signs that would suggest that a very large crowd had converged from all directions, and forcibly entered the premises. We did not find any visible signs of areas that had been heavily trampled by a large crowd. There was a footpath leading to the playground of the training school adjoining the centre; this section was not protected by a fence. We were informed that part of the crowd came from this direction.

We found the halls which accommodated the detainees completely damaged and pulled down. There was a dead body found in the debris during our visit. This body had not been identified earlier. Even the equipment used for vocational training had been heavily damaged. The condition of the buildings clearly indicate that those who caused the damage made sure that the buildings were damaged beyond repair and would not be available for use.

The Survivors' Version

In the afternoon the Commission visited the Diyatalawa Army Camp and spoke to nine of the ten inmates who had been hospitalised in the Army Hospital. One of the survivors could not speak to us as he was very badly wounded. Of these ten survivors, one was aged 11 and other 12 years. There were three others who were below the age of 18 years. While we were interviewing the survivors we observed that a team of CID officers had arrived and were conducting investigations.

According to the nine survivors who gave their account of the events of the 24th and 25th the detainees had raised issues with the OIC of the Camp on the 24th with regard to the following matters: letters received for the detainees were not delivered to them; telephone calls/messages received for them were not transmitted to them; they were being detained for unduly long periods such as one year or more when they should be held for shorter

periods of three to nine months. It also transpired that when the OIC explained that it was not within his power to release them early, as orders have to come from the authorities who dealt with such matters, they agitated and surrounded the OIC demanding that he should take immediate action to expedite their release. Observing this melee, one of the Police Officers had fired his gun in the air. This had caused further agitation among the detainees who caused damage to fluorescent-lights, the police post etc. The accounts given by the survivors also mention that they objected to the police party entering the Centre. However, after some time, they allowed the HQI to come in without any arms. They also mentioned that some villagers gathered near the Centre and threw stones at the inmates. The detainees requested the OIC of the Centre to tell the villagers that the detainees had no problem with them, and that they should not do them any harm. Their problems were with the administration. During the discussions the detainees had stated that they will not follow the vocational training classes till the OIC expedites the release of the detainees who were in the Centre for long periods. Thereafter conditions had returned to normal and the detainees had retired to their halls and gone to sleep. According to them, the police personnel and the others who came to the camp had left the place by about 11.30 p.m.

On the morning of 25th, when the detainees got up in the morning they saw a large number of civilians surrounding the camp and a number of Police Officers standing by. The crowd started to pelt stones and came into the Centre and attacked the inmates with knives, machetes, clubs, iron rods etc. They state that the crowd consisted of both men and women. According to these survivors, they were attacked when they were in the halls of residence. The halls of residence were set on fire by the mob and two or three inmates were thrown into the fire. Many were clubbed to death. They said that the Police Officers did nothing to stop the crowd. When some of the detainees tried to run for safety, one of them was shot down by the Police Officers. We observed that one of the survivors to whom we spoke had lost two fingers in one of his hands as a result of gunshot injuries. According to statements made by some of the survivors, when they had tried to hide in the police truck, the mob came in and attacked them. Two Police Officers were watching while they were being assaulted and did nothing to stop the assault. One of the injured, however, stated that the police were helpless as there was a large crowd and they failed to control the crowd even though they made some attempts. The survivors whom we interviewed do not speak of any disturbance caused by the inmates on the 25th morning prior to the attack on the Centre by the crowd. According to them when they woke, they had seen the crowd gathered around the Centre. The crowd had

then entered the Centre and started attacking the inmates soon thereafter. According to this account there was no time for the inmates to engage in protests and disturbances on the 25th morning.

Summary of Findings and Recommendations

We give below a summary of our main findings and recommendations:

The events of the 25th morning.

From all the information that we received in the course of our inquiry it is clear that the Police Officers, approximately 60 in number, have been guilty of a grave dereliction of duty in not taking any effective action to prevent the acts of violence that resulted in the deaths of 26 inmates and injury to several other inmates of the Bindunuwewa camp. There are various estimates of the crowd that entered the camp that morning ranging from a few hundred to several thousands. From what we could gather from the evidence available to us we felt that the large estimates of 2000-3000 exaggerated the size of the crowd. These estimates must be received with caution as they appear to be calculated to mitigate the inaction of the police. In any event the crowd that collected had not possessed any firearms and were armed only with knives, poles and implements. The police on the other hand were fully armed and could have easily brought the crowd under control and dispersed it; at least some of the persons who were leading the crowd could have been arrested.

The Situation preceding the Events of the 25th

All the accounts of the incidents that occurred on the 25th agree that the inmates had agitated for their release and had acted in an unruly manner. The accounts however differ in regard to the nature and seriousness of the disturbance that had been caused. A small crowd of "villagers" had collected and the inmates and the crowd had thrown stones at each other. What is however clear is that by about 11.30 p.m. the situation had returned to normal. The army which had arrived on a message from the police had left at around that time. According to the information supplied to us by the police about 30 Police Officers had been left behind to guard the camp. At this stage, both the police and the army had apparently assumed that there was no serious threat to the security of the inmates.

We also made inquiries concerning the relations between the camp inmates and the residents in the neighbourhood. The SSPs stated that the residents had complained against the continuance of the rehabilitation camp in Bindunuwewa. In 1998 there had been an exchange of correspondence between the SSP Bandarawela Police Division and the OIC of the Centre in which issues regarding the security of the Centre had been raised. The SSP had stated that he was not in a position to provide additional security to the camp owing to a shortage of police cadres and had recommended that the Centre be relocated. There is however no evidence of any overt agitation or collective protest against the camp or its inmates by the residents. Our Regional Coordinator who had regularly visited the camp has reported that the relations between camp inmates and residents had not given cause for any concern prior to these incidents.

However, the incidents of the 24th suggest that the inmates were raising new demands and articulating them more aggressively. We have not been able to investigate whether this was due to the activity of detainees who had come recently and who were out to create a disturbance in the Centre with some ulterior motives. The name of Anton James was mentioned to us as one of the agitators. The survivors whom we questioned were not able to speak with any certainty about James and the role he played in the disturbances of the 24th. But this is an aspect of the Bindunuwewa tragedy that should be fully investigated.

Action after the 25th

The action taken by the local police to arrest the persons who were responsible for the violence and the killings seems to have been totally ineffective. Mr. Premaratne the SSP Bandarawela commenting on the action taken admitted that the manner in which large numbers of villagers resident in the neighbourhood of the camp had been arrested had only had the effect of thwarting any purposeful process of investigation. The timely action taken to send special investigating teams from Colombo would hopefully prevent any cover-up by all those who are accountable for the police inaction that led to the tragedy.

We strongly recommend that there be a fair, impartial and effective investigation into the events that occurred and that appropriate and deterrent disciplinary action be taken against the errant officers irrespective of rank and the full rigour of the law be visited on all offenders who should be prosecuted swiftly and brought to justice.

We welcome the decision by the government to pay compensation to the families of the deceased and to the injured.

Posters

When we interviewed the two SSPs we found that they were unaware that a large number of posters had appeared in Bandarawela town, allegedly on the night of the 24th inciting people to violence against the inmates and the rehabilitation camp. The posters provide a line of investigation which may lead to persons or organizations which may have planned and led the attack on the camp. We learn that a statement made by one of the suspects who has been arrested had identified and named some of the persons who were responsible for the posters. He has further identified those who instigated the violence and led the attack on the camp. **We strongly recommend that this line of investigation be pursued. We think such a course of action is vital, as all the information we have been able to gather so far does not suggest that what occurred on the 25th was an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack.**

Issues Pertaining to Rehabilitation

The administration and management of rehabilitation under the provisions of section 20A(1), B(1) and C(1) of the Emergency Regulations of May 2000 need to be reviewed.

The inmates of the Bindunuwewa Rehabilitation Centre were all young persons sent to the Centre on a rehabilitation order of the Defence Secretary. They included both suspects arrested under the PTA as well persons who had surrendered voluntarily to escape the LTTE. Some of them were as young as 11-14 years. The policy of sending all these persons to one centre and treating them alike is inadvisable and needs to be re-examined. The location of Centres of this type would also need careful consideration. In some cases where the inmates cannot get back to their homes on account of the LTTE, the release after they complete their term of rehabilitation poses problems which need to be satisfactorily resolved. The Commission proposes to examine all these problems and make recommendations for dealing with them.

Safety of the Survivors

A matter which engaged our urgent attention was the security of the survivors who were hospitalised. We made some interim arrangements with the Commanding Officer of the Diyatalawa camp who readily agreed to be responsible for their safety until they were discharged. The detainees expressed concern for their safety and requested that they be relocated in a safer area. The security and welfare of these survivors is a matter that should be given immediate attention by the authorities.

Initiatives to Promote Ethnic Harmony and Reconciliation

One of the disturbing conclusions emerging from the Bindunuwewa incidents is that our society is still not free from racial violence and that it can express itself in very brutal forms. The Bindunuwewa tragedy needs to be inquired into fully and all the underlying causes that led to the atrocity uncovered. The disturbances and unrest within the Centre, the unusual speed with which a group mounted a poster campaign, the violence in the plantation areas that followed the incidents (which included the killing of two detainees from the plantation areas), the inaction of the police, the participation of local residents people regardless of the numbers involved, role and possible involvement of outsiders, all point in different directions and open different lines of investigation. No doubt, investigations have to be pursued on all these lines and everyone responsible for the incidents of the 25th and who has any complicity in them need to be brought to justice speedily. At the same time it would be necessary to strengthen all the initiatives that have been taken in the recent past to promote ethnic harmony and reconciliation and involve the local communities more effectively in those efforts.

On our return to Colombo and learning of the disturbing developments in the Plantation areas, we contacted the Secretary of the Ministry of National Integration and Ethnic Affairs and stressed the need for immediate action such as the formation of peace committees at the local level with the support of religious leaders and civil society organisations. There is also need for launching a medium and long term programme of national integration and ethnic harmony drawing lessons from the Bindunuwewa case.

Faisz Musthapha PC, Chairman/HRC and Godfrey Gunatilleke, Manouri Muttetuwegama, Sarath Cooray, and N. Selvakumaran, Commissioners/HRC.

1st November 2000.

Asia Pacific Forum of National Human Rights Institutions

Interim Report of the Advisory Council of Jurists

Reference on the Death Penalty

9 August 2000

Introduction

On August 8-9 2000 the Advisory Council of Jurists considered two issues referred to it by the Forum. Seven Forum Members have nominated representatives to the Council. As the most recent Member to the Forum, Nepal is yet to nominate its representative to the Council. The Jurists present at the meeting were Honorable Justice Dame Silvia Cartwright of New Zealand (President), Sir Ronald Wilson of Australia, Professor JE Sahetapy of Indonesia and Mr Sedfrey Ordonez of the Philippines. The Jurists present at the meeting decided to solicit the comments of the absent Members for distributing their final report as they felt that the final report should reflect the views of all Members.

The Council invites the Forum to consider the action it might take in light of the following recommendations:

Preamble

The Council is cognisant of the substantial body of international jurisprudence relating to the death penalty, and which recognises its imposition as a limited exception to the right to life. It also notes that human rights are universal, indivisible and aspirational.

Reflecting the common basis of all human rights is the recognition of the fundamental and inalienable dignity of the human person, the Council considers that in commenting on the death penalty it must pay regard not only to literal denial to the right to life, but to the broader issue of the denial to the right to live in dignity.

The Council considers that the death penalty cannot be analysed in isolation from the context within which its imposition occurs.

The Council is not persuaded that justifications proffered for the retention of the death penalty do in fact justify its retention for any purpose. The Council considers that the death penalty is ineffective as a deterrent and that the public safety concern stemming from the possibility of recidivism is largely unfounded.

Furthermore, the Council considers that the administration of a criminal justice system should not lead to the taking of the life of a person and that the exacting of retributive justice is not available as a defence to the imposition of the death penalty.

The Council emphasises the important symbolic role played by law, and the need for governments and the judiciary to promote respect for law, justice and human rights. The Council is particularly concerned that the imposition of the death penalty has the effect of dehumanising the community, and implicitly promotes the notion that the taking of life is morally legitimate.

The Council considers that criminality is influenced by economic, social, political and cultural conditions. In particular the Council considers that racism, poverty, the denial of economic opportunities, and exclusion from social and cultural life contribute to increased criminality, and are inconsistent with the creation and maintenance of a just society. The Council considers that the recognition and protection of fundamental rights will lead to a reduction in crime and only in such an environment will the rule of just law thrive.

If the death penalty is to be imposed, the Council emphasises that this must be in compliance with the rule of law and in association with a genuine commitment to its restriction and ultimate abolition.

The Council considers that the rule of law requires not only that the content of the law be just but that it be administered by an independent and impartial judiciary and independent and accountable law enforcement agencies free from corruption. For justice to thrive, the Council considers that it must exist in an environment in which the right of access to justice, the right to competent and effective counsel, the right to be free from cruel, inhuman and degrading punishment, and other rights of accused persons are protected.

The Council urges Member states to concentrate on crime control strategies that promote these fundamental rights rather than focusing on retribution; to work toward the restriction, suspension and ultimate eradication of the death penalty; and to take measures

towards the ratification of the International Covenant on Civil and Political Rights and the Second Optional Protocol to that Covenant.

1. International human rights law and standards

(i) the offences for which international human rights law permits the imposition of the death penalty.

The range of offences for which the death penalty could be imposed should be limited to the “most serious offences” as referred to in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).¹ The Council considers that the “most serious offences” are those which involve the wanton destruction of human life.

The Council acknowledges that it may take some time for States to limit the range of offences punishable by death to the “most serious crimes” because of concerns about national security. The Council expects that States will aim towards the decrease in the number of offences punishable by death as a means of achieving *defacto* abolition of the death penalty and ultimately *dejure* abolition.

The Council considers that limitation of the offences for which the death penalty is provided and ultimate abolition is possible only when the basic standards in the criminal justice system already referred to have been achieved.

(ii) whether the resumption of executions by governments after long periods during which death sentences have been commuted or not executed for other reasons is consistent with international human rights law.

The Council considers that the resumption of executions is not consistent with the spirit and intent of international human rights law. Resumption of executions is also contrary to trends in international law and practice. The Council considers that in a world of freedom, justice and peace, the reintroduction of the death penalty is indefensible. However, where there is *defacto* abolition the Council acknowledges the reintroduction of the death penalty in exceptional circumstances that threaten the peace and security of a nation or nation may occur.

¹ Article 6, 7, 14 of the ICCPR can be found at Annexure 1.

The Council urges those States that are *defacto* abolitionist to maintain this position at the very least and wherever possible, move towards the *dejure* abolition of the death penalty.

- (iii) **whether the enactment of laws that introduce or reintroduce the death penalty or that apply the death penalty to additional offences is consistent with international human rights law.**

The Council considers that the introduction or reintroduction of the death penalty and the expansion of the number of offences subject to the death penalty is contrary to the spirit of the ICCPR.

The Council considers that in those States that have abolished the death penalty, its introduction or reintroduction is proscribed by the terms of Article 1 of the Second Optional Protocol to the ICCPR.²

- (iv) **whether international human rights law allows for the imposition of the death penalty for crimes for which the sentence of death did not exist at the time the crime was committed.**

The Council considers that international human rights law clearly does not allow for the imposition of the death penalty for crimes for which the sentence of death did not exist at the time the crime was committed.

The Council endorses the terms of Article 15 of the ICCPR which states that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”³

- (v) **the nature and scope of procedural guarantees and other safeguards stipulated by international human rights law in the imposition and execution of the death penalty.**

² See Annexure 2.

³ See Annexure 1 for the full text of Article 15 of the ICCPR.

The Council considers Article 14 of the ICCPR, paragraph 7 of the General Comment 6 on Article 6 of the ICCPR,⁴ and the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁵ to be the most relevant international standards on procedural guarantees and safeguards in relation to the death penalty. The Council endorses these standards and safeguards.

The Council considers that particular attention should also be paid to the rights to: competent and effective Counsel; freedom from self-incrimination; and access to all information held by prosecuting authorities prior to trial.

- (vi) the restrictions that may be required by international human rights law on the manner and method of carrying out the death penalty.**

The Council considers that the method of carrying out a death penalty should be the most humane method available and one which upholds the dignity of the human being. The Council considers that public executions should be avoided in order to protect the dignity of the person to be executed and that the numbers of witnesses should be limited.

- (vii) whether there are further groups of persons, aside from those specified by international human rights law, upon whom it should not be permissible to impose the death penalty.**

The Council accepts as a minimum the restrictions placed on the categories of persons that can be executed as set out in the ICCPR namely persons who commit an offence while below eighteen years of age;⁶ pregnant women;⁷ and the mentally disabled.⁸

The Council questions the restriction of mothers to new mothers and believes the scope of the exemption should be determined by what is required by the best interests of the child.⁹

⁴ See Annexure 3.

⁵ See Annexure 4.

⁶ Article 6(5), ICCPR also safeguards guaranteeing protection of the right of those facing the death penalty; and Article 37 of the Convention on the Rights of the Child.

⁷ Article 6(5), ICCPR.

⁸ Safeguard 3, Safeguards guaranteeing protection of the right of those facing the death penalty.

The Council emphasizes that the persons who commit offences when below the age of 18 are not to be executed under the terms of the JCCPR and Convention on the Rights of the Child (CROC).¹⁰

The Council also considers that persons who at the time of the offence or subsequently lack criminal capacity should not be subject to the death penalty.

The Council has difficulty understanding the rationale behind the approach adopted in the *American Convention on Human Rights* in limiting the application of the death penalty to persons below the age of 70 years. In the general interest of restricting the categories of persons subject to the death penalty, however, the Council commends the approach adopted in the *American Convention* as a further means of limiting the scope of the death penalty.

(viii) whether international human rights law imposes any limitations on the duration and conditions of incarceration of persons sentenced to death.

The Council endorses the standards adopted in the *Universal Declaration on Human Rights*, Article 7 of the ICCPR, and the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Punishment.

The Council considers that use of solitary confinement following final judgment should be used only in limited instances.

The Council considers that the time between judgment and execution should not be unduly prolonged yet sufficient to allow appropriate time required for the adequate exercise of the rights and procedures of appeal and the possible commutation of the sentence.

The Council considers that during the period of detention, inhuman and degrading treatment should be totally eliminated and in particular it condemns the denial and restriction of education and adequate exercise for persons sentenced to death.

⁹ Article 3, Convention on the Rights of the Child.

¹⁰ See Annexure 5.

2. Recommendations to Forum Member States

The Council invites the Forum to act on the following recommendations.

(i) Australia

Australia is commended for its ratification of the ICCPR, Convention on Against Torture and Other Forms of Cruel, Inhuman and Degrading Punishment (CAT)¹¹ and CROC and its accession to the Second Optional Protocol.

Australia is commended for its abolition of the death penalty *de jure*, both in the federal jurisdiction in 1973 and in the States in 1987.

Australia is commended for its *Extradition Act* which imposes a positive duty on the Attorney-General not to surrender a person on whom the death penalty may be imposed.

Australia is encouraged to maintain its record of abolition of the death penalty and resist calls for its reintroduction.

Australia is encouraged to exercise national and State leadership to educate civil society on the issues surrounding the death penalty, Australia's international legal obligations and international standards and norms.

(ii) Fiji

Fiji is commended for its *de facto* abolition of the death penalty and is encouraged to move towards ratification of the ICCPR, CAT and the Second Optional Protocol.

Fiji is encouraged to affirm the rights expressed in its Constitution of 1997 namely the right to life, freedom from torture and procedural safeguards.¹²

Fiji is urged to revoke the provision of the Penal Code which provides for the mandatory imposition of the death penalty for specific crimes.

¹¹ See Annexure 6.

¹² Sections 22, 25, 27, 28, 29, Constitution of the Fiji Islands (1997).

(iii) India

India is commended for its ratification of the ICCPR and CROC.

India is encouraged to move towards ratification of the Second Optional Protocol of the ICCPR and CAT.

India is commended for its constitutional provision regarding the fostering of respect for international law and treaty obligations.

However, the Council expresses concern about the stated intention of the Government to increase the list of offences which are punishable by death and draw particular attention to its comments regarding the criteria for what constitute “most serious crimes.”

The Council endorses the comments of the Human Rights Committee in relation to India’s obligation to ensure that its Penal Code does not provide for the execution of a person who commits a crime while under the age of eighteen.¹³

The Council notes that religious and cultural traditions can not justify the breach of international human rights law. In this regard, the Council draws attention to the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief

India is encouraged to take progressive steps towards *defacto* abolition of the death penalty and ultimately its *dejure* abolition.

(iv) Indonesia

Indonesia is encouraged to move towards the ratification of the ICCPR and its Second Optional Protocol.

¹³ The Committee expresses concern at the lack of compliance of the Penal Code with Article 6, paragraphs 2 and 5 of the Covenant. Therefore, the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and lit the number of offences carrying the death penalty to the most serious crimes, with a view to its ultimate abolition.” ‘Concluding Observations of the Human Rights Committee: India.’ 04/08/97. CCPR/C/79/Add.81, para 20.

The Council notes with concern the possibility of an expansion of the crimes which are punishable by death. The Council also observes that cultural and religious traditions do not justify laws that breach international norms and standards.

The Council is particularly concerned about the lack of adherence to the principles of the independence and fairness of the judicial process.

Indonesia is urged to limit the number of crimes for which the death penalty may be imposed in line with the Council's definition of "most serious crimes".

Indonesia is urged to move towards abolition of the death penalty *defacto*, and ultimately the abolition of the death penalty *dejure*.

(v) Nepal

Nepal is commended for its ratification of the ICCPR, CAT, CROC and Second Optional Protocol.

Nepal is commended for its constitutional provision entrenching the abolition of the death penalty.

While Nepal is commended for its formal moves to abolish the death penalty, the Council expresses concern regarding information received stating that within the last year hundreds of extrajudicial killings have occurred at the hands of police squads and a significant number of persons have disappeared.

The Council considers that Nepal has an obligation to ensure that extrajudicial killings and disappearances not continue.

(vi) New Zealand

New Zealand is commended for its ratification of the ICCPR, CAT, CROC and Second Optional Protocol.

New Zealand is commended for not having imposed the death penalty since 1957, abolishing the death penalty for ordinary crimes in 1961 and *dejure* for all crimes in 1989.

The Council notes with concern the New Zealand *Extradition Act* provides for *discretionary* power to extradite persons who may be subject to the death penalty. The Council recommends that New Zealand confer on the Attorney-General a positive duty not to surrender a person who may be subject to the death penalty,

The Council notes the continuing need for leadership and public education regarding the issues surrounding the death penalty, New Zealand's international legal obligations and international standards and norms.

(vii) Philippines

The Philippines is commended for its ratification of the ICCPR, CAT and CROC and is encouraged to move towards the ratification of the Second Optional Protocol to the ICCPR.

The Council, however, expresses concern at the reintroduction of the death penalty in 1993 and the later expansion of categories of offences subject to the death penalty and notes that the reintroduction has resulted in a sharp increase in the numbers of detainees on whom the death penalty has been imposed.

The Philippines is commended for the introduction in March 2000 of a moratorium. The Council regrets, however, that the commutation of all death sentences did not occur immediately.

The Council recommends that consideration be given to the commutation of all death sentences particularly those of persons under sentence of death for a prolonged period.

The Council considers that the prolonged period of detention contravenes the Constitutional prohibition of "cruel and unusual punishment".

The Council recommends that the Philippines move towards *defacto* abolition of the death penalty and ultimately *dejure* abolition.

The Council emphasizes and commends the Philippines Constitution which enshrines such principles as the presumption of innocence¹⁴ and freedom from torture or intimidation for those charged with criminal offences.¹⁵ The Council is, however, concerned that the rights to competent and effective counsel and the requirement for an independent and impartial judiciary may not comply fully with Constitution guarantees.

(viii) Sri Lanka

Sri Lanka is commended for its ratification of the ICCPR, CAT and CROC and encouraged to work towards the ratification of the Second Optional Protocol to the ICCPR.

The Council notes, however, that not all crimes currently punishable by death are the “most serious crimes” and recommend that the laws be amended so as to reflect the Council’s definition of “most serious crimes”.

The Council notes with concern the possibility of the re-implementation of the death penalty in Sri Lanka and the expansion of the range of offences that would attract such a penalty.

The Council acknowledges the situation that Sri Lanka currently experiencing but considers that the re-implementation of the death penalty is not likely to be an effective tool to address this situation.

The Council considers that the resumption of executions and expansion of offences punishable by death in Sri Lanka would be contrary to the principles underlying a just and civilized society and contrary to the terms and spirit of the ICCPR to which Sri Lanka is a party.

¹⁴ Section 14(2), Constitution of the Republic of the Philippines (1987).

¹⁵ Section 12(2), Constitution of the Republic of the Philippines (1987).

Annexures

Extracts from the International Covenant on Civil and Political Rights

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal

assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or

international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

2. Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty, have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State

Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under Article 2 of the present Protocol, the right guaranteed in Article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.
2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in Article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Reservations, communications and notifications under article 2 of the present Protocol;
- (b) Statements made under articles 4 or 5 of the present Protocol;
- (c) Signatures, ratifications and accessions under article 7 of the present Protocol;
- (d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

3 General Comment on Article 6 of the International Covenant on Civil and Political Rights (General Comment 6(16)).

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (Article 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.
2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para 1) or incitement to violence (para. 2) as therein described.
3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.
4. States parties should also take specific and effective measures to prevent the

disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.
6. While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes." Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes." The article also refers generally to abolition in terms which strongly suggest (paras 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of Article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.
7. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

4. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.
2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.
4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.
5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.
7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

5. Extracts from the Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

No child shall be subjected to torture or other cruel, inhuman or degrading treatments or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Asia Pacific Forum of National Human Rights Institutions

Interim Opinion of Advisory Council of Jurists

Child Pornography on the Internet

On August 8-9 2000 the Advisory Council of Jurists considered two issues referred to it by the Forum. 7 Forum members have nominated representatives to the Council. As the most recent member to the Forum, Nepal is yet to nominate its representative to the Council. The Jurists present at the meeting were the Honorable Justice Dame Silvia Cartwright of New Zealand (President), Sir Ronald Wilson of Australia, Professor J E Sahetapy of Indonesia and Mr Sedfrey Ordonez of the Philipines. The Jurists present at the meeting decided to solicit the comments of the absent Members for distributing their final report as they felt that the final report should reflect the views of all Members. The Council invites the Forum to consider action it might take in light of the following recommendations.

The Council has been asked to advise on the validity of measures taken to regulate child pornography on the internet and whether such measures can be reconciled with national and international laws guaranteeing the rights of freedom of expression, privacy and freedom of information.

Before deciding whether measures are valid the Councils considers that it is first necessary to define,

- “child”; and
- the meaning of “pornography”.
- **Definition of child**

In defining a child, the Council notes the definition in Article 1 of the Optional Protocol to the Convention on the Rights of the Child which defines a child as a person -

below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

In many countries this definition means that the threshold age at which a child is protected against exploitative use in pornography is determined by the age of consent. The Council believes that the standard should apply to all children under the age of 16, regardless of the age of consent.

The Council recommends that, in determining the age of a child for the purposes of child pornography, the standard in the Convention is accepted as the general rule subject to there being no exception for children who are, or appear to be, under the age of 16 years.

- **Pornography**

The Council considers that, while there are a large number of definitions of child pornography, the definition in Article 2(c) of the recent Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography to be the most appropriate.

Article 2(c) defines child pornography as,

any representation by whatever means, of a child engaged in real, or simulated explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is depicted for a sexual purpose.

The Council considers that it is important to recognise that the subject matter of a representation includes any abuse or mistreatment of a child for sexual purposes.

- **International standards**

The Council considers that the means adopted to combat child pornography on the internet must be consistent with international human rights norms. In this context the Council noted the competing rights of freedoms of expression, privacy and freedom of information and those which protect and promote the best interests of the child. However, the Council concluded that the child's best interests should be given paramountcy given the proven physical and emotional harm inflicted on them by child pornography. In this regard the Council notes that all Forum members have ratified the Convention on the Rights Of the Child and find that the principles in Article 3 of the

Convention on the Rights of the Child should govern the resolution of this matter. Article 3 states that,

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Council considers that the rights of the child should not simply be a paramount consideration but rather *the* paramount consideration, an interpretation supported by Articles 32 and 34 of the Convention which state that,

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.*

There may be those who argue that freedom of expression should be paramount on the basis of a decision by the British Columbia Court of Appeal which found that a law

relating to child pornography contravenes the Charter of Rights and Freedoms.¹ However, the Council notes that,

- a. (in the words of the Court) “The law is flawed because it has the potential to penalise people for possessing and creating material that may merely be the product of imagination and not intended for distribution”; and
- b. The decision is currently subject to appeal.

- **Ensuring effective regulation**

In the hope that it may be of assistance to Forum members, the Council offers the following suggestions on the implementation of regulatory control.

That Forum members move to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

In order to address effectively child pornography on the internet the Council recommends a move towards the establishment of a network of laws in Forum countries, together with a hotline supported by legislation which would permit government intervention.

The Council considers that there is a need for a Forum wide approach to the prevention of child pornography on the internet and considers that giving priority to a consultative approach rather than a punitive one would be more effective and appropriate. To this end it suggests the establishment of a Standing Commission of the Forum to develop a model law in consultation with internet service providers and monitor its operation with a view to ensuring its efficiency and improvement. The development of Codes of Practice should occur on a Forum wide basis. The sophisticated and unlimited potential of the technology requires an approach that is cooperative and educative, and which combines prevention with on going monitoring.

In addition to the establishment function the Standing Commission would have the additional responsibility of:

¹ *R v Sharpe* (BCCA 1999, 416).

- formulating and revising codes of practice and monitoring compliance;
- advising and assisting parents and other carers of children in relation to the supervision and control of children's access to internet content;
- conducting and coordinating community education programmes about internet services;
- conducting research into issues relating to internet content and usage;
- liaising with and other relevant regulatory bodies about cooperative arrangements for the regulation of online content;
- informing itself, and advising on technological developments and service trends in the internet industry.²

The Council also notes that it is necessary for the effective regulation of child pornography on the internet to create a set of appropriate offences.

² See for example, the Code of the Australian Broadcasting Authority.

Legal Awareness Programme at Kirinda

M.C.M. Iqbal

Introduction

The Government of Sri Lanka had been taking steps recently to facilitate persons whose rights had been violated, to obtain speedy redress. Even though the option of seeking a remedy in such instances through the courts was available, there was a need for other options for such persons to obtain redress expeditiously and with less expenditure. The establishment of the institutions of the Parliamentary Commissioner for Administration (Ombudsman) and the Human Rights Commission provided this option.

A Baseline study of Citizens Participation in the Legal System, conducted by the Law & Society Trust in 1996/97 revealed that while people were aware of the existence of a legal system in general, most of them are not aware of their rights and how to seek redress in the event of the violation of such rights. It is this lack of awareness among the people that prompted the Law & Society Trust to launch a project to conduct a series of legal awareness programmes for selected areas in Sri Lanka. Recently the Trust held a programme at Tissamaharama. During this programme, the Trust's staff came into contact with a small community of Muslims at Kirinda, 15 miles from Tissa. They lead an isolated life and many of their names are not even on the Electoral Register.

The Programme

With the collaboration of an established civil society organisation in Tissamaharama, the Friends of Nations and the Principal of the Kirinda Muslim Maha Vidyalaya, two legal awareness programmes were organised in Kirinda – for the students of the higher classes of this school on 30th October and for civil society leaders of that area on the 31st October 2000. About 80 students attended on the first day and about 70 civil society leaders, mostly fishermen and some Muslim women attended the programme on the second day.

The lectures were on “The Need of Social Awareness,” “Fundamental Rights, Children’s Rights,” and, “The Basic Judicial Structures and Procedures.” The participants were initially reluctant to take an active part in the discussions. Consequent to the lecturers cajoling them, their inhibition melted away and lively discussions followed. One could

see that the interest of many had been kindled with regard to the laws of the land, a lack of which they realised was one of the reasons for their backwardness. The students realised that a basic knowledge of the law would help them to play an important role in society. The interest of the civil society leaders was more in question of what they should do to re-activate a Fishermen's Co-operative Society that they once had and which had become defunct several years ago as a result of some members who had obtained loans for the purchase of fishing gear, defaulting repayment. The need to form more active civil society organisations was explained.

It is planned to assess the impact of this programme on the people of Kirinda and follow it up with further awareness on other matters of concern to them.

Mrs. M.M.I. Ranjani, a freelance social mobiliser, Mr. M.I. Mohamed Azver, an intern of the LST and Mr. M.C.M. Iqbal, Consultant of LST on civil society affairs were resource persons at this programme. This programme was conducted in Tamil and more are to follow.

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