BEYOND THE WALL

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Home for Human Rights

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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

Interim administration should monitor human rights

At the time of writing the interim administration for the Tamil-dominated northeast is yet to be finalised with the Liberation Tigers of Tamil Eelam (LTTE) expected to hand over their proposals shortly. The differences of opinion between the Sri Lanka government and the rebels have led to a suspension of talks between the protagonists, with the LTTE also declining to participate at the Tokyo donor conference held in early June.

The LTTE insists that if talks are to proceed meaningfully, a power-sharing mechanism has to be established in the northeast that goes beyond mere trappings and hot air. Tamils in the northeast, exhausted by dealing with Sinhala-speaking military officials co-ordinating civilian affairs, government agents hamstrung by a plethora of administrative and financial regulations in a red tape-ridden bureaucracy, and an ineffective provincial administration that is anyway run by the governor who is creature of the central government, have indicated that they want a body that is more responsive to their needs than the organs of a Sinhala-dominated Centre.

It is therefore important that the interim administration is armed with sufficient powers that will make it a body that governs the region effectively than an entity that merely disburses funds for the rehabilitation, reconstruction and re-settlement of the displaced of the northeast.

Beyond the Wall believes that human rights monitoring too should come under the direct purview of the interim administration. This however is not to take away the powers of the judiciary to decide on whether the fundamental rights of a citizen has been violated or not. Rather, it is due to the contentious nature the subject has assumed in the northeast after the signing of the Ceasefire Agreement with each side to the conflict accusing the other of violating human rights. These accusations are for no purpose other than the warring parties trying to gain political advantage by criminalizing their adversary in the eyes of their respective constituencies and the world at large.

Soon after the Ceasefire Agreement was signed in February last year, a campaign was launched by the government and the international community accusing the LTTE of extorting money from the Muslims, abducting civilians, indulging in conscription and recruiting child soldiers. Though none of these matters were challenged in a court of law, actors in civil society, led by the NGOs, demanded the setting up of a body that effectively monitors human rights in the northeast.

It was initially felt that the scope of the Sri Lanka Monitoring Mission (SLMM) could be broadened and the body given more powers to tackle human rights issues. This suggestion however fell by when it became obvious the SLMM had greater expertise in monitoring ceasefire violations of a military nature rather than human rights ones.

The second suggestion was to recruit experts with international experience in human rights monitoring to establish a specialised body. The idea was to draw heavily from the international community, though the institution would have local input as well. This proposal too did not find acceptance.

Earlier this year, the government and the LTTE held a round of talks where human rights were discussed in depth. It was here that Ian Martin, former secretary general of Amnesty International came up with a 'human rights roadmap.' What this Ptolemy of human rights map-making recommended is not officially known to the public. It should be said however that there has been a tremendous effort on the part of the government, local civil society actors and the international community to inveigle non-Sri Lankans into such monitoring missions.

Though this might appear to be acceptable on the grounds that foreign experts have vast experience when it comes to dealing with conflict management and because they are non-partisan regarding the conflict in Sri Lanka, nothing could be further from the truth. The Ranil Wickremesinghe government is cultivating the international community purely because the big actors from the 'community' disapprove armed rebellion against established states however outrageous the human rights records of such states are vis-à-vis their citizens.

The deep-seated suspicion Tamils are beginning to entertain on the role of the international community in conflict resolution and peace-building makes it imperative that human rights be handled by a body such as the interim administration, which will be composed of locals – Tamil, Muslim and Sinhala. It will lead to a fairer hearing of transgressor and victim, a better understanding of the issues involved, and a fairer determination of guilt and innocence. To repeat, this will however not interfere with the functioning of the judiciary, but will only assist the process of dispensing justice in an area just emerging from conflict and strife.

This will be an effective forum where accusations against the LTTE on abduction, extortion and recruiting child soldiers, and gunning down their political adversaries could be heard. Similarly, accusations against the government such as preventing resettlement of IDPs, threatening and intimidating civilians and other human rights concerns such as removal of the PTA could be taken up.

The time has come to call the bluff of the international community, which by posing off as neutral and independent, has worked with the sole objective of undermining the Tamil struggle for self-determination and acting at the bidding of the Sri Lanka government.

Home for Human Rights helps cause of justice in disappearance case

By J. S. Tissainayagam

With the ceasefire agreement in place, human rights violations – especially what may be categorised under civil and political rights – do not occur with the same frequency or intensity as when all out war was in progress. There have been incidents of assassination and abduction in the east of course but not of the same volume as when the state and the LTTE were at war.

In the second week of September, an important human rights intervention by the United Nations was reported in the media. The intervention focused on the utterly inadequate safeguards from police and military brutality that is available to the citizen.

The intervention was from the United Nations Human Rights Committee on a communication made to the committee on 25 October 1999 by Jegatheeswara Sarma on the disappearance of his son Thevarajah Sarma who was allegedly abducted on 23 June 1990. The legal counsel representing Jagatheeswara Sarma were V. S. Ganeshalingam from Home for Human Rights, Sri Lanka, and Helen Duffey, of Interights, the UK.

The communication to the committee was under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The committee decided in favour of the victim's family.

Amnesty International commenting on the decision states, "This is the first disappearance case in Sri Lanka to be brought under the First Optional Protocol to the ICCPR and constitutes a considerable victory for the family and for victims of disappearances in general in Sri Lanka."

According to the complaint to the UN Human Rights Committee made by Jegatheeswara Sarama, he, his son Thavarajah and three others were removed by members of the Sri Lanka army from their home in Anpuvalipuram on 23 June 1990 in the presence of his wife and others. They were handed over to other members of the army including one Corporal Sarath. The complainant's son was suspected of being a member of the LTTE was beaten and tortured. Thereafter he was taken into custody at the Kalaimagal School, where he was tortured further, hooded and forced to identify suspects.

The complainant Jegatheeswara Sarma and others were asked to parade before his (complainant's) hooded son. Jegatheeswara Sarma was released soon after, though his son was transferred to Plantain Point military camp. The author had informed the ICRC, human rights groups and the police of what had happened. Later at a meeting with senior military officials the complainant's wife was informed that her son was dead.

The complainant however claims that between 1.30 and 2.00 p.m. on 9 October 1991 a yellow military van bearing licence plate 35 Sri 1919 had halted in front of City Medical Pharmacy, Trincomalee where he worked. An army officer entered the pharmacy and wanted some photocopies made. "At that moment the author saw his son in the van looking at him. As the author tried to talk to him, his son signalled with his head not to approach," states UN Human Rights Committee document prepared on the case.

When the Presidential Mobile Service was held in Trincomalee, the complainant approached then Prime Minister D. B. Wijetunge and complained about his son's disappearance. The prime minister had ordered the release of his son when he was found. However, in March 1993, the military had told the complainant his son had never been taken into custody.

Jegatheeswara Sarma followed this up by approaching various institutions and individuals to have his son released. He gave evidence before the Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces, without result. He wrote to the president in July 1998 and was informed by the army once again that no such arrest had occurred. On 30 March 1999 the complainant had petitioned the president seeking full inquiry and the release of his son.

The Sri Lanka government (or state party) in its submissions to the committee said the attorney general had received two letters in July and October 2000 seeking inquiry and release. The attorney general's inquiry from the armed services had been unsuccessful, as they had all said no one by the name of complainant's son had been arrested. The attorney general's department then transmitted the request to the Missing Persons Commission, which had advised the inspector general of police that suitable action should be taken.

On 24 January 2001 the Disappearance Investigation Unit had interviewed a number of witnesses and recorded statements from the disappeared person's family and military personnel at the Plantain Point army camp.

According to the state's submission to the UN Human Rights Committee, Corporal Sarath and two other unidentified persons had indeed "'involuntarily removed (abducted)'" Thavarajah Sarma. However, the abduction was independent of the cordon and search operations carried out by the military in Anpuvalipuram in the Trincomalee District in order to identify and arrest terrorist suspects. "During this operation, arrests and detentions for investigation did indeed take place in accordance with the law, but responsible officers were unaware of Corporal Sarath's conduct and the author's son's abduction."

Since Corporal Sarath had denied any involvement in the incident and refused to provide information on the complainant's son or give an acceptable reason why

In its comments the committee, after examining the question of exhaustion of domestic remedies has concluded, "the author (complainant) had used the remedies that were reasonably available and effective in Sri Lanka."

witnesses would want to falsely implicate him the Missing Persons' Commission had decided that he and two other unidentified persons were responsible for the involuntary removal of Thavarajah Sarma.

On the instance of the complainant seeing his son in the army van, though it was established there was no one by the name of the military officer named by the complainant, one with the similar sounding name was in charge of the area concerned, who had however died soon after in a "terrorist" attack.

In its submission the state said it did not cause the disappearance of the complainant's son through any action either directly or through the relevant field commanders. Though abduction is an illegal or prohibited activity the conduct of Corporal Sarath was unknown to the state. The abduction was therefore a private dispute and the state could not be charged for the violation of his human rights.

The complainant in his submission counters this stating, "...The is responsible for the acts of Corporal Sarath even if, as suggested by the state part, his acts were not part of a broader military operation, because it is undisputed that the acts were carried out by Army personnel. Corporal Sarath was in uniform at the relevant time and it is not disputed that he was under orders of an officer to conduct a search operation in that area during the period in question."

The complainant also contended there were omissions in the evidence gathered by the state party. Records of the ongoing military operations in the area in 1990 were not accessed nor, were records available of detentions in the area during cordon and search operations were unavailable. Further, the attorney general had not included certain key witnesses for the trial though they had provided statements to the authorities earlier and could provide statements material to the case.

In its decision the committee stated there had been violations of articles 7 and 9 of the ICCPR in regard to the disappeared person, and article 7 with regard to the father of the victim and his wife.

According to the rules the aggrieved party may seek intervention of the UN Human Rights Committee only when all domestic measures to seek relief have to be exhausted. The Sri Lanka state, which was respondent party, however said the author of the communication, Jegatheeswara Sarma, had not demonstrated he had exhausted all domestic measures.

The state said aggrieved party had failed to file "a writ of habeas corpus to the Court of Appeal, which gives the possibility for court to force the detaining authority to present the alleged victim before it." Or that in the event the police fail or refuse to conduct an investigation, there was the possibility of applying to the Court of Appeal to obtain a writ of mandamus when "a public authority fails or refuses to respect statutory authority." Or if the complainant was dissatisfied with the police investigation, the complainant could "directly institute criminal proceedings in the Magistrate's Court... under the Code of Criminal Procedure."

The committee is unequivocal that it was not going to entertain such arguments. It says the author (complainant) had written 39 letters and other requests to Sri Lankan authorities regarding his son's disappearance including the police, army, the national human rights commission and the president to no avail. The complainant had also stated in his communication to the committee "the remedy of habeas corpus is ineffective in Sri Lanka and unnecessarily prolonged."

In its comments the committee, after examining the question of exhaustion of domestic remedies has concluded, "the author (complainant) had used the remedies that were reasonably available and effective in Sri Lanka." This means the committee had held with the complainant that instituting habeas corpus proceedings in a Sri Lankan court were ineffective or perhaps prolonged.

The committee goes on to say "...in 1995 the author (complainant) instituted proceedings with an ad hoc body (Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces) ... Bearing in mind that the Commission had not after seven years reached a final conclusion about the author's son, the Committee was of the view the remedy was unreasonably prolonged..."

The state party submitted that though criminal investigation had revealed that someone by the name of Corporal Sarath and two others had indeed "involuntarily removed (abducted)" the victim, the abduction was independent of the cordon and search operation carried out by the army in the village where the victim was arrested (after which he went missing). The state claimed that responsible officers were unaware of the conduct of Corporal Sarath and the abduction.

The committee however does not mince words when it attributes responsibility. It states, "With regard to the author's (complainant) claim ... the Committee notes that the State party has not denied that author's son was abducted by an officer of the Sri Lanka Army on 23 June 1990 and has remained unaccounted for since then.

"The Committee considers that for establishing state responsibility it is irrelevant in the present case that the officer to whom the disappearance is attributed to acted ultra vires or that superior officers were unaware of the action taken by that officer. The Committee therefore concludes that in the circumstances, the State party is responsible for the disappearance for the author's son."

The Committee's parting shot states, "...the Committee wishes to receive from the State party, within 90 days, information about measures taken to give effect to the committee's views. The State party is also requested to publish the Committee's views."

The committee's pronouncement is an eloquent testimony that even if domestic laws in Sri Lanka are inadequate, Tamil victims of human rights violations may, in the future, be able to seek justice in the hands of at least some of the UN human rights bodies, citing the Thavarajah Sarma case as a precedent.

It is ironic that the Sri Lanka government had, earlier this year, submitted its fourth and fifth reports to the UN Human Rights Commission (not Committee) where it had listed the

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New Year's bloody dawn: Karativu 1985

By- K.N. Tharmalingam

"The exclusion of a community from power would in the long run exclude them from the benefits of power"

'Grammer of Politics'– Harold Laski

"Peace cannot suddenly descend from the heavens, it can only come when the root cause of troubles is removed. War is not a pleasant subject to contemplate. It is an ugly thing… wiped away millions of young men in their prime."

'Glimpses of world history' – Jawaharlal Nehru.

"According to Arnold – a leading authority on Islamic history, this wonderful expansion of the hitherto insignificant desert race is due not so much to their new-born religious spirit as to their desire to possess the lands and goods of their neighbours who were richer.

"When Mohammed-bin-Quassim waged war against the Brahmin king of Sind, a dreadful war ensued and the king was killed in battle. All males, six thousand, were massacred by Bin-Quassim. The queen and the other women in the palace burned themselves to escape dishonour, and all males over the age of seventeen who refused to embrace Islam were killed. Hindu temples were destroyed, gold, precious jewellery and other wealth from the temples were looted."

'Indian History' – Singh and Banerji

At the presidential election held in 1982, Karativu in its entirety voted for President J R Jayewardene in preference to Kumar Ponnambalam, a Tamil candidate. Karativu thus remained a stronghold of the UNP.

The passages quoted above are relevant to what occurred at Karaitivu from 12 April 1985, and to the atmosphere of hatred and malevolence generated against the Tamils during the 1980s, as the state set about systematically destroying them.

Of the three administrative districts in the East, the largest and the most populous is the Amparai District spread over the dry-evergreen secondary forest belt, located in the southeastern portion of Sri Lanka. Here the Tamil minority was living in harmony with the Sinhalese and the Muslims, sharing their joys and sorrows.

The prosperous town of Karativu in the Karavahu–Nintavur Pattu, in the Amparai District is a Tamil enclave surrounded by the Muslim towns – Sainthamaruthu, Nintavur and Sammanthurai to the north, south and west respectively.

Tamil villages in the East have derived their names from a variety of sources. Geographical features such as the rivers, the adjoining hills and places of worship, and of course events in history all these contributed to name villages. The name Amparai referring to both an administrative district and a town, is a pure Tamil word meaning 'beautiful rock' that stood in the centre of the ancient settlement of Tamils. Similarly, the Tamil villages of Karativu, Karungottitivu, Sainthamaruthu, Nintavur, Tirukovil and Tambiluvil, each have a history to narrate.

The people at Karativu are entirely Tamil. They are either Hindus or Christians. There exists a very ancient temple of goddess Pattini, believed to have been first built in the 2nd Century AD, which is held in great veneration by pilgrims. There are 10 other Hindu temples and a church in the area. There also exists a shrine devoted to the Buddha where Hindu worshippers paid homage until the armed forces occupied Karativu and took over the shrine.

Karativu has the singular honour of having produced several eminent men who served humanity (the human race, devoid of petty barriers) with distinction. They include among others, two scholarly monks of the Sri Ramakrishna Mission, one known as the Most Ven. Srimath Swami Vipulanandaji Maharaj who built several schools – both Tamil and English – in the districts of Jaffna, Batticaloa, Trincomalee, the present Amparai and Badulla. The swami had the rare distinction of having been invited to hold the position of professor at the University of Ceylon, when it was established.

The other monk, who earned recognition, was His Holiness Srimath Swami Natarajananda Maharaj, who functioned as the general manager of all schools managed by the Ramakrishna Mission, until the state took over all the assisted schools.

Teachers of great scholarship such as K. Kanapathipillai, who authored several books, "Periya" Kanapathipillai, "Sinna" Kanapathipillai, Arumugam, Thangarasa, Rasiah, Velupillai, Mahadevan, Vinayagamoorthy, Krishnapillai are some of the others who contributed to the spread of liberal education. Their education was centred round "teaching everything worthwhile," with emphasis on every aspect of the pupil, giving opportunity to develop talent and to cultivate the mind to be alert and sensitive. They helped to strengthen their faith in God. Their pupils were remarkable for orderliness. Karativu also produced civil servants, doctors, engineers, bankers and accomplished writers and poets.

The people of Karativu possessed knowledge and wealth that won them respect from other communities. They lived in an atmosphere of freedom, tranquillity and ease. Politically they were identified with the UNP after the general election 1977. E. Vinayagamoorthy, an educationist from Karaitivu got elected to the district development council as a UNP candidate in 1981. At the presidential election held in 1982, Karativu in its entirety voted for President J R Jayewardene in preference to Kumar Ponnambalam, a Tamil candidate. Karativu thus remained a stronghold of the UNP.

The many ethnic conflicts originating from Sinhala quarters near Amparai from about 1981 did not deter the Tamils from supporting the UNP. In 1985, Tamils were hopeful of securing life and property, even after the creation of the ministry of national security in March 1984.

When a regional political party, formed in Kalmunai in 1981 began to enjoy state patronage and support after the 1983

holocaust, it became apparent that the state was pampering the party to use its membership as a wedge to keep the Muslims apart from the Tamils. The government began to execute its plan to subordinate the Tamils through deprivation and terror. The terror of killing and arson unleashed by the state were aimed at uprooting the Tamils and displacing and dispossessing them.

The new political party lent its full co-operation to the government, and the attack on Tamils at Karativu is attributed to the joint endeavour by Mossad, the Jihad and government forces. Secret plans of the government under the cloak of 'dharmista' rule were aimed at employing the security forces to drive away the Tamils from their homelands at Karativu, Meenodaikattu, Oluvil and Akkaraipattu in Amparai, which was similar to what happened in Weli Oya after April 1984.

It was evident to the people that President Jayewardene, upset by the turn of events after the 1983 violence against the Tamils, was seeking new strategies against them in the face of Tamil demands irreconcilable with 'Dharmista' rule.

The new strategy were to create a political climate where hired goons from the Muslim community would attack, kill and maim Tamils, then loot and destroy their properties, so that the Tamils and Muslims would become divided. These plans were executed with minute precision, where unprovoked, ruthless attacks on Tamils began simultaneously at Karativu, Akkariapttu, Meenodaikattu, Oluvil and Addalaichenai after prayers at Jummah. People have alleged that the Mossad trained STF and the Jihad had attacked them while the police lent them the support.

The first attack on Tamils at Karativu began at 6.00 a.m. on 12 April 1985. Even helicopters were employed in the attack. This was a day of considerable religious significance for the Tamils, who were preparing to celebrate the Tamil-Sinhala New-Year, which would be during the early hours of the following day.

It was peculiar to the Tamils of Krativu to go to the more urban market town at Kalmunai to purchase all their requirements for New Year festivities. Purchases were made from their customary traders – Moors – on the very last day of the departing year.

Keeping to the custom of making purchases at Kalmunai, some people left Kartivu in the early hours of 12 April. Maalikaikadhu is a small Moor settlement lying between Karativu and Sainthamaruthu. Persons travelling to Kalmunai from Karativu have to travel through Maalikaikadhu and Sainthamaruthu along the main trunk road called the Pottuvil-Kalmunai road.

Tamils who were a permanent population at Sainthamaruthu for over centuries were driven away in April 1967 when aggressors stormed the Tamil division adjoining the Muslim division, set fire to homes and destroyed properties. Thereafter, Sainthamaruthu which had two divisions: the Muslim division and Tamil division, became one, an exclusively Muslims division. It became one Muslim territory. The forced expulsion of Tamils, the destruction of their Hindu kovils, the appropriation of temple lands and properties yet remain to be investigated and compensated. The attack on Tamils at Sainthamaruthu and other places were aimed at extirpation and obliteration of all signs and traces of a Hindu–Tamil identity at Sainthamarithu recorded from very ancient times.

The people who travelled to Kalmunai from Karativu on the 12th morning through Maalikaikadhu were set upon and severely beaten up by the members of the Jihad and the Mossad trained STF. The victims of the attack suffered severe injuries. However, they managed to escape death. A victim to the attack describes: "We carried much cash to purchase goods for the New Year feasts and celebrations. When we were nearing Maalikaikadhu junction, we spotted a few police vehicles being parked at the edge of the road and some Policemen together with men in camouflage. A little away from policemen were a large number of men, all strangers to the area. As we proceeded near them, we found them to be Muslim youths, identified by their dress and beard. The young men appeared restive"

The witness added, "The presence of policemen, the STF (Kaluwanchikudy) and strangers at Maalikaikadhu did not invest in our minds any sense of discomfort or nervousness. I thought that the policemen were there to prevent any possible breach of peace that may occur among Muslim fundamentalists and others. Since we had no conflict with our Muslim neighbours at Maalikaikadhu we felt safe. We proceeded on our journey. When we reached the junction, a number of youths rushed at us with menacing looks and began attacking with wooden poles. Apart from the attackers there were also the others armed with deadly weapons. They were watching the attack".

"Our senses were transported with fear at the unexpected attack. We lost our money, suffered injury and mental agony. It was a damnable behaviour on the part of the youth. The attack on the users of the highway on legitimate business in the presence of the law-enforcing authority was a revolting atrocity. When attacked we cried out to attract the attention of the policemen who were very much near the scene of attack. The policemen did not respond and nor did the STF. It was our good luck that those men did not abduct us as many Tamils disappeared later while on their journey through this area. The fact was established that the state, unable to find a just solution to the problems with its own citizens resorted to promote violence between communities. Goons were brought from elsewhere to attack the native Tamils in the district of Amparai."

The writing on the wall was very clear. It indicated disaster was imminent for the Tamils. The early morning attack on the men sent an ominous message of bitter things to follow. Respect for human rights was undermined by the evil genius of those in power.

In his 'Principles of Good Governance,' Herbert Spencer (1903) assigned only one duty to any good government when he said, "Good government exists to prevent one man from infringing upon the Rights of another". (Substance of Politics.) By all standards, the government of the day failed to stand up to this expectation.

Subsequent incidents confirmed that the state was encouraging and strengthening its forces to promote violence against the Tamils with the Mossad-trained army and hired goons brought from distant places.

An undergraduate from the University of Jaffna, Kandavanam Thevamanoharan, 20, was shot dead on this very day by the Muslim attackers without any provocation. The victim was standing near his gate when he was killed. The police did not pursue the killers.

The Karativu Tamil Refugees' Society (E. Vinayagamoorthy) reported: "It was about 2.00 p.m. on the 12 April 1985, when a mob numbering about 800 Muslim youths – all strangers, stormed into Karativu, after their Friday prayers, armed with guns, petrol bombs, fuel-cans and other deadly weapons. None could stop them and they attacked homes, business establishments along the main road. People taken by surprise and alarmed at the turn of events fled from homes.

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The new strategy were to create a political climate where hired goons from the Muslim community would attack, kill and maim Tamils, then loot and destroy their properties, so that the Tamils and Muslims would become divided.

Torture of Tamil female political detainees and implementation of CAT

By M. Sanathani

All physical and sexual torture creates acute stress, which is psychological torture and victims often suffer from post-traumatic stress disorder (PTSD), leading on many occasions to attempted suicides.

Prohibition of torture is a principle that is almost universally acknowledged yet states continue to condone this brutal and outrageous practice behind closed doors. Torture of Tamil female political detainees in Sri Lanka has caused much concern among local and international monitors. In spite of changing national laws to be in keeping with the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), successive governments in Sri Lanka have failed to ensure the elimination of torture in practice. Human rights education, which promotes an environment to fight torture and make space for the proper implementation of national laws, would help to improve effective implementation of CAT in Sri Lanka. Rehabilitation and reparation of torture victims is also very essential.

A 19-year war has been going on between the Liberation Tigers of Tamil Eelam (LTTE) fighting for an autonomous state for Tamils in the north and east, and the Sri Lankan government. With the apparent intention of controlling what it thought were acts of terrorism against the state, the Sri Lanka government introduced the Prevention of Terrorism Act (PTA) and reactivated Emergency Regulations (ER). These gave pervasive powers to the security forces with very little accountability, resulting in disastrous consequences for the Tamil population, which became its main victim. And among the war crimes these special security laws spawned, torture inflicted on Tamil women during detention in army and police custody was especially severe and deserves mention.

Amnesty International among other international human rights monitors has been severely critical of custodial torture in Sri Lanka. The Committee to Inquire Unlawful Arrests and Harassment (CIUAH) between July and December 1998 received 47 complaints of torture of Tamil political detainees in police custody. During the years 2000 and 2001 more than 15 cases of rape in custody were filed. However, so far no perpetrator has been punished except in one case where the victim was raped and murdered.[1]

Torture inflicted on Tamil female political detainees can be divided into three aspects. These are physical torture, sexual torture and psychological torture. Physical torture is systematic beatings, falanga (continuous beatings on the soles of the feet), beating after suspension by hands or legs, removing finger and/or toe nails and covering the face with polythene bags filled with petrol or chilly fumes etc. Sexual torture includes lewd verbal abuse, undressing, sexual assault such as thrusting bottles and objects into vagina, rape etc. Psychological torture combines blindfolding, disturbing sleep (through continuous questioning and cross-examination), threatening to exterminate the prisoner or intimidate family members, deprivation of basic needs while in detention etc. All physical and sexual torture creates acute stress, which is psychological torture and victims often suffer from post-traumatic stress disorder (PTSD), leading on many occasions to attempted suicides.

The following, an excerpt from the judgment delivered by Justice D. P. S. Gunasekera, judge of the Supreme Court, in the Yogalingam Vijitha case, highlights torture of Tamil female prisoners and connivance of other state officials with the police or security forces in perpetuating this crime.

"They had arrived at Negombo at 6.30. p.m. and she (Yogalingam Vijitha) had been put into a garage hand–cuffed and had been kept there till about 10. p.m. Whilst she was inside the garage the police had accused her of being a LTTE suicide bomber and had assaulted her with a club on her knees, chest, abdomen and back, which caused her unbearable pain. After assaulting her she had been put into a cell at the Negombo Police Station and had been detained there till 26.6.2000 on a Detention Order (R2), issued by Daya Jayasundera, D.I.G. Western Province, (Northern Range) under Regulation 19 (2) of the Emergency Regulation for 90 days.

"Whilst in detention between 21.6.2000 and 26.6.2000 she had been subjected to torture. The petitioner alleges that her ear studs had been removed and slapped with force. Her face had been covered with a shopping bag containing chilli powder mixed in petrol, which led her to suffocate. On one occasion she had been asked to remove all her clothes except her underwear and the brassier and her face had been covered with shopping bag containing petrol and chilli powder after which she had experienced a burning sensation all over her body. She had been asked to lie flat on a table and whilst four policemen were holding her, pressed to the table, four other policemen had pricked paper pins under the nails of the fingers and toes. She had been assaulted with a club and wires and when she fell down she had been trampled with boots. On another occasion she had been hung and whilst she was hanging had been assaulted with a club all over her body.

"On or about 25.6.2000 the policemen who were torturing her had asked her to place her signature on some statements prepared by them and when she refused to sign, one policeman had shown a plantain flower soaked in chilli powder and had said that it would be introduced into her vagina unless she signed the papers. When she refused to sign she had been asked to remove her blouse and cover her eyes with it and had been asked to lie on a table. Whilst she was lying down on the table four policemen had held her hands and held her legs apart and the plantain flower had been inserted by force into her vagina and had been pulled in and out for about 15 minutes. She had experienced tremendous pain and a burning sensation. She had become unconscious and after

a few minutes she had been asked to lie on the table till about 9.30. p.m. After some time some sheets of paper typed in Sinhala had been brought by them and she had been asked to place her signature on them. Being unable to bear the torture she had signed them. The contents of the documents she signed had neither been read nor explained to her. After sometimes she had been put into a cell with strict instructions that she should not wash her genital region.

"When she was crying in pain inside the cell one policeman on duty had shown mercy on her and by about midnight had been permitted to use the toilet. The acts of torture meted out to her as set out above has affected her physically and psychologically and her matrimonial prospects had been shattered as a result of the mental and physical trauma that she had undergone at the hands of the police. She states that she is suffering from depression, loss of sleep, loss of appetite, loss of concentration, fear and nervousness.

"On 26.8.2000 a police officer from the Terrorist Investigation Division had visited her at the Negombo Police Station and she had pleaded with him to remove her from the Negombo Police Station and thereupon she had been transferred to the Terrorist Investigation Division, Colombo where she was detained till 20.9.2000. She states that whilst in detention at the Terrorist Investigation Division too that she was mercilessly assaulted by Sub inspector Saman Karunaratne, the 3rd respondent, who had forced her to write in Tamil what was dictated to her which included several admissions that she was a member of the LTTE. Whilst in detention at the Terrorist Investigation Division she had started bleeding and had been taken to the National Hospital on 11 days and treated. On 21.7.2000 she had been produced before the Colombo Magistrate under the Emergency Regulations. In Court when she attempted to inform the Magistrate regarding the acts of torture meted out to her Sergeant Wijeratne of the Terrorist Investigation Division who was beside her had prevented her from complaining to the Magistrate, and she had been taken back to the Terrorist Investigation Division.

"On 21.7.2000 she had been taken from the T.I.D to the Vavuniya 'pass office' by the 3rd respondent and Superintendent of Police Gamini Dissanayake of the T.I.D. and a bundle of applications made by Tamil persons for passes to travel to Colombo had been placed before her and she had been asked to identify the members of the LTTE. When she failed to identify any one, she had been mercilessly assaulted by S.I. Karunaratne the 3rd respondent, in the presence of S.P. Dissanayake who advised her to pick some application to avoid getting assaulted further.

"On 21.9.2000 she had been produced before the Colombo Magistrate with strict instructions that she should not attempt to speak to the Magistrate and she had been remanded under Section 7 (2) of the Prevention of Terrorism act and had been taken to the Negombo Remand Prison. On 23.10.2000 she had been produced before the Colombo Magistrate and upon an application made by her Attorney at Law the learned Magistrate had ordered the Judicial Medical Officer, Colombo North to examine her and submit a report to Court whereupon she had been admitted to the Ragama Government Hospital and had been warded for three days. At the Ragama Government Hospital she had been examined by an Assistant Judicial Medical Officer, a Consultant psychiatrist, a Consultant Obstetrician and Gynecologist and by a Consultant Radiologist. The report of Dr. Chandrapalan the Assistant Judicial Medical Officer, Teaching Hospital, Colombo North (Ragama) had been produced."[2]

Except for a negligible number of instances, the perpetrators of torture were not punished in spite of the fact that Sri Lanka has ratified the Convention Against Torture in 1994 and an act was passed in parliament in November 1994 giving effect to Sri Lanka's obligations under the convention. The act made torture punishable by imprisonment for a term not less than seven years and not exceeding 10 years and a fine.

Paragraph one of Article 2 of the torture convention says, "Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture..." and paragraph one of Article 4 says "Each state party shall ensure that all acts of torture are offences under its criminal law." However, though Act 22 recognized torture as a crime, it was almost never implemented and in most of the cases perpetrators were not punished.

Many prisoners, including women, were arrested and tortured under the PTA and released after being detained for about two to three years without trial in spite of the fact that paragraph 1 of Article 6 of the torture convention says that minimum time should be taken for investigation.

Despite Paragraph 1 of Article 7 speaking about guarantees of fair treatment at all stages of the proceedings and Article 12 indicating that the state party shall ensure that its competent authorities are prompt and impartial in their investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction, these laws are flouted in their implementation. As mentioned above, torture victims were warned not to tell the truth to those conducting medical examinations on their persons, which prevented even initial steps being taken towards an impartial investigation.

There have been many instances where victims who file fundamental rights applications are followed by the personnel of Criminal Investigation Department (CID) and police and threatened with murder if they take action against the perpetrators. This is despite CAT Article 13 stating, "Steps should be taken to protect the complainant and witnesses against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

Since the situation in Sri Lanka was unsatisfactory, CAT had shown a grave concern and made many recommendations to eradicate torture in Sri Lanka. For an example CAT in 1998 made certain recommendations including:

- Review of ER and PTA
- Minimum detention conditions
- Ensure adherence to current safeguards
- Ensure independent investigation of reports of

Torture victims were warned not to tell the truth to those conducting medical examinations on their persons, which prevented even initial steps being taken towards an impartial investigation

torture

- Prosecution of perpetrators
- Adequate compensation and appropriate medical care or rehabilitation to the victims of torture and their dependants
- The government should strengthen the Human Rights Commission and other mechanisms involved in the prevention and investigation of torture.

As per the recommendations forwarded, the Sri Lankan government has tried to modify domestic law. In 1995 and 1998, through the Penal Code (Amendment) Act Nos. 22 of 1995 and 29 of 1998, the Code of Criminal Procedure (Amendment) Act, No. 28 of 1998, the Judicature (Amendment) Act. No. 27 of 1998 and the Evidence (Special Provision) Act of 1999, the government has put in place a legal framework, which in principle should allow a more effective prosecution of rapists. A new provision constituting 'grave crimes' was included in the penal code. The minimum and maximum punishment for rape in custody as a form of aggravated rape was 10 years' and 20 years' imprisonment respectively. The punishment for aggravated rape in custody was made 10 years' (minimum) and 20 years (maximum) imprisonment respectively.

The security forces arrest civilians and torture them to sign confessions of guilt already prepared to implicate them in imaginary crimes because the forces are pressured to arrest as many LTTE members as possible.

Even though the law was nominally changed to eradicate torture, it was not possible to implement it because the security forces were not trained to deal with the detainees placed in police or army custody. It was difficult when they were conditioned to believe that all Tamils were enemies and that the LTTE or its supporters were bent on destroying the Sinhalese community if they were not checked.

The security forces personnel who join up purely because they need employment exacerbate these problems. They undergo a lot of pressure because of continuous exposure to violence and ill treatment by their peers and superiors at their workplaces. The security forces arrest civilians and torture them to sign confessions of guilt already prepared to implicate them in imaginary crimes because the forces are pressured to arrest as many LTTE members as possible. Their quest for 'LTTEers' is buoyed by the confidence that the culture of non-accountability and impunity would shield them from being brought before the law.

Though it is understood that torture should be eradicated and laws have been formulated towards this end, it is difficult to do so in practice unless everybody realizes the consequences of torture. Human rights education should form a part of these preventive measures. The security forces should be educated on human rights during training period, which should be updated regularly throughout their professional career.

But training should not be confined to the security forces alone. Every citizen should be trained in human rights so that he/she knows what his/her rights are what are not. It is only when people remain dumb when threatened that the police and military take the upper hand knowing their victims' helplessness. Human rights education in schools could increase the understanding of torture among all the citizens in Sri Lanka, which in turn would increase the support for torture.

The victims also suffer after their release because society does not accept them anymore as 'normal' members of the community. Torture survivors often lack access to effective judicial procedures or independent judicial and administrative agencies and the authorities are simply incapable or unwilling to set up and maintain reparational schemes and programmes for the benefit of victims. In Sri Lanka, even though some victims are successful in obtaining reparation, time limits for submitting complaints are still woefully short and the compensation awarded by law insultingly inadequate. Therefore the trauma of their detention remains with them uncompensated. The failure to acknowledge the crime makes it almost impossible for perpetrators to be brought to justice or for the dignity of victims to be restored.

"Most survivors of torture will have suffered severe physical and psychological trauma, sometimes causing upheaval and drastic change in their social circumstances and personal relationships. The process of healing will normally require the survivor to come to terms with his/her traumatic past. Obtaining disclosure for the events of the past may facilitate psychological recovery; instill greater confidence and a sense of the future, thereby contributing to the overall integration process."[3]

Torture of Tamil political detainees in Sri Lanka is prevalent on an unacceptably widespread scale, though many international and national mechanisms have been created to prevent it. Human rights education will help victims to assist themselves and others. Recurrence could be prevented by such means as: ensuring effective civilian control of military and security forces, restricting the jurisdiction of military tribunals specifically to military offences committed by members of the armed forces, strengthening the independence of the judiciary, protecting persons in the legal, media and other related professions and human rights defenders.

Further, conducting and strengthening on a priority and continued basis human rights training to all sectors of society, in particular the security forces, law enforcement, correctional, media, medical/psychological, social services and staff of economic enterprises, and creating mechanisms for monitoring conflict resolution and preventive intervention are important. Let's hope that torture will be eradicated and Tamil women in Sri Lanka would live in peace.

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Hidden realities behind the problems of upcountry Tamils

By Megala Shanmugam

Everyone born into this world has the right to a life that transcends distinctions based on nationality, language, gender, colour or religion. The United Nations Declaration of Human Rights guarantees this. Though our country too has ratified this declaration, one community on our soil is unable to enjoy the rights that should be guaranteed by the declaration. This is the community of upcountry Tamils.

Many of you might ponder as to who these people called 'up-country' Tamils are. This is due to a lack of understanding among Sri Lankans about this downtrodden community consisting of more than two million people. Since the scales of justice are never held evenly the injustices caused to innocent people are never brought out and the community suffers in silence.

Sri Lanka has close connections with the Indian sub-continent in every way. History reveals this. During very ancient times there was direct connection by land between Sri Lanka and India facilitating a movement of people between the two countries, which, due to geological causes became separated. Whatever it may be, there was movement of people between India and Sri Lanka even at later periods.

The advent of the foreigners who dominated India for commercial exploitation influenced Sri Lanka as well. During Dutch rule about 10, 000 or more Indian Tamils came over to Sri Lanka to work on the cinnamon estates. But it was during British rule that a larger number of upcountry Tamils were brought to Sri Lanka to work in the estate sector. Apart from the estate sector, the departments of railways and public works employed them. There is evidence that some of them worked as senior officials and soldiers in the British army. It is their descendants who are now known as 'upcountry Tamils.'

These people live not only in the hill country of Sri Lanka but everywhere, in all the provinces of the country. They contribute their share in all spheres of activity including trade.

TAMILS EMPLOYED IN ESTATE SECTOR

YEAR	NUMBER EMPLOYED
1871	1.09,444
1901	4.36,622
1911	4,40,285
1921	4,93,944
1931	6,92,540
1946	6,65,853
1953	8,09,084
1963	9,43,793
1971	9,51,785

TAMILS EMPLOYED IN RAILWAY SECTOR

YEAR	NUMBER EMPLOYED
1903	2,804
1905	1,941
1906	4,274
1907	1,873

TAMILS EMPLOYED AT PUBLIC WORKS DEPARTMENT

YEAR	1901	1902	1903	1904	1905	1906	1907
Central Province	4,648	12,470	6,750	7,398	12,368	20,175	21,651
Uva Province	45	362	941	533	1,149	2,664	2,643
S'gamuwa Province	86	86	156	3,640	86	1,568	3,126
Western Province		75				21	

PROVINCIAL COMMUNITIES OF SRI LANKA

YEAR	SINHALESE	CEYLON TAMILS	TAMILS OF INDIAN ORIGIN	MUSLIMS
1901	65.4%	26.7%	-	6.4%
1946	69.2%	11.0%	11.7%	5.6%
1953	69.3%	10.9%	12.0%	5.7%
1963	71.2%	11 %	10.6%	6.3%
1971	71.9%	11%	9.4%	6.5%
1981	73.98%	12.6%	5.56%	7.12%

The table above illustrates that through upcountry Tamil workers have recently come to be defined as 'Tamils of Indian origin' in the laws and Constitution of Sri Lank, they were regarded as part and parcel of 'Ceylon Tamils' up to 1946, and in 1953 was numerically the largest minority in Sri Lanka.

According to the census, reasons for pushing upcountry Tamils from first to third place among the minorities are as follows:

The younger generation shows a willingness to live in this country. But they question as to how agreements that were concluded between the Sri Lankan and Indian governments without obtaining the consent of their ancestors, could bind their descendents now.

1) The Citizenship Act (1948)
2) Extradition laws between India and Sri Lanka forced several upcountry Tamils to leave for India against their will
3) The violence that was unleashed against the Tamil-speaking community
4) Those who migrated from the hill country identified themselves as Ceylon Tamils.
5) The family planning measures adopted with incentives in the estate sector
6) Census gathering ignores them

The root cause for this deplorable state of affairs among the hill country Tamils is the consequence of having been deprived of citizenship rights. Article 15 of the UN Declaration of Human Rights states, (1) Every person has a right to belong to a nationality. (2) No person shall be deprived of his nationality or denied the right to change his nationality.

But they question as to how agreements that were concluded between the Sri Lankan and Indian governments without obtaining the consent of their ancestors, could bind their descendents now.

However, there seems to be no possibility of correcting errors of the past. People who migrated from south India have now become assimilated into larger Sri Lankan society. It is by their untiring efforts that virgin land was converted into high-yielding tea and rubber estates. They toiled hard to uplift the economy of the country, getting in return only paltry sums as wages. They were subjected to all sorts of humiliation. These people have natural endowments that qualify them to share equally the heritage of our country. They ought to live on this soil enjoying a separate identity and self-respect. Attempts by element to oust them from this position are therefore contrary to Article 15 clause 2 of the Declaration.

It is an undeniable fact that every community or society has right to live as equal citizen with its counterparts. There should be, absolutely, no room for any discrimination whatsoever. It is the bounden duty of both the governments of India and Sri Lanka to set up the necessary legal framework towards this end. It is not possible for a community to suffer endlessly. The younger generation among the upcountry country Tamils are not in favour of the idea of being branded as "people of Indian origin" any more.

These people still suffer from wounds created both by the government of India and of Sri Lanka on the question of citizenship. The wishes of the people were not consulted and their objections went unheeded. On the contrary, agreements were signed for repatriating hundreds of thousands of people from Sri Lanka to India against their will. Among those who remained, the Government of Sri Lanka accepted a specified number while those who were left out, or the residue, and their progeny, became known as "stateless persons." These people live in the midst of misery and suppression. There are about 200, 000 people who are stateless. This problem exists like a cancer that cannot be cured.

Even those who were promised absorption by the Government of India are unable to go to India due to the political environment prevailing there, even though they have obtained Indian passports. In the case of some of those who were originally categorised as 'stateless' persons but are now deceased, their descendants continue to live here. But their future is at stake. The younger generation shows a willingness to live in this country. But they question as to how agreements that were concluded between the Sri Lankan and Indian governments without obtaining the consent of their ancestors, could bind their descendents now.

Citizenship laws

However, according to the agreement concluded without consent of the people, both the governments agreed to grant Indian citizenship to 600, 000 persons, and Ceylon citizenship to 375, 000 persons. Accordingly, 9,75,000 persons were considered citizens. The balance however were rendered 'stateless persons.'

The Citizenship Act No. 18 of 1948 was enacted and passed. It is this regressive step that rendered Tamils of the upcountry 'stateless persons.' Following this, several laws was enacted and agreements entered into. A small number of persons were recognized as 'citizens by registration.' These persons were second-class citizens and were not given all the freedoms and rights like other citizens of the country.

The following five laws were enacted on the subject of citizenship:

- Citizenship Act, No. 40 of 1948
- Indo–Pakistan Act No. 3 of 1949
- Indo Ceylon Act, No. 14 of 1967
- Grant of citizenship to stateless persons Act No. 5 of 1986
- Grant of citizenship to stateless person (Special Provisions) Act 39 of 1988

In accordance with these acts, those who were granted citizenship as Registered Citizens had to carry with them the certificate signifying citizenship by registration whenever they had to transact business anywhere. Furthermore, since officials at state organisations were not fully conversant with the category of 'citizens by registration,' those who were classified thus, encountered several hardships while transacting business. An attendant problem is that many have lost their identity documents during bouts of ethnic violence.

Upcountry Tamils, being backward in education, do not have the capacity to understand the laws under which they are registered. Furthermore, since the administrative authorities belong to the majority community, Tamils from the upcountry are unable to assert rights whenever they go to transact official business. It may be mentioned here that they are subjected to all sorts of inconveniences when they apply for registration as voters. Hence many people are deprived of the right to franchise and thereby denied proper political participation.

According to the laws of Sri Lanka, any citizen above the age of 18 may be registered as a voter. But among upcountry Tamils there are many persons above the age of 18 who are not registered. This is because their parents were granted citizenship by the Indian

Women returning from sterilisation (Courtesy the Veerakesari)

government as they came within that quota. The parents however chose to remain in Sri Lanka without agreeing to repatriation.

Since they had become Indian citizens, the Sri Lanka government did not grant them citizenship. It was however their children who suffered. The children were not Indian citizens because their parents had chosen to remain in Sri Lanka despite being granted Indian citizenship. And just because they were born in Sri Lanka to Indian citizens the progeny were not granted Ceylon citizenship either. Therefore, even though the parents have citizenship rights and voting rights, these rights were denied to children.

These people are not in a position to assert their rights. An employee though denied his legal rights is forced to remain silent. He has no other way. Even though Tamil Grama Sevakas were appointed, the GSs were not given full powers. And there have been unwritten instructions issued from 'above' not to register more than a particular number of persons every year. But the victims cannot fight against these injustices.

Therefore, discrimination that the cunningly planned plot of deprivation of citizenship achieved ,was repeated in the guise of registration. Step-motherly treatment has led to frustration among upcountry Tamils. In ancient times, it was compulsory that all citizens must be treated alike. These people must be given full freedom to choose their identity according to their own liking.

Upcountry Tamils were originally classified as follows: Estate workers, Railway workers PWD workers and as Persons engaged in business (trade). But today, they may be classified as: Estate workers, Persons connected with state institutions, Persons who do not belong to the estate sector, Persons connected with NGOs, Persons engaged in business, Persons who are employed abroad and Persons engaged in garment and the private sector.

Among these, with the exception of those who do not belong to the estate sector, others are doing relatively well. But those who linger in the estate lines remain an unfortunate lot.

The estate sector

Those who belong to the estate sector were not absorbed into the political mainstream of the country. They are kept confined to the estates. This framework is very rigid. People are treated like slaves. Their fundamental rights are denied.

The local entrepreneurs and managers have a duty not only to look after the management of the estates, but to also look into the needs and the future of the estate workers. The estate workers do not enjoy even a quarter of what other citizens enjoy in their social, cultural and economic life. Housing of the estate workers are in the hands of the estate management. This is the authority that handles and looks after the housing, healthcare and protection of the estate workers. They are nearly all Sinhalese.

As the management of the estates is in the hands of the Sinhala community, so too is the Social Development Fund. As a result, the estate community faces many

Further, the conditions under which sterilisation takes place violate acceptable norms of privacy and cleanliness. It is usually done in the open at places where the tender tealeaves are weighed, without any privacy whatsoever.

difficulties in I Compulsory family planning, II In pre-school education, and III Housing.

I Compulsory family Planning Year 2000

	Estate	Sri Lanka
Female Sterilization	60%	30%
Male Sterilization	7%	3%

Further, the conditions under which sterilisation takes place violate acceptable norms of privacy and cleanliness. It is usually done in the open at places where the tender tealeaves are weighed, without any privacy whatsoever.

It may be seen from the above figures that sterilisation – especially female sterilisation – is much more prevalent in the estate areas than in the country in general. However, these figures hide a more awful truth. In very many instances women in the estates are compelled to undergo sterilisation. Though a spate of accusations arose against the enforcement of compulsory family planning , it has been unable to prevent its practice.

Though it appears that this measure was imposed upon poor, uneducated workers in order to satisfy World Bank recommendations, this was actually resorted to with the ulterior motive of curtailing the ethnic proportion of the upcountry Tamils.

In spite of the existence of permanent family planning methods and temporary family planning methods, the state enforced permanent family planning methods on the estate sector. Further, the conditions under which sterilisation takes place violate acceptable norms of privacy and cleanliness. It is usually done in the open at places where the tender tealeaves are weighed, without any privacy whatsoever. Moreover, females are taken and brought back in large numbers in lorries for sterilization along rugged roads full of potholes. Many have had to face death due to a lack of proper post-sterilization care. We have several reports of these incidents in newspapers.

Women are never told details about the sterilization they are about to undergo and about the advantages and disadvantages of doing so. Since the estate medical officer (EMO), as well as the field officer is from the majority community, the women are unable to get necessary guidance regarding sterilization aftercare.

In the absence of other proof, what has been published in newspapers and even rumours have taken the form of complaints. In the Uva Province for instance, at Neyyam Division ,(Bandarawela) the following incident was reported. Sinnammah, 25, is a mother of three children. On 1 July 2003, while she was plucking tea, the EMO and a few women helpers took her forcibly to the medical centre of the estate. On examination the woman was not found to be pregnant. She was examined very rudely and was told that she could not have more than three children. As soon as she went home Sinnammah attempted suicide being unable to bear the humiliation. When the matter was reported to the police, the police, instead of taking action are reported to have subjected the woman to verbal abuse. It appears that action is being taken against the trade union leader who brought this matter to police.

Outsiders should not interfere with the freedom of the female estate workers. An interference of this nature may be termed violation of human rights. A stop should be put to this.

II Pre-school education

Children are the wealth of a community. In 1972, UNESCO introduced the slogan 'education for life.' This stresses the importance of educating oneself with life skills. In 1993, the UN Commission on Human Rights stressed the importance of all countries ratifying the Convention on the Rights of the Child. Even Sri Lanka has taken several steps to protect the rights of children.

But the plight of the children of estate workers is deplorable. They are employed in shops and houses as workers. Though many parents aspire to educate their children and to give them better opportunities, the aspirations of these parents are unfortunately shattered at the very base.

Estate management companies conduct childcare centres under the sponsorship of the Plantation Housing Social Welfare Trust at every estate. However, if a person is to be employed as a crèche attendant, she must see to it that she admits 15 children. Those responsible are field officers.

Workers entrust their children to childcare centres and crèches. Children from one month to three years are admitted there. After three years, parents would like to send their children to a pre-school Montessori. But those in the childcare centres do not welcome this. They conduct makeshift pre-schools with the idea of retaining the children at the crèche and giving their employees work. But those employees are not qualified to teach.

Parents, educated persons on the estates and NGOs have opposed this move. How is it possible to have children from one month to five years in a childcare centre since there is only one attendant in each crèche? When the one-month-old child wants to sleep the five-year-old will be playing. How can a balance be stuck between the two?

Even when queries were raised as to whether this would affect the physical and psychological development of children, the estate management companies and the Trust used devious means to divert the questions to their advantage. Parents are threatened both directly and indirectly. Managements assert that fussing parents will be thrown out of employment and nutrients like triposha and other medicines will not be given to the children. As a result, parents have no other alternative but to give in.

It cannot be understood whether it is fate or a plot in the guise of fate that innocent children of the estate sector have to sacrifice their future for the benefit of a

few privileged people who swindle and squander the funds given by foreign countries to the Trust.

Other shortcomings remain. How is it possible for upcountry Tamil children to study Tamil in the hands of Sinhalese crèche attendants? What are the children's language rights? According to psychologists the formative period before the child reaches five years is very crucial. They believe this determines the child's future. Therefore what is happening to estate children is detrimental to the overall social and individual well being of the community. These practices go on because there is no authority to monitor these centres.

III Housing

From time they came as indentured labour, estate workers have been living on 'lines,' which is a row of rooms each measuring about 10'x10' with no proper roof and dilapidated walls. Each line room houses a family. The 'lines' were built during the British colonial period.

The estate workers do not own land. They are forced to obtain loans from the Trust to construct homes. Their provident fund is held as security to obtain these loans. These loans are recovered with interest from their wages over a period of 15 years. This makes the daily-paid wage earner a pauper. He runs into debt. But there is no assurance that the house constructed by him will belong to him one day because the deeds are never given to him. This makes the estate worker vulnerable to instant eviction, despite spending what to him is a fortune on building his house.

It is a matter of grave concern that the ruling establishment shows reluctance to divide the estate lands for ownership among the labours who toil hard on the soil to develop the economy. It is against the democratic principle for a community's collective rights to be denied in this despicable manner. This atrocity should be eradicated.

Funds to enhance the amenities for estate workers that flow through provincial and local government channels never reach them. It is estate management companies that block these. Moreover, road transport, postal service and legal reforms are unknown in the estate sector.

But from time to time it has been the practice for successive governments to highlight the pathetic state of estate workers to get grants from countries that offer them. But how can private estate management companies and the Trust that exploit labourers, ever be expected to render any assistance to labourers? But the funds from foreign countries are channelled through these sources. These institutions are also going to handle the grant of 114.4 million rupees given by the Asian Development Bank.

Like cheating the people of this country, the estate management companies are busy cheating foreign benefactors too. It may be that these funding agencies are never made aware of the fact that benefit to the estate sector could never be a reality unless the government takes over the management of the estates. A project undertaken in any other manner will prove to be a failure.

If the people of this country do not realize and understand the problems faced by the estate sector, how can we expect the international community to understand them? The international community that propagates the virtues of human dignity, women's rights and social rights should monitor the activities of those countries that beg for help from donors, apparently on behalf of the downtrodden innocent labourers of the estate sector. They should exert pressure on countries that resort to oppressive and suppressive measures on the masses living at the threshold of poverty.

If everyone in this world has a right to live, upcountry Tamils too should be included. If they were to enjoy their rights, all obstacles in their way must be removed. First, these obstacles must be identified. Those elements with tendencies to control, oppress and exploit will never acknowledge the rights of others or at least will not acknowledge them to the fullest extent. Therefore, it is necessary for the downtrodden masses to act with caution and forethought.

The problems faced by the upcountry Tamils should be identified in the order of priority and the ways and means of solving them must be identified. First domestic means must be tried. If domestic means do not give the desired result it is wise to move to the international sphere. When we are made a prey to the whims and fancies of others, we must not be silent or impervious to the issue.

As far as I am concerned nobody gives us human rights. It is our birthright. We were born with them. It is our duty to retain them till we die.

But how can private estate management companies and the Trust that exploit labourers, ever be expected to render any assistance to labourers?

Home for Human Rights....

Contd. from page 5

various measures taken by the state to curb disappearances and investigate such misdeeds that occurred in the past.

A set of statistics in the report stands out starkly. Though Amnesty International records "more than 20,000 'disappeared' persons were presumed to have been killed in custody," the government's report to the UN Human Rights Commission says, "So far criminal proceedings have been instituted against 597 personnel attached to the Police and the Armed Forces. The cases have been filed in the High Courts and the Magisterial Courts, and they are now proceeding." And of these 597 police and armed forces personnel, 423 have been discharged due to the want or absence of evidence.

Therefore the decision by the UN Human Rights Committee could become a precedent for other cases to be taken up before this body. For instance, there are the 600 cases of those who disappeared in Jaffna in 1995-1996, which are yet to be investigated.

Kumarapuram, where the army butchered pregnant women

By S. Shanmugathasan

People who were adversely affected by actions of the security forces and Sinhala thugs during numerous military operation lived in continuous fear in Kumarapuram. Out of those they regard 11 February 1996 as the most unforgettable. The Sinhala army killed 25 people by shooting and stabbing them, and caused injuries to 27 others. Among the dead were many pregnant mothers, children and old people. Furthermore, many were maimed; they lost their sight and other parts of their bodies.

For the purpose of collecting particulars regarding this incident, the team from Home for Human Rights started on 11 December 2002 reaching Kumarapuram at 2.30 in the afternoon. We had to reach it by crossing on our way Veruga1 and Killiveddi rivers through Vakarai. The route passed through virgin jungles, streams and fields. Before coming to Vakarai we were stopped at the army camp at Mankerny and had to show our identity papers, motorcycle and the driving licenses. The particulars were registered and we were asked the purpose of our visit after which we were allowed to continue our journey. After that when we crossed Verugal and reached Eachilampathai, where we were questioned at the army and police camps on the same thing and allowed to proceed.

Kumarapuram is an exuberant village surrounded by the sea, rivers and paddy fields. In addition, at a few miles distance there are Dehiwatta and Menkamam, which are Sinhala villages, and Muttur and 59th Village that are Muslim villages. There is no transport problem whatsoever in this village. The roads, Killiveddi-Verugal, Verugal-Trincomalee and Killiveddi-Batticaloa pass through this village. Daily bus services are available on these roads.

People came and settled down in this place during the period 1981 to 1985. Thangavel Maruthayee, an elderly woman aged 56, at Kumarapuram said, "In 1971 due to lack of income we left Alagola in Udapussellawa and came to Puliyadicholai in Killiveddi. Later during 1983 violence the Sri Lankan army and the Sinhalese chased us away and burned our houses with all our belongings. As a result all the villagers got displaced and after living for one year in Sampur village, in 1985 each of us was given a plot of land in Kumarapuram and since then we are living here."

Likewise, one Arasaratnam Nagarajah, aged 52 years while speaking to us said, "In 1951 I came to settle in Dehiwatta village. Along with other six Tamil families I lived for 27 years. During the ethnic violence that broke out in 1977, the houses of those six families were burnt down and we were chased out. In 1981 the Kumarapuram lands were allotted to the peasants. In the same way people from Matale, Badulla, Uddapussallawa, Killiveddi and Trincomalee came and settled

The army personnel and the Sinhalese looted our belongings and burned the houses in this area. Because of this only 45 families returned and re-settled in that village.

The appalling conditions in which the Kumarapuram victims now live

down in this village. During the period 1981-1985, 85 families lived here. But now, only 33 families are living. The reason is the violence and the brutal killings that took place here in the past.

"The people who thus settled down were affected by the violence that broke out in 1985 and the 85 families fled in all directions. The army personnel and the Sinhalese looted our belongings and burned the houses in this area. Because of this only 45 families returned and re-settled in that village. During this period people who got displaced lived as refugees in Muttur GPS building, Cheenakuda, Thoppur, Sampur and Clappenburg areas."

Narrating this incident Ramaiah Pavalakody a woman who was affected by 1985 violence stated thus: "due to the violence that broke out in 1985 we fled to Senaiyoor where we lived as refugees for three years and from there went to Clappenburg refugee camp and lived there for two months. With the arrival of the Indian Peace Keeping Forces (IPKF) once again we went to Killiveddi school and stayed there for one month. Subsequently, when the fight between the IPKF and LTTE resumed we went to Pachchanoor temple and after staying their for one month went to the school in the 58th Village and after staying there for three months as refugees went back to our homes and saw our houses burnt down."

For the people who had undergone suffering already, the war of 1990 caused more difficulties. Due to the clash between the army and the L TTE, people ran in search of safety. During this period people lived as refugees in Pachchanoor church, Chenaipalli beach, Manalsenai, Kathiraveli, Killiveddi, Mahavidyalayam and 59th Village refugee camp. Others who were displaced stayed in the homes of their relatives in Batticaloa and Trincomalee.

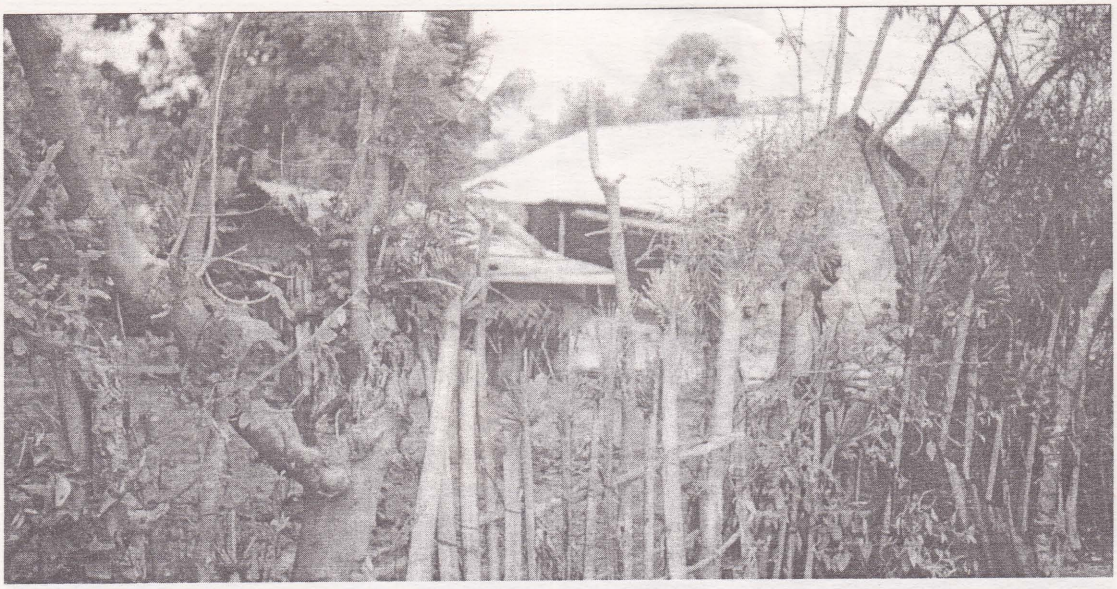
Kandiah Thavamani, 30, describes the 1990 displacement thus: "through fear we went and stayed for four months in a relative's home at Manalchenai and from there we moved and stayed for one year at the Kathiraveli refugee camp. Later we went. to Pallikudiyiruppu. After staying for six months as refugees, when we returned to Kumarapuram, our own place, we saw nothing left. As these people had been moving from place to place, due to their belongings being destroyed and due to poverty they are badly affected. This has caused a big setback to their children's education."

The agonising incident that took place on the 11 February 1996 however compelled some residents never to return to Kumarapuram. At about 4.30 in the evening a gunshot was heard from 59th Village. Villagers thought that someone was shooting game. Later, the same sound was heard from the adjoining village Killiveddi. It was only then people realized that two army personnel had been shot dead by some unknown people. On hearing the gunshots the people took refuge in their houses or at their neighbours'.

The army personnel came to Kumarapuram a little later shooting indiscriminately. On their way they killed many people through random shooting and stabbing. The people came from all directions and gathered at certain homes and stayed together. The army personnel who came to those places broke open the doors and killed some by lobbing hand grenades and shooting others. Others were chopped to death and injured with axes. Many pregnant mothers, children and elders died as a result. Many were injured. They also sexually assaulted a 16-year-old girl.

Thangavel Maruthayee describes the incident thus: "on hearing gunshots my husband, my father, my brother, his wife, some children and a neighbour's children and I gathered together and remained in our house. A soldier named Kapila of the Killiveddi camp (there is a scar on the right side of his face) and a corporal tried to enter the house. They then forced the

The army personnel came to Kumarapuram a little later shooting indiscriminately. On their way they killed many people through random shooting and stabbing.



door open and started firing. In that round of shooting my father Kidnan Govinthan succumbed to the gun shot injuries he got in his stomach and leg. The neighbour's child Stephen Pathmini aged 15 too died of gunshot. They fired at me when I begged of them not to shoot but a bullet struck my husband and he also died."

Marimuthu Selvanaachiyaar narrating the incident said, "we got frightened hearing gunshots and waited inside the house. While waiting, Kandasamy of Killiveddi and his son Nishanthan (aged 10) came and took refuge in my house. At that time army personnel came to my house, broke open the door and threw a hand grenade inside. As a result I lost vision completely in one eye and sustained injuries in my arm and stomach. Then they shot dead Nishanthan the boy who came seeking refuge in my house."

When they opened fire at them, the eldest daughter of Thuraiamma who was in her final stage of pregnancy was struck by a bullet in the belly and died with the head of the unborn child visible

Likewise, when the army personnel entered the house of Thuraiamma there were 25 persons hiding inside. When they opened fire at them, the eldest daughter of Thuraiamma who was in her final stage of pregnancy was struck by a bullet in the belly and died with the head of the unborn child visible. Her other daughter, who was three months pregnant, was also struck by a bullet and died instantly. A total of seven people died in that house that day and many were injured. It should be mentioned here that some people escaped death as they were lying along with dead bodies pretending to be dead."

The same day Thanaledchumy (16) daughter of Mylvaganam Arumaithurai was returning from her evening class along with the neighbourhood boy. Hearing the gunshots they took refuge inside a shop that was nearby. The army personnel who came there shot dead the boy and took the girl to the dairy farm close by where she was sexually assaulted by more than one person and killed. With tears in his eyes her father recounted how he recovered his daughter's mutilated body the following day, and how the Judicial Medical Officer at the Muttur Hospital told him his daughter had been sexually assaulted and wanted the body to be sent to Colombo for a post-mortem. But unwilling to countenance any further indignity heaped on his child Arumaithurai declined to give his consent for that course of action, he buried her..

Regarding the incident of rape E. Nageswari of Kumarapuram hesitated to tell us about the child who was gang raped by between 20-25 army personnel and subjected to many other atrocities. They had behaved in the most inhuman way by biting and stabbing her with knife the female organs of the child. Seeing her half dead, one soldier felt sorry and shot her dead saying that it was better to put her out of her suffering than let her remain that way. The soldier later gave evidence at the police inquiry to initiate judicial proceedings.

Likewise, many narrated sorrowful stories Because of this many have abandoned their jobs and houses and resettled in other places. Now there are only 33 families living in Kumarapuram. Their relocation has adversely affected their children's education. There is not a single elementary school here. Some children who stay in Trincomalee and Muthur study in homes. Most people here do not show much interest in education. Children stop their education halfway by going for harvesting, fishing and as casual labour.

Further, they do not have a permanent job. They do not own any land for cultivation. Their major source of income is through casual labour and fishing in rivers. Some women find foreign employment and other young men work in cigar companies in Colombo.

This place is suitable for animal husbandry and the soil is fertile enough for chena cultivation. These people have experience in agricultural activities. But during summer, due to scarcity of water they have to go to lakes for fresh water. There are only two wells in this village. Not a single house has lavatory. From the small children to the old people, all go to the jungle to perform their ablusions. Their houses are mostly huts. Their health habits are inadequate to prevent the spread of infectious diseases. As their shelters have sandy floors and the roofs covered with cadjans they are very often attacked by snakes and other poisonous creatures.

While the war has a great impact on the people the government has paid to some families which suffered bereavement Rs.10,000 for adults and Rs.5,000 for children. Some have not been paid this amount. This aside, no other

Sovereignty and contradictions in the international legal order

By Sujith Xavier

According to many academics and theorists, the Second World War marked the beginning of the age of human rights. Given the atrocities committed and the reactions to it, it is not surprising that this was *the* monumental event that brought about the creation of the United Nations and the Universal Declaration of Human Rights. However, there has been a major hurdle that has been hindering the full emancipation of human rights - namely the notion of national sovereignty. Václav Havel, President of the Czech Republic stated that, "the idol of the state must inevitably dissolve in a world that connects people, regardless of borders, through millions of links of integration - ranging from trade, finance, and property, to information links that impart a variety of universal notions and cultural patterns."[1] Yet this has not nor will it happen in the near future given the current context. The 'War on Terrorism' succeeded by the 'War on Iraq' (invasion for oil) has somehow changed the dynamics of the context.

Within this paradigm, it is appropriate to evaluate to what extent the notion of national sovereignty contradicts the universal aspiration of human rights within the international legal order. There are numerous contradictions that have been elucidated by many scholars and human rights activists. Initially, in order to fully grasp the significance of the contradiction, it is essential to look at some political issues that lay the foundation for the legal inquiry. The realist perspective describes the reality behind current world politics and aptly denotes the workings of the legal order. Thus within this archetype, the contradictions will become clearer and more straightforward. However, it should be emphasised that inquiry is only within the confines of the international legal order and will only centre on legal aspects. However, prior to delving further into the contradiction, it is essential to look at some of the opposing views points.

Realist perspectives

To completely ascertain the contradictions between the national sovereignty and human rights aspiration, it is pertinent to have the realist perspective in mind. The international order can be described as a loose gathering of all the member states that adhere to some form of law. Yet this adherence is based on their willingness to participate and their willingness to be bound by the treaties and obligation. This is enhanced by the notion of customary international law and state practice, which dictates some form of uniform rules. When there are breaches in treaties or custom, the violator can be subjected to some form of punishment, i.e. withdrawal of diplomatic relations, economic sanctions etc. Consequently, those with the largest amount of resources and powerful friends can dictate the outcomes.

Raymond Aron aptly described the international order as "an anarchical order of power in which might makes right"[2]. The premise behind this conceptual framework is that international law and international legal order (human rights aspirations are located within) are dependent on the will of nation states.[3] Therefore in international relations, power governs rather than law where the abilities of powerful States to manipulate and control the other States are of paramount importance. The system is one of 'co-ordinate relations' where the national interest of the States involved is at the apex rather than universal moral standards. Hence human rights aspirations expounded in the conventions take a back seat to the prevailing interests of the nations. Those States with political clout and influence are the ones that dictate international law and thus control it. For example, the ICJ in the Nicaragua case ruled that the actions of the United States were illegal; however the United States did not accept the jurisdiction of the court.[4] Similarly, within the human rights realm, this is a regular occurrence. Human rights violations in China are overlooked since China is a powerful and strong State with a large market that can be exploited by many. Therefore human rights violation in Tibet or restriction on freedom of expressions is considered to be irrelevant. In contrast, the human rights violation in Cuba such as the restrictions on freedom of expression are discussed at international human rights forums and given importance. Within this contextual realist framework, the extent of the contradictions in international law between national sovereignty and human rights aspirations can be examined.

Fulfilment of human rights aspirations

Numerous legal academics (Shaw, Browlie etc) have articulated that there has been shifts in the way states conduct their affairs. The creation of the UN and its mechanism (both treaties and charter organizations) has legally embedded the notion of human rights in the way States conduct their affairs. Also, recent trends in terms of intervention where there are grave human rights abuses goes to show that States are setting aside the notion of sovereignty and are adopting human rights aspirations. The words of the UN Secretary General captures this eloquently when he said "the protection of human rights must take precedence over concerns of state sovereignty."[5] There are numerous arguments that can be put forward. For the purpose of this analysis, it is appropriate to deal with two concepts; *Jus cogens* and idea of institutionalised habit.[6]

Customary international law has clearly established Genocide as a peremptory norm. For example, the United Nations War Crimes Commission (UNWCC) established

The words of the UN Secretary General captures this eloquently when he said "the protection of human rights must take precedence over concerns of state sovereignty."

in 1943 held that international law may sanction individuals for 'crimes against humanity' in times of peace as well as times of war.[7] Genocide has been deemed by various academics as *jus cogens* or a peremptory norm, which means that it is a rule of supreme importance, which should override other legal principles and rules. The crime of torture has also been imbedded in international law as *Jus Cogens*. "Article 5 of the UDHR of 1948 and Article 7 of the ICCPR of 1966 both provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law.

Consequently, are the existing mechanism and standards established in international law sufficient to protect fundamental freedoms? Obviously, the answer is no, especially from an advocacy perspective.

In the 90's, there has been greater impetus in making these codified aspirations as being part of customary international law in order to ensure that all the states were bound by it, rather than those who have ratified certain treaties or conventions. As enunciated by the Pinochet case[8] in the United Kingdom and the Yeroda Case[9] brought before the ICJ, the crimes of torture and genocide have the status of *Jus Cogens* through state practice and reaffirmation in many legal documents and other treaties. Yet is this sufficient? Fundamentally, human rights advocates and academics would say no, since genocide and torture are not the only human rights violations that can be endured. All of the human right elucidated within the conventions need to be incorporated within the customary international law.

It can be asserted that States - powerful and weak - do observe international law most of the time. "Much compliance can be attributed to institutional habit; officials follow the rules as a matter of practice, and in countless decisions, they look towards treaty obligations, to precedents that evidence custom and to general principles of law."[10] Therefore the possibility of violation is not even thought of by the officials since they have 'internalised' the rules of international law and the decision making culture has been entrenched. Some of the examples used by the academics are the assertion of jurisdiction over foreign flag vessels in the high seas. Some of the outdated materials point to the notion of use of force by one state against another to take over territory or resources. However this has been invalidated with the initial invasion of Kuwait by Iraq and then the Coalition lead 'invasion' of Iraq, which was contrary to international law because there was no Security Council resolution to warrant such action (moral authority in this case is irrelevant). This does point to the flaws within this claim. Also it should be mentioned that this argument may be asserted in terms of normal international law - i.e. high seas jurisdiction etc. Yet this cannot be asserted in terms of human rights given predisposition of States in violating fundamental human rights and the fact that human rights mechanism and standards were only introduced in the 50's.

Consequently, are the existing mechanism and standards established in international law sufficient to protect fundamental freedoms? Obviously, the answer is no, especially from an advocacy perspective. Thus within this context, the answers to the query - to what extent does national sovereignty contradict human rights aspiration can be determined and analysed.

A flawed system

Human rights abuses are an everyday occurrence. "Genocide, mass killings, arbitrary and summary executions, torture, disappearances, enslavement, discrimination, widespread debilitating poverty and the persecution of minorities still have to be stamped out. Institutions and mechanisms have been established at the United Nations to eradicate these blights on our civilization."[11] Yet what should be emphasised is that these occurrences are the direct result of States and their actions or their inability or unwillingness to act. The primary actors and those who wield enormous powers are the states within the international legal order and they must act (either through resolutions, creations of new bodies, enactment of legislation at home or through use of force) to protect and promote human rights. Thus there is a strange dichotomy that emerges. The structure of the international legal order and its instruments are based on an epic negation since it allocates primary importance to the notion of sovereignty and equality among members yet at the same time assigns the same importance to the notion of human rights. But the former takes precedence. The initial argument purported to distil the contradiction between the notion of national sovereignty and human rights is that the Charter of the United Nations makes the contradiction vehemently clear. Secondly, it can be argued that the existence of the ability of States to make reservations shows that states can and do choose to accept certain obligation, ignoring those that are not convenient or problematic for themselves. Finally the lack of enforcement show that there is a chasm between the concept of universal aspiration of human rights and national sovereignty in international law.

i. The United Nations Charter

The United Nations Charter in Article 1 (3) establishes the basic tenet in protecting and promoting human rights. It states:

"The Purposes of the United Nations are: To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; "[12]

However Article 2(7) states: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[13]

Thus in Article 1, there was a clear articulation of the importance of human rights within society. The wording itself shows that the international community was to act together to ensure that everyone would enjoy a minimum standard of human rights. This was reinforced by the

Universal Declarations and the two Covenants. However, the implementation of these aspirations was qualified in Article 2 where the stated aims were to be achieved in accordance with the principle of national sovereignty. Hence juxtaposing the human right aspirations and sovereignty of member states is rather hard. On one had there is the drive towards emancipation of rights to all but then it is subjected to the notion of national interest.

In layman's terms, even though there is a clear obligation to protect human rights, States can instantly repudiate such obligation though the umbrella notion of national sovereignty. This can be further highlighted by the statements made by an official during the adoption of the UDHR in the General Assembly. The representative of the United States of America stated, "in giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not or does not purport to be statement of law or obligation..."[14] Therefore, human rights ideals are a moral standard that states can adhere to when it is convenient for them. Thus the umbrella of jurisdiction has been used to escape adherence to international standards.

i. Domestic Jurisdiction

Domestic jurisdiction is a crucial element within the confines of sovereignty. It was given further weight within the United Nations Charter under Article 2 (7).[15] The notion of domestic jurisdiction is an important feature in showing the contradictions between national sovereignty and human rights. However it should be emphasised that this is not as strong as the other arguments, nonetheless relevant. Thus, a State within its own boarders has the ultimate power to enact legislation and control the legal system within its areas. Yet international law has been encroaching on certain areas. For example, multilateral treaties, such as the one that created the European Community have strict rules that a European state must follow or it will be in breach of treaty obligations. Human rights conventions and treaties have the same effect. Yet it is dependent on one factor, the extent of the State's power within the international legal order.

Concept of self-interest and power as elucidated above, have a monumental impact on the abilities of powerful States to ignore human rights treaties obligations. An often-cited example would be that of the United States of America - *the* most democratic country in the world.[16] For example, the US State department releases country reports on Human Rights Practices every year, which details the human rights violations around the world.[17] Arguably, within the current context, the US is an important and influential player within the international legal order. Yet what is appalling is that this state has not ratified some of the most important Conventions that seek to protect basic human rights.[18] The irony of this situation is that the United States of America sees itself as the great protector of human rights and has been condemning and tormenting smaller and less powerful States by using the aspirations of human rights as a weapon against them. Thus, the extent and power of the State in question will set the tone for its ability to adhere to international human rights standards and implementation of them. Therefore, contradictions between the national sovereignty and human rights aspirations have been ingrained in the United Nations mechanisms.

ii. Reservation

The contradictions between the notion of national sovereignty and human rights aspiration can be exposed through the existence of reservation in international law. The Vienna Convention on the Laws of Treaties, 1969 has codified the ability to make reservation within the international legal order. Article 2 states: Use of terms

1. For the purposes of the present Convention:

(d):'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

One of the primary reasons behind the inclusion of this clause within the Treaty was because there are many States who participate within the international system and all their views and interpretations cannot be included within a particular convention. Therefore, States are allowed to make reservations and modify the terms of the treaty to suite their needs. Consequently, the sovereignty of the State is preserved and ensures that the wishes of the States are satisfied. Therefore, the enactments of treaties pertaining to human rights are subject to reservations since it is part of the international legal system. It should be noted that if a particular country is not party to the Vienna Convention, then the normal rules of customary law applies. The values enshrined within the convention are part of customary international law. "There has been as yet no case where the court has found that the convention does not reflect customary law."[19]

The reservations are subject to numerous conditions. In Article 19, the treaty states that there are prohibited modifications. If the reservation contradicts the purpose and object of the Treaty then the reservation is void[20]. However, many States are able to by pass this requirement, especially in terms of human rights treaties. The UN Human Rights Commission, the monitoring body of ICCPR has in its general comments stated that, "...the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties and the Covenant specifically, is not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place...."[21] Yet this is not the accepted view of some of the States. Both the United Kingdom and the United States have argued that a

Therefore, human rights ideals are a moral standard that states can adhere to when it is convenient for them.

reservation is an essential part of a State's consent to be bound by a particular treaty - it has taken the time to make that reservation for the very fact that it is of paramount importance to that particular state. Therefore reservations cannot simply be erased.

It is also pertinent to mention that within the domain of international law, the concept of derogation exists. For example, this can be found within Regional agreements, the European Convention on Human Rights and even within ICCPR.[22] Derogations allow States to enact legislation that may be contrary to treaty obligations in special circumstances. Thus this also a means by which the national sovereignty of the state conflicts with human rights aspirations since the state can declare that national security warrants the suspension of the right to have fair trial or the right to liberty and security.

In a world where human rights atrocities are common occurrence, the inability of States to accept the importance of human rights only leads to further violations.

iii. Enforcement

The third notion that can support the claim that human rights aspirations contradict the ideals of national sovereignty is the lack of enforcement mechanisms within the international legal order. Currently there are six treaty bodies that monitor compliance[23] to the ideals enunciated within the United Nations Treaty that protect and promote human rights,[24] along with Charter bodies. The existence of the committees (treaties) is a positive step in ensuring State compliance, since the treaties allow the committee to review the periodic reporting etc. However, the downfall is that States can make reservations against the inquiry procedure and individual compliant procedure. Thus a State may be party to one of the conventions but this does not necessarily mean that that particular State is adhering to aspirations of the convention. For example the United States of America ratified ICCPR on May 10, 1977 and made reservation on Article 5-7,10 (2,3), 15 (1), 19, 20, 27, 47. Article 6 of the Convention ensures that everyone has the right to life.[25]

The Charter bodies are also faced with the same problems. For example, the General Assembly, which consists of all the members can adopt resolutions which are non-binding on Member States. Thus, at times, there are numerous resolutions that are passed condemning certain actions by specific states etc. Yet this is dependent on the clout of the State in question and its ability to muster support to counter it. The Security Council on the other hand is much more powerful and it can authorise armed intervention for example. Nonetheless, the events within the past few months have shown the ineffectiveness of the system. Human rights standards were used as a means to advocate regime change in Iraq. When this was not possible with the consent of all members of the Security Council, the United Kingdom and United States were able to use their political and military might to invade and overthrow the regime in an independent and sovereign State, stetting back many years of precedence and custom. Thus whatever enforcement mechanisms are available, their weaknesses have become overwhelmingly clear given the prevalence of national interest.

In conclusion, by using the realist perspective, the contradiction between the notion of human rights aspirations and national sovereignty were examined within the international legal order. It was shown that there is a chasm between the two conflicting ideals where the States tend to place their national interest prior to the emancipation of human rights. This was further highlighted by evaluating some of the opposing views, which were used to strengthen the idea that the contradictions are present and are not reconcilable. In a world where human rights atrocities are common occurrence, the inability of States to accept the importance of human rights only leads to further violations. Thus full realisation of human rights is dependent on the will of States and their ability to conform to a set universal standards, which may at times conflict with their national interest.

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Footnotes

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[13] Id

[14] 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

[15] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present

Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." http://www.un.org/aboutun/charter/

[16] http://www.guerrillanews.com/human_rights/doc1690.html

[17] http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html

[18] ICESR,CRC, Forced Labour Convention, Migrant Workers Convention, Convention on the reduction of Statelessness, Convention relating to the Status of Refugees are some of the conventions not ratified by the United States, even though it has signed it.

[19] Aust, Anthony, Modern treaty law and Practice, Cambridge University Press, 2000, p.11

[20] http://www.un.org/law/ilc/texts/treaties.htm#abstract

[21] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument

[22] Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

[23] http://web.amnesty.org/web/web.nsf/pages/treaty_bodies

[24] The six include the Committee on Torture (CAT), the Committee on the Elimination of Discrimination Against Wemen (CEDAW), the Committee on the Elimination of Discrimination (CERD), the Committee on the Rights of the Child (CRC), the Committee on Economic, social and Cultural Rights (CESCR) and Human Rights Committee (HRC) which monitors the compliance to the ICCPR.

[25] http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet

Thus a State may be party to one of the conventions but this does not necessarily mean that that particular State is adhering to aspirations of the convention.

How voluntary are confessions made by PTA suspects?

"The principal question for decision in this appeal is whether a trial Judge may presume that a voluntary confession is true and convict the accused despite the absence of any independent supporting evidence."

Beyond the Wall *has, in earlier issues, pointed out how the state could convict innocent men and women using provisions under the Prevention of Terrorism Act (PTA) allowing the admissibility of confessions as evidence. The state has resorted to the simple device of torturing suspects and extracting confessions from them under duress to the effect that they had committed various crimes punishable under the PTA.*

Once confession is obtained from the suspect it has to be established as evidence before court. There are various advantages the prosecution enjoys in this respect, such as the onus of disproving that his/her confession had been obtained through inducement or duress lies with the accused person. But more insidious is the provision under the PTA permitting a confession without any other corroborating evidence to convict accused persons.

Nagamani Theivendran vs. The Attorney General *is basically about admissibility of confession without corroborative evidence, revolving around the question of whether the confession was voluntary or not.*

Legal action initiated by the State in the High Court (H.C. Colombo No. 7807/96) went up through the Court of Appeal (this time with Nagamani Theivendran as appellant) to the Supreme Court.

The High Court and Court of Appeal held the confession was voluntary and could be used as evidence even in the absence of corroborative evidence. The matter came up in appeal before judges F. N. D. Jayasuriya and P. H. K. Kulatileka (C.A. No. 137/97) and was argued and decided on 28 March 1999.

Justice Jayasuriya stated in his judgment with Justice Kulatileka agreeing, "Thus the learned trial Judge (in the High Court) had come to a firm finding that the Accused did make a statement before the ASP Ratnayake and in the absence of any vitiating factors referred to by the Accused at the voire dire held before the trial Judge, learned trial Judge has correctly held that the confession is voluntary in terms of the provisions of the Prevention of Terrorism Act."

However, Nagamani Theivendran appealed again, this time to the Supreme Court (S.C.Appeal No: 65/2000). The case came up before a three-man bench comprising judges Ameer Ismail, Mark Fernando and C. Wigneswaran. It was argued on 24 May and 6 June 2002 and decided 16 October 2002.

The Supreme Court overturned the High Court judgment, which called to question the admissibility of confessions as evidence without establishing whether those confessions are actually voluntary and true. The three judges wrote separate judgments.

Justice Ismail said, "It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. However, before it can be acted upon, it must satisfy the tests of voluntariness, truth and sufficiency. It must be shown that it was made voluntarily and that it was true and sufficient to constitute a confession."

Justice Fernando in his judgment stated, "The principal question for decision in this appeal is whether a trial Judge may presume that a voluntary confession is true and convict the accused despite the absence of any independent supporting evidence."

Justic Wigneswaran raised three important issues "Are contents of a confession obtained in terms of the provisions of Act No. 48 of 1979 solely sufficient to convict an Accused? Does a presumption operate that an accused would not make a self-incriminating statement unless it was true? When Act No. 48 of 1979 refers to 'special categories of persons' against whom offences under it may be committed (i.e. specified persons), could the identity of such specified persons be established solely through the confession?"

Beyond the Wall reproduces here the judgment of Justice Wigneswaran. The Court of Appeal judgment of Justice Jayasuriya and the Supreme Court judgments of Justices Ismail and Fernando. were reproduced in the March 2003 edition of the journal. Certain portions of the original version are in Sinhala and for the convenience of readers have been translated into English. The translated portions are in italics

WIGNESWARAN. J.

I have had the benefit of reading in draft the judgment of my brother Ameer Ismail, J. Since the matters in issue in this case appear to me to be far more basic and weightier than has been identified by the Supreme Court at the time of granting leave and since certain submissions made by the State Counsel need adequate examination, I deem it appropriate to express my views upon some aspects of the arguments placed before us.

Leave was granted on 13.11.2000 raising the question whether the Court of Appeal was in error in assuming that there was a presumption that the author of a statement would not make an admission against his interest, unless it was true. A far more fundamental matter was raised by the Counsel for the Accused-Appellant-Petitioner as to whether the contents of a confession in itself were sufficient to establish the truth of its contents and as to whether the prosecution was required to establish the truth of such contents by independent evidence. This question was overlooked while allowing leave. I am glad that brother Ameer Ismail, J. had taken this matter into consideration while writing his judgment.

As pointed out by Counsel for the Accused-Appellant-Petitioner with some reluctance and trepidation, it is

difficult for a Counsel to persuade a Bench to grant leave on all matters applied for, when Leave itself was the prerogative of the Bench. Unless we on the Bench are circumspective and clothed with experience and understanding to view the matters in issue with foresight and far sight in an appeal of this sort, the granting of leave might degenerate into a flippant cosmetic exercise. The social consequences of inadequately dealing with matters in issue might be so far reaching as to lead to a miscarriage of justice. Fortunately this Court is not debarred from examining matters consanguine to the question on which Leave is granted, especially when questions raised in appeal are fundamental and are of far reaching consequences.

In **State** Vs. **Ranwalage Tennyson Kumar Fernando** (H.C. Colombo Case No. 6082/93 – reported in Meezan – Law Students' Muslim Majlis Publication 1996/1997 – Sri Lanka Law College) as far back as on 30.09.1994 I had determined as High Court Judge, Colombo that the prosecution cannot in law prove its case under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Emergency Regulations then in force, purely and solely on the basis of a confession of the Accused. Confession no doubt was evidence but weak evidence adduced to support the occurrence of certain events. Such evidence cannot become the occurrence itself. Only when the occurrence of an event is established would the confession under Act No. 48 of 1979 help to prove the part by the accused in the enactment of the event. The determination in the above said case was not appealed against. Similar orders were made by me in many other cases none of which were then appealed against by the Attorney-General. I am happy to note that an appeal of this nature has finally come up before the Apex Court. There seem to be paucity of authorities in this regard.

While the question of "presumption" raised and Leave granted thereto appears to be the main matter for determination in this case (item ii below), I should like to deal in addition with the other two questions (i) and (iii) raised by Counsel in his petition of appeal dated 29.09.1999 though they were overlooked for the granting of Leave. Granting of leave is only a threshold exercise to generally weed out chaff from grain initially. Cast aside grains could no doubt be retrieved. There cannot be any estoppels in this connection. All three questions in any event are related and interlinked. The matters that were raised were:

(i) Did the Court of Appeal err in law in holding that the evidence in the nature of a confession revealed an attack on "specified persons"?

(ii) Did the Court of Appeal err in Law in holding that a presumption operates that the author of a statement would not make an admission against himself unless it is true?

(iii) Did the Court of Appeal err in Law in holding that the contents of the Confession in itself were sufficient to establish the truth of its contents and that the prosecution was not required to establish such truth of contents by independent evidence?

While my brother Justice Ameer Ismail has dealt with facts relevant to this case, it is my intention to pursue certain general principles flowing out of the facts of this case and to deal with them since the questions involved, to my mind are basal. I would also refer to certain pitfalls that High Court Judges should be cautioned about. Thus three matters arise for consideration.

(i) Are contents of a confession obtained in terms of the provisions of Act No. 48 of 1979 solely sufficient to convict an Accused? [From item (iii) above].

(ii) Does a presumption operate that an accused would not make a self incriminating statement unless it was true? [(From item (ii) above].

(iii) When Act No. 48 of 1979 refers to special categories of persons against whom offences under it may be committed (i.e. specified persons), could the identity of such specified persons be established solely through the confession? [From item (i) above]

The learned Senior State Counsel made the following submissions in these regard with particular references to this case –

(i) In the instant case the confession had been found to have been made voluntarily. This meant that no threat, promise nor inducement was used. This fact cannot now be challenged. Whether accused stated in evidence that he had not in fact made such a confession to the ASP is now irrelevant. The Court does not have any discretion at this stage and is therefore bound to accept the voluntariness of the confession. There is thus a guarantee of credibility of the confession.

(ii) By the Supreme Court refusing Leave to Appeal on 28.01.2000 in Court of Appeal Case No. 208/95 the Supreme Court had already concluded, endorsing the view of the Court of Appeal that "there is a presumption that a person would not make an admission against his interests unless it is true." The corollary of this presumption was that an admission in the form of a confession contains necessarily the truth (78 NLR 413). These presumptions are rebuttable. (Section 31 of the Evidence Ordinance). The burden according to Act No. 48 of 1979 in this regard is on the accused, (Vide also **Bhag Singh** v. **Jai Singh** – 1929 AIR Lahore page 319), which the accused in the instant case had failed to discharge. (vide **Ajit Prasad Narayan Singh** v. **Nandini Satpathi** 1975 AIR Orissa page 184). The Trial Judge had therefore under the circumstances of this case correctly presumed against the accused. (Vide **Shankaria** v. **State of Rajasthan** 1978 AIR page 1248 – Supreme Court). The evidentiary value of a dying declaration was compared in this connection.

(iii) Confession consists of extrinsic and intrinsic materials. The former contains details of the incident that needs to be corroborated by evidence to be called by the prosecution. Intrinsic material on the other hand speak for themselves. Such material facts do not need corroboration. Inferences and presumptions from such facts are permissible (**Queen** v. **Wilegoda** 60 NLR 246; Wills on Evidence 3rd

Whether accused stated in evidence that he had not in fact made such a confession to the ASP is now irrelevant. The Court does not have any discretion at this stage and is therefore bound to accept the voluntariness of the confession.

Edition P. 154; Best on Evidence p. 452). In any event confessions are not admitted in to blindly. Hearsay material, inferences and beliefs are necessarily separated from the confession before admission. Such separation was done in this case at the stage of trial. That cannot now be disputed.

These submissions would now be examined.

1. Voluntariness of Confession

Even though Voluntariness is not a question raised in this case, I think it relevant to point out certain matters that were not taken cognizance of by the High Court Judge when coming to her conclusion that the so-called confession was voluntary. Without considering the question as to whether the confession itself was properly evaluated in the light of the surrounding circumstances and probabilities of the case, to turn to trustworthiness of the confession would appear presumptuous.

I cannot accept the submission of the learned State Counsel that this Court does not have any discretion at this stage but to accept the voluntariness of the confession.

Not to consider the pitfalls pertaining to perfunctory non-judicial confession and to shut out the Supreme Court from considering the verity of the finding of the learned High Court Judge with regard to the Voluntariness of the confession would lead to miscarriage of justice. The Supreme Court being the highest Court of the land has the incumbent duty to guard against such occurrence. Otherwise the consequences are irreversible. Inadequate scrutiny as to the Voluntariness of a confession specially when it happened to be the sole evidence for conviction as in this case would most certainly not lead to proper and due administration of Justice.

Professor Stephen Bailey said, "... given that "psychological pressure" is inherent in the phenomenon of interrogation at the Police Station and given the number of miscarriages of justice based solely or largely upon confession evidence, particularly in the case of vulnerable suspects, the use of this evidence requires and has received close scrutiny." *(Rights in the Administration of Justice in "The ICCPR and the United Kingdom Law," David Harris and Sarah Joseph, Oxford, 1995 page 185 at 233).* It is therefore my view that the Supreme Court has an inherent duty despite certain procedural constraints self imposed in relation to the granting of Leave, to venture out to examine in appropriate cases whether adequate steps had been taken by a lower Court in coming to its determinations even if they are not for consideration directly before it, specially when such conclusions by the Supreme Court without adequate consideration could cause a domino effect and thereby a travesty of justice. In this instance even though voluntariness had not formed a question with regard to Leave, in the light of the evidence of the accused that he made no confession to ASP Ratnayake the question of voluntariness becomes a matter that should be looked into by the Court even at this late stage. I cannot accept the submission of the learned State Counsel that this Court does not have any discretion at this stage but to accept the voluntariness of the confession. This Court does have the right to inquire in to the voluntariness of the confession even at this stage since the whole case is based on that one single piece of evidence and if any shortcomings are perceivable in the receipt of such evidence and acting upon it, this Court is bound to air its views and take such steps as are necessary in that regard.

As stated by my brother Ameer Ismail, J. the confession in this instance is lacking in congruity and consistency with regard to dates, places and time. The source of information regarding the alleged death of five army personnel during the course of the alleged attack had not been forthcoming. There is no evidence even we presume that there were deaths consequent to an attack that those who died were "specified persons." The indictment refers to attack on "specified persons" during a four-month period in 1993 at Kattuwan. It is no secret that the Armed Forces utilize the services of certain mercenaries who know the language and terrain of the area the armed forces control, in their day to day activities, which mercenaries certainly are not "specified persons'. Causing death to such persons or attacking such persons may attract different provisions of the Law but not the provisions of the PTA nor Emergency Regulations. If in fact five Army personnel died during the period in question or an Army Camp in Kattuwan was in fact attacked what prevented the prosecution identifying such army personnel who died or confirming the fact of such attack through official witnesses? After all, it was the attack on the Army Camp and the consequent death of five Army personnel, which formed the crux of the charge against the accused. When asked in cross-examination at pages 258 and 259 of the Brief ASP Ratnayake answered as follows:

Cross-examination

Q You recorded the confession of the suspect on 18. 08. 95?

A August 19th.

Q Regarding what incident was the record made? After recording was it examined?

A I did not do so.

Q Then, if you had not examined the contents, according to your position, how do you know whether the contents are true or not?

A . That I cannot say

No evidence was led to show that there were deaths at the relevant Army Camp on any specific day within the period mentioned in the indictment and those who died were "specified persons." No independent evidence even of an attack on an identified army camp during the relevant period was led. In fact an analysis by my brother justice Ismail of the time periods mentioned in the confession takes the period of any such attack to a time anterior to the period mentioned in the charge sheet.

In addition the confession dated 19.08.1995 itself was in Sinhalese, a language unfamiliar to the Accused. In considering such a confession the reliability and competence of the interpreter was most relevant. Often High Court Judges have found, when questioned as to the contents of so-called confessions and their

interpretation, the officer alleged to have acted as an interpreter had no clue as to the Tamil version or the Sinhala translation before Court. They lacked sufficient knowledge in the Tamil language to translate. There is no evidence that the knowledge and competence of Police Officer Ansar in the Tamil language was tested in this instance. Suppose an interpreter is unable to state in simple Tamil what is produced as a confession in the Sinhala language, how could Court conclude that the Sinhala version is what the accused allegedly made as a confession if in fact he made a confession? It has been my experience as a High Court Judge to have found that the initial statements "obtained" by Police from accused or the subsequent material for the so-called confessions, are taken down in many cases by persons other than Police Officers who were no doubt competent in Tamil. They have been identified as Tamil mercenaries working with the Police or Army but certainly not Police Officers. Often such mercenaries have axes to grind against persons taken into custody either personal or political. The so-called confessions are "prepared" from the initial statements taken down by such persons while the accused are in Police custody prior to being taken before an Assistant Superintendent of Police. This aspect could easily be unearthed if High Court Judges call for the first statement and compare it with the confession. They could also call for similar statements and confessions made or obtained at or around the same time relating to similar incidents in the same area, as the confession in question. In many instances the description of the facts, their sequence and wordings would be found almost exact, sometimes verbatim, and the alleged Police interpreter would be often found to lack knowledge of the Tamil language and unable to explain such similarity, giving the impression that confessions are "manufactured" in Police Stations, generally with the help of such mercenaries. At the time the initial statements are obtained there is generally allegations of assault and torture at the Police Station. The so-called confessions come in subsequently, allegedly made before an ASP. In this instance on the other hand it was a Sinhala statement that was signed by the accused. According to the accused he was told that he was to be released on signing the document. He had denied any connection with any militant organization.

Before accepting the Police story, the Judge should have checked all aspects with regard to the authenticity and admissibility of the so-called confession.

It must be remembered that the burden cast on the Trial Judge in terms of Section 24 of the Evidence Ordinance to "process" the confession before admitting it as relevant evidence has not been taken away by Section 16(2) of Act No. 48 of 1979. Such primary obligations of the Court are still very much in tact. It must took into the question of admissibility of confession from all angles especially so with regard to extra-judicial confessions. The right given to the accused to prove irrelevancy under Section 16 (2) of Act 48 of 1979 does not entitle a Judge to admit each and every statement made to Police by an accused haphazardly and arbitrarily without investigation and shift the burden cast under Section 16(2) to the accused. This would in effect amount to colluding with Police prevarication if any. The relevant portion of the Section reads as follows:

"16(1) ..... (any statement).....may be proved as against such person if such statement is not irrelevant under Section 24 of the Evidence Ordinance.

Provided, however, that no such statement shall be proved as Against such person if such statement was made to a Police Officer below the rank of an Assistant Superintendent".

The phrase "may be" confers discretion on the Court. The duty of checking whether any statement was in fact made to an Assistant Superintendent of Police and whether he understood what the accused had to say and how he came to understand such statements if he did not know the language of the accused are all matters to be examined by Court. In this instance the accused denied making any confession to the ASP. The ASP admitted ignorance of the mother tongue of the accused.

In this instance the accused denied making any confession to the ASP. The ASP admitted ignorance of the mother tongue of the accused.

Every confession should be a statement of the individual concerned in his own words describing certain facts. If such statements were to come from different individuals, having made them before different Police Officers, and their statements when examined happen to be similar and/or exactly verbatim, cautious and probing High Court Judges hearing PTA cases should immediately probe into this aspect. In coming to conclusions with regard to voluntariness, every High Court Judge must go beyond the cosmetic package presented as confessions before them, prior to their coming to a conclusion. There is no evidence that the Court in this instance took sufficient steps to inquire into the sufficiency of the confession or the competence of the interpreter (vide page 266-271 of the Brief).

After all, the general civilized law of the country frowns upon the admission as evidence of confessions to Police Officers. When a special politically motivated Law admits them, significantly when such admission [Section 16(1) & (2) of the PTA] is incompatible with Articles 14(3)(g) and 14(2) of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) to which Sri Lanka is a signatory [Vide Article 27(15) of our Constitution and Justice Mark Fernando's dictum in *Weerawansa Vs. The Attorney General and others - (2000) 1 Sri Lanka Law Reports page 387 at page 409],* the responsibility of the Court which sits without a Jury increases manifold. The burden on the Judge is quite heavy in such instances.

Here was a case where the accused himself gave evidence in Court and denied making nor giving a confession to nor signing a confession before ASP Ratnayake. The cross examination of the accused at page 238 of the High Court Brief runs as follows:

Q So I suggest to you that on the 19th you were referred to A S P Ratnayake?

A Yes I was brought and I came. I was not questioned. He said no problem for you. You will be released.

Q Further I suggest to you that you have voluntarily

given a statement to A S P Ratnayake

A. He did not ask anything from me. No questions were asked. That gentleman came with some typed documents and asked me to sign. He said you can go and do your job.

Q I suggest to you that you voluntarily gave the statement?

A No.

In the light of such evidence given not in the form of dock statement, but under cross examination, it was incumbent on the part of the High Court Judge during the course of the Voire Dire inquiry to have considered voluntariness and truth of the so called confession in correct perspective.

After all, to borrow a famous phrase, "the politics of the last atrocity" lay at the root of many of the counter-terrorism laws

Firstly she should have noted that the confession was not made to a Judicial officer. The Judges' Manual prepared for the benefit of Judges, over sixty years ago laid down many safeguards to be taken before obtaining confessions. Among Judges, recording of confessions by suspects or accused is the exception rather than the rule. In this instance the confession was alleged to have been made to a policeman while the accused was still in the custody of the police. The accused at page 127 of the Brief explained why he signed a prepared Sinhala document. He was told if he signed the Sinhala document he would be released and freed (promise and inducement). It appears that in PTA and Emergency Regulations' cases every accused is most desirous to make a confession to a Police Officer!

Secondly, the accused had in evidence denied making any confession to ASP Ratnayake or signing such a confession in his presence. ASP Ratnayake stated as follows when asked as to why he obtained the so called confession in Sinhalese when there was provision for the accused to write his confession down in Tamil himself and hand over to the Police:

At page 117-118 of the Brief

If according to the ASP the person who wanted to give a confession voluntarily was not interested in writing it down himself in his own language, but preferred to give it to him, a police officer, in a language alien to him, while he was still in the custody of the Police, the statement by the accused that he never made any such confession to ASP Ratnayake could have found greater favour before the High Court Judge than the evidence of the ASP.

It must be remembered that scepticism about the reliability of confessions has increased in modern times in England. (See Report of an Inquiry by Sir Henry Fisher on the Confait Case in 1972 – Vide page 394 of the Law of Evidence Vol. 1 by E.R.S.R. Coomaraswamy). The Fisher Report showed how an inaccurate version of events can be produced in Court and presented in such a way as to convince a jury beyond reasonable doubt, as in that case, which was based on confessions. Lord Reid observed in *Customs and Excise Commissioners v. Hanz (1967) 1 AC 760 at 820 (House of Lords),* that there is a popular feeling that when a man is convicted solely on the basis of his own confession, the duty of the prosecution to prove him guilty has not been discharged.

The finding of the High Court Judge in this instance that the so-called confession was voluntary seems to be based on inadequate grounds.

2. Probative value of confessions

Voluntariness and truth are not coincident. What probative value should be allowed to confessions is not the same as the question whether they were made voluntarily. It was held by the High Court of Australia consisting of five Judges in ***Basto v. the Queen*** *[(1954) 91 Commonwealth Law Reports page 628 at 640]* as follows: "A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth." In considering the first submission of the learned Senior State Counsel it must be noted that there is no guarantee of credibility of confessions just because it is held to have been made voluntarily, since there could be invalidating circumstances, which too must always be considered. As far back as in 1783 it was held in ***R. v. Warickshall*** *(1783) 1 Leach 263* that even if the Judge accepts the voluntariness, still the denial by the accused of making such confession affects the credibility of the statement i.e. its truthfulness. At page 264 it was said, "Facts thus obtained (through confessions), however must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived." In that case the confession itself was inadmissible, but the physical evidence found in consequence of such inadmissible confession was sought to be admitted. Hence the above dictum.

As opposed to the real physical evidence found in ***R. v. Warickshall,*** we have in this case a mere paper evidence, that too denied by the maker of the statement. It may be argued that under Sec. 16 of the PTA such confessions are admissible and therefore independent corroborative evidence was unnecessary unlike in ***R. v. Warickshal.*** But it must be noted that Section 16 of the PTA admits as evidence confessions to Police Officers, otherwise frowned upon by our Law of Evidence, subject to the condition that such statements were not irrelevant under Sec. 24 of the evidence Ordinance. This reservation necessitates the safeguards mentioned in ***R. v. Warickshall*** to confessions under the PTA. We must not forget that the major change to the general law by the enactment of the PTA apart from Section 16 was the introduction of Sec. 17, which made Sections 25, 26 and 30 of the Evidence Ordinance inapplicable to PTA cases. Otherwise the presumption of innocence of the accused, proof beyond reasonable doubt, the necessity for a fair trial etc. are still part of our law. Many Penal Code offences were made offences under the PTA with enhanced punishments without defining what 'terrorism' meant. The same offence against parliamentarians for instance could attract Criminal Procedure Code' provisions or PTA provisions without any guidelines being set down. Hence safeguards in admitting confessions become very necessary. After all, to borrow a famous phrase, "the politics of the last

atrocity" lay at the root of many of the counter-terrorism laws. They are not normal laws. They are 'reactive' laws. Even in Britain after the passing of Prevention of Terrorism legislation in 1974 there were many safeguards designed to ensure the protection of civil liberties. (Vide "Political Violence and Civil Liberties" by Conor Gearty in Individual Rights and the Law in Britain" edited by Christopher Mccruden and Geralds Chambers 1994 at page 145).

E.R.S.R. Coomaraswamy in his "Law of Evidence" Vol. 1 page 395 has stated as follows:

"Before a confession can be acted upon by a Court or Jury, it must satisfy three tests – the test of voluntariness, the test of truth and the test of sufficiency. It must be shown that it was made voluntarily, that it is true and that it is sufficient to constitute a confession."

Thus, even if a confession is admitted as voluntary there is still no guarantee of credibility with regard to them.

Bentham said that there were three invalidating considerations in extra-judicial confessions viz. Mendacity, Misinterpretation and Incompleteness. Mendacity meant fabrication either by accused himself acting through some motive or by the witnesses who depose to the confession having been made. Motives could have their roots even in altruism or bravado. From a political standpoint in the modern world the terms "terrorist" and "hero" seem inter-changeable. Misinterpretation happens where a wrong meaning is put by the witness on the accused's statement. Where so-called interpreters lack proper knowledge of the language of the accused or where third parties are used in the course of such interpretation, misinterpretation becomes a strong invalidating consideration. Incompleteness could inter alia be due to negligence on the part of the speaker or interpreter or inattention on the part of the hearer.

It was incumbent on the part of the Trial Judge in this case to have considered the above aspects. There is no indication on the record that these matters received the attention of the Judge at the end of the voire dire inquiry.

3. Presumptions in 'confession only' cases

It would thus be seen that there is much to be desired in the conclusion of the learned Trial Judge that the so-called confession in this instance was voluntary. In any event, voluntariness of a confession does not confer any guarantee of credibility on such statement if such voluntariness is disputed by the maker of the statement. If the statement was not made voluntarily or if the Trial Judge had come to her conclusions in favour of the prosecution without adequately investigation into the voluntariness and veritability of the confession, presumptions should not be allowed to be used to buttress and fortify such questionable confessions.

Lord Reid's words in ***S. v. S.*** *[(1972) A.C. 24 at 41, (1970) 3 All ER 107 at 109]* are most relevant in this regard. He said:

"Once evidence has been led it must be weighed without using the presumption as makeweight in the scale of legitimacy. So even weak evidence against legitimacy must prevail if there is no other evidence to counter–balance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it.

In Cross and Tapper on 'Evidence,' 8th Edition (Butterworths) 1995 at page 139 it is said as follows: "... it is hard to believe, since the decision in ***Woolmington v. DPP*** *– 1935 AC 462* that an English Court, would be prepared to apply a Common Law presumption so as to cast a persuasive burden upon the accused in a criminal case". (See also **R** *v.* ***Yacoob*** *1981 – 72 Cr App. Rep. 313 at 364).*

In the same page 139 the stringent modern approach as illustrated in relation to the presumption of the lawfulness of official actions – praesumuntur rite esse acta – in ***Dillon v. R.*** *1982 AC 484 (also 1982 1 All E.R 1017),* is set out thus:

"The Accused, a policeman, was charged with negligently permitting the escape of two prisoners who were lawfully within his custody. The prosecution failed to offer formal evidence of the lawfulness of the custody. The accused submitted that there was no case to answer, but both trial judge and appellate court held that the prosecution could rely upon the presumption (above said). The Privy Council rejected this view, holding that the courts will not presume the existence of facts which are central to an offence, and that when the liberty of the subject is involved there is no room for presumptions in favour of the Crown.

It also expressed the view that: it would be contrary to fundamental principles of law that the onus should be on a prisoner to rebut a presumption that he was being lawfully detained, which he could only do by the (notoriously difficult) process of proving a negative."

Thus it is not the existence, operation nor authenticity of the presumption that the author of a statement would not make an admission against himself unless it be true, that is relevant but its applicability in a case of this nature. To bring in such a presumption to play in a case already teeming with a number of presumptive inferences would be highly prejudicial to an accused. The Trial Judge without proper investigation had accepted that a confession had in fact been made to the ASP though the accused denied making such confession. She presumed that the ASP told the truth and the accused a lie. She admitted in evidence the so-called confession in Sinhalese as the correct version of what the accused might have said, even though the accused did not know the language, without testing the interpreter's competency. She therefore presumed that Police witness Ansar had interpreted and translated correctly. She presumed that all what was said in the alleged confession were true without any extraneous proof of the intrinsic contents of it. She presumed that the persons who allegedly died were "specified persons" without an iota of evidence to confirm such a conclusion. She presumed that there was an attack on an army camp without any one confirming that there was in fact such an attack during the specified period. The Court of Appeal to affix the stamp of approval on the judgment of the High Court had added another presumption to buttress the plethora of presumptions that led to the conviction of the accused by the Trial Judge. It is in cases of this nature that presumptions such as the present one dealing with self-incriminating statements should not be

The Trial Judge without proper investigation had accepted that a confession had in fact been made to the ASP though the accused denied making such confession. She presumed that the ASP told the truth and the accused a lie.

used nor admitted to prop up a case dependent entirely on a confession. Courts must not presume the existence of facts basic to the offence, to the prejudice of an accused. The prosecution in this case had no difficulties whatsoever to prove the so-called attack during the relevant time on the Kattuvan Army Camp, if in fact there was an attack, through official witnesses.

The evidentiary value of a dying declaration was compared in this connection. There is a significant difference between a dying declaration and a confession. What has to be proved to succeed in a criminal case is the commission of an offence and the identity of the person who committed it. By a dying declaration only the identity of the person who may have committed the offence as per the dying declaration is admitted. The commission of any offence by such person mentioned in the dying declaration would have to be proved separately. In this instance the commission of the offence itself or the occurrence of an event is sought to be presumed by virtue of a confessionary statement made by the accused. A dying declaration, it must be noted, is not made by the accused. If it was by the accused there would be no case coming up before a Court of Law against him. A dying declaration is generally used only to prove identity of the person who allegedly committed an offence and not to prove the commission of the offence itself. A dying declaration would only be a supportive evidence with regard to the commission of the offence.

An accused, despite the provisions of the PTA, is still presumed to be innocent until he is proved guilty. The burden of proving so is still with the prosecution.

In this instance the confession was used to prove commission of the offence as well as identity of the person who committed it and the shortcomings in the obtaining of the confession itself has been overlooked and to give credence to such a dubious confession ingeniously a presumption has been used by the Court of Appeal. Such a presumption even if it were to exist should not have been used to prop up an entirely weak case. Perhaps such a presumption could only come "on the very rare case of the evidence" of the prosecution and of the defence "being so evenly balanced that the Court is unable to reach a decision on it." [Vide Lord Reid's words *S.v.S. (supra)]*

Until all steps are taken by a Court to determine positively that a confession had been actually made by an accused and that too voluntarily, the provisions of Sec. 16(2) of the PTA would not come into play. The function of the Court should not be abdicated to the accused. As stated earlier it is not open to a Court in view of the provisions of Sec. 16(2) of the PTA to admit as evidence any and every statement without investigation and pass on the burden of proving irrelevancy under Sec. 24 of the Evidence Ordinance to the accused. An accused, despite the provisions of the PTA, is still presumed to be innocent until he is proved guilty. The burden of proving so is still with the prosecution. In proving the guilt of an accused his confession to a Police Officer is to be admitted in terms of the PTA even though our Evidence Ordinance would not admit such evidence. But the burden of proving the case beyond all reasonable doubt is still with the prosecution. The prosecution in this instance failed to provide any independent material to disturb the presumption of innocence in favour of the accused. The original Court in this instance failed to adequately examine the sufficiency of the so-called confession and its authenticity inter alia in the light of the competence or otherwise of the interpreter.

It was argued by the learned State Counsel that confessions consist of intrinsic material and that the latter would speak for themselves. He identified the present case as one, which had intrinsic materials in the confession to convict the accused.

In ***R. v. Burge*** *(1968) QB 112 at 117* it was stated that the weight to be attached to the confession depends upon its contents and all the circumstances in which it was obtained. Without a Court sufficiently investigating into the manner of obtaining a confession, to attribute weight-age to its intrinsic contents would be like putting a cart before a horse. The contents of a denied confession cannot be seriously considered for a conviction. As pointed out by my brother Justice Ameer Ismail the truthfulness of the confession itself is in doubt in this case. Under such circumstances how could a Court give any credence to the intrinsic contents of the confession under consideration? Where there is doubt with regard to the authenticity of the confession itself the value of the intrinsic materials of the confession also becomes questionable.

Such is the confession in this case. Its voluntariness is questionable, its authenticity is questionable, its adequacy with regard to material matters is questionable and above all its veracity is questionable. Such questionable confession should not be made the basis for conviction of the accused in this case.

I should therefore like to have it on record for the reasons mentioned heretofore that the contents of a confession obtained in terms of the provisions of Act No. 48 of 1979 are solely not sufficient to convict an accused. There must be corroborative evidence to prove the occurrence of the event or events mentioned in the confession. A confession cannot be used to prove the happening of an extraneous event as well as the confessor's conduct in such an event. In this case the identification of the "specified persons," which was basic to the charge did not take place through the so-called confession. The special categories of persons mentioned in Act No. 48 of 1979 against whom any offences committed become the subject matter of PTA case must be independently identified by the State. It cannot be established solely through the confession.

The presumption that an accused would not make a self-incriminatory statement unless it was true cannot be used in criminal cases of this nature for the simple reason that PTA has allowed inadmissible evidence, under the Evidence Ordinance, to be admitted and if the presumption of truthfulness is used to buttress the otherwise inadmissible evidence, Courts would enlarge the scope of the provisions of a much maligned law, foisting double jeorpardies on an accused. In any event such a presumption must necessarily contend with various invalidating considerations relating to confessions such as mendacity, misinterpretation, and incompleteness even it were to be used. None of these have been considered in this case.

I agree with my brother Justice Ameer Ismail that the conviction in this case by the High Court must be set aside allowing the appeal of the Accused–Appellant-Petitioner against the order of the Court of Appeal.

Judge of the Supreme Court.

(Concluded)

New Year's bloody.....

Contd. from page 7

First, the attackers looted homes and shops and then set fireto the buildings. The very ancient Temple of Pattini (Kannagi Amman kovil) too was not spared. (It is a known fact that Muslims, when struck by illness or misfortunes offered various articles to propitiate the Goddess). The mob burnt a part of the temple and pulled down the perimeter wall around it. Petrol bombs were thrown over buildings and burnt.

"The Muslim youths in their frenzy of hate committed murder, arson and looted shops and homes and even the places of Hindu worship. As they moved on leaving trails of devastation by bombs, Karativu was reduced to ashes.

"Many were killed by the mob and among those killed on that day included 58-year-old Nallaratnam Devaviradhan, a pensioner. He remained in his home after sending his family members to places of safety. The mob looted all the valuables they found in his house and then attacked the man. When he lay fallen on the ground, they are said to have burnt him alive with petrol".

"Another case of murder committed by the mob was on a middle–aged man K. Sinnathamby who was similarly killed. Sinnathamby was both a farmer and a merchant. He prospered in both agriculture and trade. The goons first looted his shop and then consigned his shop to flames. His car, tractor and trailer were also set on fire."

"When everything was set on fire, the goons dragged Sinnathamby to the highway opposite his shops, poured petrol over him and then set him alight. The man was burnt live."

A human rights activist provided the following information. A few days before the attack on Tamil villages, the police got all persons possessing licensed guns for the protection of crops and personal security, to surrender their weapons to the police. The seizure of weapons by the law enforcing authority, before the eruption of violence, is interpreted as a pre-planned strategy to expose the Tamils to the atrocities unarmed. It was a subtle scheme to have the Jihad and the STF attacking Tamils when they were defenceless. This is in contrast to an attack on Tamils at Kalmunai in 1967, when the Tamils fired at a mob and saved lives and properties.

The attack in 1985 left several hundreds of families homeless at Karativu, on the eve of the New Year festival. The New Year dawned with fears and miseries never experienced before. An accusing finger pointed at the government as villain.

The families rendered homeless were accommodated in schools. They had no food or clothes. In the absence of the Tamils' right to life and security of person, and the blatant disrespect for the promotion of friendly relations between communities, exposed the government of violating the rights enshrined in Article 3 of the Universal Declaration of Human Rights (UDHR). The Tamils' right to life, liberty, and security were in limbo when the state failed to contain the barbaric attack on innocents. The people spent the night in fear of death. For them the night was long, and when it dawned, it was the New Year Day!

The victims waited till about 8 o'clock in the morning before planning to leave the schools where they spent the night. They were anxious to inspect the extent of damage and caused by the havoc.

The people while preparing to leave the schools on 13 April, when reports from firearms were heard, which announced the goons had returned to wreak havoc in the other areas of Karativu that they could not attack on the previous evening. The people were agitated and did not know what to do. The Karativu Rehabilitation Society reported that 500 youths participated in the attack on Karativu on that day. Their report to the government agent said, "The attack on the village (Karativu) began at an hour when it was least expected. A mob numbering approximately 500 entered the limits of Karativu from three directions. The first group came through the northern gateway along the Kalmunai–Pottuvil … trunk road, causing destruction on properties all the way.

"This well-organized group of criminals entered the sanctum sanctorum (of the temple), the innermost room where the golden image of the goddess Pattini was installed and consecrated, entry into which is forbidden to all except the officiating priest. They removed the golden image and broke the idols on the steeple and the surrounding temples devoted to Lord Ganesha, Murugan, and the host of other deities. The goons did not spare any house or shop. Houses and shops were looted and burnt as done on the previous day. Things they collected as loot were carried away in trucks.

"The second group of the Jihads entered Karativu through the northeastern direction where the Sithanai Kutty Swami kovil stands. They were a bit cautious and seemed reluctant to engage in any attack until they made sure that there were no Tamil militants in the vicinity. They seemed to have anticipated a counterattack from Tamil militants. They took quite a while to begin attacking, and, once they were assured that there were no cadres of the Tamils, they entered the field with wild enthusiasm.

"They bombed the kovils, and removed valuables. Thereafter, they turned on the shops and homes. They broke the doors and helped themselves with all what they could lay their hands upon. In the course of their attack, everything built with bricks and cement was smashed to the ground. They smashed not only the houses, even the parapet walls of the houses and the temples. They left the area by about 2.00 p.m. and when they left the entire area was enveloped in smoke.

"The third group arrived at T. Mylvaganam Lane and began plundering. At first they exploded a grenade to announce their arrival. As the people had all fled from their homes on the previous day … the attackers had no difficulty in breaking open the houses and shops. The marauding band of attackers robbed the houses and shops and thereafter, set fire to the buildings. Valuable possessions passed from one generation to the other were destroyed in a matter of minutes.

"A total of 450,000 bushels of paddy harvested from the Maha crop was set on fire. They opted to burn the stored paddy, as they could not carry the 150,000 bags.

"Four persons, N. Arulanandam, T. Perinpamoorthy, V. Thangavadivel and K. Kasidurai who remained in their houses were put to death. Their deaths have not been probed. The killers got off free."

Attempts made by the people's representatives, members of the district development council and the public to contact members of parliament, the ministers and the heads of departments were rendered futile as communications including the telephone were disconnected.

"The Muslim youths in their frenzy of hate committed murder, arson and looted shops and homes and even the places of Hindu worship. As they moved on leaving trails of devastation by bombs, Karativu was reduced to ashes.

A report made to the government alleged that the Mossad and the Jihad movement had indulged in large-scale robbery, arson, desecration of places of worship and murdered innocent Tamils. However, no action about all of what had happened appears to have been taken. That was the status to which the Tamils have been reduced to during the post-1983 period.

14 April 1985 was a Sunday. The Tamil public, which had suffered from the trauma of a most distressing nature and had unpleasant experiences of successive attacks on Karativu on the two previous days, thought that the attackers would not reappear. But it was destined that Karativu should suffer a third attack. Grenade blasts heralded the arrival of the Jihads on the third day. Remarkably, the police were found missing. It was 8 o'clock on Sunday the 14 April.

They damaged the temples were sacred to Lord Ganesha, Lord Veerapathirar, Amparayan kovil and the Anaikutty kovil. They painted the words, "Allahu Akbar" on the broken walls of the attacked temples.

The people were sheltered in the schools. They thought it was only a temporary measure to save their lives and limbs. None of them ever knew that they were going to be there at the schools for quite some time until their homes were to be rebuilt with the support of the International Community, the Catholic church, Sri Ramakrishna Mission, the ICRC, the Lions Club and the YMCA.

Grenade blasts were heard from two directions, the north and east. The blast of the grenade was followed by reports of gunfire, believed to be from the sea beach. The people were alarmed and excited fearing the worst.

Wondering as what to do next, the people remained in bewilderment. It was apparent that the attackers were merely serving the designs, purposes intentions and schemes of the politicians 'to end the Tamil problem.' The state planned to end the problem through a systematic violation of Tamil rights.

At this juncture, it might be worthwhile taking our thoughts back to a period in 1984, four months before the attack on Karaitivu was carried out.

It has to be recalled the state employed the army and air force to drive about 300 Tamil families from Manal Aru, Kokkilai and Kokkuthoduwai through violence. It was a clear violation of all known cannons of justice. The state employed the same methods with little variation by the introduction of the Jihadies and Mossad-trained militias. The aim of the attackers was to uproot Tamils from their native soil as they had successfully carried out in other districts.

Article 17 of the UNDHR reads, "No one will be arbitrarily deprived of his property." But in Sri Lanka, this was brazenly violated by the state employing all the means it commanded. Contempt for the human rights of the Tamils and permitting every type of barbarity helped to strengthen the militants.

Young boys remaining with their parent in schools climbed treetops to ascertain the facts. They looked towards the sea and found the attackers arriving in fishing craft to begin their attack from the east.

The attackers, before they landed on the beach, took the precaution of ascertaining whether it was safe for them to land there. They wanted to ensure that Tamil militant cadres were not present in the vicinity to oppose them and commence a counterattack. They fired from the craft and sensing that there was no danger jumped to the shore with all their ammunition.

The attackers then proceeded towards Karaditottam division and began to loot houses and shops. They attacked bakeries, dispensaries, cattle sheds with animals, rice mills, grinding mills and even the post office, the DDC (District Development Council) office and all the government institutions like the Agrarian Services Centre, the Agricultural Instructor's Office and the Multipurpose Co-operative Society. The houses and shops were soon set on fire and clouds of smoke billowed into the air.

Eighteen fishing crafts, fishing equipment and even five fishermen's huts were burnt. They damaged the temples were sacred to Lord Ganesha, Lord Veerapathirar, Amparayan kovil and the Anaikutty kovil. They painted the words, "Allahu Akbar" on the broken walls of the attacked temples. Two government schools and a pre-school too were burnt. Their attack lasted nearly six hours. The people had neither food nor water and they were 'more dead' than alive consequent to fear.

During the three days of savage attack on civilians and their properties at Karativu, 17 were killed, several went missing and a large number were injured. Village leaders were looking for shelter for 84 children who were orphaned.

Altogether six Hindu temples had been damaged by fire and pillaged, 802 houses looted and gutted; 210 head of cattle, 332 goats and 3500 poultry were slaughtered.

A government hospital and two dispensaries run by medical practitioners were totally damaged, 84 shops looted and burnt; 17 motorcars, two tractors, trailers, two motorcycles, 22 double bullock carts, and 987 bicycles were burnt. What baffled human rights activists were whether the police were conniving actively or passively with the goons who were attacking the Tamils.

The "Sithirai varudap pirappu", or, the dawn of the Hindu New Year occurring in the month of April is an event of considerable importance to the Tamils. The Hindu regards it as one with immense cultural significance.

Astrologically, when the sun enters the constellation of Aeries during the "Vasantha ruthu," at springtime, auguring good luck, prosperity and happiness, Tamils in the district participate in religious activities to be absolved from the malefic effects of the planets. The New Year, it is believed, brings pleasant surprises and joyous moments in the life of the people whose fortunes are influenced by the planets.

In April, nature adds beauty and glamour as the trees put out leaves and the buds begin to blossom, spreading sweet fragrance all around. The farmer is rewarded for his hard labour with a bountiful harvest from the Maha crop. He is happy at heart after having stored his grain at home, in time to celebrate the New Year. Homes are whitewashed, utensils that are old are cast away, and, new ones purchased.

It is important to understand the frame of mind in which the Tamils were when the savage attacks were launched on Karativu. This event, coming at this moment, had a tremendous impact on the belief system of these simple, rural communities who were steeped in astrology and the significance of time in all what they did.

The Muslim community living around Karativu shared common interests and built abiding trust and friendship of the Tamils over the years, and, had no reason to attack them. Islam teaches, "God is merciful and compassionate." The Muslim followed the middle path, practicing hospitality and charity, and, attending the mosque for prayers five times a day on the cry of the Moozin.

Fridays are of special religious significance to Tamils and Muslims who are bidden to prayers at noon. Witnesses confirmed that the state violence let loose on Karativu began on a Friday after their Jumma prayers and about 800 men joined in the attack. Helicopters fired at those who stood homeless.

The identity of some of the participants to the attack was established immediately after the attack from their National Identity Cards found at the places of looting and burning. They indicated that the participants were residents of Colombo, identified with 'Jihad'. One need not possess super intelligence to draw conclusions from what was seen in Sri Lanka from 1977 onwards. The Tamil community received a good thrashing from the state forces from August 1977. The reported attacks on the Tamils during the years 1977, 1981, 1983 and 1984-85, indicated that government was hell bent on dispossessing the Tamils and displacing them from their traditional homeland. The brute force employed by the state to uproot the Tamils in the country cannot be forgotten when the same method was adopted in the attacks on Karativu in April 1985.

The government in its folly tried to show that the attack on Karativu as an isolated, spontaneous one and labelled it as a "holy war" waged by the Muslims. Wars have sometimes been called holy wars. Those holy wars were aimed at converting non-Muslims to Islam, and were called Jihad. It is claimed that the Prophet Rasool (Sal) preached such wars against idolaters. The war on Karativu was to destroy Tamils and not intended to convert!

A short description of Jihad would be appropriate to grasp the potency of the direction of those who planned the destruction of Karativu in 1985. The Encyclopaedia explains, "The Jihad is the conception of waging war with swords against non-Muslims."

Islam refers to "Dar-al-Islam" (abode of Islam) Dar-al-barb, (abode of war). The sacred book demands that all adult males and able-bodied men must take part in hostilities referred to as Jihad, against neighbours who are 'enemies' i.e. non-Muslims. The enemies are classified as "Kajie" (non-believers of Islam) and 'Akl-al-Vietal' (people of books). Buddhists and Hindus belong to the second category. There are two options for the enemies. One is to embrace Islam and the other is to face execution.

Other than the Jihad, there were the security forces, which attacked Karativu. They mostly comprised Buddhists. Buddhists are decreed to follow a different path, the path of compassion and kindness. Buddhism teaches its adherents to show respect for life and to extend kindness even to animals.

The sprit of Buddhism, and, the three out of its eight precepts that are intended to raise levels of morality, which are repeated every time in prayers: "to refrain from taking life; to refrain from stealing, looting, and to refrain from falsehood," were absent among those who destroyed Karativu.

The destruction of Karativu echoed within the walls of the Colombo High Court when the Civil Rights Movement and Home for Human Rights with their team of leading human rights lawyers, S. Nadesan, Q.C., JCT Kotelawela, I.F. Xavier, Suriya Wickremasinghe, M. Alagarajah, A. Samarajeewa and N. Fernando defended Mr. Nallanayagam, president of the Citizens' Committee Kalmunai who stood indicted with having committed offences under the Emergency Regulations, of making false statements accusing the STF of destroying the village called Karativu and the abduction of 23 Tamil youths from Natpittimunai and killing all of them at Thambiluvil.

The arm of the 'Dharmista' government, the ministry of national security and the police were seen involved in the attack on Karativu. What was stranger, the public reported that inquests were not held for the dead. The failure of the government to punish the offenders was enough proof of government complicity in the destruction of the village.

While there were public accusations of bringing several lorry loads of goons from Colombo for the destruction of Karativu, the government attempted to drag in the community of Muslims into the scene, alleging that the Muslims fought against the Tamils.

The Tamils in Amparai district, though economically weak following the spate of terror from 1977, are possessed of a philosophy of the ancients, which some say is unsuited to the present cultural environment. A popular leader, two decades ago, among the Tamils told me, "Contemplate on 'Him:'

The Timeless Thing, The Supreme Spirit,
'OM SAT CIT ANANDAM'. Whence we are born?
Whither do we go? The Pleasures and Sorrows,
Wealth and Power of the World
Are all transient." This is real resignation.

His words reminds me of what Jesus told his people, to give up even what they had, in order to gain the Kingdom of Heaven. Do not the Christians, in their prayers, only ask, "Give us this day our daily bread," and the Gospel exhorts, "Lay not up yourselves treasures upon earth."

Successive Government from 1956 have sought to destroy the Tamil community and the destruction of Karativu is a craftily manoeuvred attempt to get rid of Tamils from Karativu.

It is considered useful to quote Dr. N. D. Wijesekere, who records in his 'People of Ceylon' (1945) as follows: "The Tamil population of the present day is spread on the whole Island with concentration in the North, Eastern, and North Central Provinces."

The community of Tamils who lived at Anuradhapura, Kurunegala, Polonnaruwa, Kalawewa, Tambuttegama, Eppawela, and Mannampitiya have been either wiped out or assimilated. Attempts made on Mullaitivu and Trincomalee have been successful for the government. Those in authority do not seem to know the direction they are pursuing with regard to the preservation of human rights. We could only remind them of the famous Persian poet Omar Khayaam who in the Rubaiat, said:

"Fools, with damnation as your destiny,
Sentenced to fuel the eternal fire of Hell."
"Avoid all greed and envy, unperturbed
By permutation, foul succeeding fair:
Soon the whole scene must vanish."

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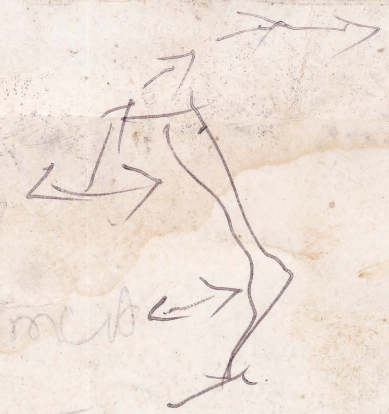

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