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## Sri Lanka: A Study in Microcosm of Regional Problems and the Need for More Effective Protection of Human Rights

### Keywords

Human Rights Law, United Nations, Rule of Law

# Sri Lanka: A Study in Microcosm of Regional Problems and the Need for More Effective Protection of Human Rights

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## I. INTRODUCTION

This paper analyzes events both as a study in microcosm of some current human rights issues in the Asia Pacific region, and as a vehicle through which to address the current need for more effective protection of human rights as one necessary part of a wider strategy for the promotion and enhancement of peace.<sup>1</sup>

Sri Lanka, like many other countries, has recently experienced a deteriorating economy and a consequent serious decline in standards of living, a state of affairs exacerbated by the deflection of government expenditure to military purposes and away from programs of education, research, health and welfare. During the last decade, the numbers of incidents of violence occurring in the country with ethnic, religious and political overtones have been escalating rapidly. In many of these incidents police and security forces have at best stood by ineffectively or, at worst, have themselves participated in attacks on unarmed minority groups, on peaceful strikers, and on demonstrators. Vigilante groups have sprung up in different parts of the country. The numbers of extra-judicial executions, tortures, arbitrary arrests, murders, and disappearances number in the tens of thousands, and political detainees have been brutally murdered while held in custody in state prisons. Meanwhile, the government has repeatedly failed to mount impartial investigations to identify and bring to justice the perpetrators of these breaches of human rights.

In a different arena, government sponsored transmigration schemes have exacerbated ethnic tensions, particularly in the eastern parts of the

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1. See further PATRICIA HYNDMAN, *THE COMMUNAL VIOLENCE IN SRI LANKA* (1983) [hereinafter HYNDMAN, *COMMUNAL VIOLENCE*]; PATRICIA HYNDMAN, *DEMOCRACY IN PERIL, SRI LANKA: A COUNTRY IN CRISIS* (1985) [hereinafter HYNDMAN, *DEMOCRACY IN PERIL*]; and recent reports of non-governmental organizations in Sri Lanka, e.g. the reports of the Civil Rights Movement (CRM), of the Movement for Inter-Racial Justice and Equality (MIRJE), of the Center for Society and Religion, and from Amnesty International reports.

country. Elsewhere, Sri Lanka's indigenous peoples, the Veddhas, have been pushed off the lands they traditionally occupied, and discrimination of different kinds have been practiced against other minority groups. Added to this there have been incidents calculated to undermine the independence of the judiciary and of lawyers; human rights lawyers have been threatened and attacked, some even murdered, as a direct consequence of their involvement in the defence of some particular accused.

Successive and lengthy states of emergency have been declared. Increasingly wide powers have been vested in the executive arm of government, and this trend has been accompanied by an increasing non-accountability of both the military and police forces. Over the past decade emergency powers have been used to disadvantage real and assumed political opponents of the party in power through, *inter alia*, the proscription of opposition parties, the imprisonment of their leaders, or other measures to silence them and their campaigns in the periods prior to elections. In addition there has been severe press censorship and extensive direct and indirect government control over the media generally. Despite such measures, there have also been serious irregularities in the conduct of elections, some of which have received later sanction in legislation.

During the last ten years in Sri Lanka there has been a steady escalation of violence, an erosion of democratic principles and of the rule of law, serious breaches of human rights, the creation of situations of severe deprivation and an increasing brutalization of society. As in all communities, the violence and hardship has impacted most severely on those groups least able to protect themselves — the elderly, the sick or injured, and children. One direct consequence has been that Sri Lanka has become a major producer of asylum seekers, thereby adding to the strains and stresses currently experienced by the international system protecting refugees.

First, some background information on Sri Lanka is provided to put the events outlined in this introduction into context. These events are then examined in more detail. Next, a possible approach is considered towards the prevention of such escalations of violence, erosions of democracy and derogations of human rights.

In its Preamble, the U.N. Declaration of Human Rights states:

recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [and that] it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

In this paper, ways to contribute to that foundation of freedom, justice and peace are considered. In the second part of the paper, one possible means of the promotion of "the recognition of the inherent dignity and of the equal and inalienable rights of all people," an initiative currently being taken by the LAWASIA Human Rights Committee is ex-

amined. This initiative has so far led to a Draft Pacific Charter of Rights and, it is hoped, will lead ultimately to the establishment of a human rights promotion and protection mechanism for the Pacific, and eventually prove an impetus for the establishment of such a mechanism for the Asia Pacific region as a whole.

## II. SRI LANKA: A STUDY IN MICROCOSM

### A. *Background Information on Sri Lanka*

#### 1. Demography, Religion, Language and Legal System

According to the 1981 census, the population of Sri Lanka is predominantly Sinhalese (74%), 18.2% Tamils, and 7% Muslim descendants from Moorish traders.<sup>2</sup> The remaining 0.8% includes small minority groups such as: the tribal peoples (the Veddhas); the Burghers (descendants of colonial-era Ceylonese-European marriages); and the few Europeans who live on the island.

The arrival in the country of the first members of the two largest ethnic groups, the Sinhalese and the Tamils, is shrouded in myths and legends. It seems that members of both groups have been in Sri Lanka for at least two thousand years. Historically, the Sinhalese have considered the Tamils as invaders upon Sinhalese territory. Both groups originally arrived from India — the Sinhalese from northern, and the Tamils from southern, India. The Tamils who live in Sri Lanka are divided into two separate groups. The smaller group, the “Indian” Tamil group, forms 5.6% of the total population. They are descendants of people brought from India to Sri Lanka by the British in the nineteenth century as indentured laborers to work on plantations. These people live mainly in the hill country in the central part of the island, and most of them still work on the plantations.

The majority of the Tamils in the country (12.6%) are variously called the “Ceylon,” “Jaffna,” or “Sri Lankan” Tamils. This group has lived in Sri Lanka for hundreds, possibly thousands, of years. Many “Ceylon” Tamils live in the north and east, areas claimed by Tamil militants for the separate state they wish to establish. In the early 1980’s, in the northern and eastern districts, Tamils formed 97.7% of the population in the district of Jaffna, 89.9% in Mullaitivu, 76.3% in Vavuniya, 72% in Batticaloa, 64.0% in Mannar, and 36.4% in Trincomalee. In addition, many “Ceylon” Tamils have lived and worked for generations in areas of the country with a predominantly Sinhalese population.<sup>3</sup>

The island is home to a variety of religions. The great majority of the Sinhalese people are Buddhist; a small number are Christian. The Tamil

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2. Department of Census Statistics, Ministry of Plan Implementation, Sri Lanka Census of Population and Housing (1981).

3. *Id.*

population is predominantly Hindu, although some Tamils also are Christian. A smaller segment of the population, mainly the descendants of Moorish traders, are Muslims. The percentages in the 1970's were said to be: Buddhists 66.3%, Hindus 18.5%, Christians 8.4%, and Muslims 6.7%.<sup>4</sup>

A factor of some significance is that many people in Sri Lanka identify Buddhism with Sinhalese nationalism and virtually equate being Sinhalese and being Buddhist. Many Buddhists believe that Sri Lanka was consecrated by the Buddha. The country is one of the world's major Buddhist centers. It is claimed that the Buddhism which exists in Sri Lanka is the closest to the original teachings of Buddha. Buddhism has been preserved here while, in surrounding countries, other religions have gained strength. This adds to the feeling that moves towards separatism not only threaten the Sinhalese race but also threaten Buddhism, a fear that has tended to dominate government policy, to be exploited by rival political parties for short-term political gains, to exacerbate tensions and to result in expressions of intolerance towards other groups and other religions.

Language is another important factor. The Tamils and the Sinhalese have languages which are quite different and which have different alphabets. During British rule the medium of education in many schools, especially those in the cities, was English. As a consequence both Tamils and Sinhalese could be, and were, educated together. The common language provided an essential bridge by which friendships transcending ethnic barriers could be formed.<sup>5</sup>

After Independence in 1948, moves were made to use the local languages. The consequence has been that children are taught either in Sinhala or in Tamil. They learn from different basic texts and are imbued with different traditions and cultures. They grow up separately, speaking different languages, writing in different alphabets and identifying with one of the two races only. Some Sinhalese and some Tamils, but not large numbers, speak English in addition to their own language, but many Sinhalese people do not speak Tamil and vice versa. Hence many people in the country are unable to communicate with each other. This situation undoubtedly has been instrumental in providing fertile ground for the growing misunderstandings and misperceptions between the two communities.

In addition to these complexities in the fabric of the society, the country's legal system has complexities of its own. Described by one author as a "legal museum," it contains elements of the laws of the main ethnic groups overlaid with elements of the systems introduced by successive colonial powers and, more recently, modern Sri Lankan law, legislative and judicial. Sri Lanka was colonized first by the Portuguese in the

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4. JAMES JUPP, *SRI LANKA: THIRD WORLD DEMOCRACY* 35 (1978).

5. HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1, at 277.

early sixteenth century and later by the Dutch, who were followed by the British. The Portuguese left little trace of their legal system, but Roman-Dutch law has had a strong and continuing influence. The British retained the legal system administered by the Dutch but gradually an overlay of English common law and statutes filtered in as well. In addition unofficial regulation continues in the form of local values and social and religious practices.

## 2. The Post-Independence Constitutions and the Protection of Basic Rights Under the Present Sri Lankan Constitution

At the outset it should be noted that the Tamil community has not participated in the drafting, nor in the adoption, of any of the post-Independence constitutions. Tamils claim that they have, therefore, never relinquished sovereignty over their traditional homelands. They assert that this sovereignty reverted to them when Sri Lanka emerged from colonial dependence at the time of the granting of independence by Britain in 1948. In essence and without going into detail, the Tamils claim the right to the international legal principle of self-determination.<sup>6</sup>

The Soulbury Constitution<sup>7</sup> provided for the Ceylon Constitution Order-in-Council which had effect from February 4th 1948 and contained no bill of rights, but in section 29 did provide that:

No . . . law shall . . . make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or . . . confer on persons or on any community or religion any privilege or advantage which is not conferred on persons of other communities or religions.

Should any legislation be enacted which was alleged to contravene the rights guaranteed by the constitution, the matter could be taken to the courts and ultimately to the Privy Council in London, at that time the final court of appeal in the Sri Lankan court hierarchy.

Section 29, the safeguards it provided, and appeals to the Privy Council were abolished when Sri Lanka became a Republic and a new constitution was enacted by Mrs. Bandaranaike's government in 1972. This new constitution conferred priority status upon both the language and the religion of the majority Sinhalese community, declaring Sinhala to be the country's only "official language" and giving "foremost place" among religions to Buddhism.

The newest and present Constitution was promulgated by the Jayawardene government in 1978 very shortly after it came to power in the 1977 general elections. This Constitution did accord to the Tamil lan-

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6. See R. Balasubraminian, *Ceylon Tamils and the Revival of Sovereignty*, in HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1, at 372-75.

7. The Order-in-Council of the United Kingdom Parliament under which Sri Lanka came to independence in 1948, authorized in the Ceylon Independence Act, 1947, 11 Geo. 6, Ch. 37 (Eng.).

guage the status of being a "national" language,<sup>8</sup> though Sinhala is still the only "official" language.<sup>9</sup> Freedom of religion is guaranteed by Articles 10 and 14. However, Buddhism remains in the "foremost place" among religions,<sup>10</sup> and Article 9 states that "it shall be the duty of the state to protect and foster the Buddha Sasana."

The 1978 Constitution contains a much more comprehensive protection of rights than did its predecessors. Many, but not all, of the rights contained in the *International Covenant on Civil and Political Rights* are included in Chapter III.<sup>11</sup> Protected are: freedom of thought, conscience and religion; freedom from torture or cruel, inhuman or degrading punishment; the right to equality and freedom from discrimination on the grounds of race, religion, language, caste, sex, political opinion or place of birth and the possibility of special protection for the advancement of women, children or disabled persons is provided for; freedom from arbitrary arrest, detention and punishment; prohibition of retro-active penal legislation; and freedom of speech, assembly, association, occupation and movement. Article 4(d) states:

The fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.

Article 15 allows restrictions to be placed on some of these protected rights in the interests of national security, racial or religious harmony, national economy or public order, and the protection of public health or morality. Nevertheless no limitation is permitted on the rights protected by Article 10, freedom of thought, conscience and religion, or by Article 11, freedom from torture, cruel, inhuman or degrading punishment.

Article 27 of Chapter VI of the Constitution contains many of the rights which receive protection under the *International Covenant on Economic, Social and Cultural Rights*.<sup>12</sup> These are included as "directive principles of state policy and fundamental duties." As is the case with many similar provisions in other constitutions, for instance some of constitutions of Pacific island states, these provisions are not enforceable.<sup>13</sup>

A potentially very valuable provision which was introduced in the 1978 Constitution is Article 126. This provides for the enforcement of the rights protected under Chapter III, and gives the Supreme Court sole and exclusive jurisdiction to determine questions relating to the infringement,

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8. SRI LANKA CONST. art. 19 (1978).

9. *Id.* at art. 18.

10. *Id.* at art. 9.

11. *Id.* at arts. 10-17.

12. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, Art. 10(1), 993 U.N.T.S. 3, *adopted* by G.A. Res. 220 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6313 (1966).

13. SRI LANKA CONST. art. 29 (1978).



by executive or administrative action, of any fundamental right, or language right, protected by the Constitution. In addition, Article 156 makes provision for the establishment of an Ombudsman. The duty of this office is to investigate and report "upon . . . allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions."

The independence of the judiciary receives comprehensive constitutional protection.<sup>14</sup> The Preamble refers to the "immutable republican principles of representative democracy" and assures to "all peoples freedom, equality, justice, fundamental human rights and the independence of the judiciary as the intangible heritage that guarantees the dignity and well-being of succeeding generations." Article 107 governs the appointment and removal of judges of the Supreme Court and Court of Appeal. The appointments are made by the President, the judges hold office "during good behavior." They may not be removed except by the President and only then after an address for removal made by Parliament introduced by not less than a third of its members and supported by a majority of the total number of members, including those not present. Under Article 108, judges' salaries are to be determined by Parliament and may not be reduced for any judge during that judge's term of office. Article 116 provides that every judge shall exercise and perform his/her powers and functions without being subject to any direction or other interference, and that every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial power or functions of any judge shall be guilty of an offense.

### 3. Ratification of International Human Rights Instruments

Early in its term of office, the Jayawardene government ratified several important international human rights instruments: the International Covenant of Civil and Political Rights,<sup>15</sup> including Article 41 recognizing the Human Rights Committee as competent to hear inter-state complaints, the International Covenant on Economic, Social and Cultural Rights,<sup>16</sup> the International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>17</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>18</sup>

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14. *See id.* at Ch. XV and arts 107, 108, 116.

15. International Covenant of Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, adopted by G.A. Res. 220 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

16. *Supra* note 12.

17. International Convention on the Suppression and Punishment of the Crime of Apartheid, July 18, 1976, 1015 U.N.T.S. 244, adopted by G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30A, U.N. Docs A/9233/Add., and A/L.712/Rev. 1 (1973).

18. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

## B. *Regional Problems in Microcosm*

### 1. Children

Children by their very nature are vulnerable, unable to protect themselves against the superior power of adults, and against socio-economic, civil and political and other conditions over which they have no control. Children are always among the first to take the brunt of civil strife, burgeoning third world debt and the hardships which follow. Children in Sri Lanka are no exception. One aspect only of their condition is examined in this paper, the situation of those children who are forced prematurely into the labor market by poverty and associated factors.

Frequently young children work for long hours in totally unsatisfactory conditions. They may have no adequate protective clothing, no unions to advance their rights, no severance or unemployment benefits and no health care. Although domestic protective legislation concerning the conditions of working children is quite extensive in Sri Lanka<sup>19</sup> as it is in other nearby countries of South Asia, social and economic realities often militate against its enforcement. Working children frequently have no educational or training opportunities to enable them to progress in later years to more skilled occupations. Childhood is the time when a child's future is set, yet with little or no access to welfare, health or educational facilities, or effective legal protection, young child laborers generally exist in conditions of extreme hardship, and are caught in a vicious cycle of poverty and oppression from which it is unlikely that they, or their children in turn, will ever escape.<sup>20</sup> Distressingly, the numbers of children in the world who must work to survive<sup>21</sup> are increasing.

As in many developing countries, the population of Sri Lanka is predominantly rural. Child laborers in the rural sector work on tea plantations, in farming, or in activities ancillary to the fishing industry. When working out of doors they may go unprotected against burning sun, driving rain or cold temperatures. Recently small boys between the ages of eight and fourteen who had been kidnapped from their homes were found in coastal areas laboring in the scorching sun for long hours each day, salting and drying fish.<sup>22</sup>

In the urban sectors of the countries of South Asia children work at all kinds of jobs:<sup>23</sup> as domestic servants, in factories, as "apprentices" to

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19. See S. Goonesekera, *Child Labour and Child Prostitution in Sri Lanka and the Legal Controls*, in THE MEETING OF EXPERTS ON THE EXPLOITATION OF THE CHILD, NOVEMBER 12-13, 1984: SINGAPORE AND THE CONFERENCE ON CHILD LABOUR AND CHILD PROSTITUTION, FEBRUARY 21-23, 1986, KUALA LUMPUR (Patricia Hyndman ed., 1986) [hereinafter Goonesekera, *Child Labor*].

20. See *Report of Seminar on the Exploitation of Child Laborers* (1988).

21. ILO Regional Workshop to Combat Child Labor, Sept. 1986, PIACT/1986/9, at 2.

22. Goonesekera, *Child Labor*, *supra* note 19, at 137.

23. *Id.* at 137.

various trades, in hotels, restaurants and street trades, in mines, heavy manufacturing industries, and on construction sites, in jewelry industries, and with automobile repairs and servicing — to name just some of their occupations. Others are “self-employed,” performing tasks such as shining shoes, and scavenging for re-usable waste.

Children are used for purposes which are clearly illegal as well. Their swiftness and nimbleness encourage adults to employ them to steal. Both boys and girls are employed in organized prostitution, pornography and drug trafficking. Clubs in the developed world advertise sex tours to third world countries such as the Philippines and Sri Lanka, and provide clients with information regarding the availability of young boys, the risks involved, how much to pay and how to avoid being arrested. In addition, children are being recruited, often against their free will and at very young ages, into national armed forces and into various armed militant groups.

Children in Sri Lanka suffer from abuses of all these kinds — a far cry from the protection sought to be conferred on them by more than 80 international instruments, and most recently by the most comprehensive of the international instruments for the protection of children, the 1989 UN Convention of the Rights of the Child.<sup>24</sup>

## 2. Minority Issues

As may be imagined from the background already provided there is potential in a country like Sri Lanka for a number of minority issues to surface. A survey of some of them is briefly outlined in this section.

### a. The Minority Syndrome

The first is the “minority syndrome.” Several communities within Sri Lanka are fearful due to their positions as minorities. The Sinhalese themselves, despite being a 74% majority in the island, number only twelve million and thus are a very small group in the South Asia region. Only twenty-two miles away across the Palk Straits are the nearest shores of the state of Tamil Nadu in Southern India, with its more than fifty million Tamil inhabitants.

In addition to the Tamils, who are considered in a separate sub-section, other communities as well have exhibited signs of anxiety due to their position as minorities. Christians generally, and Sinhalese Christians in particular, feel isolated, and are fearful as a minority group. Some Muslim communities have been subject to violent attacks and recently are said to have launched counter-attacks on other groups.

The fears of these different groups, whether originally realistic and legitimate or not, have served to heighten the level of tension in the coun-

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24. United Nations Convention of the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989), reprinted in 28 I.L.M. 1448 (1989).

try, and thus make outbursts more likely. There is a dangerous and frightening spiral of fears, non-communication, resentments and over-reaction which more and more is erupting in alarming episodes of violence.

#### b. The Veddhas

The Veddhas are probably the oldest race in the island.<sup>25</sup> Their number is variously estimated but is very small, 0.01% of the population at most.<sup>26</sup> A difficulty encountered when attempting to estimate their numbers is the problem of definition: Who is a Veddha?

The Veddhas are nowhere defined for the purposes of national law. The approach used for the 1911 Census was that people who "had knowledge of their varuge" (i.e. social group or clan), and a knowledge of Ved-dha religion combined with hunting as an "occupation" would be counted as a Veddha.<sup>27</sup> In the Census of 1946, the procedure adopted was that whoever described himself or herself as a Veddha, if he or she thought fit to do so, was counted as such.<sup>28</sup> Generally when Veddhas are spoken of the reference is to a group whose membership is defined by culture, self-perception and the perception which other groups have about them, rather than to a group defined by race, or by language (i.e. differences in the culture and in the structural organization of the Veddha community distinguish it from other communities in the country).

The Veddhas have their own language, which is unwritten but continues to be spoken in remote areas. Veddhas who live a traditional lifestyle in the jungle do not attend schools and cannot read or write. Traditionally Veddhas were hunter-gatherers and the forest ecology determined the structure of their society.<sup>29</sup> The restricted scale of resources available to them and their nomadic lifestyle demanded that the size of individual groups remain small. Veddha groups, or clans, are generally composed of either the nuclear or extended family or by a few family units. Unlike the Sinhalese and the Tamils, the Veddhas do not have a system of dowry. Instead, simple gifts are given by the prospective son-in-law to the father of the bride, and he in turn is given a small gift by his future wife.<sup>30</sup> In Veddha society there is no striking difference in the status of men and women. Women are not considered inferior. There are discriminations, however, in property entitlement.

Traditionally, each clan occupied a clearly defined territorial area spread throughout a jungle region. Boundaries were determined by the mark of an arrowhead on rocks or trees and these were treated with respect by other Veddhas. The territory of each clan historically was suffi-

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25. H.A.I. GOONETILEKE, 1 *BIBLIOGRAPHY OF CEYLON* 179 (1973).

26. The latest available Census figures in which the Veddhas were separately recorded are those of 1953. They then numbered 3,000, or 0.01% of the population.

27. 1911 Census, *cited in* NANDADEVA WIJESEKERA, *VEDDHAS IN TRANSITION* 192 (1964).

28. *Id.* at 95.

29. *Id.* at 48.

30. *Id.* at 95

cient to supply members of the group with game, roots, plants, flowers and honey. The Veddhas live in simple dwellings, lean-tos, caves or hollow trees, as is appropriate to their nomadic life-style. Their tools are simple. Luxuries, and indeed any possessions, are few. Personal belongings are kept to a minimum, and most property is held in common with other members of the clan. The Veddhas' religion, like that of many other primitive peoples, is animistic.<sup>31</sup>

Today, little of the territory in which Veddhas traditionally lived remains in its natural state, and full expression of traditional Veddha culture found among the jungle dwelling tribes is fast disappearing. Cultural assimilation of the Veddhas with other societies has been going on for many hundreds of years. In addition, over the last several decades the Veddha hunting grounds have been greatly diminished. Since the early nineteenth century, lands have been cleared and transformed into plantations. In the twentieth century, irrigation schemes have rendered formerly unproductive lands capable of supporting farming, and successive waves of agricultural settlement have reduced the areas of wilderness available to support nomadic tribes. Private entrepreneurs have, legally and illegally, felled forest timber, and the modern hunting practices of other Sri Lankans have seriously depleted the wildlife in the jungles.

Generally, the Veddhas have quietly submitted to encroachment by other groups, or, if they have resisted, they have done so passively and ultimately have retreated. As the land available to them has been reduced they have begun to practice shifting cultivation, but they are not naturally agriculturalists and would much prefer to hunt. The Veddha view of the jungle surrounding their dwelling areas is one of communal property which belongs to the clan members.

Under Sri Lankan law there is no recognition of Veddha rights to their ancient lands. No treaties have been made with them, and they come under no special legal provisions. Despite the legal pluralism of some parts of the Sri Lankan legal system there is no institutionalized place for Veddha traditional laws, and Veddha views of the jungle land surrounding their villages as being held in communal ownership conflict with the government view of these areas as Crown land. According to Brown, an anthropologist writing in 1978: "Even in recent historic times the Veddhas are known to have been still widely distributed throughout the island."<sup>32</sup> An article in the Lanka Guardian in 1983 warned that the "perpetuation of the Veddha institutional structure is clearly linked to a particular forest ecology" and that "disturbance of this delicate relationship" will lead to a destabilization of the structural basis of this community and thereafter their existence as "an individual techno-cultural group."<sup>33</sup> In 1982, an academic member of Peradeniya University pre-

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31. S. Senevirantne, *The Curse of the Duveni*, LANKA GUARDIAN, May 1983, at 10.

32. JAMES BROWN, VEDDHA VILLAGES IN ANURADHAPURA 31 (1978).

33. Seneviratne, *supra* note 31, at 9.

dicted that in fifteen or twenty years time the Veddhas would be extinct.<sup>34</sup> This prediction seems, sadly, to be increasingly probable as warnings are not being heeded and the plight of the Veddha people is afforded scant attention.<sup>35</sup>

c. The Status of Tamils "Of Recent Indian Origin"

Both Sinhalese and Tamil groups perceive each other as having received unfair privileges and advantages. Some of these perceptions are due more to misunderstandings and myths than to actual facts. Some have real foundation.

One sector of Sri Lankan society with very real cause for feeling aggrieved is the group known as "Indian" Tamils brought to Sri Lanka from southern India by the British in the nineteenth century to work in the plantations. Since that time these people have worked for long hours for very low pay, and they have contributed enormously to the country's economy. Yet, although born in Sri Lanka and, in many cases, descended from one, two or more generations of ancestors also born in the country, a hundred years after their initial arrival large numbers of "Indian" Tamils were without Sri Lankan citizenship and in effect stateless persons.

Prior to Independence, they, in common with all others born in either India or Sri Lanka, were British subjects and entitled to vote. In fact, in the general elections of 1947 they elected seven Indian Tamil Members of Parliament<sup>36</sup> and exercised a significant influence on the voting in several other electorates as well. No provisions concerning citizenship were contained in the 1948 Constitution. For the "Indian" Tamils this omission carried grave consequences.

One of the first acts of the new government was to determine the country's citizenship requirements. Legislation was enacted conferring citizenship only on those people who had either been born in Sri Lanka to fathers also born there or, if those seeking citizenship had not been born in the island, their fathers and grandfathers were required to have been born there. Due to the lack of records such facts were very difficult to prove. Not everyone was required to furnish the proof in order to acquire citizenship, but Indian Tamils were required to provide this evidence, and generally could not do so. By a later statute, citizenship was made available by registration in certain circumstances, but for a variety of reasons few Indian Tamils took advantage of this provision.

The outcome was that most Indian Tamils were rendered effectively stateless and were disenfranchised as well. A group without voting power is likely to experience considerable difficulty in securing equal treatment for itself, and this has been the case for the Indian Tamils. Education and

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34. Professor K.N.O. Dharmadasa, COLUMBO DAILY NEWS, June 4, 1982.

35. V. Stegborn, *Sri Lanka: The Veddhas — A People Under Threat*, 42 IWGIA NEWS-LETTER 166 (1985).

36. HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1, Appendix XXIII, at 166.

medical facilities in the areas where Indian Tamils reside have been consistently of a lower than general standard, and social welfare benefits and the granting of cost of living adjustments have lagged seriously behind those enjoyed by other sectors of the community.<sup>37</sup> Although over the years various arrangements have been made to grant citizenship to Indian Tamils — citizenship either of India or of Sri Lanka — by the mid-1980's considerable numbers of these people, despite Article 15 of the Universal Declaration ("Everyone has the right to a nationality"), continued to be both stateless and exceedingly underprivileged.<sup>38</sup>

#### d. The "Ceylon" Tamils

##### i. Education and State Sector Employment

During colonial times Tamils held what was later perceived to be a disproportionately large number of university places, high governmental positions, domination of the professions. This happened partly because particularly good missionary schools had been established in Tamil areas, and partly due to other factors which have long motivated Tamils in Sri Lanka to view education, and work in the professions and public sector, as the means to economic progress.

After Independence successive governments took measures to redress the imbalance between Sinhalese and Tamils in educational achievement and public sector employment.<sup>39</sup> These measures included the provision of better schools in Sinhala districts and "standardization" and then "quota" systems of admissions to universities and a favoring, by government policy, of Sinhalese as against Tamils in new recruitment to state employment. The consequence was a greatly reduced proportion of university places and public sector jobs gained by Tamils. International human rights norms and Article 12(2) of the Sri Lankan Constitution forbid discrimination between people "on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds," except when separate treatment is justified as a measure essential to empower disadvantaged groups. When this is the case, empowering positive discrimination is permitted, but only temporarily, until the formerly disadvantaged groups have reached a position of real equality.

By the early 1980's, statistics compiled by the Marga Institute, a research organization based in Colombo,<sup>40</sup> were released by the University Grants Commission<sup>41</sup> and by government sources, showing any previous

37. *Sêe, e.g.* HYNDMAN, COMMUNAL VIOLENCE, *supra* note 1, at 260 (statement adopted by the National Council of the Ceylon Workers Congress, August 14, 1983).

38. *See* HYNDMAN, DEMOCRACY IN PERIL, *supra* note 1, at 9-13.

39. *See* HYNDMAN, COMMUNAL VIOLENCE, *supra* note 1, at 272-276.

40. FAR E. ECON. REV., Nov. 17, 1983, at 31.

41. Statistics on University admissions released by Division of Planning and Research, University Grant Commission, 1983, *reprinted in* LANKA GUARDIAN, Nov. 1, 1983, at 10. Statistics on public sector employment released by the Dept. of Census and Statistics and Min-

imbalance to have been corrected. However, the quota system and employment selection systems were not withdrawn. To Tamils, with their emphasis on educational achievement, accessibility on a criterion of merit to university entrance and to public sector employment is extremely important, and these policies have been the source of very real grievances.

## ii. The Status of the Tamil Language

The status of the Tamil language within Sri Lanka has been another source of discontent. In 1956, eight years after Independence, Mr. Bandaranaike's government enacted the Official Language Act.<sup>42</sup> This legislation provided that Sri Lanka's only "official" language would be Sinhala<sup>43</sup> and reversed the resolution, adopted in 1944 by the State Council, that both Sinhalese and Tamil would be the country's official languages. Henceforth, the official administration of the country was to be conducted in Sinhalese, and proficiency in Sinhalese became a requirement for confirmation of, appointment to, and promotion within the public service. This requirement contributes to Tamil difficulties both in gaining public sector employment and later in securing promotion, since Sinhalese for Tamils, and Tamil for Sinhalese is very much a second or third language.

In 1958 the Tamil Language (Special Provisions) Act was passed. This legislation would have ameliorated the situation somewhat, providing as it did for the use of Tamil in the spheres of education, public examinations and official correspondence conducted with Tamil speaking people. Unfortunately, the regulations required for its implementation were not brought into effect until 1968. They were carried through at that time amidst strong protests from the opposition parties, by Mr. Dudley Senanayake, the then Prime Minister, in pursuance of the Senanayake-Chelvanayakam Agreement made between the government and Tamil leaders in 1965. In 1961, Mrs. Bandaranaike's government passed the Language of the Courts Act, which provided for the replacement of English by Sinhala in certain courts of law. In 1972, under this same government, the position of Sinhala as the country's only "official" language was given constitutional status. The Tamil people have interpreted the language policies of the different post-Independence Sinhala dominated governments as an indication that they were being accorded inferior status.

The Jayawardene government, recognizing that past language policies were a source of grievance to the Tamil people<sup>44</sup> sought, by provisions which it included in its 1978 Constitution, to grant a greater measure of recognition to the Tamil language. Although Sinhala remained the "offi-

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istry of Plan implementation Committee for Rational Development, *Sri Lanka's Ethnic Problems: Myths and Realities*, LANKA GUARDIAN, Nov. 1, 1983.

42. Act No. 33 (1956).

43. *Id.* at § 2.

44. See UNP Election Manifesto, Colombo, 1977, and its statements and undertakings concerning *The Problems of the Tamil Speaking People*.



cial" language and "the language of administration throughout Sri Lanka," both Tamil and Sinhala were declared to be "national" languages.<sup>45</sup> The new Constitution provided that both languages may be used in Parliament, though English is also used in Parliament and Hansard is published in all three languages, and that official documents and laws must be published in both Sinhala and Tamil.<sup>46</sup> Under the Constitution, candidates at any official examination are entitled to be examined, and students are entitled to education, in either of the two official languages. The Tamil language is required to be used in addition to Sinhala as the language of administration and in the courts<sup>47</sup> of the northern and eastern regions,<sup>48</sup> and any person is entitled to "receive communications from, and to communicate and transact business with, any official in his official capacity, in either of the national languages."<sup>49</sup>

The protection thus accorded to the Tamil language by the 1978 Constitution was a very fair recognition of the rights of an 18% majority. Unfortunately, the failure has been in its implementation. The constitutional recognition was not resized in practice and Sinhala continued to be used as the language of communication by government departments even when entirely inappropriate, for instance in replies to letters written in Tamil by Tamil people.

### iii. "Colonization"

Another major factor which has caused severe problems and resentments is the policy, carried out by successive governments over a long period of time, of land redistribution, or "colonization" as it is called in Sri Lanka. This process began when the British brought Tamils from India to work on the plantations in the nineteenth century and placed them on land taken from Sinhalese people in the hill country to the great resentment of those displaced. More recently, from the 1930's onwards, successive governments have adopted a policy of settlement of the north, central and eastern regions of the island. This has been done as formerly dry and unproductive areas have been rendered fertile by irrigation schemes and has consisted mainly in the resettling of Sinhalese people from the more densely populated southern areas.

From the outset the Tamil people have objected that this program affected land within the regions they have regarded as their traditional homelands. They regard the relocation of large numbers of Sinhalese into the areas where Tamils have historically formed a high proportion of the population as a deliberate plan to bring about a change in the ethnic composition of those areas. The resettlement program has inevitably re-

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45. SRI LANKA CONST. art. 19 (1978).

46. *Id.* at arts. 22-23.

47. Direction made under SRI LANKA CONST. art. 24(1)(a) (1978), on Sept. 7, 1978, reprinted in GAZETTE EXTRAORDINARY, No. 1/6.

48. *Id.* at art. 22(1).

49. SRI LANKA CONST. art. 22(2) (1978).

duced the effectiveness of Tamil voting power in these parts of the country.

Some Sinhalese, on the other hand, see these Tamil protests as further evidence of what they view as the inflated demands which this group continually makes, perceiving the underlying motivation as being the desire of a minority group to secure for itself large tracts of hitherto sparsely occupied land.

The government approach is that Sri Lanka is home to all Sri Lankans, that all citizens should be free to live in any part of the island, and that the colonization programs give due recognition to the rights of everyone. The argument here is that under the programs, the people are resettled in numbers proportionate to the ethnic composition of the entire island.<sup>50</sup>

Colonization has been a source of agitation for many years and proposed resolutions have included more than one agreement reached between government and Tamil leaders. The first such agreement was made in 1957.<sup>51</sup> This, and a later agreement made in 1965<sup>52</sup> were both abandoned unilaterally by the different governments which had made them in response to pressures mounted against their implementation by the opposition parties of the time.<sup>53</sup>

#### e. Tamil Moves Towards Violent Opposition

The approach adopted by Tamils to secure what they regard as their due measure of recognition within the country was, for the first thirty years after Independence, a peaceful one. They sought a federal arrangement within one country, not a separate state, and did not resort to, nor advocate, violence as a means of achieving this. In the mid-1970's however, disillusioned and feeling that they were steadily losing ground, the Tamil political parties reformed themselves as one party, the Tamil United Liberation Front (TULF). One of the planks in TULF's election platform was separatism, although with the stated aim of achieving this through negotiation and not by force.

On this platform, TULF gained all the seats in the northern part of the country, some of those in the eastern region, and became the major opposition party at the 1977 general election. At about the same time, a small group of Tamil youth declared their intention to establish a separate state and began to resort to violence. Until this time the conduct of most Tamil people in Sri Lanka had indicated that they opposed an approach of force.

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50. During my visits to Sri Lanka I have been unable to locate any statistics from which it is possible to verify the actual numbers and ethnic proportions of those who have been resettled under the schemes.

51. Bandaranaike-Chelvanayakam Pact

52. Senanayake-Chelvanayakam Pact.

53. HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1, at 21-22.

f. Government Responses to Growing Tamil Militancy

In order to check the rise of Tamil militancy, the demand for a separate state, and other forms of opposition, the Jayawardene government took a number of measures seriously curtailing rights in circumstances where these curtailments were not "strictly required by the exigencies of the situation," and hence were not legitimate under Article 4 of the International Covenant on Civil and Political Rights.<sup>54</sup>

In response to criticisms, the government repeatedly argued that the steps were essential and that the country was in a state of emergency. Ironically, the exacerbation of the situation to this degree may have been brought about in no small measure by restrictions which were excessive from the outset. Indeed, even given a justifiable state of emergency, some of the provisions taken were so extreme as to be in contravention of applicable international human rights norms.

The history of the relevant legislative measures is as follows. In 1979 harsh preventive detention legislation was enacted,<sup>55</sup> first as a temporary measure but made permanent in 1982.<sup>56</sup> This prevention of terrorism legislation, although general in its wording, until the late 1980's was directed almost exclusively at young Tamil males. Indeed in many villages all the young Tamil males were rounded up and arrested simply because their age and ethnic origin were deemed by the security forces to make it likely that they may, at some time, engage in militant activities.<sup>57</sup>

Successive states of emergency were declared in the early 1980's and, from May 1983 until after President Jayawardene stepped down and President Premadasa came to power in 1989, a continuous state of emergency was maintained covering the whole island. Laws promulgated under this emergency regime,<sup>58</sup> together with the prevention of terrorism legislation, have permitted, *inter alia*: strict censorship of the media,<sup>59</sup> silencing of political opposition,<sup>60</sup> prolonged detention without charge or trial, arbitrary arrests and imprisonment, and the holding of detainees incommunicado, in army camps and police cells.<sup>61</sup> Many detainees have been tortured, some murdered, many others have "disappeared." Inquests into the deaths of those who have died in state custody have been suspended except when deemed permissible by security personnel.<sup>62</sup> The prevention

54. *Supra* note 15.

55. Prevention of Terrorism (Temporary Provisions) Act, No. 48 (1979).

56. Act No. 10 (1982).

57. HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1, at 43-45.

58. The emergency regulations were brought into existence by proclamation as required by art. 155(3) of the Constitution, and renewed as required by resolutions passed by a 2/3 majority of parliament under art. 155(8). The authority for the enactment of the emergency regulations is the Public Security Ordinance, sec. 5.

59. Reg. 14.

60. Regs. 12, 28, 68.

61. Regs. 16-20.

62. Reg. 55A-G.

of terrorism legislation and emergency regulations, although initially used primarily against Tamils, have since been used also in the south against insurgent Sinhalese groups.

Other emergency regulations imposed on Tamil-dominated areas in the north and east of the island are so stringent that, where implemented, they have caused massive disruption to the normal civilian life of the areas affected. Essential services have ground to a halt, hospitals could not function adequately, factories were closed, farming could not be carried out, transportation could not function, schooling was disrupted, and banks and post offices did not operate. There were grave shortages of food, fuel, medical and other supplies. The result: deprivation, hardship and suffering and, from time to time, an exodus of great numbers of Tamils fleeing to southern India and elsewhere.

The emergency regulations and the prevention of terrorism legislation, and their mode of implementation, have over the years led to an increasing feeling amongst the Tamil people that the government identifies the entire Tamil population of the north and east, and not just the militant elements, as its enemy. The consequence has been increasing fear and resentment amongst the people in these areas and, despite increasing violence by Tamil militants, a growing feeling in the minds of more and more hitherto peaceful Tamil people that their only hopes of salvation lie with the militants.

g. Erosions of Democracy and the Rule of Law

i. Erosions of Democracy

The 1978 Constitution established a system conferring very wide executive powers on the President.<sup>63</sup> At the 1977 general elections, the United National Party (UNP) government gained a landslide victory, winning 140 of the 168 seats in Parliament. Landslide victories are not uncommon in Sri Lankan elections. Until 1977, since which date the UNP has retained its hold on power, it and the Sri Lanka Freedom Party (SLFP), alternated in office at each election with tremendous swings in the numbers of votes received on each occasion.

Under the 1978 Constitution, elections were due in 1983 but were not held. Instead, in 1982 the government used its large majority to amend the Constitution<sup>64</sup> in order to allow the Parliament to remain in power for a further six years without a general election but on the result of a referendum. By this means the government, by a vote of 54.6%, retained its huge parliamentary majority.<sup>65</sup> In the meantime, the President held in his

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63. See SRI LANKA CONST. arts. 30, 35, 43-44, 46-47, 52, 54 (1978).

64. *Id.* at amend. IV.

65. In August 1982, the Third Amendment to the Constitution was passed. This inserted a new provision, Article 31(3A), empowering the incumbent President to go to the people after only four years of his six year term in office, and to hold an election at that

possession signed, undated letters of resignation of all the Members of Parliament of his party.

The referendum to extend the life of the Parliament was held under strictures which severely hampered the opposition campaign. Some opposition politicians were detained under emergency regulations. Some have been stripped of their civic rights. Some opposition papers were banned and some opposition presses were sealed. The polling itself was marred by the harassment of electoral officers, candidates and voters.<sup>66</sup>

## ii. Changes in Electoral Laws

The Ceylon (Parliamentary Elections) Order-in-Council of 1946 was amended in 1984<sup>67</sup> in a manner which gave rise to several concerns. For instance: henceforth, a result may be declared even if ballot boxes are missing. Further, an "information," which need not be in writing, stating it is not possible to commence or continue a poll due to "the occurrence of events of such a nature," described as a "disturbance" in the marginal note, is conclusive of the existence of those events.<sup>68</sup> Once an information has been made, counting can commence without the receipt of the ballot boxes from the polling station at which a "disturbance" has been reported, and the result can be declared without these votes being counted.<sup>69</sup>

The effect is to disenfranchise those voters whose votes are in the ballot boxes which do not reach the counting station, and also to disenfranchise those who cannot vote due to the occurrence of "events of such a nature." In effect the legislation concedes election irregularities to be a feature of Sri Lankan life, yet until the time of the Jaffna Council elections in 1981, at which blatant irregularities occurred, elections in Sri Lanka had always been conducted openly and honestly. The procedure this legislation establishes for the counting of votes and the declaration of winning candidates in circumstances where "disturbances" have occurred allows a severe erosion of principles whose maintenance is essential if a truly democratic system is to survive.

## iii. Threats to the Independence of the Judiciary

The independence of the judiciary is well provided for under the 1978 Constitution.<sup>70</sup> Despite this, the independence of judges has been threatened more than once in recent years. Constitutional guarantees depend for their effectiveness on a determination by those with substantial

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time seeking a mandate for a further term. The President did this and in an election boycotted by many Tamils, he received 52.9% of the total number of votes polled.

66. See Civil Rights Movement of Sri Lanka, Colombo, *Was the Referendum Free and Fair?* (1983).

67. Act No. 36 (1984).

68. *Id.* at § 47A.

69. *Id.* at § 48.

70. *E.g.*, SRI LANKA CONST. arts. 107-08, 116 (1978).

power under the Constitution that the guarantees be given force.

The transitional provisions of the 1978 Constitution state: "[A]ll judges of the Supreme Court and the High Courts . . . holding office on the day immediately before the commencement of the Constitution shall, on the commencement of the Constitution, cease to hold office."<sup>71</sup> This gave the Jaywardene government the opportunity, which it took, to effectively remove a number of judges from the former court by not re-appointing them and, instead, to appoint others to positions on the newly established Supreme Court. Many lawyers in Sri Lanka saw the changes thus made to have been politically motivated. By taking this action the government was able to avoid the effect of the constitutional safeguards to secure the tenure of the judiciary.

In two cases in the early 1980's,<sup>72</sup> members of the police force were promoted after being found by the Supreme Court to have acted unlawfully. In each case the Supreme Court had heard complaints brought against the police officers concerned under Article 126, which gives the Supreme Court sole and exclusive jurisdiction to determine questions relating to the infringement, by executive or administrative action, of any fundamental right protected by the Constitution. The Court had, in both cases, found that the rights of the complainant had been infringed. The promotions were reported to be made to ensure that public officials should "follow orders without fear of consequence from adverse court decisions."<sup>73</sup>

Two days after the handing down of the judgment for the second case the houses of the three Supreme Court judges concerned were surrounded by rowdy mobs shouting obscenities, creating disturbances, and carrying placards referring to the judgment. No one was hurt, but all attempts by the judges to obtain the assistance of the police proved futile. An editorial in *The Island*, on the 13th June, 1983, stated:

There is proof that the demonstrators had been brought in buses. The authorities must initiate an immediate enquiry to ascertain who was responsible for this demonstration and why the police failed to respond . . . If the judges of the Supreme Court cannot receive immediate protection from the vulgar mobs what chance will the ordinary citizen stand?

No such enquiries were held and no action was taken. Such a situa-

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71. *Id.* at art. 163.

72. In the first case the Rev. Dharamitipola Ratanasata, Secretary to Pavid Handa, brought an action claiming infringement of the right to freedom of expression under Art. 126 after the Superintendent of Police had seized 20,000 of the organizations's leaflets in which opposition was expressed to the 1983 referendum to extend the life of Parliament. The second case arose out of an incident during an International Women's Day demonstration in March 1983 when Mrs. Vivienne Goonewardene, a former MP, complained she was assaulted while in a police station inquiring about a photographer apprehended during the demonstration.

73. Civil Rights Movement Publication, Ref CRM E 2/6/83 Colombo, 1983.

tion neither protects the independence of the judiciary nor serves to reinforce, in the minds of the citizens of the country, a belief that the rule of law will be respected and observed.

Twice shortly thereafter allegations of impropriety in the behavior of judges of the Supreme Court were made, and were considered by Select Committees of Parliament set up for the purpose. At the time many people expressed concern that, taking into account the background in both cases, i.e. judgments delivered of which the executive disapproved, and statements made that were critical of the executive, the bringing of the two judges in question before a Select Committee of Parliament was intended to clearly indicate to them that they are subordinate to, and not independent of, the executive and the legislature. Democracy cannot survive long without an independent judiciary. In Blackstone's words:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.<sup>74</sup>

#### h. Other Incidents Which Have Tended to Encourage Lawlessness

In recent years other incidents also have tended to encourage lawlessness and to reduce the confidence of ordinary citizens in the power, or willingness, of the legitimate forces of government to protect them.<sup>75</sup> Attacks by organized mobs occur not infrequently, and result in murders, rape, destruction of property and looting. There has been strong evidence of complicity by the security forces in some of these attacks. Nonetheless the government has repeatedly failed to instigate independent, public and impartial inquiries to identify, and bring to account, those responsible. Indemnity legislation has been passed on at least two occasions to restrict legal proceedings against Ministers, Deputy Ministers or any person holding office in the government.<sup>76</sup> Such legislation inevitably gives rise to the impression that the government has condoned any breaches of the law which may have been committed by these people.

Acts of violence are an increasingly common occurrence. Vigilante groups flourish. Human Rights activists are threatened, tortured and killed. The numbers of lawyers willing to take cases involving human rights issues decreased dramatically in 1989 and 1990 as the killings increased. Since the perpetrators and organizers of these atrocities are not

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74. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 269 (T. Tegg, 1830).

75. See generally SOME SIGNIFICANT EXAMPLES OF INCIDENTS TENDING TO ENCOURAGE LAWLESSNESS: CIVIL RIGHTS MOVEMENT IN SRI LANKA, COLOMBO, reproduced as Appendix XI, HYNDMAN, DEMOCRACY IN PERIL, *supra* note 1, at 361-3.

76. See, e.g., Indemnity Act, Act No. 20, 1982.

apprehended and brought before the courts, lawlessness and intimidating behavior carried out by a variety of different groups have become more and more prevalent. A climate of impunity has been allowed to develop.

As mentioned earlier, the repressive measures and the violence initially used against Tamils in the northern and eastern parts of the country has, more recently, been used also in southern Sri Lanka against militant Sinhalese, those suspected of being militant, and their families. Sinhalese as well as Tamils were fearful of arbitrary arrest, detention and torture, and many of them left the country in search of asylum elsewhere. Sixty thousand deaths are said to be attributable to the excesses of the security forces in the wake of the recent failed insurrection in the south by the rural Sinhalese Marxist J.V.P. movement.<sup>77</sup> As in countries of South America, mothers here have organized marches to bring attention to the increasing numbers of people taken into detention who simply "disappear."

The violence developed to involve factions of Sinhalese against each other and against the government, as well as security forces against them and against the Tamils in the north. Rival Tamil militant groups carry out vendettas against each other. Corpses have been found at the sides of roads encircled by tires filled with petrol and ignited, or bodies are found hanged from lamp posts, or with heads severed. In fact violence seems to have become a way of life in Sri Lanka, the instant solution to all problems, though more recently, the situation in the south has become much calmer.

#### i. The Present Position

The tragedy of the catalogue of events just recited is all the more disturbing when viewed against the context in which it has occurred. Until the early 1980's, Sri Lanka was widely regarded as a country with an excellent reputation for upholding democratic principles, in which human rights were respected and where the rule of law prevailed. Moreover, the present situation of erosion of democratic values, weakening of the authority of the rule of law, perpetration of violence, and provocation of racial antagonism has occurred against the background of a country with considerable assets.

Statistics from the early 1980s show the population to be highly literate, with an 85% literacy rate among adults, life expectancy of 69 years, and a low infant mortality rate of 37.7 per thousand. While the per capita income of the country has never been high, Sri Lanka possesses the essential resources to be successful. The island is not overpopulated, enjoys a good climate, and possesses large areas of forests, fertile lands, abundant farming and fishing and productive plantations. Physically, Sri Lanka is remarkably beautiful. It has a long-established civilization, many historical monuments of great interest and antiquity, a rich and varied culture

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77. British Refugee Council, SRI LANKA MONITOR, March 1991, at 4.



and, the present problems notwithstanding, a charming, friendly and overwhelmingly hospital people.

Yet escalating violence of the kind described above has occurred and must, eventually, reach the stage where it causes total collapse of normal civilized society. In parts of Sri Lanka it would seem, sadly, that this is precisely what has now come about.

I do not know when you will get this letter — if at all. But I am sending it through some priests who are going abroad — to Colombo, Sri Lanka!!! you may laugh - but the sad reality is such.

The North and East is completely cut off from the rest of the island and the world. No telecommunication, no postal service, no transport, no electricity —no everything. No food is allowed to be brought in except through the Red Cross who managed to bring in just a few tons of food. Food items are gone up in price by six or seven times. Petrol, diesel and kerosene by twelve times as these are brought in illicitly on *bicycles* from *115 miles away*. There are more than five hundred thousand refugees in the North and East by government estimates. A good number are in camps but the majority are with friends, relatives, and good Samaritans.

Here, one of the tragic experiences one faces daily is the bombing of civilian targets *night and day*. Every night, every day. Our Bishop's house bombed, our Cathedral bombed, hospitals bombed, power station bombed, *thousands of houses* demolished in Jaffna, Kilinochchi, Vavunya, Trincomalee, Manar, Batticaloa. Killing civilians, where the Sri Lankan army is in control, is a routine affair — with the help of the so called Home Guards. More than 75,000 refugees as at yesterday have gone to India. Often one hears of many dead bodies being washed ashore, shot by the Sri Lankan Navy, or by overloading.

I cover a broad range from one end of my parish to the other, with many churches, and some small islands. Though the parish had a vehicle and a boat, now due to scarcity of fuel much of my travelling for services — both religious and humanitarian — is on the bike. (To the islands of course by sail boat). There is a co-Pastor who helps me. At the moment, much of my time is spent on looking after the welfare of the refugees. Every church is being organized to cater to the refugees. Many weary refugees trek through my parish to find boats to India. Their stories are just tragic. I have no space or time to write them to you just now. May be one day. . . .<sup>78</sup>

#### j. Sri Lanka: A Producer of Asylum Seekers

One consequence of these events has been that Sri Lanka has become a major producer of asylum seekers. As recounted in the letter, thousands of people are displaced within the country in search of sanctuary from

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78. Extract of a letter written from Northern Sri Lanka August 1990.

violence, thousands from the north are trying to get to India, many others are reaching countries further afield by plane and applying for refugee status there. At the same time international refugee protection is experiencing a period of severe strain.

As summarized in December 1990:

[T]he number of refugees has almost doubled in the last ten years . . . the resources available to UNHCR [the Office with the UN mandate for the protection of refugees] have hardly increased at all. The basic needs of many uprooted people are not being met. Many of the world's poorer countries, where the largest concentrations of refugees are to be found, are struggling to cope with the pressure that the new arrivals have placed on scarce resources. In the Third World there is now a discernible tendency to make asylum and protection conditional upon adequate levels of assistance. In the industrialized states, both politicians and the public have reacted negatively to the growing number of people seeking sanctuary in their territory. The principles of refugee protection, painstakingly developed over the course of the last 40 years, are increasingly being challenged . . . .<sup>79</sup>

The situation in Sri Lanka and the exodus from the country is adding to the crisis.

Government acceptance of obligations towards refugees is made in a compromise between the state's absolute power to decide who may enter and remain in the country, and the recognition of a wider requirement to assume, and honor, commitments to people recognized by the international community to be deserving of international protection. The definition of such people — "refugees" — is a restrictive one. Only those with a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion satisfy its criteria under international law.<sup>80</sup>

Developed states which earlier might have more generously offered places of resettlement for refugees already in camps in countries of first-asylum, or which might more generously have accommodated those arriving at their borders and seeking to remain there, are today experiencing something described as "compassion fatigue."

The 1970's and the 1980's have seen the advent of first "boat" and now of "jet" refugees. No longer do asylum-seekers merely cross neighboring borders. Modern forms of travel, particularly air travel, has produced the phenomenon of large numbers arriving at the borders of countries geographically far removed from their country of origin, countries with which there are often no historical, linguistic or cultural ties. With a worsening economic recession, and increasing numbers arriving in this manner, these distant states are becoming increasingly reluctant to enter-

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79. UNHCR, 1990: *THE GLOBAL OUTLOOK, REFUGEES*, Dec. 1990, at 3.

80. Convention Relating to the Status of Refugees art. 1A(2), 19 U.S.T. 6260; T.I.A.S. 6577; 189 U.N.T.S. 137 (1951).

tain claims for asylum from people for whom they feel no special responsibility. The situation is exacerbated as governments view large numbers of these people not as "genuine refugees" but as people in search of a higher standard of living, or "economic refugees." In addition they are frequently seen as attempting to by-pass normal immigration procedures and to "queue-jump" to achieve their ends. Governments express concern for refugees already in camps whose chances of receiving resettlement offers from third countries may diminish if great numbers of people arrive to claim refugee status directly from resettlement states; such arrivals may exhaust the number of places which any given government is prepared to offer for refugee resettlement.

The consequence? An unsympathetic response to all asylum-seekers. Sometimes no access is provided to refugee status determination procedures, sometimes the procedures which do exist are not fair procedures, sometimes the 1951 Refugee Convention definition criteria receive an excessively strict interpretation, sometimes there are forcible repatriations to the country of origin. In other instances people are rejected at the frontier on the basis that another state has a more direct and immediate responsibility. The rejecting state does not always ascertain that this third state will in fact honor this responsibility.<sup>81</sup>

In the result there is the danger that genuine refugees may be returned, directly or indirectly, to the territory from which they have fled. Such return, if the people in question are refugees according to international law, is contrary to the obligations imposed by the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol<sup>82</sup> and, relevant to states which are not signatories to these international instruments, may also be contrary to customary international law.

Asylum-seekers from Sri Lanka who apply for refugee status in distant states are both contributing to the factors which are bringing refugee protection under strain and, in some cases, are themselves falling victim to those strains.

### C. *Concluding Comments on Part II*

The current situation of violence and ethnic tensions within Sri Lanka is one which perhaps wise statesmanship could have avoided. Unfortunately, as is so often the case, the steps taken were frequently steps to secure short-term political advantage while the rights of many of the people of Sri Lanka, or of particular groups of them, were ignored. Succeeding governments, political parties in opposition and other powerful factions, militant groups included: all have contributed to this state of affairs.

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81. See, e.g., J. Crawford and Patricia Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 INT'L J. REFUGEE L. 155 (1989).

82. Convention Relating to the Status of Refugees, 1967, 19 U.S.T. 6223, TIAS No. 6577.

Once violence erupts, the taking of violent measures to control its perpetrators is a comprehensible, instinctive response, but a circular pattern is thereby set in motion, and violence begets violence. This is precisely the type of instinctive "eye for an eye, tooth for a tooth" response that civilized society and the establishment of legal systems has sought to transcend and relegate to the level of an historical anachronism. Long-term solutions will be achieved only through negotiation and removal of the grievances which underlie militant movements. There is ample evidence, both in Sri Lanka and elsewhere, that strong legislative, administrative and military measures by governments in attempts to deal with movements expressive of dissatisfaction do not work and the victory, at any level of society, achieved as a result of coercion merely sets the stage for later retaliation.

### III. THE NEED FOR MORE EFFECTIVE PROTECTION OF HUMAN RIGHTS

What then can be done? Protection of basic rights, of the independence of the judiciary, and of access to a fair and democratic system is provided under the Sri Lankan Constitution yet this protection has not proved effective. The reality is that national guarantees of fundamental rights, however impressive their appearance, will only be as effective as those wielding real power allow them to be. When use (and abuse) is made of declarations of states of emergency in circumstances not strictly in conformity with the requirements of international human rights law, when opportunity is taken in these periods to increase the power in the hands of the executive body and/or military forces, when minority groups are not afforded protection and respect, when the independence of the judiciary is not jealously maintained, and easy and effective access to both the legal system and the democratic processes are not assured, provisions protecting the rights of individuals, whether in ordinary legislation, the common law or enshrined in the constitutional document, simply will not work.

Such provisions may look good, and they may, to a degree, enable the rulers of the state possessing them to posture on the international stage, but in the final analysis they will not achieve their purpose: the protection of the rights of the citizens of the country in whose laws they feature. This is not to say that the enactment of laws, or constitutional provisions, which aim to achieve this purpose should not be encouraged but that without more they cannot be expected to prove effective in all circumstances. In times of crisis politics tend to override both constitutions and national legal protections.

Is there any guide from international human rights law? The Preamble to the Charter of the United Nations, in its statement of that organization's aims, ranks respects for human rights second only to the need to save later generations from the scourge of war. On joining the United Nations, member states "pledge themselves to take joint and separate action" for the achievement of the United Nations' goal of the promotion of respect for human rights and fundamental freedoms "for all without dis-

inction as to race, sex, language or religion."<sup>83</sup>

In 1948 the United Nations adopted the Universal Declaration of Human Rights.<sup>84</sup> Today the rights it enunciates, encompassing civil, political, economic, social and cultural rights, are, for the most part, encapsulated in and made legally binding on the states parties to them, including Sri Lanka, by the two major international covenants on human rights: the International Covenant on Civil and Political Rights<sup>85</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>86</sup> Undeniably, despite the considerable number of ratifications of these and other important international human rights instruments, the human rights record of some of the signatory states leaves much to be desired. Nonetheless, despite limitations to the effectiveness of international human rights instruments, their finalization and adoption is a significant step forward in that they provide an agreed, if not always observed, measure which governments have accepted as the standards of human rights they are required to afford to those within their jurisdictions. No longer can ratifying governments claim with any legitimacy that breaches of these obligations towards people resident within their territory is a matter of domestic jurisdiction only, and not a matter of proper concern to the wider international community. By their signatures, any breaches of these instruments become breaches of those governments' binding obligations under international law.

In addition to these developments at the global level, there have been regional initiatives. First European states, and then the states of Latin America developed human rights instruments.<sup>87</sup> Both regions have established regional commissions and courts of human rights. Recently the Organization of African Unity developed a regional charter of human rights and, in 1987, established a commission of human rights.<sup>88</sup> The Arab region, which has a commission on human rights, has now produced a draft regional charter of human rights.

The regional settlement of disputes threatening international peace and security is envisaged in Articles 33 and 52 of the United Nations

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83. U.N. CHARTER preamble.

84. Universal Declaration of Human Rights art. 16(3), G.A. Rés. 217A (III), U.N. Doc. A/810 (1948), reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 10.1 (1985).

85. *Supra* note 15.

86. *Supra* note 12.

87. See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222; and American Declaration of the Rights and Duties of Man, OAS Treaty Series No. 36, OAS, OR, OEA/Ser.A/16, reprinted in 9 I.L.M. 673 (1970) and the American Convention on Human Rights, OAS, OR, OEA/SER.L/V/E.23, Doc. 21, Rev. 2 (1948).

88. See African Charter on Human and People's Rights (Banjul Charter), adopted June 27, 1981, entered into force Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/Rev.5, reprinted in 21 I.L.M. 59 (1981). In late 1987, the African Commission on Human Rights, created by the African Charter, began to function.

Charter and can, quite legitimately, be extended to disputes concerning human rights violations. In fact Article 44 of the International Covenant on Civil and Political Rights expressly recognizes this.<sup>89</sup> There are some legitimate concerns, however, concerning the form which regional human rights instruments might take. The whole concept of universal human rights can be threatened if regional instruments stray from the basic norms of the international instruments and, as a consequence, produce one set of human rights for Africa, a different set in the Americas, yet another in Europe and so on. The United Nations has from time to time expressed reservations to regional arrangements on this score, and care does need to be exercised to ensure that the rights in the universal instruments are strictly maintained in all regional documents.

Despite these cautions, when it comes to implementation there is much to be said for the establishment of regional systems. Many states which have recently shaken off the yoke of colonialism are not happy at conceding part of their new found independence to any external system, particularly to one located in a remote area of the world, and more particularly if that is the geographical location of their former colonial rulers. Further, the same system of implementation will not necessarily be appropriate in different parts of the world given, to take just one example, the widely differing geographical considerations of size and distance operating, for instance in Europe as compared to the Pacific. Also, regional mechanisms have an advantage over the global in that the nations cooperating within a regional framework are likely to have certain commonalities eg of culture, language, law and political and economic institutions and, in such a context, measures adopted for the promotion and implementation of human rights standards are likely to be more realistic and practicable than are their United Nations counterparts.

Certainly the European and Inter-American systems have developed much more effective implementation procedures than has been possible at the global level. It is too early yet to know how effective the African Commission will be. The Inter-American system was founded and operates in a region which has seen severe breaches of human rights not unlike those just catalogued in the case of Sri Lanka, yet through its establishment of an individual petition system, its scrutiny even of states in its region which have not ratified the Inter-American Convention on Human Rights, its reporting on country situation, its sending of on-site missions and its constant emphasis on the need for democratic systems of government and the observance of the rule of law, has done a great deal to encourage a return of democracy to states within that region in recent years.<sup>90</sup>

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89. *Supra* note 15.

90. For a good account of the system, see R.E. Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 108-132 (H. Hannum ed., 1984).

Notably absent from concrete regional arrangements are the Asian and Pacific states. During the last decade, a regional body, the Law Association for Asia and the Pacific (LAWASIA), has taken steps aimed at encouraging wide-ranging discussion of possible regional and sub-regional arrangements for this area, and in the next section of the paper the steps so far taken by the LAWASIA Human Rights Committee are briefly outlined.

#### A. *Steps Taken by the Lawasia Human Rights Committee*

The LAWASIA Human Rights Committee has had a continuing interest in the establishment of human rights mechanisms in the region since it came into being at the Sixth LAWASIA Conference held (ironically it now seems) in Colombo in 1979. From the outset one of the Committee's terms of reference has been to initiate steps towards the ultimate establishment of an Asian Commission and/or Court of Human Rights.

Unlike Europe, Africa and the Americas, the Asia Pacific region has no existing inter-governmental structure with which a regional human rights commission could be associated. For this and other reasons the Committee has seen the establishment of such a commission as a long-term project, and has felt it desirable to approach the task in stages. The Committee therefore has sought to promote the protection of human rights in the region in several different ways: first, through its dissemination of information concerning human rights issues; second, through its services in setting in motion the meetings which established a regional coalition of non-governmental human rights organizations; and third, through the taking of specific steps which it is hoped ultimately will lead to the establishment of sub-regional (and eventually of a regional) commission.

##### 1. Dissemination

In furtherance of this goal, the Committee, like many other human rights NGO's, has produced and distributed various publications. It has commissioned the translation of the Universal Declaration on Human Rights, the International Covenant on Political and Civil Rights and the International Covenant on Economic, Cultural and Social Rights into several important Asian languages, including Thai, Filipino, Hindi, Malay and Burmese. The Committee has produced and published several reports covering human rights issues of importance in the region, e.g. reports on militarization in the Pacific,<sup>91</sup> on the status of women,<sup>92</sup> on issues concerning indigenous populations,<sup>93</sup> on the situation in Burma,<sup>94</sup> and in

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91. LAWASIA Human Rights Newsletter, September 1986.

92. LAWASIA, *Women and the Law* (Lahore, 1987).

93. LAWASIA, *Aboriginal Deaths in Custody* (Sydney, 1987).

94. M. Szeinvok, *Burma* (LAWASIA, Sydney, 1988).

March 1991 on the situation in Tibet.<sup>96</sup> In addition, it has convened a number of conferences on matters of regional human rights concern, e.g. on the status of women, on the independence of the judiciary and of the legal profession, and on the exploitation of children. Since governments in Asia and the Pacific have a poor record in terms of the numbers of accessions to and ratifications of international human rights instruments the committee has actively urged them to ratify the major international human rights instruments. The Committee sends observer missions to contentious human rights trials and to situations raising serious human rights issues and publishes reports of these missions, e.g. to Pakistan,<sup>96</sup> Sri Lanka,<sup>97</sup> mainland Malaysia,<sup>98</sup> and Sarawak.<sup>99</sup>

## 2. The Establishment of a Regional Coalition of Human Rights NGO's

An initiative which the LAWASIA Human Rights standing Committee took in its early years was to play the role of catalyst in the formation of a regional coalition of non-governmental human rights organizations. The lack of inter-governmental structures to protect human rights in the Asia Pacific region has meant that the activities of non-governmental organizations have assumed greater significance in the protection and promotion of human rights than might otherwise have been the case. Cooperation and contact between active non-governmental human rights organizations has the potential to fulfil a variety of useful purposes: to enable more effective pursuit of common goals, to provide contact, information and support, the opportunity to avoid duplication of effort and also to provide assistance in the protection of members who are, from time to time subject to harassment simply by virtue of their activities.

Accordingly, the LAWASIA Human Rights Committee in the early 1980's organized and addressed a series of meetings of groups of non-governmental human rights bodies to explore the kinds of co-operation which might be useful. The NGO's attending the first meeting held in Bangkok in 1981 were very much in favor of establishing some loose form of organization, and the Committee undertook to perform a co-ordination role. Subsequently, NGO meetings were held in Colombo in June 1982, in New Delhi in October 1982 and in Manila in September 1983. At the 1983 meeting, attended by 27 organizations from 12 countries, the Asian Coalition of Human Rights Organizations (ACHRO) was formed. This body, as established in Manila, is separate from and independent of LAWASIA, and since that time has pursued its own vigorous program of activities.

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95. LAWASIA-TIN Report, *DEFYING THE DRAGON* (1991).

96. See generally R. NICHOLSON, *REPORT TO THE LAWASIA COUNCIL ON THE INDEPENDENCE AND FREEDOM OF LAWYERS IN PAKISTAN* (1982).

97. HYNDMAN, *DEMOCRACY IN PERIL*, *supra* note 1.

98. See generally D. MALCOLM, *THE TRIAL OF PARAM CUMARASWAMY* (1986).

99. See generally D. BONIFACE, *CASES AGAINST PENAN TRIBAL MEMBERS IN SARAWAK* (1988).



### 3. Moves Towards the Establishment of Regional and Sub-regional Human Rights Commissions

At the Sixth LAWASIA Conference, Mr. P.J. Downey of New Zealand, later to become the Co-Chairman, with Mr. F.S. Nariman of India, of the LAWASIA Human Rights Committee, presented a paper advocating the creation of a Human Rights Commission for the South Pacific region, urging that such a move would be a viable step towards the eventual establishment of a Commission of Human Rights for the entire Asia-Pacific region.

Shortly afterwards, Dr. D.H. Geddes, then Secretary General for LAWASIA, prepared a background paper<sup>100</sup> for the U.N. convened Seminar on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region held in Colombo in June 1982. In this paper Dr. Geddes canvassed the desirability and difficulties of setting up a regional human rights commission. He looked at the history of the establishment of the European, African, American and Arab Commissions, and pointed out that, with these as examples, it should be possible, allowing for the differences appropriate to the context of this region, to set up such a body here. He concluded, however, that since there was no inter-governmental structure for the region as a whole, it would be wise to approach the task in stages, with the establishment of a regional Human Rights Commission being the ultimate goal. Indeed, the U.N. Colombo Seminar did not resolve to establish such a Commission, seeing it as a very long term project indeed.

Dr. Geddes recommended, among other approaches, the creation of sub-regional commissions as a preliminary step to the setting up of an overall regional human rights commission. For this purpose he divided the area into four sub-regions: the Western Region (Iran, Afghanistan, India, Pakistan, Bangladesh and Sri Lanka); the Central, expanded ASEAN region (Burma, Thailand, Laos, Kampuchea, Vietnam, Malaysia, Singapore Indonesia, Philippines); the South and Western Region (Australia, New Zealand, Papua New Guinea, Fiji and the Pacific Island communities); and the North and North-Eastern Region (China, Hong Kong, North Korea, South Korea and Japan).

In many ways the Pacific region would be the one easiest to tackle first for the reasons outlined in Mr. P.J. Downey's paper presented to the Sixth LAWASIA Conference: cultural affinity, a good degree of political understanding, a certain historical involvement, relationships of trade and through the continual movements of people in and around the region. There is generally good human rights record in this part of the world, something seen as a promising sign in that it indicates a climate favorable to, and respectful of, human rights. In addition there are existing structural groupings, such as the South Pacific Commission and judicial con-

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100. This paper is reproduced in LAWASIA, *Recent Trends in Human Rights* (1982).

ferences are held regularly. Such structures could well provide a base of co-operation from which to begin to build.

In April 1985, the LAWASIA Human Rights Standing Committee convened a Seminar in Fiji to consider prospects for the establishment of a Pacific Human Rights Commission.<sup>101</sup> The sixty-three participants were all people keenly interested in human rights. Delegates attended from Australia, Belau, Cook Islands, Eastern Caroline Islands, Fiji, France, French Polynesia, Hawaii, Korea, Malaysia Philippines, Nauru, New Caledonia, New Zealand, Solomon Islands, Sri Lanka and Western Samoa. They included lawyers, non-governmental representatives, social workers, judges, church workers, academics and representatives of minority (including indigenous) groups.

Included amongst the speakers were a Senior Lawyer with the European Commission of Human Rights; the Minister for Foreign Affairs of the Provisional Government of Kanaky; the Vice President of the World Council of Indigenous People; an anti-nuclear lawyer from the Republic of Belau; the Chairman of the New Zealand Human Rights Commission and the Deputy Chairman of the Australian Human Rights Commission. The conference was opened by the Fijian Minister of Justice and Attorney-General. Government observers from Fiji, Papua New Guinea, Australia, New Zealand, Hong Kong, Guam, Western Samoa, Kiribati, India and Malaysia were also in attendance.

Among the topics discussed at the conference were: decolonization movements in New Caledonia and French Polynesia; nuclear issues affecting the Pacific; the position of women; and the rights of indigenous populations and issues of development. It was the first time people from, or interested in, the Pacific area had agreed to come together to discuss many of these issues in such a way. A report of the proceedings of the Conference and an edited collection of all its papers was prepared and distributed to heads of government in the region. At the same time governments were again urged to ratify the major human rights conventions, invited to promote greater awareness of human rights among their people and encouraged to give consideration to the early establishment of an inter-governmental treaty-based human rights body.

In its Recommendation No. 10<sup>102</sup> the meeting had urged the LAWASIA Human Rights Committee to conduct a research project to investigate whether or not a human rights commission for the area might be feasible. In accordance with this recommendation the Committee established first a Drafting Committee and later a Working Party whose members all possessed considerable experience and expertise within the Pacific area. A meeting of the Drafting Committee, held in Sydney in late June 1986, resulted in a brain-storming session which proved fruitful and

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101. See *Report on The Conference on Prospects for the Establishment of an Inter-governmental Human Rights Commission in the South Pacific Held in Fiji* (1985).

102. *Id.* at 510.

worthwhile. Draft proposals were then drawn up. A Working Party was constituted which met in Apia in August 1986, and the draft which had emerged from the Sydney meeting was taken further. The Law Ministers, who were in Western Samoa for the South Pacific Law Conference being held at the same time, were told of the project and expressed interest in it. After this meeting the members of the Working Party remained in contact and continued to work together.

In May 1987 a regional UNESCO Conference was held at the University of New South Wales Human Rights Centre in Sydney, Australia, called Human Rights Teaching, Information and Dissemination.<sup>103</sup> In Session 13, *What is to be Done: The Need for a Regional Impetus*, the LAWASIA initiative towards a Human Rights Commission for the Pacific area was the subject of discussion. The Papua New Guinean representative on the LAWASIA Working Party, also a LAWASIA Human Rights Committee member, was the paper-writer for this session.

The UNESCO Seminar participants, in commenting on the paper, noted that discussion by Pacific participants throughout the seminar had reflected a concern about the adoption of human rights instruments from outside the region. The point was made that often what is important is not how human rights are phrased in charters, but how they are interpreted and applied. At the present time, the European application of the European Convention constitutes a large proportion of the available jurisprudence. Through a regional charter and commission the Pacific region would be able to develop its own distinct jurisprudence. This would assist in avoiding "Eurocentric" interpretations of human rights. The participants saw immense benefit flowing from this to the whole international human rights movements. They expressed support for the project and urged LAWASIA to continue it, suggesting that perhaps UNESCO might also become involved.

Turning to a larger forum, in August 1988, the LAWASIA Human Rights Committee organized a seminar<sup>104</sup> which was held in Manila. A delegate from the Geneva based U.N. Center for Human Rights joined the thirty-seven delegates from twelve countries who attended the seminar. The program addressed human rights and the role of international, regional and national governmental commissions, the protection of human rights in national constitutions, education and issues of implementation.

Returning more specifically to its promotion of a Pacific Human Rights mechanism, the LAWASIA Human Rights Committee in May 1989 convened a seminar in Apia, Western Samoa.<sup>105</sup> The Drafting Com-

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103. See UNESCO, *Report of Asia-Pacific Regional Seminar Human Rights Teaching, Information and Dissemination* (1987).

104. See LAWASIA, *Conference Report, Human Rights Today and Tomorrow: National Human Rights Commission and Other Organs* (1989).

105. See LAWASIA, *Report of Seminar on Draft Pacific Charter of Human Rights held in Western Samoa* (1989).

mittee produced a report raising the issues to be considered in relation to the establishment of a regional human rights body and had also developed a Draft Charter which had taken as its model the African Charter of Human and People's Rights.<sup>106</sup> The Draft Pacific Charter sets down civil, political, economic, social, cultural and people's rights, and refers also to the duties of governments and the duties of individuals. It contains a provision for a Pacific Human Rights Commission to be established not only to supervise compliance,<sup>107</sup> but also to assist governments with activities related to human rights issues generally.<sup>108</sup> It is envisaged that this would involve assisting governments in meeting their reporting and other obligations incurred under regional and international human rights treaties,<sup>109</sup> obligations which can impose very considerable strains on small states with limited resources.

The applicable principles by which the Commission is to be guided include the major international human rights instruments and also Pacific traditions. The Commission is required to draw inspiration from international law on human rights and also to take into consideration as subsidiary measures "other general or special international conventions, laying down rules expressly recognized by Parties to the present Charter; Pacific practices consistent with international norms on human and peoples' rights; customs generally accepted as law; general principles of law recognized by Pacific states; as well as legal precedents and doctrine."<sup>110</sup>

Article 61A provides:

The Parties recognize the customs and traditions of the diverse communities of this region. The rights, freedoms and duties recognized in this Charter shall be interpreted and understood by the Parties and the Commission in the light of these customs and traditions.

This draft of the Working Party was the subject of discussion at the Apia Seminar and, as a consequence, further amendments were made. LAWASIA has now forwarded copies of this latest version of the Draft Pacific Charter and its Explanatory Memoranda to all governments in the Pacific region, requesting comments and suggestions.<sup>111</sup> It is hoped that the next activity will involve Pacific government representatives in active discussion about the proposed charter, about a possible commission, and the whole issue of the protection and promotion of human rights.

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106. The Draft Charter and explanatory memoranda are reproduced at the end of the 1989 LAWASIA WESTERN SAMOA SEMINAR REPORT.

107. *Id.* at arts. 45-62.

108. Arts. 30-65.

109. Art 45.

110. Art. 60.

111. Copies of the Draft Pacific Charter and its Explanatory Memoranda may be obtained from the new Secretariat to the LAWASIA Human Rights Committee. In October 1990 the Secretariat moved from its earlier location in the Faculty of Law at the University of New South Wales in Sydney to its present location in the Faculty of Law at the University of Atenio in Manila.

#### IV. CONCLUSION

The recent severe breaches of human rights, the escalation of violence, and the erosion of democracy and of the rule of law in Sri Lanka exemplify the point that domestic protection of basic rights, without more, may not always be able to withstand internal political pressures, and that the protection of human rights at an international level is essential. This realization led to the emphasis in the U.N. Charter on the protection of fundamental rights and freedoms for all without discrimination, to the Universal Declaration of Human Rights and to the many other human rights instruments which have now been drafted and adopted at the international level. Despite this growth of international human rights instruments, the development of effective universal enforcement mechanisms, which achieve both acceptability to large numbers of governments and also offer effective protection of fundamental rights, is taking time, persistent effort and a great deal of patience. To date, regional implementation systems, specifically the European and the Inter-American systems, have offered a far more effective protection of human rights than has been achieved at the global level.

Although the aim, ultimately, must be for effective universal implementation arrangements, current experience would suggest that in the short term, and as a step along the way, it may be beneficial to establish such arrangements first at regional and sub-regional levels. Accordingly, these moves by the LAWASIA Human Rights Committee are put forward for consideration as one possible approach through which we may seek to further the promotion of human rights and thus the protection of the inherent dignity and equal and inalienable rights of all members of the human family which, as acknowledged in the Preamble to the Universal Declaration, are essential prerequisites for a true and firm foundation for freedom, justice and peace in the world.

