

Judicial Independence in Sri Lanka



Report of a Mission

14-23 September 1997

Centre for the Independence of Judges and Lawyers
Geneva, Switzerland

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Report of a Mission

14-23 September 1997

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Glossary of Abbreviations

CIJL	Centre for the Independence of Judges and Lawyers
HRTF	Human Rights Task Force
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IPKF	Indian Peace-Keeping Force
JVP	Janatha Vimukthi Peramuna (a left-wing nationalist party)
LTTE	Liberation Tigers of Tamil Eelam (the "Tamil Tigers")
PA	People's Alliance (the coalition forming the present Government of Sri Lanka)
PTA	The Prevention of Terrorism (Temporary Provisions) Act, N° 48 of 1979
SLFF	Sri Lanka Freedom Party (the main Government party)
TULF	Tamil United Liberation Front
UNP	United National Party (the main opposition party).

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I - INTRODUCTION

This is the Report of a Mission sent by the Centre for the Independence of Judges and Lawyers (CIJL) to Sri Lanka. The CIJL is a component of the International Commission of Jurists (ICJ) dedicated to promoting and protecting the independence of judges and lawyers throughout the world. The function of the Mission was to report on the status of the independence of the judiciary and the legal profession and the state of the administration of justice in Sri Lanka. The members of the Mission were Lord William Goodhart Q.C. (United Kingdom), a member of the Executive Committee of the ICJ (leader and rapporteur); Justice P. N. Bhagwati (India), former Chief Justice of India and Chairman of the CIJL Advisory Board; and Phineas M. Mojapelo (South Africa), a member of the Judicial Service Commission and Law Commission of South Africa.

The Mission arrived in Colombo on Sunday 14 September 1997 and left on Tuesday 23 September 1997. During that time we held meetings with the Chief Justice, the Attorney General, the members of the Human Rights Commission, and other judges and holders of official positions. We were unable to meet the Minister of Justice, who was absent from Sri Lanka on official duties throughout the period of the Mission. The Mission received full and helpful cooperation from the Government. We met the Executive Committee of the Bar Association, representatives of several human rights organisations, and individual lawyers, journalists and politicians. A list of those whom we met (omitting a small number who preferred their discussions with us to be off the record) is attached as an appendix to the Report as Annex I. We are grateful to all those who assisted us. In particular, we are grateful to Desmond Fernando (a Vice-President of the ICJ) and Suriya Wickremasinghe (a member of the Advisory Board of the CIJL) for their help in arranging our meetings.

On 24 April 1998, the CIJL sent a letter to the Permanent Mission of the Democratic Socialist Republic of Sri Lanka before the United Nations in Geneva enclosing the report on confidential basis for its

comments on the issues we have raised. We added that if we were able to receive the response before 25 May 1998, we would include it in the published version of the report. No comments were received from the Government of Sri Lanka, however.

For most of the period since 1983 there has been a state of conflict in the Northern and Eastern provinces of Sri Lanka between the Government and militant Tamil separatist groups (in particular, the Liberation Tigers of Tamil Eelam (LTTE), known as the Tamil Tigers). There has also been internal political violence within the majority Sinhalese community, which began in 1971 and reached a very high level between 1987 and 1990. As a result, the Government assumed emergency powers which have continued for almost all the time since 1971. During the course of these conflicts, many killings and other violations of human rights have been carried out both by Government forces and their opponents.

The ICJ and the CIJL are organisations of lawyers. The Mission concentrated on matters in which lawyers and judges are likely to be directly involved - in particular, the state of legislation; the legal system; the legal protection of human rights; the independence of the judiciary and lawyers; and the investigation and prosecution of those suspected of violations of human rights. Some of these matters are directly linked to the state of emergency; others are broader.

Chapter II of the Report sets out a brief historical and constitutional background. In Chapter III, we report on the legislative framework of emergency powers - in particular, the Emergency Regulations and the Prevention of Terrorism (Temporary Provisions) Act (PTA) - and on judicial responses to that legislation. In Chapter IV, we report on the structure of the court system; the appointment, training and removal of judges; the independence of the judiciary; and delays. Chapter V discusses the independence of lawyers and the availability of legal services. Chapter VI deals with the investigation and prosecution of murders and disappearances for which the security forces are believed to have been responsible, and steps which have been taken to reduce the number of violations of human rights. Chapter VII reports on the newly established Human Rights Commission. Chapter VIII considers the extent to which Sri Lanka has complied with the International Covenant on Civil and Political Rights and the other international

human rights instruments to which it is a party. Chapter IX considers the Chapters of the proposed new Constitution for Sri Lanka which deal with fundamental rights, the legal system and the judiciary. Finally, our conclusions and recommendations are set out in Chapter X.

We have been able to report favourably on some aspects, such as the independence of the judiciary. In other respects - such as the excessive width of the Emergency Regulations and the limited judicial control over them, and the almost complete failure so far to bring to justice the perpetrators of violations of human rights - we have been critical. We acknowledge that since about 1991 successive Governments have shown concern for human rights and have taken some steps to remedy the problems. We are not dealing with a government which deliberately flouts or ignores human rights. There remains, however, much that needs to be done to improve standards of observance of human rights and to punish past infringements.

The LTTE are also undoubtedly guilty of many violations of human rights. We have not attempted to discuss them in any detail in this report, as there is no recognised legal system in the parts of Sri Lanka under their control, and our investigations have not focussed on such violations.

II - BACKGROUND

The first known inhabitants of the island of Sri Lanka (formerly known as Ceylon) were the Veddas, of whom only a few hundreds still survive as an identifiable ethnic group, living in remote forest villages. The majority ethnic group - the Sinhalese - are believed to have come from northern India during the 6th Century B.C. Some 300 years later Buddhism spread from India to Sri Lanka. Although Buddhism was later almost entirely displaced from India itself by Hinduism and Islam, the Sinhalese have remained strongly Buddhist. Under Article 9 of the present Constitution of Sri Lanka, Buddhism is given "the foremost place".

From about 200 B.C. a sophisticated Sinhalese civilisation developed, with its capital in the great city of Anuradhapura. However, there was constant movement across the narrow strait separating Sri Lanka from South India and over the centuries Hindu Tamils came to occupy the north of the island and a strip of land along the eastern coast, while the Sinhalese occupied the south, west, and most of the interior of the island.

In 1505, Portuguese traders started to take control of the coastal areas of Sri Lanka. Relics of Portuguese rule include a significant Christian minority, both among Sinhalese and Tamils, and a number of Portuguese surnames such as Fernando, de Silva and Perera. In 1658 the Dutch replaced the Portuguese, and they in turn were replaced by the British in 1796. During this period independent Sinhalese kingdoms continued to exist in the interior, but the last of these, based on Kandy in the central hills, was annexed by Britain in 1815.

From then until independence, Sri Lanka was the Crown Colony of Ceylon. The legal system was based on the Roman-Dutch law introduced by the Dutch, but it became overlaid by many elements of English law.

In the 19th Century the British brought in large numbers of Tamils from South India to work the tea plantations being established in the

central hills. These - known as the Hill Tamils or Indian Tamils - are separated from the Tamil inhabitants of the north and east of the island by geography and, to a considerable extent, by differences of caste. The Hill Tamils have kept a low political profile and have played almost no part in the conflicts which have wracked Sri Lanka.

In 1931 Britain granted Ceylon limited self-rule and a universal franchise. In February 1948 - six months after the independence of India and Pakistan - Ceylon was granted its independence and became a member of the Commonwealth. The original constitution was to a large extent a codification of the British Parliamentary system, and created a unitary state.

Sri Lanka has had a fully democratic political system ever since independence. Politics have been dominated by two main parties, the United National party (UNP) and the Sri Lanka Freedom Party (SLFP). Historically, the UNP has been associated with a market or mixed economy and the SLFP has been associated with socialist economic policies, but with the collapse of socialism as an economic theory there is now little ideological difference between the two parties.

The UNP, under D. S. Senanayake, his son Dudley Senanayake, and Sir John Kotelawala, governed Sri Lanka from independence until 1956 and again from 1965 until 1970. The SLFP was in power for most of the period from 1956 to 1965, first under SWRD Bandaranaike and then, after his assassination in 1959 (the first of the many assassinations of political leaders which have bedevilled Sri Lanka) by his widow Sirima Bandaranaike, who became the world's first woman Prime Minister. Mrs. Bandaranaike was returned to power in 1970. In 1972 her Government introduced a new Constitution. Under that Constitution the name of the country was changed from Ceylon to Sri Lanka and it became a republic, while remaining within the Commonwealth. The office of President replaced that of Governor General but was a largely ceremonial office, with effective power remaining in the hands of the Prime Minister.

The UNP, under J. R. Jayewardene, was elected with a massive parliamentary majority in 1977. Mr. Jayewardene was able to use this majority to adopt a new Constitution in 1978, based on the French constitutional system. This Constitution - with some later amendments - is

the present Constitution of Sri Lanka. It establishes an executive Presidency, with the Prime Minister being appointed by the President as the leader of the majority party in Parliament.¹ The President is directly elected.² Members of Parliament are elected by proportional representation.³ Amendments to the Constitution require the supporting votes of two thirds of the total number of Members of Parliament and, in certain cases, approval by referendum as well.⁴ The Constitution (as amended by the 13th Amendment in 1987) declares both Sinhala and Tamil to be official and national languages, with English as a "link language".⁵ Two parts of the Constitution - those dealing with fundamental rights (Chapter III) and those dealing with the judiciary and the superior courts (Chapters XV and XVI) are considered in some detail later in this Report, and are set out in full in Annexes A and B.

Before continuing the political history of Sri Lanka, we must look back at the post-independence ethnic tensions. The Sinhalese make up 74 per cent of the total population of Sri Lanka of about 18 million (1994).⁶ The Tamils make up 18 per cent - that is about 3⁹ million, though about 1 million of these are Hill Tamils. There is also a separate Muslim community making up 7 per cent of the population, many of them living in the east of the island. They speak Tamil.

Following independence, the Tamil community became increasingly concerned with the oppressive use of majority power by the Sinhalese. These concerns were greatly increased by the decision of the Bandaranaike government, following the 1956 elections, to declare Sinhala the official language of Sri Lanka. Other matters of concern to

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- 1 See Chapters VII and VIII of the Constitution.
 - 2 Article 94. A form of the alternative vote system is used.
 - 3 Article 99, as substituted by the 14th Amendment. Before 1978, Members of Parliament had been elected for single-member constituencies under the first-past-the-post system.
 - 4 Articles 82 and 83.
 - 5 Articles 18 (as amended by Article 2 of the 13th Amendment) and 19. Before the 13th Amendment, Sinhala was the only "official" language, though both Sinhala and Tamil were "national" languages.
 - 6 The figures for Sinhalese and Tamils include Christians, who are about 6 per cent of the population.

Tamils included changes in the system of admission to universities which reduced the proportion of Tamil students, and the promotion of Buddhism and Buddhist symbols. Tamil politicians, alienated by the failure to achieve a settlement of their grievances by negotiation, moved from campaigning for federalism to campaigning for independence for a separate state of "Tamil Eelam" in the north and east of the island. In the 1977 elections a separatist party - the Tamil United Liberation Front (TULF) - won all the seats in Tamil majority areas. In 1978 a number of militant separatist groups began to emerge, notably the Liberation Tigers of Tamil Eelam (the "Tamil Tigers", or LTTE). There were attacks on the police in Jaffna, the main town in the northern part of the island. These groups are believed to have received support from Tamils in India, where there are some 50 million Tamils, most of them in the state of Tamil Nadu. There was also, in 1971, a brief revolt in the Sinhalese part of the island, organised (on political rather than ethnic grounds) by an extreme left-wing nationalist party, the Janatha Vimukthi Peramuna (JVP) whose membership was predominantly Sinhalese. This led to the proclamation of a State of Emergency, which has continued (with relatively short interludes) ever since.⁷

Returning to events after the adoption of the 1978 Constitution, J. R. Jayewardene took office as the first President under the new Constitution and was re-elected for a six-year term in 1982. Following a constitutional amendment approved by a dubiously conducted referendum in 1982, the life of the Parliament elected in 1977 was extended to 1989.

7 A State of Emergency has been in force, in all or part of Sri Lanka, as follows since 1971:

- (1) 16 March 1971 to 15 February 1977
- (2) 11 July to 27 December 1979
- (3) 16 July to 15 August 1980
- (4) 3 to 9 June 1981
- (5) 17 August 1981 to 11 January 1982
- (6) 20 October 1982 to 20 January 1983
- (7) 18 May 1983 to 11 January 1989
- (8) 20 June 1989 to 15 July 1994
- (9) 16 August 1994 to the present.

Serious communal violence broke out in the Jaffna Peninsula in 1981. 27 Tamil youths were arrested without warrant and held incommunicado for several months, following a bank robbery in which two policemen had been killed. At the end of May, a Tamil candidate for the UNP in local elections in Jaffna was assassinated, and two policemen were killed during an election rally. Following this, the police went on the rampage and burned the market area of Jaffna and the Jaffna Public Library.⁸

In July 1983, following a period of escalating tension in Tamil areas, an LTTE unit ambushed and killed 13 soldiers. This triggered reprisals against Tamils. Hundreds of Tamils were killed in riots, particularly in Colombo (where there is a substantial Tamil population), tens of thousands were driven out of their homes, and 100,000 fled to South India. The Government admitted that more than 50 of the victims were killed by the security forces. 52 Tamil prisoners, detained under the Prevention of Terrorism Act, were murdered by Sinhalese prisoners in Welikada prison in Colombo.⁹ The Government's failure to prevent this amounted to a breach of their duty to ensure the safety of prisoners.¹⁰

The Government responded further by introducing the Sixth Amendment to the Constitution (coming into effect on 8 August 1983) which made it a criminal offence to advocate the establishment of a separate state within the territory of Sri Lanka, and proscribed any political party having as one of its aims the establishment of such a state. The Amendment also introduced an oath, to be sworn by MPs and holders of official posts, which included a promise not to support the establishment of such a state within Sri Lanka. The TULF Members of Parliament refused to swear the oath and walked out of Parliament. The Amendment, in so far as it criminalised peaceful support for separatism and excluded supporters from public office, involved a breach of Articles 19.2 (freedom of expression) and 25 (right to take part in public life) of the International Covenant on Civil and Political Rights.

8 See the ICJ Report "Ethnic Conflict and Violence in Sri Lanka" (1981).

9 See the ICJ Report "Sri Lanka - A Mounting Tragedy of Errors" (1984).

10 The Government made ex gratia payments to relatives of a number of the victims, but did not admit liability.

The Indian Government's position was ambivalent, being on the one hand anxious to retain the support of its own Tamils but on the other fearing that an independent Tamil Eelam would encourage separatism in Tamil Nadu. India therefore entered into an agreement with the Government of Sri Lanka in July 1987. As a result of this agreement, the Thirteenth Amendment to the Constitution of Sri Lanka was adopted. The Amendment established nine provinces (two of them, the Northern and Eastern, with Tamil majorities) and created elected Provincial Councils with powers over an extensive list of devolved matters. However, considerable powers of control over Provincial Councils were reserved to the Governors of the Provinces, who are appointed by the President. The Amendment also gave the Tamil language, in law, equal status with Sinhala.

The Indian Government agreed to send a Peace-Keeping Force (the IPKF) to take control of the Tamil areas of Sri Lanka and to restore order. Initially, all militant groups agreed to surrender their arms to the IPKF and to stop fighting. However, within a few weeks the LTTE decided to resume its struggle for an independent Tamil Eelam and refused to surrender its arms. As a result, the IPKF and the LTTE started fighting each other, with considerable loss of life on both sides.

The agreement between India and Sri Lanka sparked off a second and much more serious uprising by the JVP in the Sinhalese areas, with the JVP objecting to Indian intervention in the internal affairs of Sri Lanka. The JVP, at that time an extremely violent organisation, used tactics of terror and assassination which led to reprisals and counter-terror by the Government. Many thousands of people were killed by each side. Estimates of the numbers killed range from 30,000 to 60,000. Many of those killed by the security forces, it now seems clear, were not members of the JVP at all but were members of other political parties or ordinary individuals who had been falsely denounced to the security forces as JVP supporters by their neighbours in order to remove political opponents or settle old scores. The most notorious of these incidents - the abduction and murder of 32 teenage schoolboys at Embilipitiya in 1989 - seems to have been sparked off by the headmaster's desire for revenge on pupils who had teased his son about a love letter.¹¹

11 The Chairman of the Human Rights Task Force's Annual Report for 1991-92, pp. 23-27.

The killings in the JVP areas started in 1987 and reached a peak in 1989. In November and December 1989 the security forces captured the entire leadership of the JVP. They were all reported as having been killed after arrest in cross-fire or while trying to escape. The uprising then collapsed and the killings subsided very quickly, virtually ceasing by the middle of 1990. Since then, the south, west and centre of the island have been peaceful apart from some terrorist attacks by the LTTE, mainly in Colombo. The JVP now exists as a legitimate political party and has some strength in local government, but it is no longer violent. It should be remembered that the worst of the unlawful killings by Government forces appear to have taken place not in the many years of fighting against the LTTE but in the relatively brief and, outside Sri Lanka, now forgotten period of JVP militancy.

Meanwhile, Ranasinghe Premadasa of the UNP (who had always opposed the 1987 Accord with India) was elected as President in 1988 to succeed President Jayewardene. The UNP also won another majority in the 1989 Parliamentary elections. The Premadasa Government entered into negotiations with the LTTE but these proved fruitless. In March 1990 the IPKF (whose role had become increasingly unpopular in India as a result of the casualties which it had suffered) was withdrawn. Their withdrawal led to fighting between the LTTE and Tamil groups which had co-operated with the IPKF. This battle was won by the LTTE, and was followed by the flight of many Tamil opponents of the LTTE to India. In June 1990, the LTTE attacked police stations and army convoys in the north and east. They captured and executed many police officers. The war between the LTTE and Government forces resumed with renewed ferocity, with some 3,000 killings and disappearances by Government forces being reported in the first three months of fighting.

President Premadasa was assassinated in May 1993 and was succeeded by the then Prime Minister, D. J. Wijetunga. In August 1994 the Parliamentary elections were won (with a majority of one) by the People's Alliance (PA), a coalition consisting of the SLFP together with some small parties. The PA leader, Chandrika Bandaranaike Kumaratunga, was appointed Prime Minister. She is the daughter of the former Prime Ministers Sirima and SWRD Bandaranaike. In November 1994 Mrs. Kumaratunga was elected President, following a campaign in which her original UNP opponent, Gamini Dissanayake,

was assassinated (together with some 50 other people) by a suicide bomber suspected of being a member of the LTTE. Mrs. Kumaratunga appointed her mother to succeed her as Prime Minister (an office which Mrs. Bandaranaike still holds, although she is now 82 and in poor health).

The Government resumed negotiations with the LTTE and on 8 January 1995 a cease fire agreement came into force. However, on 18 April 1995 the LTTE denounced it and resumed hostilities.

In the latter part of 1995 Government forces undertook a campaign to regain control of Jaffna and its peninsula. Jaffna fell to them on 5 December. The Government has gained control of the Jaffna peninsula and a limited degree of normal life has returned to the city. However, there is no overland access to Jaffna as the LTTE remains in control of the road and railway between Vavuniya and Kilinochchi, which link the Jaffna peninsula to the Government-controlled areas further south. While our mission was in Sri Lanka Government troops were starting to clear the road but were making very slow progress. Furthermore, the effort needed to recapture Jaffna meant that the Government had to withdraw some troops from other districts where, as a result, the LTTE have been able to strengthen their control. They inflicted a major defeat on Government forces at Mullaitivu. There are some areas which are controlled by the Government by day but by the LTTE by night.

The LTTE does not have universal support among Tamils. Hardly any Tamils have real confidence in the present Government or in the opposition, or in the future of relationships between the communities. However, many of them accept that an independent Tamil Eelam is not a practical possibility and will accept a quasi-federal state with power devolved to the Tamil-speaking provinces, though they are not satisfied with the Thirteenth Amendment. There are also Tamil militia groups, armed by the Government, which fight the LTTE. The LTTE have made themselves unpopular among many of their own community by the very high levels of taxation they impose to support their campaign, by the forced conscription of schoolboys into their units, and by their brutal punishment of anyone suspected of collaboration with the Government. However, they retain the strength to make the military campaign a virtual stalemate and it would be very optimistic to expect an end to the violence in the near future. The LTTE receives a great deal of funding from the Tamil diaspora.

III - LEGISLATION AND THE EMERGENCY

Emergency Regulations – the Statutory Framework

As will be seen from the historical outline in the previous Chapter, there has in effect been a civil war in Sri Lanka since 1983, though except in the years 1987-90 this has mainly been confined to the north and east of the island and to terrorist incidents in Colombo. In this Chapter, we look at the framework of legislation which the Government has relied on to combat its opponents, the LTTE and other militant Tamil groups and the JVP.

The Government has relied mainly on Emergency Regulations made under the Public Security Ordinance 1947 (Parts I and II of this Ordinance as amended are set out in Annexe C). Part I of the Ordinance confers on the President power to proclaim a state of emergency in all or part of Sri Lanka if a public emergency exists or is imminent.¹² When an emergency has been proclaimed, Part II of the Ordinance confers on the President power to make such Emergency Regulations as appear to her to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.¹³ Emergency Regulations may, among other things, authorise the detention of persons.¹⁴ Emergency Regulations may override existing laws.¹⁵ Neither the existence of an emergency nor an emergency regulation nor an order, rule or direction made under such a regulation may be called in question in any court.¹⁶ No action or prosecution lies against any person for any act in good faith done in pursuance or supposed

12 Public Security Ordinance, s. 2 (1).

13 *ibid*, s. 5 (1).

14 *ibid*, s. 5 (2) (a).

15 *ibid*, s. 7.

16 *ibid*, ss. 3, 8.

pursuance of an emergency regulation or an order or direction made under it.¹⁷

The Public Security Ordinance dates from 1946, just before independence. It has been retained and given its present force by Article 155 of the 1978 Constitution (which, as amended by the 10th and 13th Amendments, is set out in Annexe D). Emergency Regulations may override any existing law except the Constitution itself.¹⁸ The proclamation of an emergency takes effect for one month and a further proclamation may be made before or at the end of that period.¹⁹ A proclamation has immediate effect but must be approved by Parliament within 14 days.²⁰ When a proclamation is renewed, existing Emergency Regulations are deemed to continue in force unless otherwise directed by the President.²¹

As mentioned in the last paragraph, Emergency Regulations can not override the Constitution and, in particular, the provisions of Chapter III which confer fundamental rights.²² In the context of the Emergency Regulations, the most important rights are those conferred by Article 11 (freedom from torture) and Article 13(1)-(4) (freedom from arbitrary arrest, detention and punishment). However, the rights declared by Articles 13(1) and (2) (freedom from arbitrary arrest and detention) are, by virtue of Article 15(7), "subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality".

Before looking at the Emergency Regulations themselves, we must comment on the legislative framework, about which we have some criticisms.

17 *ibid*, s. 9.

18 Article 155 (2).

19 Article 155 (5).

20 Article 155 (6), (8).

21 Public Security Ordinance, s. 2 (2A), inserted by the Public Security (Amendment) Act, N° 28 of 1988.

22 See Annexe A for the text of Chapter III.

First, it is in our opinion wrong that the existence or imminence of a state of emergency can not be called in question in a court.²³ The proclamation of a state of emergency confers extremely wide powers on the President. Those powers are much more easily abused than her ordinary constitutional powers. While we believe that the President should have considerable discretion in deciding whether or not a state of emergency exists, her decision should at least be based on a rational belief that a state of emergency exists or is imminent.

We therefore recommend that section 3 of the Public Security Ordinance be amended to permit a proclamation under section 1 to be challenged in the Supreme Court on the ground that there is no reason to believe that a state of emergency exists or is imminent.

In making this recommendation, we acknowledge that a state of emergency has in fact existed continuously since 1983. We have not considered whether all of the earlier proclamations under the Ordinance were justified.

In our view, there is insufficient Parliamentary control over Emergency Regulations. A limited degree of control is given by s. 5 (3) of the Public Security Ordinance, which provides that an emergency regulation may be added to or altered or revoked by resolution of Parliament.²⁴ In addition, Articles 155 (5) and (6) of the Constitution restrict the operation of a proclamation to a period of one month and require such a proclamation to be approved by Parliament within a period of fourteen days. There is, however, no requirement that new Emergency Regulations should be laid before Parliament for approval. We regard this as unsatisfactory, particularly in view of the very inadequate system (discussed in more detail below) for publicising changes in the regulations. Even Members of Parliament may not be aware of new regulations.

We recommend that all new regulations, or new amendments to existing regulations, should be required to be laid before Parliament for approval. Except in cases of necessity, such

23 Public Security Ordinance, s. 3.

24 This power has apparently never been exercised.

regulations or amendments should not take effect until so approved.

We are concerned that section 8 of the Public Security Ordinance provides that no emergency regulation shall be called in question in any court. This section has not prevented the Supreme Court from exercising its jurisdiction under Article 126 of the Constitution to protect the fundamental rights set out in Chapter III of the Constitution as discussed below. We believe, however, that there should be a wider power to challenge Emergency Regulations, on the ground (for example) that there is no basis for the President's belief that a particular regulation is necessary or expedient in the interests of public security.

We recommend that section 8 of the Public Security Ordinance be repealed.

We are also concerned that section 9 of the Ordinance excludes civil or criminal proceedings against any person for any act done in good faith in pursuance or supposed pursuance of an emergency regulation. We believe that the test of liability should be objective.

We recommend that so much of section 9 of the Public Security Ordinance as excludes liability for acts done in good faith, but not in fact authorised by Emergency Regulations in force for the time being, should be repealed.

We would accept the exclusion of liability for acts authorised by Emergency Regulations subsequently held to be invalid.

The provisions of Article 15 of the Constitution which permit restriction of the fundamental rights set out in Articles 12-14 are not tightly enough drawn.

We recommend that any restriction of fundamental rights on the grounds of national security should only have effect when a state of emergency has been proclaimed and then only to the extent strictly required by the exigencies of the situation.²⁵

25 See Article 4.1 of the International Covenant on Civil and Political Rights.

Detention under the Emergency Regulations

We now turn to the Emergency Regulations themselves. There are three areas which need particular investigation. These are:

- (i) the terms of the regulations, in particular in relation to powers of detention,
- (ii) the problems of ascertaining what regulations are in force, and
- (iii) the use of Emergency Regulations for purposes outside the scope of the emergency.

At the date of the mission, a state of emergency was in force only in Colombo, the Northern and Eastern Provinces, and adjoining districts. Between 4 April 1996 and 4 July 1997 the state of emergency had extended to the whole of the island. It was suggested to us at one meeting that there was no need to extend the state of emergency to Colombo, but (taking into account the bomb explosion in central Colombo in mid-October) we believe the inclusion of Colombo and its suburbs is justifiable.

The main Emergency Regulations concerning detention were, at the date of the mission, contained in the Emergency (Miscellaneous Provisions and Powers) Regulations N° of 1994 ("the principal Regulations"). The principal Regulations have been amended from time to time. The text of Part II of the principal Regulations is set out in Annexe E.

Part II of the principal Regulations authorises three different kinds of detention. These are:

- (i) preventive detention, under regulation 17;
- (ii) detention following arrest, under regulations 18 and 19; and
- (iii) detention for rehabilitation, under regulations 20 and 22.

The Secretary of the Ministry of Defence may under Regulation 17 order that a person may be detained in custody if he is satisfied that

this is necessary to prevent that person from acting in a manner prejudicial to national security or the maintenance of public order or essential services, or from committing certain offences. Such an order may be made for a period not exceeding three months, and may be renewed for not more than three months at a time for a total period not exceeding a year. Thereafter, detention may be continued if the detainee is produced before a Magistrate, with a report from the Secretary of the Ministry of Defence setting out the reasons for the detention and why it needs to be extended. Detention can be ordered by the Magistrate for a period of not more than three months, and the order can be renewed an unlimited number of times.²⁶ Any person aggrieved by a detention order may present his objections before an Advisory Committee appointed by the President; the Advisory Committee reports to the Secretary of the Ministry of Defence, who may confirm or revoke the order.²⁷

We were told by the Ministry of Defence that 885 new detention orders under regulation 17 had been made between the beginning of 1996 and the date of our mission. Of those orders, 525 were no longer in effect, the detainees having either been released, transferred to the ordinary prison system following criminal charges, or become the subject of Rehabilitation Orders. This leaves a balance of 360, together with any detention orders made before 1 January 1996 and still in force.

Under regulation 18 any police officer or any member of the armed forces may detain or arrest without warrant any person who is committing or has committed or whom he has reasonable grounds for suspecting to be concerned in, or to be committing or to have committed, an offence under any emergency regulation. Any person arrested by a member of the armed forces outside the Northern and Eastern Provinces must be handed over to the police within 24 hours.²⁸ Arrests must be reported within 24 hours to the Superintendent of Police of the Division or to the commanding officer of the area.²⁹ When any person

26 The Emergency (Miscellaneous Provision and Powers) Regulation, N° 4 of 1994, reg. 17 (1).

27 *ibid*, reg. 17 (5) - (11).

28 *ibid*, reg. 18 (1).

29 *ibid*, reg. 18 (7).

is taken into custody under this regulation, the arresting officer must issue a "receipt" to the spouse, father, mother, or other close relative of the detainee acknowledging the fact of the arrest.³⁰

A person arrested or detained under regulation 18 may be kept in detention on an order made by a police officer not below the rank of Deputy Inspector General or, in the case of arrests or detention by a member of the armed forces in the Northern and Eastern provinces, by a senior officer of the armed forces. Detention must be in a place authorised by the Secretary of the Ministry of Defence. Detention is authorised for a period of up to 60 days in the Northern and Eastern Provinces and up to 21 days elsewhere. At the end of that period the detainee must be released, unless an order for his preventive detention has been made or he has been remanded in custody by a court.³¹ The officer in charge of an authorised place of detention is required to provide the local Magistrate every 14 days with a list of the detainees in that place, and the Magistrate is required to display the list on the notice board of his court.³² The Magistrate is required to visit places of detention in his district at least once a month.³³

We have no information about the number of people arrested and detained under regulations 18 and 19. In any event, these figures are likely to fluctuate quite rapidly.

Under regulation 20, a person detained under regulations 17 or 19 or under the PTA may be detained for rehabilitation in the interests of his own welfare, under a Rehabilitation Order made by the Minister of Defence or the Secretary of the Ministry, in substitution for the previous form of detention.³⁴ Rehabilitation takes place in a Youth Development and Training Centre.³⁵

30 *ibid*, reg. 18 (8).

31 *ibid*, reg. 19 (2), as amended by Gazette 928/11 of 19 June 1996; reg. 19 (9).

32 *ibid*, reg. 19 (5).

33 *ibid*, reg. 19 (6).

34 *ibid*, reg. 20 (1).

35 *ibid*. reg. 21 (2).

A different form of rehabilitation is provided under regulation 22.³⁶ When anyone voluntarily surrenders to the police or armed forces "in connection with" various offences or "through fear of terrorist activities", steps must be taken within 10 days to assign him to a Protective Accommodation and Rehabilitation Centre, where he is supposed to be provided with appropriate training.³⁷ The Secretary to the Ministry of Defence is required to order the detention of the surrendering person for a period of up to 12 months, which may be extended for up to four further periods of three months each. He must then be released, without prejudice to any criminal proceedings against him.³⁸

We were told³⁹ that applications for detention orders which have to be approved by the Minister of Defence or the Secretary of the Ministry are considered by a processing committee, which includes the Legal Adviser to the Ministry and a member of the Attorney-General's Department and meets weekly. Applications are submitted by the police or the Criminal Investigation Department. The committee considers whether the applications comply with the Emergency Regulations or (as the case may be) the Prevention of Terrorism Act, and if they are in order submits them to the Secretary or the Minister.

Detention under the Emergency Regulations clearly contravenes Article 9 of the ICCPR (the text of which is set out at Annexe F). It can therefore be justified only in so far as the Government has validly derogated from its obligations under Article 4 which permits derogation only "in times of public emergency which threatens the life of the nation" and then only "to the extent strictly required by the exigencies of the situation".

As we have said above, we are satisfied that a state of emergency exists and that it is one which, within the meaning of Article 4, threatens the life of the nation. However, the regulations go beyond what is

36 As substituted by Gazette 938/13 of 29 August 1996.

37 *ibid*, reg. 22 (1) - (5).

38 *ibid*, reg. 22 (6), (8) - (10).

39 Interview with the Legal Adviser to the Ministry of Defence.

strictly required by the exigencies of the situation, and there has been no sufficient derogation.⁴⁰

Preventive detention is a draconian power which can only be justified in exceptional circumstances. We have concluded that the circumstances in the parts of Sri Lanka covered by the Emergency Regulations are exceptional and that preventive detention can not be ruled out in principle. However, we believe that a much greater degree of judicial control is needed than is provided by regulation 17. This is emphasised by Article 3 of the UN Basic Principles on the Independence of the Judiciary, which requires the judiciary to have jurisdiction over all issues of a judicial nature.

We recommend

- (i) that the initial preventive detention order made by the Secretary of the Ministry of Defence must be confirmed by a Magistrate within a period of one month**
- (ii) that all subsequent renewals of the order must be made by a Magistrate**
- (iii) that there should be a strict limit on the total duration of a detention order**
- (iv) that the procedure for presenting objections to the Advisory Committee be replaced by a proper and speedy system of appeal to a judicial body having power to give binding directions.**

We were told by the Attorney-General that, following the recent decision of the Supreme Court in the Cooray case (discussed below), the making of preventive detention orders had been suspended. A revised regulation 17 incorporating the safeguards required by the Cooray decision may be introduced, but he thought it unlikely that it would be used. We believe that the longer periods of detention

40 See Chapter below on International Obligations.

authorised under regulation 19 following arrests in the Northern and Eastern Provinces are not justified;

we recommend that the 21-day limit on detention under regulation 19 should be reduced to 7 days and apply to all districts subject to the Emergency Regulations.⁴¹

The provisions for the issue of "detention receipts", for supplying magistrates with lists of detainees and posting those lists on notice boards, and for monthly visits by magistrates to detention camps, have had a valuable effect in helping to reduce the number of people who have "disappeared" following arrest. However, we were told that magistrates were not ensuring that these obligations are observed.

We recommend that steps be taken to ensure that magistrates receive lists of detainees, post them on the court notice boards, and visit detention camps in their districts as required by the regulations.

It appears that only a relatively small number of people are detained for rehabilitation. On 1 January 1997, there were 186 people detained for rehabilitation, 155 of them under regulation 20 and 31 under regulation 22.⁴² We were told that, as at 14 September 1997, the number detained for rehabilitation was 118.⁴³ We heard little criticism of rehabilitation orders under regulation 20. However,

we recommend that Rehabilitation Orders should be made by courts and not by the Minister or the Secretary to the Ministry of Defence and that Orders under regulation 20 should be limited to two years.

In practice, we understand that very few orders are made for a longer period.

41 The work of the Human Rights Task Force (now taken over by the National Human Rights Commission) has provided valuable safeguards for detainees. This is discussed in Chapter VIII below.

42 Letter of 10 February 1997 from the Commissioner General of Rehabilitation to the Nadesan Centre.

43 Interview with the Legal Adviser to the Ministry of Defence; no breakdown given between detentions under regulations 20 and 22.

Rehabilitation Orders under regulation 22 were more severely criticised, on the basis that there is no reason why those who surrender voluntarily should automatically be required to serve a period of rehabilitation. We agree, and believe that the other powers of detention are adequate to cover the cases where detention is appropriate.

We recommend that regulation 22 be repealed.

The Emergency Regulations do not prescribe minimum standards for the conditions in which detainees are kept.

We recommend that the Emergency Regulations should prescribe minimum standards for conditions of detention which should comply with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the UN General Assembly.

Detention under the Prevention of Terrorism Act

Detention is also authorised under Part III of the Prevention of Terrorism (Temporary Provisions) Act, N° 48 of 1979 ("the PTA"). The text of Part III is set out in Annexe G.

Where the Minister of Defence has reason to believe or suspect that any person is connected with or concerned in any "unlawful activity", she may order that the person may be detained for a period not exceeding three months, renewable for further three month periods up to a maximum of 18 months.⁴⁴ The Minister may, alternatively, make an order for similar periods imposing restrictions falling short of detention, such as house arrest or curfew, travel restrictions, restriction of activities as a member of an organisation, and restrictions on addressing public meetings or holding political office.⁴⁵ Orders of either kind are stated to be final and not to be called in question in any court or

⁴⁴ Prevention of Terrorism Act, s. 9 (1).

⁴⁵ *ibid*, s. 11 (1).

tribunal.⁴⁶ This provision can not, however, exclude the constitutional power of the Supreme Court to exercise its fundamental rights jurisdiction. Any person against whom an order has been made may make representations to an Advisory Board⁴⁷ (which is, in practice, the same body as the Advisory Committee set up under the emergency regulations). Detention is in such place and subject to such conditions as may be determined by the Minister.

We were told by the Ministry of Defence that 99 new detention orders had been made under the PTA between the beginning of 1996 and the date of our mission. Of those, 42 were no longer in force, leaving a balance of 57. As detention under the PTA is limited to 18 months, no earlier orders could remain in force.

There are many differences between the power of detention under the PTA and the power of preventive detention under the Emergency Regulations - for example, the fact that an order under the PTA must be made by the Minister rather than by the Secretary, and that there is a maximum duration for orders under the PTA. Perhaps the most important distinction at the present time is that the PTA power continues to apply to the whole of Sri Lanka, whereas the Emergency Regulations apply only to part of it. It is confusing and, in our view, unnecessary to have two separate and parallel powers of detention. Furthermore, the making of a detention order under the PTA at a time when no proclamation of a state of emergency is in force in the relevant part of Sri Lanka involves a contravention of Article 9 of the ICCPR which is incapable of being the subject of a derogation.

We recommend that the powers of detention under the PTA should be abolished or, failing that, made subject to the same restrictions as we have proposed above for the power of preventive detention under the Emergency Regulations; in particular

(i) the initial order should be subject to confirmation by a court, and renewals should be ordered by a court

46 *ibid*, ss. 10, 11 (5).

47 *ibid*, s. 13.

(ii) there should be a right of appeal against a detention order to a judicial body

(iii) no order can be made except when and where a state of emergency is in force, and

(iv) minimum standards for conditions of detention should be prescribed.

The power to make an order for a form of restriction falling short of detention might, at first sight, seem more acceptable than a power of detention. However, this is not necessarily the case. The very fact that restrictions do not have such serious consequences as detention may make it easier for a government to abuse the power to make restriction orders. In fact the power to make restriction orders appears to have been very little used and we received no comments about them, either in interviews or written material.

We recommend that the power under the PTA to make restriction orders should be reviewed and that, unless a clear case for retention can be made out, the power should be repealed.

As in the case of the Public Security Ordinance,

we recommend that the exclusion of liability for acts done in good faith, but not in fact authorised by the PTA, should be repealed.

"Unlawful activity" is defined by the PTA, as amended in 1982, as including any act committed prior to the date of passing of the PTA which act would, if committed after such date, constitute an offence under the PTA. We believe this to be a clear breach of Article 15 of the ICCPR, which prohibits retrospective criminal legislation and is not derogable. In view of the fact that the practical operation of this provision must by now be spent we do not formally recommend a change in the definition, but we wish to draw attention to its impropriety.

Section 7 of the PTA requires the courts to order the remand in custody of persons arrested on suspicion of "unlawful activity". This deprives the court of the discretion to grant bail. "Unlawful activity"

includes the commission of any offence under the PTA. Some of those offences - for example, defacing a street sign - are quite trivial. In such cases the exclusion of bail is wholly inappropriate. We were told that the absence of a right to bail leads to extensive plea-bargaining. Persons charged, for example, under section 5 of the PTA with failing to give information to the police will often plead guilty and receive a suspended sentence rather than remain in custody pending a contested trial.

We recommend that section 7 of the PTA be amended so as to allow the courts to grant bail except in the most serious cases.

Judicial Control of Emergency Regulations and the PTA

In spite of the general provisions discussed above excluding the jurisdiction of the courts in relation to Emergency Regulations and the PTA, the Supreme Court has in fact found ways of intervening on a number of occasions.

In a number of earlier cases the Court found in favour of the Government. In *Yasapala v Wickremasinghe*⁴⁸ the Court held that the President was the sole judge of the existence or imminence of a state of emergency for the purposes of the Public Security Ordinance, and was not bound to state the reasons for his proclamation. The President's belief in the necessity or expediency of the regulations made by him was conclusive of their validity. In *Kumaranatunga v Samarasinghe*⁴⁹ the Court held that preventive detention under regulation 17 of the Emergency (Miscellaneous Provisions and Powers) Regulations was not contrary to Articles 13 (1) and (2) of the Constitution, being a restriction authorised by Article 15 (7), and was not punishment for the purposes of Article 13 (4).

48 FRD (1) 143; SC Application N° 103/82.

49 (1983) 2 SLLR 63; SC Application N° 121/82.

However, in *Edirisuriya v Navaratnam*⁵⁰ the Court, while finding that arrest and detention under regulation 19 was lawful on the facts, asserted that it had power to investigate the circumstances of any arrest and detention under the regulations to see whether the powers had been properly exercised. In *Nanayakkara v Perera*⁵¹ the Court held that an order for detention under regulation 19 (2) must state the reasons for detention so that the detainee can make a purposeful and effective objection to his detention; and that there was a constitutional obligation under Article 13 (2) of the Constitution to produce a detainee before a Magistrate within a reasonable time (being not more than 30 days).

In the landmark case of *Perera v Attorney-General*⁵² the Court held that the President's power to make Emergency Regulations restricting fundamental rights protected by the Constitution did not permit restrictions exceeding those authorised by Article 15 of the Constitution. Thus restrictions on freedom of speech would have to be justified on the ground that there was a proximate and reasonable nexus between such restrictions and the preservation of national security or public order. It was competent for the Court to consider whether such a nexus existed. The petitioners had been arrested and detained at a public meeting at which they had distributed leaflets strongly criticising Government policies on education; they had been charged with offences under Emergency Regulations which prohibited acts bringing the President or the Government into hatred and contempt or inciting feelings of disaffection, and with violation of an emergency regulation requiring the prior permission of the Inspector-General of Police for the distribution of leaflets.

The Court unanimously held that the regulation requiring prior permission for distribution of leaflets was bad in law because it created an arbitrary power conferring an absolute and uncontrolled discretion, having no rational or proximate nexus with national security or public order. Two of the judges held that the arrest and detention of the petitioners was not justified because no reasonable person could have been

50 (1985) 1 SLLR 100; SC Application N° 109/84.

51 (1985) 2 SLLR 375; SC Application N° 19/85.

52 SC Application N° 107/86.

satisfied that the material would bring the President or the Government into hatred or contempt or incite disaffection; a majority held that the original arrest was justifiable in the circumstances but that the petitioners had been detained for an unjustifiably long period and were entitled to compensation.

In *Sriryalatha v Baskarasingham*⁵³ the Court of Appeal held that, notwithstanding section 8 of the Public Security Ordinance, a preventive detention order under the Emergency Regulations is open to judicial review on the grounds of reasonableness in proceedings for a writ of habeas corpus. The Court may consider whether sufficient grounds exist to support the Secretary's decision and whether the Secretary has misdirected himself in law.

In *Wickremabandu v Herath*⁵⁴ the Supreme Court confirmed that preventive detention did not constitute punishment for the purposes of Article 13 (4) of the Constitution and did not infringe Articles 13 (1) and (2) because the rights guaranteed by those Articles were subject to restrictions under Article 15 (7). However, if restrictions were clearly unreasonable, they could not be regarded as being within the scope of Article 15 (7). Section 8 of the Public Security Ordinance could not oust the Supreme Court's jurisdiction to review detention orders in exercise of its fundamental rights jurisdiction. On the facts, although the petitioner's initial detention was reasonable it had continued after it ceased to be reasonable and he was entitled to compensation.⁵⁵ In *Weerakoon v Mahendra*⁵⁶ it was held that the petitioner's arrest and detention were ordered mechanically and were bad in law. The Court should be provided with the material on the basis of which the petitioner was arrested to enable it to determine objectively the reasonableness of the suspicion leading to the arrest. The failure to produce the petitioner

53 Court of Appeal Habeas Corpus Application N° 7/88. The Court of Appeal has original jurisdiction in habeas corpus applications: Article 141 of the Constitution.

54 (1990) 2 SLLR 348; SC Application N° 27/88.

55 See also *Dissanayake v Superintendent Mahara Prison*, SC Application N° Spl. 6/90 (detention under PTA held unjustified); *Karunaratne v Rupasinghe*, SC Application N° 71/90 (Rehabilitation Order made against person not in detention at the time of the Order held bad in law).

56 (1991) 2 SLLR 172; SC Application N° 36/90.

before a Magistrate, as required by the Emergency Regulations, also vitiated her detention.

The case of *Cooray v Secretary of the Ministry of Defence*⁵⁷, decided by the Supreme Court in August 1997, created a great deal of publicity because the petitioner, Sirisena Cooray, was a former Cabinet Minister and a former General Secretary of the UNP. In June 1997 the Secretary of the Ministry of Defence ordered the detention of Mr. Cooray on suspicion of being involved in a plot to assassinate the President. The Court held that there were no reasonable grounds for the Secretary's decision and that Mr. Cooray's arrest was therefore in breach of his right under Article 13 (1) of the Constitution not to be arbitrarily arrested. The Court also held that the failure to bring Mr. Cooray before a Magistrate within 24 hours was a breach of Article 13 (2). The Court directed Mr. Cooray's release and awarded him substantial compensation.

We conclude that the Supreme Court has shown independence and good judgement in balancing the interests of national security against the fundamental rights of its petitioners. As a result, some of the most serious potential consequences of the efforts to oust the jurisdiction of the courts over Emergency Regulations and orders made under them or the PTA have been averted.

Publicity for Emergency Regulations

Publicity for Emergency Regulations is very inadequate. As already mentioned, Emergency Regulations come into effect immediately upon being made and do not have to be laid before Parliament. We have recommended above that all Emergency Regulations should be laid before Parliament for approval and, except in extreme situations, should not come into effect until so approved. This would at least enable Members of Parliament to inform themselves of emergency legislation.

⁵⁷ Not yet reported, but a transcript of the judgment of Amerasinghe J, on behalf of the Court, has been printed in 'The Island' newspaper. See also *Channa Pieris v Attorney-General* (1994) 1 SLR 1.

This alone, however, would be inadequate. Emergency Regulations are published in the official Gazette. However, the Gazette has a very limited circulation. The quantity of emergency legislation is very large and it changes constantly. There is no proper system of numbering, listing or indexing the regulations. An independent human rights organisation, the Nadesan Centre for Human Rights through Law, provides an invaluable service in monitoring the Gazette and notifying subscribers of changes in the regulations. However, this should not be left to a private organisation.

We recommend

- (i) that all new Emergency Regulations and amendments and rescissions of existing regulations, should be published in Sinhala, Tamil and English language newspapers circulating throughout the areas under the control of the Government**
- (ii) that the Government should prepare and keep updated and indexed a collection of the Emergency Regulations for the time being in force which would be accessible to the public; as soon as possible this should take the form of a computer database which could be accessed on the internet.**

Use of Emergency Regulations for Non-emergency Purposes

Emergency Regulations are sometimes very wide in scope, and enter into fields which do not have any very obvious connection with the emergency; it is hard to see, for instance, what relevance to the emergency the Emergency (Games of Chance) (Jack-pot) Regulation N° 1 of 1995 can have. More seriously, there are some cases in which the Government appears to have been trying to use Emergency Regulations as a short-cut to avoid the need for primary legislation in relation to matters which have no real connection with the emergency. A particularly serious example was the Emergency (Generation of Electrical Power and Energy) Regulation N° 1 of 1997. The effect of this

regulation was to remove the application of existing environmental protection legislation from the generation of power and energy. The motive for this, it is believed, was the Government's wish to construct a particular new power station without having to comply with the legislation. As a result of public pressure the regulation was rescinded by the Government after about three months.

We believe that abuses of this kind could be prevented by adopting our recommendation, made above, for the repeal of section 8 of the Public Security Ordinance. This would enable Emergency Regulations to be challenged in the courts on the basis that they could not reasonably be regarded as necessary or expedient for the purposes authorised by the Ordinance.

The Indemnity Act

We have already referred to provisions in the Public Security Ordinance and the PTA which exclude civil and criminal liability for certain acts done "in good faith". In addition, the Indemnity Act of 1982, as amended by the Indemnity (Amendment) Act of 1988, excludes civil and criminal liability "for or on account of or in respect of any act, matter or thing . . . done or purported to be done with a view to restoring law and order during the period August 1, 1977 to [16 December 1988], if done in good faith" by a person holding government office (including the police and the armed forces) or acting under the authority of such an office-holder.

This Act was not raised with us as an issue during our mission, perhaps because any acts covered by it must have been at least nine years old. In any event, the incidents which have caused particular concern involve acts which could not by any stretch of the imagination be described as having been done in good faith. However, legislation of this kind giving retrospective immunity from suit or prosecution for unlawful acts is in our view wholly unjustifiable. Even though the Act now has little practical importance, it should not remain on the statute book.

We recommend that the Indemnity Act be repealed.

Confessions

The normal rule in Sri Lanka is that confessions to police officers are not admissible in evidence; confessions are only admissible if made before a Magistrate. Confessions to police officers are suspect because of widespread use of torture. However, confessions to a police officer of the rank of Assistant Superintendent or above are admissible on the trial of offences both under the Emergency Regulations⁵⁸ and under the PTA.⁵⁹

We believe that the admissibility of confessions in such cases encourages the use of torture and that such confessions can not be regarded as reliable. We were told that in many cases the courts have in fact refused to admit confessions made to police officers on the ground that they were not made voluntarily.

We recommend that the ordinary rules as to the admissibility of confessions should apply to the trial of offences under Emergency Regulations or the PTA.

58 Emergency (Miscellaneous Provisions and Powers) Regulations, reg. 49

59 Prevention of Terrorism (Temporary Provisions) Act, s. 16.

IV - THE JUDICIARY

The Courts and their Jurisdiction

Article 105 of the Constitution (see Annexe B) establishes a Supreme Court, a Court of Appeal and a High Court. Lower courts are established by Act of Parliament. The Judicature Act No. 2 of 1978 as amended by the Judicature (Amendment) Act No. 16 of 1989 established District Courts, Magistrates Courts, and Small Claims Courts.

The Supreme Court consists of the Chief Justice and not less than six or more than ten other judges.⁶⁰ It is the final court of civil and criminal appeal.⁶¹ An appeal lies to the Supreme Court from the Court of Appeal, with the leave of either Court, in any matter which involves a substantial question of law; and leave must be granted if the question to be decided is of public or general importance.⁶²

However, the Supreme Court also has original jurisdiction in several important matters. The most significant of these is the Court's exclusive jurisdiction to hear actions relating to the infringement by executive or administrative action of any fundamental right declared by Chapter III of the Constitution.⁶³ We were told that cases involving its fundamental rights jurisdiction now take up about 75 per cent of the time of the Supreme Court. As discussed in the previous chapter of this Report, the Supreme Court has used its fundamental rights jurisdiction to gain some control over the exercise of the Government's powers under Emergency Regulations and the PTA.

60 Constitution, Art. 119.

61 *ibid*, Arts 118 (c), 127 (1).

62 *ibid*, Art. 128 (1), (2).

63 *ibid*, Arts 118 (b), 126. For Chapter III of the Constitution, see Annexe A. The Supreme Court also has jurisdiction under Article 126 in relation to infringement of language rights under Chapter IV.

The Supreme Court also has jurisdiction to determine whether any Bill is inconsistent with the Constitution and, in the case of a Bill to amend the Constitution, whether it requires approval by a referendum under Article 83 of the Constitution.⁶⁴ However, this jurisdiction can only be invoked by a petition filed within one week of the Bill being placed on the Order Paper of Parliament.⁶⁵ Apart from this procedure, the Supreme Court has no power to declare a Bill or Act of Parliament to be unconstitutional.⁶⁶ The Supreme Court has exclusive jurisdiction to determine questions relating to the interpretation of the Constitution, and if any such question arises in a lower court it must be referred to the Supreme Court for determination.⁶⁷

The Supreme Court has a consultative jurisdiction on questions referred to it by the President, and original jurisdiction in relation to certain election petitions, breaches of Parliamentary privilege, and any other matters ordained by Parliament.⁶⁸

The Court of Appeal consists of a President and not less than six or more than eleven other judges.⁶⁹ It has jurisdiction to hear appeals on matters of fact or law from courts of first instance or tribunals, and to hear applications for judicial review and most election petitions.⁷⁰ It has original jurisdiction to issue writs of habeas corpus, though the Court may (and usually does) refer applications for habeas corpus to a court of first instance to inquire and report to the Court of Appeal on the facts of the case.⁷¹

Both the Supreme Court and the Court of Appeal are based in Colombo and sit in divisions, normally of three judges in the Supreme Court and two in the Court of Appeal, though in cases of exceptional constitutional importance there may be a larger panel or the Supreme

64 Constitution, Arts 118 (a), 120

65 *ibid*, Art. 121 (1)

66 *ibid*, Art. 124

67 *ibid*, Art. 118 (a), 120

68 *ibid*, Arts 118 (d) - (g), 129 - 131

69 *ibid*, Art. 137.

70 *ibid*, Arts 138, 140, 144

71 *ibid*, Art. 141.

Court may sit in banc. For example, the case concerning the Thirteenth Amendment to the Constitution Bill was heard by nine judges.

The High Courts are the courts of first instance for serious criminal cases.⁷² They have also recently acquired jurisdiction as civil courts of first instance in commercial matters (including company law).⁷³ They hear appeals from Magistrate's Courts and Small Claims Courts⁷⁴, and they have jurisdiction to make orders of habeas corpus in respect of persons illegally detained within the relevant Province and to exercise judicial review in certain circumstances.⁷⁵

There is a separate High Court in each Province.⁷⁶ Branches of a Provincial High Court may sit in more than one place in the Province. At the date of our mission the High Court was not functioning properly in the Northern or Eastern Provinces. In the North, a High Court was opened in Vavuniya during the mission but there was no High Court branch in Jaffna or Mannar. In the East, a single Court was serving both Trincomalee and Batticaloa. Most trials of defendants from the Northern and Eastern provinces charged with serious offences take place in Colombo, which is very inconvenient for them - particularly in the case of defendants from the Jaffna peninsula, given that overland travel from Jaffna to the Government-held areas to the south is still impossible. We believe that it is important to reopen a High Court in Jaffna as soon as possible.

There are now seven High Courts sitting in Colombo. Until recently there were six; it was originally proposed that the additional court should sit exclusively to hear charges under the PTA. In the event, it was decided that the new court should exercise a general jurisdiction. We welcome this decision; we do not believe it is right to have special courts to hear cases related to the emergency.

72 Judicature Act, N° 2 of 1978, s. 9.

73 High Court of the Provinces (Special Provisions) Act N° 10 of 1996.

74 Judicature Act s. 26, as substituted by the Judicature (Amendment) Act, N° 16 of 1989.

75 Constitution, Art. 154 P (4, inserted by the 13th Amendment.

76 *ibid*, Art. 154 P (1).

District Courts are the main first instance courts for civil actions, and also act as family courts.⁷⁷ Magistrates' Courts deal with all criminal offences except those tried in the High Court. Small Claims Courts have a very limited civil jurisdiction, mainly concerned with small debt cases.⁷⁸

Sinhala is officially used as the language of the courts except in the parts of Sri Lanka where Tamil is the language of administration, in which case it is the language also of the courts.⁷⁹ Parties and their lawyers who are not conversant with the language of the court are entitled to use the other language in court and to the services of an interpreter provided by the State.⁸⁰ The Minister of Justice may authorise the use of English in any court.⁸¹ In practice, the proceedings of the Supreme Court and the Court of Appeal are conducted in English.

We were told⁸² that there were serious problems for Tamil litigants and lawyers, particularly in Colombo. The right to the services of an interpreter is not observed because interpreters are not available. Few judges can function in Tamil. Publication of legislation and Emergency Regulations in Tamil is not up to date. Law Reports and textbooks are not available in Tamil.

We recommend that steps be taken to improve the access of Tamil lawyers and litigants to justice by providing interpreters and ensuring publication of legislation and law reports in Tamil.

Encouragement could be given to judges to become able to conduct trials in both Tamil and Sinhala - perhaps by a salary bonus.

77 Judicature Act, s. 19, as substituted by the Judicature (Amendment) Act, N° 16 of 1989.

78 *ibid*, s. 24, as so substituted.

79 Constitution, Art. 24 (1) (as substituted by the 16th Amendment). Tamil is the language of administration in the Northern and Eastern Provinces: Art. 22 (1) (as substituted by the 16th Amendment).

80 *ibid*, Art. 24 (2), (3) (as amended by the 16th Amendment).

81 *ibid*, Art. 24 (4) (as amended by the 16th Amendment).

82 Interview with Neelam Thiruchelvam, MP.

The Appointment of the Judiciary

Appointments to the offices of Chief Justice, President of the Court of Appeal, and judge of the Supreme Court, the Court of Appeal or the High Court are made by the President.⁸³ Judges of the Supreme Court have constitutional tenure to the age of 65, and judges of the Court of Appeal to the age of 63⁸⁴, subject to the power of removal discussed below.

District Court Judges and Magistrates are appointed and may be transferred, dismissed or disciplined by the Judicial Service Commission.⁸⁵ The Commission consists of the Chief Justice and two judges of the Supreme Court, appointed by the President for renewable five-year terms.⁸⁶ The Secretary to the Commission - an important office - is appointed by the President.⁸⁷

There are well-established conventions as to appointments to the Supreme Court, Court of Appeal and High Court. The majority of appointments are made by promotion, normally on the basis of seniority, from judges of the court of the next lower level. However, a certain number of appointments at each level - perhaps one in four - are made direct from lawyers of appropriate seniority who are members of the Attorney-General's Department and other government lawyers. When there is a vacancy in the office of Chief Justice or of President of the Court of Appeal, the next senior judge of the court is normally appointed to the office, but by convention the Attorney-General may be appointed to fill a vacancy in the office of Chief Justice. Appointments are occasionally made from the lawyers in private practice, and in one case (former Chief Justice Neville Samarakoon) the Chief Justice was appointed direct from private practice. However, successful lawyers in private practice earn far more than judges and are reluctant to accept appointment. Again by convention (and not, as in India, by express

83 Constitution, Arts 107 (1), 111 (1) (as substituted by the 11th Amendment)

84 *ibid*, Art. 107 (5)

85 *ibid*, Art. 114 (1), (6)

86 *ibid*, Art. 112 (1), (4)

87 *ibid*, Art. 113. For powers which may be delegated to the Secretary see Art. 114 (4), as amended by the 11th Amendment.

constitutional requirement) the President consults the Chief Justice before making appointments.

A highly controversial break with precedent occurred in October 1996 when the President appointed Shirani Bandaranaike to the Supreme Court. Ms Bandaranaike (who is not related to the President) was the first woman to be appointed to the Supreme Court. She was a young (aged 37 when appointed) academic lawyer who had been admitted to the Bar for only 13 years and had never practised. We were told that she had published little and was not particularly well regarded as an academic lawyer. It is widely believed that the Chief Justice was not consulted about her appointment.

The appointment led to consternation among many judges and members of the legal profession, and was challenged by legal proceedings in the Supreme Court on the ground that the President had acted improperly in the exercise of her constitutional powers. The Supreme Court, in a rather Solomonic judgment of a 4 to 3 majority, held that it would be improper for the President not to consult the Chief Justice about an appointment (despite the absence of an express constitutional requirement) but dismissed the application because the applicants had failed to produce evidence that the President had not in fact consulted him about the appointment of Justice Bandaranaike. Thus the Supreme Court laid down guidelines for future appointments while avoiding the constitutional crisis which would have resulted from holding the appointment of Justice Bandaranaike to be void. The minority held that the President was under no constitutional obligation to consult the Chief Justice. We were told that Justice Bandaranaike had adopted a low profile since her appointment, and there was no criticism of her conduct on the Court.

In our view, there is much to be said for having at least one woman judge on the Supreme Court, having regard in particular to the fact that discrimination on the ground of sex is one of the matters covered by the fundamental rights jurisdiction of the Court.⁸⁸ To the extent that this requires a departure from established constitutional conventions, we believe that such a departure is justified. It does appear to us,

⁸⁸ *ibid*, Art. 12 (2), (3).

however, that Justice Bandaranaike's qualifications for appointment would have been regarded as clearly inadequate had she been a man. From our discussions it appeared to us that there were a number of women who had better qualifications for the post. We therefore feel some concern about the motivation for the appointment.

There has also been criticism of delays in filling vacancies. Vacancies which occurred in the Court of Appeal in April and December 1996 and March 1997 were not filled until July 1997, when three new appointments were made. One of these was the senior High Court judge, Upali Gunawardena, who had until immediately before his appointment been engaged in a prolonged trial of the editor of the Sunday Times on a charge of criminal defamation of the President, of which he was found guilty. This inevitably led to speculation that the appointments had been delayed as a threat to Justice Gunawardena. It may well be that the appointments were delayed in order to preserve the seniority in promotion which Justice Gunawardena, as the senior High Court judge, would have expected; but even so it is unfortunate that the vacancies were left open so long, particularly since the Court of Appeal is notorious for its delays. The problems and the suspicion could have been avoided if (as is the case in some other countries) judges were permitted, on promotion, to complete hearing the case on which they are currently engaged.

This leads to the wider question whether the current laws and conventions governing the appointment of judges of the appellate courts and the High Court are satisfactory. There are two main criticisms - first, the fact that the President's power to make appointments is not constrained (at least formally) by any obligations to consult or obtain the concurrence of any other persons, and is therefore open to abuse; and second, that the emphasis given to seniority results in promotion on the ground of long service rather than merit.

It is of course true that promotion by seniority, though worse than promotion on merit, is preferable to appointment based on political partisanship. Thus a strong convention of promotion by seniority (such as exists in Sri Lanka) may deter the person with the power of appointment from making partisan appointments and may increase the independence of the judiciary by reducing the fear that decisions which displease the government may lead to the withholding of promotion.

Under the present system of appointment in Sri Lanka, with no formal restrictions on the President's power of appointment but with a strong culture of judicial independence, we believe that a convention of appointment by seniority does more good than harm. However, we believe that appointment and promotion on merit through selection by an independent Judicial Service Commission, or by the President from a short list of names selected by the Commission, is a better system. We draw attention to the South African system, where the Commission includes members selected by the judiciary, the legal profession and opposition parties as well as by the government. An alternative method would be to add the Judicial Service Commission to the list of bodies whose members are, under the draft of the proposed new Constitution, to be appointed on the recommendation of the Constitutional Council.

As mentioned above, judges of the lower courts are appointed by the Judicial Service Commission. We were told that appointments were usually made from relatively junior lawyers.⁸⁹ They become, in effect, a career judiciary.

By another convention, the two senior judges of the Supreme Court are appointed to sit with the Chief Justice on the Judicial Service Commission. Here again there has been another recent departure from convention, since the two most senior judges - Justices Mark Fernando and Amerasinghe - have not been re-appointed after the conclusion of their first terms of office. Those two judges have a particular reputation for independence and there is concern that this may have been a reason for not re-appointing them.

Women and Tamils are underrepresented on the bench. Justice Shirani Bandaranaike is the only woman judge of the Supreme Court. There are no women judges of the Court of Appeal and, as we

⁸⁹ Under the rules made by the Judicial Service Commission in 1978 a person became eligible for appointment as a Magistrate after having been in active practice (which includes Government service or service as a teacher of law) for six years, and for appointment as a Grade II District Judge (unless already a Magistrate) after ten years. We understand that these periods have now been reduced, and that the minimum period of practice required for appointment as a Magistrate is now three years.

understand it, only one woman High Court judge out of 26. There is one Tamil judge of the Supreme Court, one of the Court of Appeal, and one of the High Court, though on a proportional basis there would be two at each of the two appellate levels and four or five in the High Court.

We therefore recommend

- (i) that consideration should be given to changing the constitutional method of judicial appointment**
 - (a) by selecting the Judicial Service Commission by methods which will make it more independent and**
 - (b) by requiring appointments to the higher courts to be made by the Commission, or by the President from a short list of names selected by the Commission**
- (ii) that if the above proposal is not adopted, constitutional force should be given to the conventions that the President must consult the Chief Justice before making appointments and that the two senior judges of the Supreme Court should, with the Chief Justice, make up the Judicial Service Commission**
- (iii) that the Secretary of the Commission should be appointed by the Chief Justice and not by the President**
- (iv) that in making appointments the desirability of increasing the number of women and Tamil judges should be borne in mind.**

Judicial Training

A limited amount of training for newly appointed Magistrates and District Court Judges is provided by the Sri Lanka Judges Institute. This body was set up in May 1984 and became a statutory body on 1 January 1986, under the Sri Lanka Judges Institute Act No. 46 of 1985.

The statutory objects of the Institute are

- (a) to provide facilities for the exchange of views and ideas on judicial and legal matters by judicial officers
- (b) to organise and hold meetings, conferences, lectures, workshops and seminars with a view to improving the professional expertise of judicial officers and advancing their knowledge and skills
- (c) to formulate and conduct training and research courses in various aspects of the administration of justice
- (d) to provide library facilities and other educational material for judicial officers.

The Institute has a Board of Management, consisting of the Chief Justice and two other judges of the Supreme Court appointed by the President. The Institute was until October 1990 funded by the Asia Foundation. Since then, the Institute has been funded by an annual grant of 750,000 Rupees. This is equivalent to about US\$15,000, which is obviously insufficient for anything above a very basic level of activity.

The Director of the Institute at the date of the mission was Mr. J. F. A. Soza, a retired judge of the Supreme Court. Justice Soza had been the Director ever since the foundation of the Institute. He impressed us as a man of remarkable energy, enthusiasm and dedication, and is held in the highest regard by human rights organisations in Sri Lanka. He is assisted by a Deputy Director, secretary and office aide. The Institute consists of a lecture room with space for up to 20 people, and an office which contains a library of about 150 books - the majority of them on American law, presented by the Asia Foundation.

The Institute now provides a six-month training course for newly appointed Magistrates. There were ten Magistrates currently undergoing training at the time of the mission. Training consists of lectures and seminars given by sitting and retired judges of the higher courts and senior staff from the Attorney-General's Department. Workshops on subjects such as children's and women's rights and environmental law are conducted by specialists. Trainee magistrates then complete the

course by being sent to sit as observers with experienced magistrates. About 12 seminars a year are held as in-service training. There are also two or three seminars a year for High Court judges, by invitation.

An increasingly serious problem is the inadequate knowledge of English of many of the newly appointed judges of the lower courts. Almost all the law reports are in English; there are hardly any law reports in Sinhala and none at all in Tamil. It is therefore of great importance that judges should be able to read and understand judgments in English. Knowledge of English is, of course, essential if the judiciary in Sri Lanka is to keep abreast of case law in India, the UK, and other common law countries. The Judges' Institute has been unable to tackle this problem effectively because there are no funds to pay for the intensive language training course of several months which would be needed.

The Institute has, for lack of funds, been wholly unable to carry out its statutory object of providing library facilities for judges.

Justice Soza has produced very ambitious plans for the development of the Institute, including a residential training college for newly appointed judges. As an immediate objective, the plan for a training college may perhaps be unrealistic. However, we fully endorse most of Justice Soza's recommendations; in particular,

we recommend

- (a) there should be intensive training in Tamil and English for newly appointed judges who need it**
- (b) there should be a much more intensive course of lectures and seminars for new judges**
- (c) there should be specialised training in commercial law for new High Court judges**
- (d) space, books and the services of a librarian should be provided to set up a proper library to meet the needs of the Institute's own courses and of the judiciary.**

We recognise that this requires funding which may be very difficult to raise in a developing country which is burdened with the costs of an internal war. We think that the attention of foreign donor governments and organisations could be drawn to the Judge's Institute as a place where quite small amounts of funding (some of which could be in kind, such as providing copies of textbooks and law reports, rather than cash) could have valuable long-term benefits.

Removal from Office

Judges of the Supreme Court and Court of Appeal can only be removed from office by an order of the President, made after an address of Parliament, supported by a majority of the total number of Members of Parliament, for such removal on the ground of proved misbehaviour or incapacity.⁹⁰ The procedure for investigation and proof of the alleged misbehaviour or incapacity is governed by Parliamentary Standing Orders.⁹¹

Only one attempt has been made to remove a judge under this procedure. This occurred in 1984, following a speech by the then Chief Justice, Neville Samarakoon, at a school prize-giving day. A Parliamentary Select Committee was set up to investigate and report on the alleged misbehaviour of the Chief Justice. The Committee's Report was split on party lines. The majority, while concluding that the Chief Justice's speech fell short of "proved misbehaviour", and therefore did not justify his removal, claimed that the speech amounted to a serious breach of convention which had imperilled the independence of the judiciary. The minority said that nothing in the speech was even remotely possible of being interpreted as proved misbehaviour.⁹²

90 Constitution, Art. 107 (2).

91 *ibid*, Art. 107 (3).

92 For an account of these proceedings, see the pamphlet published in 1997 by the Nadesan Centre to commemorate the tenth anniversary of the death of Mr S. Nadesan, who had been counsel for the Chief Justice in the proceedings. The Chief Justice had been President Jayewardene's personal lawyer at the time of his appointment but had delivered a number of judgments unwelcome to the ruling UNP.

A more successful attempt to remove from office judges unwelcome to the Government had been made in 1978 on the introduction of the present Constitution. The Constitution reorganised the higher courts, replacing two levels (the Supreme Court and the High Court) with the present three. Article 163 of the Constitution directed that all judges of the Supreme Court and the High Court holding office immediately before the commencement of the new Constitution should cease to hold office. Most of them were re-appointed, but eight judges of the previous Supreme Court and five of the High Court were dropped. This action was seen at the time as a grave breach of judicial independence and created a sense of insecurity which has still not entirely dissipated. If a new Constitution is adopted, it is most important that this particular precedent should not be followed.

We think it is very unsatisfactory for the inquiry into the alleged misconduct or incapacity of a senior judge to be carried out by a Parliamentary Committee acting under Parliamentary Standing Orders. Such an inquiry is plainly a judicial process.

We recommend that Article 107 (3) of the Constitution be replaced by a provision requiring investigation and proof of alleged misbehaviour or incapacity to be carried out by an appropriate judicial body.

Judges of the High Court are removable by the President on the recommendation of the Judicial Service Commission.⁹³ Dismissal and disciplinary control of the judges of lower courts is a matter for the Judicial Service Commission.⁹⁴ We did not hear any complaint of cases where these powers had been improperly exercised, though there were one or two cases where it appears that the powers had not been exercised when they should have been. In one case, a Magistrate has been accused in the press of obtaining a woman's consent to sexual intercourse in return for a promise of favourable treatment for her husband. So far as we are aware, no action has been taken to investigate these claims.

⁹³ Constitution, Art. 111 (2).

⁹⁴ *ibid*, Art. 114 (1).

The Independence of the Judiciary

There is a strong culture of judicial independence in Sri Lanka. The Supreme Court, in particular, is vigorously independent. While it took some time for it to get used to the exercise of its fundamental rights jurisdiction under the 1978 Constitution it now exercises that jurisdiction freely and effectively.

We have already outlined in the previous Chapter a number of important decisions in which the Supreme Court and the Court of Appeal have decided cases in favour of petitioners and against the authorities in relation to the Emergency Regulations and the Prevention of Terrorism Act. There have been similar decisions in other fields.

Perhaps the most important decision of the Supreme Court in recent years was its decision in November 1987 in the case of the Bill introducing the Thirteenth Amendment to the Constitution,⁹⁵ which created Provincial Councils and devolved extensive powers to them. The issue was whether the Amendment could be passed by a special Parliamentary majority under Article 82 of the Constitution or whether it required approval by a referendum under Article 83 as well as the special majority. A referendum is required for the amendment of certain entrenched Articles, including Article 83 itself. In a complex decision, four of the nine judges hearing the case held that no referendum was required. Another four held that the Amendment was inconsistent with some of the entrenched Articles - in particular, Article 2, declaring Sri Lanka to be a unitary state - and could not be adopted without a referendum. The ninth judge held that certain provisions of the Amendment concerning the method by which the new Articles introduced by the Amendment could themselves be amended were inconsistent with Article 83 and would require approval by referendum, but that the Amendment did not in other respects require approval by referendum. The result was on balance a victory for the Government, since it was able to modify the terms of the Amendment so as to avoid

⁹⁵ SC Application Nos. 7-47/87 (Spl) and SD 1 & 2/87 (Presidential Reference) decided on 6 November 1987. The Court was exercising its constitutional jurisdiction under Article 120.

the necessity for a referendum. However, the judgments show a conflict of strongly held individual opinions and certainly not a judiciary subservient to the executive.

In another case of great constitutional importance, the Court of Appeal held that the dissolution of two Provincial Councils was invalid under the Thirteenth Amendment because the Governors of the Provinces concerned had acted beyond their powers.⁹⁶

There have been other, more recent cases in which the Supreme Court has given decisions unwelcome to the Government. An important recent example was the challenge to the validity of the Sri Lanka Broadcasting Authority Bill.⁹⁷ In a powerful judgment, the Court held that the Bill was inconsistent with the Constitution in a number of respects, and could only be enacted by a special Parliamentary majority and a referendum. The fact that the proposed Authority would have control over the content of programmes broadcast by private broadcasters but not over the programmes of the state radio and television companies would involve a breach of Article 12 (1) (equality before the law). The Court, while rejecting the argument that any licensing system would involve a breach of Article 14 (1) (freedom of speech), held that the proposed Authority lacked independence and was susceptible to interference by the Minister and that, having regard to the powers conferred on the Authority and the Minister by the Bill, the Bill was inconsistent with Article 10 (freedom of thought - an entrenched Article) and Article 14 (1).

It has been a political tradition in Sri Lanka to grant licences to sell liquor to Government supporters, and that when the Government changes hands licenses granted by the previous Government are not renewed at the end of the year for which they have been granted. When the incoming Government attempted to do this in 1994, the Supreme Court held that the non-renewal of licences granted by the UNP Government was a breach of the fundamental right to carry on business and was therefore unconstitutional.

⁹⁶ *Premachandra v Jayawickrama* [1993] 2 Sri LR 294.

⁹⁷ SD N° 1-15/97, decided on 5 May 1997.

Judges of the lower courts may be somewhat more susceptible to pressure, given the possible adverse consequences on promotion of decisions unwelcome to the Government. Our impression was that this was more feared as a possibility than seen as an actuality.

Sri Lanka has a tradition of judicial independence which is reinforced by the example of judicial independence in India - a country whose influence on Sri Lanka is strong. We are satisfied that there is a high degree of independence among the current judiciary in Sri Lanka. There are, however, some matters of concern. As explained above, we are critical of the present system of judicial appointment. We are also worried that the President has made a number of public statements critical of the judiciary - for example, after the *Cooray* case, she made what were described to us as intemperate remarks about the judiciary during a question and answer session on television.

Finally, we recognise that judicial independence can be threatened by private corruption as well as by Government pressure. We were glad to be told that judicial corruption is not seen as a significant problem in Sri Lanka. We were told that there was one suspected case some years ago among the lower judiciary; it was not proved but the judge left the service.

Delays

The law's delays are a source of complaint in developed as well as developing countries, in civil law as well as common law systems. However, there are some aspects of delay in the Sri Lankan system which cause us particular concern.

Fundamental rights cases in the Supreme Court can often be heard quite quickly, though there may be delays of up to a year if, for example, there are difficulties in getting statements from the police in detention cases. It takes a year to 18 months for appeals to come on for hearing, which is quite good compared to the situation in the highest courts of some other countries. There are delays of some two to three years in the Colombo High Court, and there are delays in some District Courts.

By far the worst delays occur in the Court of Appeal. The Chief Justice and the President of the Court of Appeal said that the delay was about 4 or 5 years (though the latter said that in criminal appeals the delay was two years at most). Other estimates were as high as six to eight years.

It is not entirely clear why the delays are so bad. One reason which was given to us was that most appellate work is in the hands of a small number of leading lawyers who often have clashes of hearing dates and are all too happy to help each other out by agreeing to their opponents' requests for an adjournment when this happens. We heard this from enough sources to believe it to be true. We believe that the Court of Appeal should be less willing to grant adjournments for counsel's convenience. The Court lays emphasis on the principle that a litigant is entitled to be represented by the lawyer of his choice, but this principle should not be used to allow a case to be adjourned until such time as counsel of the litigant's choice is free if this causes serious delay.

On the other hand, it was pointed out to us that an agreed application for adjournment takes up little of the Court's time so that, while this may lead to excessive delays in particular cases, it should not significantly increase the total backlog. A more serious cause of delay is probably the shortage of judges in the Court of Appeal. The President of the Court told us that, of the twelve members of the Court, three had current or recent medical problems and two had been appointed to sit as members of a commission, thus reducing the number of divisions available to hear cases. There is no power in Sri Lanka (as there is in some other countries) to invite retired judges with experience on the Court of Appeal to return temporarily when regular judges are absent, or to deal with a temporary increase in business.

We recommend that action be taken to cut the delays in the Court of Appeal; such action should include a tougher attitude towards adjournments for the convenience of counsel and either an increase in the number of full-time members of the Court or the use of retired judges on a part-time basis or both.

While the delays in appeals are bad enough, we were horrified at the delays in the exercise of the Court's original habeas corpus jurisdiction. Habeas corpus should be - and in most jurisdictions is - treated as

a matter of the utmost urgency. In Sri Lanka, habeas corpus applications take years. Indeed, we were told that habeas corpus was now sought mainly in cases which were not urgent; in urgent cases it is more effective to apply to the Supreme Court under its fundamental rights jurisdiction on the grounds of breach of the freedom from torture or from arbitrary arrest and detention.⁹⁸

Representatives of one human rights organisation⁹⁹ which helps applicants in habeas corpus cases said that many cases took five or six years. We were shown one specific case¹⁰⁰ which had been filed on 10 January 1992. There had been 33 hearings; the next hearing date was fixed for shortly after the end of our mission. It was said that those who could give evidence in the matter were serving in the war zone, and were not available; meanwhile, the "corpus" remains in custody. In another case, the Attorney-General's Department took more than a year to file its objection to the writ - the first step in the proceedings.

Another human rights organisation, the Movement for the Defence of Democratic Rights, reported in 1996 that between 1989 and 1993 it had filed 133 applications for habeas corpus. The Court of Appeal had come to a decision in only 6 of those cases. In a further 66, the Magistrate's inquiry and report process had been completed and the cases were awaiting final argument in the Court of Appeal.

One serious cause of the delay is the fact that, as mentioned above, the Court of Appeal normally exercises its constitutional power to refer writs of habeas corpus to a court of first instance to inquire and report.¹⁰¹ This may be an appropriate course of action in some cases - particularly those of "disappearances" where it is certain or virtually certain that the victim is in fact dead and the real purpose of the application is to try to find out what happened. However, where there is a live "corpus" the reference for inquiry and report is bound to add greatly to delay. We recommend that the Court of Appeal treats *habeas corpus* applications as a matter of the greatest urgency, insists on rapid

98 Constitution, Arts 11, 13 (1), (2).

99 Lawyers for Human Rights and Development.

100 N° 02 of 1992.

101 Constitution, Art. 141, first proviso.

responses from the respondents, and in most cases hears the evidence itself instead of referring it for inquiry and report.

LTTE Courts

The LTTE set up a basic court system in Jaffna and surrounding areas when they were in control. Legal training continued to be provided in Jaffna during this period and we understand that young law graduates (all or most of whom were LTTE cadres) served as judges. These courts ceased to function when Jaffna was recovered by Government forces. Only the most rudimentary legal system, if any, exists in the areas now controlled by the LTTE. We do not think any useful purpose would be served by commenting further.

V - LAWYERS AND LEGAL SERVICES

There are a number of routes by which people can obtain legal services if they are too poor to pay for them themselves. First, the Courts will assign counsel to defendants charged with serious criminal offences. Counsel receive small payments from the state for acting in this capacity. Second, there is the Legal Aid Foundation, which was founded in 1978 and is an official body set up under statute. It has a governing body of eight members, five being nominated by the Bar Association and three by the Government. It provides some legal aid in certain types of civil action. It receives a Government grant of 500,000 rupees (about US\$ 9,000) which is insufficient to pay administrative costs but the bulk of the funding comes from the USA through the Asia Foundation.

Third, the Bar Association itself provides legal assistance in some fundamental rights cases. The Supreme Court (like the Indian Supreme Court) will accept petitions on a very informal basis, even treating letters of complaint as petitions. The Supreme Court refers informal petitions to the Bar Association's Human Rights Committee, which will investigate the matter and, if satisfied that there is an arguable case, will arrange for counsel to file a proper petition and appear in court. Counsel act pro bono or are paid a nominal sum. Finally, there are several NGOs which provide free legal services in cases with human rights implications; these include Lawyers for Human Rights and Development,¹⁰² Movement for the Defence of Democratic Rights, and Movement for Inter-Racial Justice and Equality. These NGOs are mainly funded by foundations in Northern Europe and North America.¹⁰³

102 In 1996, according to its annual report, LHRD made 461 appearances in 156 cases.

103 According to its annual report for 1996, more than 80 per cent of LHRD's funding of a little over 3 million rupees (about US\$ 55,000) came from grants by NORAD, CIDA, the Asia Foundation and Helvetas.

Among those whom the mission interviewed, there were quite sharp differences of opinion as to the availability of the legal services provided in these ways. The balance of opinion (including that of Mr. R. K. W. Goonesekere, who is widely regarded as the leading human rights lawyer in current practice in Sri Lanka) was that there is no difficulty in getting lawyers to act as counsel. However, the quality is variable. Many lawyers taking on these cases are (not surprisingly) young and inexperienced, and take them on to gain experience. Few established senior lawyers (Mr. Goonesekere being by all accounts the outstanding exception to this rule) are willing to appear regularly for poor clients in human rights cases.

During the period of JVP insurgency from 1987 to 1990 a number of lawyers active in the human rights field were killed, mainly by the police or armed forces. The number of deaths, according to the Bar Association, was seven or eight, though other sources place the figure at more than 20.¹⁰⁴ A number of other lawyers fled the country. However, it was the unanimous view of those with whom we raised the subject that lawyers in Sri Lanka (including those who defend Tamils on charges related to the emergency) are not now under any threat of personal danger or intimidation. Indeed, it was suggested to us that young lawyers are often eager to defend cases brought under the Prevention of Terrorism Act because of the press publicity which they obtain.

We heard criticism of low standards in some of the institutions providing legal education. This has been made worse by the expansion of legal education in recent years and the creation of new institutions to provide it. Lack of familiarity with the English language and the shortage of textbooks and law reports in Sinhala and Tamil have also contributed to the lowering of the standards of legal education.

We conclude that, taking into account Sri Lanka's relatively poor economy, current arrangements for providing legal assistance to those charged with serious offences, and to petitioners in fundamental rights cases, are reasonably satisfactory.

¹⁰⁴ The figures may perhaps be reconciled if the higher figure includes the deaths of those who were lawyers but who were killed for reasons not connected with their practices.

VI -DISAPPEARANCES AND EXTRA-JUDICIAL EXECUTIONS

The History

As explained in the Introduction, the Mission's duties did not include primary investigations of alleged incidents involving disappearances and extra-judicial killings. A great deal of work in this field has been done by other organisations, notably Amnesty International.¹⁰⁵ The United Nations Working Group on Enforced or Involuntary Disappearances has also reported on Sri Lanka. The United Nations Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions visited Sri Lanka shortly before the Mission's visit.

The role of the Mission was to look at the procedure for investigating alleged violations of human rights, for prosecuting those against whom there is evidence, and for preventing or reducing future violations of human rights in the course of the current emergency. Since our investigations are concerned with what the Government has done or failed to do, we have not looked at incidents for which the LTTE or the JVP have been responsible. However, some background information is necessary in order to appreciate what is involved.

"Disappearance" is, in the great majority of cases, a euphemism for murder. There were some cases of temporary disappearances in earlier days, when there was no obligation on the security forces to notify detainees' families or the Human Rights Task Force of arrest or detention. We were told that there have been a few cases, in recent months,

¹⁰⁵ See, in particular, "Sri Lanka - When will justice be done?" ASA 37/15/94, published July 1994; "Sri Lanka - Time for truth and justice" ASA 37/04/95, published 1995; "Sri Lanka - Wavering commitment to human rights" ASA 37/08/96, published August 1996; "Sri Lanka - Government's response to widespread disappearances in Jaffna", 27 Nov. 1997 ASA 37/24/97.

where deserters from the LTTE who have surrendered to Government forces have preferred that it should not be known that they are still alive, for fear of LTTE retribution against their families. However, these seem to be very much the exception.

The incidents fall into two very distinct categories. The first category arises out of the war with the LTTE. Killings in this category have occurred in the Northern and Eastern Provinces, and to a limited extent in the Colombo area. The victims have been exclusively Tamil. The perpetrators have been the security forces and pro-Government Tamil and Muslim militia, armed by the Government. Most of the incidents have arisen out of indiscipline; in particular, there have been numerous cases of revenge killings following the killing of members of the security forces. There are some cases in which security forces - in particular, the para-military Special Task Force - are thought to have carried out deliberate and premeditated killings. These include the killing of 23 young Tamils abducted in Colombo whose bodies were found in Bolgoda Lake or nearby waterways in September 1995. We consider below whether the present government and its predecessors have taken adequate steps to prevent them or punish the perpetrators.

The numbers in this category are, not surprisingly, uncertain. Amnesty International has estimated that between 1984 and 1987 there were about 680 disappearances from those held in Government custody in the North and East.¹⁰⁶ During the period from then until the spring of 1990 the IPKF was in occupation of the Northern and Eastern Provinces. (It is not the responsibility of the Mission to report on the actions of the IPKF). Disappearances resumed in 1990, but fell to very low figures by the mid-1990's. According to the US State Department,¹⁰⁷ there were only ten disappearances in 1994 and 34 in 1995. In 1996 there was a large increase, with an estimated 300 disappearances in Jaffna and 50 elsewhere. Most of these followed an incident in Jaffna in July, when an LTTE suicide bomber attempted to kill the Minister of Housing; the Minister survived but 25 people, including a Brigadier, were killed. In 1997 we were told that the figures

106 AI Report, "Sri Lanka - Time for Truth and Justice".

107 Sri Lanka Country Report on Human Rights Practices for 1996 (released 30 January 1997).

were down again, to a figure of perhaps 100 from the beginning of the year to the time of our visit.¹⁰⁸

The second category of incidents arises out of the period of JVP insurgency between 1987 and early 1990, which almost exactly matches the period of the IPKF's involvement. (This is not a coincidence; it was the Government's decision to invite the IPKF into Sri Lanka which sparked off violence from the JVP, an extreme nationalist party). The opposing groups were members of the same ethnic community and were not geographically separated. This, in a sense, made the JVP more dangerous opponents of the Government than were the LTTE; the LTTE never threatened to take control of the whole of Sri Lanka but the JVP aimed to do so. The result was that terrorism by the JVP was met by extremely aggressive counter-terrorism by the UNP Government of the day.

The death toll was horrific. The UN Working Group on Enforced or Involuntary Disappearances in 1990 identified more than 4,500 disappearances in the period from 1987 to 1990, most of them in the last two years of that period. This figure does not include an estimate of the number of unidentified cases. In a report published by the Group in December 1994 the number of disappearances reported to it since 1983 had risen to more than 11,000. A European Parliamentary delegation estimated the total number of killings and disappearances between 1988 and 1990 (including those for which the JVP was responsible) at 60,000. The three regional commissions set up in 1994 to investigate disappearances after 1 January 1988 have identified some 17,600 cases where there is *prima facie* evidence of disappearances for which the security forces were responsible¹⁰⁹ This can be taken as a reliable minimum figure. The Commissions' procedure was based on complaints relating to the disappearance of a particular individual. Taking into account that in many cases there were no complaints (perhaps because there were no surviving close relatives) or no *prima facie* evidence the actual figure is probably much higher.

108 Interview with a representative of the US Embassy. Amnesty International reported a much higher figure of 648 between late 1995 and April 1997: News Release ASA 37/10/97, 11 April 1997.

109 Interview with the Attorney-General and members of his department.

As mentioned in Chapter II, the victims of disappearances were by no means all supporters of the JVP. Many of the disappearances resulted from false accusations given to the security forces to settle old scores or to remove political opponents. There is no doubt that members of all political parties were among the victims, though it is believed by many that the SLFP and its associates suffered more severely than the UNP.

It is hard to believe that such an aggressive policy of counter-terror could have been adopted without the acquiescence, if not the active encouragement, of the then Government. Some UNP MPs and Provincial Councillors are believed to have been directly involved in the disappearances.

Disappearances linked to the JVP insurgency stopped in 1990 and have not recurred.

Commissions of Inquiry

In January 1991 the UNP Government set up a Presidential Commission of Inquiry into the Involuntary Removal of Persons to investigate disappearances after that date. Thus, it had no power to investigate the disappearances that had occurred during the JVP insurgency. It carried out a number of investigations but it has largely been superseded by the Commissions mentioned in the next paragraph.

On winning the Parliamentary election in 1994, the People's Alliance Government announced that it would investigate past human rights violations, bring the perpetrators to justice and compensate victims or their families. Pursuant to this announcement, President Kumaratunga appointed three independent Commissions of Inquiry in November 1994 ("the Commissions of Inquiry"). The responsibility of the Commissions was split on a geographical basis, with one Commission covering the Northern and Eastern Provinces, another covering the provinces in the south and west of the island, and the third covering the provinces in the centre of the island. Three members were appointed to each Commission, but in the case of the Commission covering the central provinces one of the appointed Commissioners did not take up office and another retired shortly after appointment, leaving Mr. T. Sunderalingam as the sole Commissioner.

The terms of reference of the Commissions of Inquiry were to inquire into and report on:

- (a) whether any persons have been involuntarily removed or have disappeared from their places of residence at any time after 1 January 1988
- (b) the evidence available to establish such alleged removals or disappearances
- (c) the present whereabouts of the persons alleged to have been so removed, or to have so disappeared
- (d) whether there is any credible material indicating the person or persons responsible for the alleged removals or disappearances
- (e) the legal proceedings that can be taken against the persons held to be so responsible
- (f) the measures necessary to prevent the occurrence of such activities in future
- (g) the relief, if any, that should be afforded to the parents, spouses and dependants of the persons alleged to have been so removed or to have so disappeared.

Notices of the setting up of the Commissions of Inquiry, inviting the submission of complaints, were published in newspapers in mid-January 1995. The notices asked for complaints to be submitted within one month, and the Commissions were initially required to submit their reports within four months. The Commissions were overwhelmed by the number of complaints,¹¹⁰ and both the time limit for submitting complaints and the time limit for delivery of the reports were extended several times. Mr. Sunderalingam told us that his Commission, which he believed to have been the most active, had received about 15,000

¹¹⁰ The prospect of obtaining compensation may have stimulated some complainants who would not otherwise have bothered to submit complaints.

complaints. After allowing for duplication these covered about 12,000 individual disappearances, of which he was able to inquire into about 6,400.¹¹¹ In his view, about 1,300 cases in his area deserved full investigation. The Commissions delivered a number of interim reports. They eventually had to stop investigating complaints before they had completed all of them, in order to produce final reports within a reasonable time. The final reports were delivered to the President on 3 September 1997, a few days before the arrival of the Mission.

The President has undertaken to publish the Reports, though - understandably - this had not yet been done by the time of the Mission's visit. Unfortunately, the Reports are a long way from being the final stage in bringing the perpetrators to justice. It would obviously have been quite impossible for the Commissions to have investigated several thousand complaints in any individual detail. As we understand it, the Reports basically do no more than record the names of the victims, the places where they were last seen by family or friends, and the persons who are alleged to have arrested them or in whose custody they were last believed to be. This is clearly insufficient as a basis for charging anyone with murder or lesser criminal offences such as abduction. Thus, even before charges can be laid, there will have to be further enquiries to try to establish a prima facie case for the prosecution of individuals.

We were told by the Attorney-General's Department that, of the 17,600 disappearances reported by the Commissions of Inquiry, there was material for further investigation in about 20 per cent (i.e. 3,500) where there was evidence of the identity of the wrongdoers. The number of possible defendants would be substantially less than 3,500 because the same names frequently recur in case after case. The Attorney-General told us that, in his view, the strong cases would have to be selected for prosecution without running through the lot.

111 The US State department's Sri Lanka Country Report on Human Rights Practices for 1996 claimed that by August 1996 the Commissions had jointly received a total of 61,000 complaints and investigated 38,000. These figures are difficult to reconcile with the lower figures which can be extrapolated from Mr Sunderalingam's statements to the Mission.

The position of the ICJ is that, on matters such as disappearances which constitute a gross violation of human rights and a crime against humanity, every case should be fully investigated and the perpetrators should be brought to trial. This is the position which has been systematically taken by the ICJ with regard to disappearances in Latin America.

This is plainly the right principle. However, the resources available to the Attorney-General or which could reasonably be made available to him do not permit simultaneous investigation of large numbers of cases. It is wholly impracticable to give speedy and detailed investigation to all 3,500 cases. This would require hundreds of lawyers and hundreds of police investigators. We believe that there is no practical alternative to giving priority to investigation and prosecution of the stronger cases.

We do not believe that amnesty should be given to the persons involved in cases not selected for priority investigation. We accept that given that most of the cases reported on by the Commissions are already at least eight years old further delays in the investigation of non-priority cases may lead to some perpetrators escaping prosecution. However, it is better that the perpetrators of the worst violations should be convicted than that all should escape because the system has broken down through overloading. However, this makes it essential that the cases which are selected for detailed investigation should be investigated both fully and with all possible speed. Anyone who is the subject of investigation who is still in the police or the armed services should be suspended from duty.

We understand that some investigatory work has started on the basis of the interim reports, and that a team of some 85 to 90 police investigators has been set up under the direction of the Deputy Inspector General (Crimes). We were told that the members of the team were not experienced in work of this kind and that the start of work was delayed for several months by a dispute over subsistence allowances.

Trials and Prosecutions

It would be quite impracticable for this Report to try to report on individual incidents where prosecutions should have been brought but have not been. It is obvious, from what has already been said, that there are many of them. Some of them, like the murder in February 1990 of the journalist, actor and satirist Richard de Zoysa, have attracted international attention. Most have not. In some cases (like that of Mr. de Zoysa) there have been investigations which have not led to charges. In others, there have been no investigations in spite of the apparent existence of substantial evidence. The outstanding example is the disappearance of 158 people (one of them a boy of 11) from a refugee camp at the Eastern University in Vantharamoolai in September 1990. The victims were removed from the camp by soldiers (four of whom have been identified) in the presence of large numbers of other refugees.¹¹² No investigation has been carried out, let alone a prosecution.

What is more useful is to report on cases where prosecutions have been brought. The list is extremely depressing, both because of the small number of prosecutions and because of the unsatisfactory outcome of those that have been brought.¹¹³ The list below is not a complete list, but the number of other cases where prosecutions have been brought is very small.

Wijedasa Liyanarachchi

Mr. Liyanarachchi was a lawyer who was arrested on 25 August 1988 on suspicion of involvement with the JVP. He died on 2 September 1988 as a result of police torture. Three police officers were prosecuted for his murder, but the charges against them were subsequently reduced to illegal detention and conspiracy to detain illegally.

112 See the Report of the Chairman of the Human Rights Task Force for 1992-93, pp. 22-24.

113 In this section, we acknowledge our particular debt to the Amnesty International Report, "When will justice be done?", ASA 37/15/94, published July 1994.

In March 1991 they were convicted on these charges and given suspended sentences and fines.

The Court recommended that investigations be reopened to establish who was responsible for Mr. Liyanarachchi's death, and in particular to investigate the role of a Deputy Inspector General of Police (DIG), who had given evidence which was disbelieved by the Court. The DIG shortly afterwards took early retirement and left the country but subsequently returned and was appointed Vice Chairman of the Sri Lanka Port Authority.

The Attorney General told us that new evidence had been obtained (including the discovery of a torture chamber at Batalanda in Colombo) and that the matter had been reopened. There could be a prosecution of the former DIG.

Jayantha Bandara

Mr. Bandara was shot dead by the police in June 1989. Seven police officers were charged with his murder. In October 1989 Sanath Karalliyadda, one of the lawyers who had appeared at the magistrate's inquiry into Mr. Bandara's death, was abducted from his home by two or three armed men, one of whom was reported to have been wearing army uniform. His dead body was found the next day. Four prospective witnesses against the police officers were murdered, and several other lawyers and prospective witnesses received death threats. The case against the police officers came on for hearing at Kandy in January 1990, but no witnesses appeared. The police officers were released in November 1990 for lack of evidence.

The disappearance of schoolboys at Embilipitiya

This has probably had the highest profile of any disappearance case. The allegations are outlined in the Report of the Chairman of the Human Rights Task Force, Justice Soza, for 1991-92.

Mr. D. L. Galappaththi was the principal of Embilipitiya Central School. His son Chaminda, who was a pupil at the school, was having a love affair with a schoolgirl. One of Chaminda's love letters fell into the hands of another boy in the school, Rasika Wijetunga. Rasika and his friends teased Chaminda, and altercations spread to Chaminda and Rasika's friends in other schools. It is alleged that Mr. Galappaththi, who was a close friend of the local army commander, denounced Chaminda's enemies to the army as troublemakers. Rasika (whose mother, a prominent UNP supporter, was principal of another local school) was abducted on 6 November 1989. In the following two months 31 other schoolboys, aged between 17 and 19, were also abducted. Eight military personnel stationed at the local army camp were identified as having been responsible for the abductions. The boys never returned. Their bodies have not been found, though it is suggested that they may be among the bodies later found in a mass grave at Suriyakande.

Justice Soza's Report stirred up some action and in 1992 the Criminal Investigation Department began investigations. In February 1993 they questioned a number of military personnel, including a Brigadier. Eventually, eight military personnel and Mr. Galappaththi were charged with abduction with intent to murder. The trial was proceeding at the time of the Mission's visit; the prosecution had completed its evidence and witnesses for the defence were being called.

The murder of villagers at Wavulkelle

In February 1990 thirteen villagers from Wavulkelle were abducted from their homes and driven to an isolated place. Twelve of them were shot dead; one escaped and gave evidence of the killings. Most of the victims are thought to have been supporters of the SLFP.

The CID investigated the killings. Fourteen police officers were arrested, but seven of them were discharged. The remaining seven were charged with murder, abduction and other offences.

In November 1991 one of the accused, who was believed to be the ringleader, was shot dead during a hearing in the Magistrate's Court.

The alleged killer escaped and fled the country, but has recently returned and an indictment against him is being prepared. The Attorney-General told us that the killing is not thought to be linked to the murders at Wavulkelle. Eventually, four of the police officers were brought to trial. They were acquitted in the High Court on 5 April 1997 on the ground of insufficiency of evidence.

On the previous day, two police officers accused of mass murder at Hokandara in 1989 were discharged when the Attorney-General informed the Court that he would not be pursuing the action.

The murder of villagers at Kokadichcholai

In June 1991 two soldiers were killed in an explosion at Kokadichcholai. Their unit went on the rampage and killed 67 people from two local villages. A Commission of Inquiry was set up to investigate the facts. The Commission found that the killings were deliberate retaliatory action by soldiers and recommended that the army take action under military law.

An officer and 19 soldiers were charged with murder and tried before a military tribunal. In October 1992 the soldiers were all acquitted. The officer was acquitted of murder but convicted of failing to control his troops and of illegally disposing of the bodies of the victims.

The Attorney-General told us that the killings at Kokadichcholai were one of the incidents being investigated by the Presidential Commission of Inquiry responsible for investigations in the Northern and Eastern Provinces. A criminal prosecution is a possibility - apparently (somewhat to our surprise) it would not be ruled out on the ground of double jeopardy.

The murder of villagers at Mailanthanai

In July 1992 33 members of an army and police patrol were killed by the LTTE in an ambush in the Poonani area, and a few days later sever-

al army leaders were killed by a bomb. As a reprisal, soldiers from Poonani killed 35 inhabitants of the village of Mailanthanai¹¹⁴ on 9 August 1992.

There were a number of witnesses who had survived the attack. The Magistrate at Batticaloa held 68 identity parades, as a result of which 24 soldiers were identified by witnesses. The proceedings were transferred to Polonnaruwa for continuation of the inquiry. Following the inquiry three soldiers were discharged. The remaining 21 were in March 1994 committed for trial in the High Court on charges including murder and riot. The case has been transferred to the High Court in Colombo for hearing. At the time of the Mission the trial was still pending.

Bolgoda Lake

In the summer of 1995 the bodies of 23 young Tamils were found floating in Bolgoda Lake near Colombo and in nearby waterways. In October 1995, 22 members of the para-military Special Task Force were arrested and detained under the Emergency Regulations on suspicion of murdering the Tamils. They were released on bail in February 1996 and resumed police duties. The Supreme Court has ordered the payment of compensation to the families of the victims.

We were told by the Attorney-General that there has been great difficulty in identifying the bodies because of their state of decomposition. Samples have been sent to the University of Glasgow for a forensic report, which had not been delivered at the time of the Mission. Charges for abduction were being presented against 7 of the original 22 suspects. There could be murder charges, depending on the Glasgow report.

¹¹⁴ See the Report of the Chairman of the Human Rights Task Force for 1991-92, pp. 30-31; for 1992-93, p. 29; for 1993-94, p. 18.

Torture at Batalanda

In August 1996 five police officers were charged with involvement in torture and murders believed to have been systematically carried out in the late 1980's at a Government detention centre in Batalanda, Colombo. Proceedings are awaiting the conclusion of a Presidential Commission of Inquiry set up to investigate the allegations.

The murder of villagers at Kumarapuram

In February 1996 24 inhabitants - of whom reportedly 13 were women and 7 were children - were killed in the village of Kumarapuram, near Trincomalee by soldiers from a nearby army camp. The killings were apparently carried out in revenge for the killing of two soldiers by the LTTE about half an hour earlier. It was reported that some of the women had been raped.

Eight soldiers have been arrested and charged with murder and attempted murder. The case is proceeding but has not yet come to trial.

The rape and murder of Kirushanthi Kumaraswamy

In September 1996 Kirushanthi Kumaraswamy, a 17 year old schoolgirl, was stopped at an army checkpoint near Jaffna on her way home from school. She was raped and murdered. Her mother, brother and a neighbour went out to look for her and were also murdered at the checkpoint. Their bodies were buried and were discovered a few weeks later.

Nine soldiers were arrested and have been charged with rape and murder. The Attorney-General asked for a "trial at bar" - an unusual procedure which involves a trial before three High Court judges rather than a judge and jury. (In the case of a jury trial, the accused would have been entitled to ask for a Sinhala-speaking jury). We were told by the Attorney-General that the trial had been fixed for November 1997.

The Human Rights Task Force

The Government of President Premadasa, while it failed to take any serious steps to investigate and prosecute violations of human rights by the security forces during the period of the JVP insurgency, did start taking steps in 1991 to make the recurrence of violations less likely in the future. One of these - the Presidential Commission of Inquiry into disappearances set up in 1991 - has already been mentioned. A much more effective step was the creation of the Human Rights Task Force. Justice J F A Soza, a retired judge of the Supreme Court,¹¹⁵ was appointed as Chairman of the HRTF. He proved to be extremely energetic and independent-minded.

The HRTF was created on 10 August 1991 under Emergency Regulations described as the Monitoring of Fundamental Rights of Detainees Regulations, published in Gazette 674/17 of that date.¹¹⁶ The objects of the HRTF were

"to monitor the observance of fundamental rights of persons detained in custody, otherwise than by a judicial order"

For this purpose it had power

- "(i) to maintain a comprehensive and accurate register of such persons with full details of their detention and ensure observance of, and respect for, their fundamental rights, and ensure humane treatment for them*
- "(ii) to investigate and establish the identify of each such person by a proper identification process*
- "(iii) to monitor the welfare of such persons*

115 See Chapter IV for a discussion of Justice Soza's continuing role as Chairman of the Judge's Institute of Sri Lanka.

116 The creation of these Regulations was in fact a two-stage process, with an earlier regulation published in Gazette 673/2 on 31 July 1991 having authorised a body known as the Sri Lanka Foundation, created under the Sri Lanka Foundation Law No. 31 of 1973, to set up the HRTF by Regulations approved by the President.

"(iv) to ensure the safe handing over of such persons to properly identified next of kin at release from detention

"(v) to carry out regular inspections of places of detention . . .

"(vi) to record any complaints or representations or grievances that may be made to it and to take immediate remedial action."¹¹⁷

The HRTF consisted of not more than five members appointed by the President.¹¹⁸ By March 1993, the HRTF had built up nine regional offices as well as a head office in Colombo. Its staff, after the completion of the network of regional offices, was close to 100.¹¹⁹ The Colombo office maintained a 24-hour service for the receipt of complaints.

During its first year the HRTF prepared a computerised register of detainees (numbering 7,356) in the six official detention camps and the six rehabilitation camps then functioning. The HRTF also made unannounced visits to 104 police stations and 10 army camps, where a total of 783 detainees were seen.

By September 1993 the number of detainees in official camps had fallen to 1,545. The HRTF made 1,350 visits to 321 police stations and 72 visits to 21 army camps, where a total of 3,523 detainees were seen. By July 1994 the number in official camps had fallen again to 646; there were 2,414 visits to 355 police stations and 115 visits to 16 army camps where a total of 3,334 detainees were seen.

Intervention by the HRTF secured the improvement of rations and medical care and some additional welfare items such as soap and books. The HRTF followed up a number of reports of arrests where families did not know where the detainees had been taken, and managed to locate them; the numbers located were 93 in 1991-92 (including

117 The Monitoring of Fundamental Rights of Detainees Regulations 1991, reg. 2. These have been replaced by the Emergency (Establishment of the Human Rights Task Force) Regulations N° 1 of 1995.

118 *ibid*, reg. 3.

119 See the Annual Report of the Chairman of the HRTF for 1991-92, 1992-93, and 1993-94, for this and the other information in this section.

four who had been in detention since 1989), 114 in 1992-93, and 72 in 1993-94. In 1991-92 the HRTF received 3,589 complaints of disappearances,¹²⁰ many of which pre-dated its formation. In the two years ending 31 August 1994, the HRTF's regional offices received 2,408 complaints of missing persons. Thus the number traced were only a small proportion of those reported missing.

In some cases the HRTF assisted detainees in challenging their detention in court. The HRTF investigated disturbances in camps and reported on a number of murder and other human rights violations linked with the emergency, including some of those mentioned above. Every officer making an arrest or order for detention was required to notify the HRTF within 48 hours of the fact of the arrest or detention and the place where the person in question was being held, and the HRTF was entitled to enter any police station or other place of detention at any time to have access to a person arrested or detained.¹²¹

Justice Soza was satisfied with the cooperation he received from the security forces, who did not try to hinder him or members of the HRTF staff in the performance of their duties. However, Justice Soza seems to have been somewhat naive in accepting in August 1994, without investigation, the Army Commander's denial that the army maintained a secret detention camp near the Indian High Commission in Colombo, even though the existence of the camp had already been disclosed in an Amnesty International report.

Justice Soza's term of office as Chairman of the HRTF finished in August 1994. He was replaced by another member of the HRTF, Mr. Sam Wijesinha. However, when a new set of Emergency Regulations was promulgated in September 1994, the regulations concerning the HRTF (including the crucial requirement to report arrests to the HRTF) were omitted. The HRTF continued to function to a limited extent, but its status was unclear and its effectiveness was destroyed.

120 Three quarters of these came from the districts of Batticaloa and Ampara in the Eastern Province.

121 See the Presidential Directions dated 18 July 1995 issued under the Emergency (Establishment of the Human Rights Task Force) Regulations, para. 6.

A new HRTF was created by Emergency Regulations in June 1995, with powers similar to those of the original HRTF. A former Commissioner of Prisons, Mr. C. T. Jansz, was appointed Chairman. He is generally regarded as having done a good job, in spite of many problems.

The HRTF was wound up on 30 June 1997, when its functions were transferred to the newly established National Human Rights Commission. There have been consequential problems, which are considered in the next Chapter.

Other steps to inhibit disappearances

One of the factors leading to disappearances was the fact that detentions by the security forces were inadequately recorded and reported. This made it easy for members of the security forces to kill those whom they had taken into custody and then deny all knowledge of the victims. When the Emergency Regulations governing detention were revised in 1993, steps were taken to make it more difficult for this to happen. In particular, when any person is taken into custody under the Regulations, the fact of the arrest must now be reported to a senior officer within 24 hours and an "arrest receipt" must be issued to the spouse, father, mother, or other close relative of the detainee; where it is not possible to issue such a receipt the reasons for this must be entered in the Information Book at the police station.¹²² In addition, it is now an offence to detain a person in a place not authorised by the Secretary of the Ministry of Defence.¹²³

An Emergency Regulation which positively encouraged disappearances was a regulation which permitted the security forces to dispose of dead bodies without an inquest and without reporting to a magistrate. This Regulation was repealed in March 1990.¹²⁴ However,

122 See now the Emergency (Miscellaneous Provisions and Powers) Regulations N° 4 of 1994, reg. 18 (7) - (9).

123 *ibid*, reg. 19 (9).

124 See the ICJ Report "Sri Lanka - A Mounting Tragedy of Errors" (1984), pp 42-45, for a detailed criticism of this Regulation.

Emergency Regulations still override the requirements of the Code of Criminal Procedure relating to inquests "where a police officer or a member of the armed services has reason to believe that the death of any person may have been caused as a result of or in the course of any armed confrontation between the police or the armed services . . . and any other person or persons engaged in waging war against the Government of Sri Lanka."¹²⁵ In such a case the Code would require a mandatory inquest by a Magistrate, but under the Emergency Regulations the death merely has to be reported to the Magistrate.¹²⁶ An inquiry is held only if the Inspector-General of Police applies to the High Court in Colombo with a request for one.¹²⁷

There have been improvements in training army personnel in human rights. We were told by the Judge Advocate-General, Brig. Samarakoon, that human rights are part of the officer training syllabus. Lectures are given regularly by the Army's legal branch. There is a course in human rights in the Defence Academy. Officers are expected to pass on guidance on human rights to their troops. Circulars on human rights are issued to military units periodically. We were shown copies of two - one (issued in May 1993) a simple set of rules drawing attention, in particular, to the duty to protect civilians and civilian property. The other was a copy of the President's Directions issued in July 1995 under the Emergency (Establishment of the Human Rights Task Force) Regulations No. 1 of 1995. The Directions (which are set out at Annexe H) had the force of law and contain important rules about the procedures for arrest and detention.

Conclusions

Between 1983 and the present day the security forces in Sri Lanka (including the armed forces, the police, and local militia units armed by the Government) have been responsible for thousands of murders and

125 Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994, reg. 43.

126 *ibid*, reg. 44.

127 *ibid*, reg. 46.

disappearances, the vast majority of the latter involving deliberate killings. The worst offences took place during the JVP insurgency in 1987 to 1990, when something close to a frenzy of killing seems to have occurred. However, a great many murders and disappearances have also occurred in the course of the struggle against the LTTE. After a welcome decline in 1994 and 1995, there was a significant recurrence in 1996 (mainly in the Jaffna peninsula) and, though declining again, these incidents are still continuing.

Both the UNP Government, from 1991 onwards, and the present People's Alliance Government have taken some steps to reduce violations of human rights linked to the emergency. In 1991 the UNP Government set up the Presidential Commission of Inquiry into the Involuntary Removal of Persons (which does not seem to have been very effective), and the HRTF. The HRTF, thanks to the dedicated leadership of Justice Soza, proved to be an extremely effective weapon both in protecting the lives of detainees and improving their conditions. In 1993, the UNP Government amended the Emergency Regulations in ways which gave greater protection to detainees.

However, the UNP Government, while taking steps to minimise the risk of future violations of human rights, did almost nothing to secure the punishment of those who had already perpetrated them. Indeed, the UNP's present position is that there should in principle be no prosecutions for offences committed before February 1990.¹²⁸ We regard the choice of February 1990 as the cut-off date as manifestly self-seeking. It would exclude almost all of the incidents linked to the JVP insurgency, in which a number of individual UNP MPs, Provincial Councillors and other activists are believed to have been implicated.

The present Government rightly took steps to reopen the question of past violations by setting up the three Presidential Commissions of Inquiry in November 1994. These took nearly three years to deliver their final reports. We do not blame the members of the Commissions for this delay; they appear to have been overwhelmed by an unexpectedly large number of complaints. However, it is now some ten years

¹²⁸ Interview with the leader (Ranil Wickremasinghe) and other leading members of the UNP.

since the beginning of the period under review, and the next step will be a further investigation before any charges can be brought.

The fact is that not a single member of the security forces had, at the date of the Mission, been convicted of murder. Changes in procedure to cut the number of killings are not enough. We draw attention to the United Nations Declaration on the Protection of All Persons from Enforced Disappearance,¹²⁹ which requires States to bring to justice all persons presumed responsible for forced disappearances.¹³⁰ A culture of impunity has developed, with perpetrators of grave violations being convicted of minor offences or, in most cases, not at all.

The reports of the three Commissions of Inquiry present a last chance for changing the culture of impunity. The Government faces many pressures to avoid effective action. These include the length of time which has occurred since many of the disappearances occurred; pressure to avoid alienating the armed forces which are still engaged in fighting the LTTE; and pressure to treat the JVP insurgency as a matter of past history and to avoid reopening the wounds which it caused. We regard it as a matter of the greatest importance that these pressures should be resisted.

It is in our view essential that

- (i) a number of target cases should be selected from the information provided by the Reports
- (ii) further investigations into the target cases should be carried out as quickly and thoroughly as possible
- (iii) members of the security forces under investigation should be suspended from duty

129 Adopted by General Assembly resolution 47/133 (1992).

130 Declaration, Art. 14.

- (iv) where the investigations produce sufficient evidence to justify charges, the cases should be prosecuted swiftly and vigorously.

As for the present situation, we believe that there are no longer problems with the killing of detainees once they have been taken into custody at a police station or army camp. However, killings are still occurring elsewhere as a result of failures in discipline, as in the cases of the Kumarapuram villagers or the Kumaraswamy family. It is essential that all cases be fully investigated and that there should be quick and effective prosecutions wherever the evidence justifies them.

VII - THE NATIONAL HUMAN RIGHTS COMMISSION

In August 1996 Parliament enacted the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. This established the Human Rights Commission.¹³¹ The Commission consists of five members, "chosen from among persons having knowledge of, or practical experience in, matters relating to human rights".¹³² The members are appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition.¹³³ In making recommendations, the Prime Minister must have regard to the necessity of the minorities being represented on the Commission.¹³⁴ Sections 10 and 11 of the Act, which are set out in full in Annexe I, confer extensive functions and powers on the Commission. These include powers to investigate complaints of infringements of fundamental rights; to advise the government on legislation to promote and protect public rights, and on measures to ensure that laws and administrative practices are in accordance with international human rights standards; and to promote awareness of human rights. There is a specific power to monitor the welfare of detainees, and to make recommendations for improving their conditions of detention.

Where an investigation conducted by the Commission discloses the infringement of a fundamental right by executive or administrative action, the Commission may refer the matter for conciliation or mediation. If the Commission does not think it appropriate to do so, or if the

131 Human Rights Commission of Sri Lanka Act, s.2 (1).

132 *ibid*, s.3 (1).

133 *ibid*, s.3 (2). If and when a Constitutional Council (as proposed in the draft new Constitution) is established, appointments will be made by the President on the recommendation of the Council.

134 Human Rights Commission of Sri Lanka Act, s. 3 (3). The present Commission includes a Tamil (Mr T. Suntheralingam) and a Muslim (Mr Javed Yusuf).

conciliation or mediation is unsuccessful, the Commission may make recommendations to the appropriate authority for remedying the infringement, or for instituting proceedings against the persons responsible for the infringement, or the matter may be referred to a court. If an authority fails to take adequate action to give effect to its recommendations, the Commission makes a report of the facts to the President, who is required to lay a copy of the report before Parliament.¹³⁵ The Commission has no power to make binding orders.

The Act requires that the arrest or detention of any person under the Prevention of Terrorism (Temporary Provisions) Act or Emergency Regulations, and the place at which the person is being held in custody, to be notified to the Commission within 48 hours. Releases and transfers to another place of detention must also be notified.¹³⁶ Any person authorised by the Commission may at any time enter any police station, prison or other place of detention to ascertain the conditions of the detainees.¹³⁷

The Act was brought into force in March 1997, when the members of the Commission were appointed. The Commission formally commenced operations on 1 July 1997. The Human Rights Task Force, whose work is discussed in the previous Chapter, was wound up on 30 June and its responsibilities were transferred to the Human Rights Commission.

The Chairman of the Commission is a retired Supreme Court Judge, Justice Seneviratne, now aged 75. Two of its members - Mr. Suntheralingam and Mr. Yusuf - come from legal backgrounds. The other two members are Prof. Arjuna Aluvihare, a professor of surgery and Dr. A. T. Ariyaratne, a leading social worker. The Chairman and two of the members are full-time, the others being part-time.

All the members are men; we think it is desirable in principle that at least one member should be a woman.

135 *ibid*, s. 15.

136 *ibid*, s. 28 (1).

137 *ibid*, s. 28 (2).

The Commission has been slow to get off the ground. At the date of the Mission it was still recruiting staff and setting up regional offices, including one in Jaffna. It was hoped to complete this process by the end of October, after which the Commission would be able to concentrate on its statutory functions.

This delay has had awkward consequences for the work formerly carried on by the HRTF. There appears to have been complete uncertainty, in the period leading up to the establishment of the Commission, about what would happen to the work and staff of the HRTF. In the event, the Commission re-employed almost all of the staff of the HRTF on temporary contracts ending at the end of October, and the staff continued to carry on the work previously carried on by the HRTF. We were told that most of the former staff of the HRTF were applying for permanent posts with the Commission. Their experience would be a qualification, and those with reasonable track records would be likely to be re-employed.¹³⁸

Thus the work of the HRTF has been carried on continuously, and has not been abandoned as was feared by some observers at the time. However, we believe that the uncertainty surrounding the future of the work and staff of the HRTF and the replacement of a single Chairman of the HRTF by a more remote Commission having wider responsibilities and concentrating on setting up its own infrastructure has damaged the efficiency of the work and the morale of the employees. This damage could have been reduced if the HRTF had been kept in existence as a separate body until the Commission was more firmly established. In addition, the regular programme of HRTF visits to police stations has been interrupted.

We believe that the Commission has potentially a great deal to contribute to human rights in Sri Lanka. We greatly welcome its creation, in spite of its teething troubles in taking over the work of the HRTF. In such a body much depends on the quality of its members. We were favourably impressed by four of the members of the Commission. Some human rights organisations were unhappy that two members of the Commission had no legal background, but we believe that the

¹³⁸ Meeting with the members of the Human Rights Commission.

Commission itself finds that this is a positive advantage and that non-lawyer members are able to broaden its outlook. However, the appointment of the Chairman met with universal criticism from human rights organisations. Our own meeting with the members of the Commission left us with some concern on this score. It is unfortunate that a more widely acceptable appointment was not made to this key position.

VIII - INTERNATIONAL OBLIGATIONS

Sri Lanka is a State Party to several international human rights treaties. These include the Geneva Conventions; the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Sri Lanka has ratified the Optional Protocol to the ICCPR, which authorises individual citizens to submit to the Human Rights Committee petitions complaining of violations by their government of their rights recognized by the ICCPR. This ratification gives effect to one of the recommendations of the Human Rights Committee in its Report referred to in the next paragraph. However, at the date of the Mission there had been a considerable and unexplained delay in depositing the Instrument of Ratification, the final step needed to bring the Protocol into force in Sri Lanka. We recommend the Instrument be deposited as soon as possible.

The Human Rights Committee published its comments in 1995 on the Report submitted by Sri Lanka under Article 40 of the ICCPR.¹³⁹ The Committee found a number of positive aspects, including the proposed constitutional reforms (considered in the next Chapter); the important role played by human rights groups in protecting human rights; the then proposed (and now actual) Human Rights Commission; and the provision of human rights education in schools and the security forces.

However, the Human Rights Committee was concerned (as are we) by certain provisions of the proposed new Constitution. The Committee was also concerned that courts do not have power to examine the legality of the declaration of emergency and of the measures taken during the state of emergency. Although the Supreme Court has been quite effective in circumventing these restrictions, we respectfully

¹³⁹ UN Doc CCPR/C/79/Add. 56 (1995).

concur with the views of the Human Rights Committee and have expressed our own views fully in Chapter III.

An important statement by the Committee is as follows:

"The Committee is seriously concerned about the information received of cases of losses of life of civilians, disappearances, torture, and summary executions and arbitrary detentions caused by both parties in conflict. The Committee notes with particular concern that an effective system for prevention and punishment of such violations does not appear to exist. In addition, concern is expressed that violations and abuses allegedly committed by police officers have not been investigated by an independent body, and that frequently the perpetrators of such violations have not been punished. The Committee notes that this may contribute to an atmosphere of impunity among the perpetrators of human rights violations and constitute an impediment to the efforts being undertaken to promote respect for human rights."

Again, we concur with the views of the Committee. The efforts made by the Sri Lankan Government to reduce the number of violations received a setback in 1996, though they are now falling again. As we have said in Chapter VI above, impunity remains a very serious problem. The reports of the three Presidential Commissions of Inquiry represent a last chance to overcome the culture of impunity, but the Government faces great pressures to refrain from prosecutions and it will take a great effort of will to overcome these pressures.

The Human Rights Committee was also concerned about the powers of the Secretary of the Ministry of Defence to order detention, about the effectiveness of habeas corpus, and about the absence of regulations governing conditions of detention in places other than prisons. These are all matters which are of serious concern to the Mission.¹⁴⁰ The Committee was also concerned with the effect on the independence of the judiciary of the constitutional provisions for the removal from office of judges of the higher courts.¹⁴¹

140 See Chapters III and IV. However, the comment of the Committee that prisons and other places of detention are not regularly visited by magistrates or other independent bodies does not do justice to the work which was being done by the Human Rights Task Force.

141 See Chapter IV for the comments of the Mission.

There are a number of important respects in which the fundamental rights recognised by the present Constitution of Sri Lanka fall short of the standards required to comply with the ICCPR. For example, the Constitution contains nothing equivalent to Article 6.1 of the ICCPR (the right to life). The Constitution does not restrict the death penalty to the most serious crimes, nor does it prohibit the death penalty for crimes committed by persons under 18 years of age.¹⁴² The Constitution contains no prohibition of slavery or of forced or compulsory labour.¹⁴³ The provisions of Article 13 of the Constitution, which provide for freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation, are in a number of respects weaker than the equivalent provisions of Articles 9 and 15 of the ICCPR; for example, the Constitution does not contain any provisions prohibiting delays in bringing persons charged with criminal offences before a judicial officer, in bringing them to trial, or in dealing with habeas corpus applications.¹⁴⁴ The prohibition of retroactive penal legislation, which is unconditional and non-derogable under the ICCPR, is subject to limitations in the interests of national security under the Constitution.¹⁴⁵ The Constitution contains no provision requiring persons deprived of liberty to be treated with humanity and dignity.¹⁴⁶ The provisions of the Constitution governing criminal proceedings¹⁴⁷ provide very much less protection than those provided under Article 14 of the ICCPR. In particular, the Constitution does not provide any of the specific "minimum guarantees" required by Article 14.3 of the ICCPR, nor does the Constitution require a right of appeal, a right to compensation for miscarriages of justice, or the prohibition of double jeopardy.¹⁴⁸ The Constitution contains no provisions equivalent to Articles 17 (prohibition of arbitrary interference with privacy, family, home or correspondence), 23 (protection of families and the right to marry) and 24 (protection of children) of the ICCPR.

142 ICCPR, Arts 6.2, 6.5; Constitution, Art. 13 (4). In practice, Sri Lanka does not implement sentences of death.

143 ICCPR, Art. 8

144 Compare ICCPR Arts 9.3, 9.4, 14.3 (c) with Constitution, Arts 13 (2), (3) and 141 (habeas corpus)

145 Compare ICCPR Arts 4.2, 15 with Constitution, Arts 13 (6), 15 (1)

146 ICCPR, Art. 10

147 Constitution, Arts 13 (3), (5)

148 ICCPR, Arts 4.5, 4.6, 4.7.

Article 15 of the Constitution imposes restrictions on some of the fundamental rights recognised by Articles 12, 13 and 14. Some of these restrictions go beyond the restrictions authorised under the ICCPR. We have already referred to the fact that the prohibition of retrospective criminal legislation under the Constitution is not absolute, unlike the corresponding provision of the ICCPR, which is unconditional and non-derogable. Other differences are that the presumption of innocence under the Constitution is subject "to such restrictions as may be prescribed in the interests of national security"; no such restriction applied to the corresponding provision of the ICCPR.¹⁴⁹ The right to freedom of speech under the Constitution may be (and until September 1997 in fact was) restricted "in relation to parliamentary privilege" - a restriction which is not justified under the ICCPR.¹⁵⁰ Furthermore, restrictions which may be imposed under Article 15 of the Constitution are not - unlike the corresponding restrictions under the ICCPR¹⁵¹ - limited to those which are necessary to achieve the stated purpose.

There are a number of ways in which the Government of Sri Lanka (by which we mean both the present administration and its predecessors) has been in serious breach of its obligations to ensure to all individuals subject to its jurisdiction the rights recognised by the ICCPR.¹⁵² Disappearances and extra-judicial killings by security forces have occurred, in breach of Article 6 of the ICCPR. There has been torture by security forces in breach of Article 7. Detention without trial under the Emergency Regulations or the Prevention of Terrorism Act is a breach of the right to liberty under Article 9.1. The inordinate delays involved in habeas corpus proceedings constitute a breach of Article 9.4. The conditions of detention have frequently fallen short of the requirements of Article 10.¹⁵³

Article 4.1 of the ICCPR provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the

149 Compare ICCPR, Art. 14.2 with Constitution, Arts 13 (5), 15 (1)

150 Compare ICCPR, Art. 19.3 with Constitution, Art. 15 (2)

151 See, for example, ICCPR, Arts 18.3, 19.3, 21, 22.2

152 As to this obligation, see ICCPR, Art. 2

153 See the Reports of the Chairman of the Human Rights Task Force.

present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation . . .”

As indicated in Chapter III, the Mission is satisfied that the insurgency of the LTTE constitutes an emergency which threatens the life of the nation. The existence of the emergency has been officially proclaimed. We believe that the introduction of a power of detention without trial could be the subject of a lawful derogation under Article 4.1 of the ICCPR. However (as discussed in Chapter III) the Mission believes that the actual powers conferred by the Emergency Regulations and the Prevention of Terrorism Act go well beyond what is strictly required by the exigencies of the situation, having regard in particular to the lack of judicial control. It is also a matter for concern that the Government of Sri Lanka has not given the Secretary-General of the United Nations notice of any such derogation, as required by Article 4.3 of the ICCPR. As we understand it, the only current derogation which has been notified to the Secretary-General is a derogation from Article 9.2, which requires anyone who is arrested to be informed, at the time of his arrest, for the reasons for his arrest and to be promptly informed of any charges against him. In the absence of any further derogation, the powers of detention exercised by the Government of Sri Lanka must be regarded as constituting a breach of its obligations under Article 9 of the ICCPR.

The Mission wishes to draw attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly of the United Nations by Resolution 43/173 (1988). Unlike the ICCPR, compliance with the Body of Principles does not constitute a formal treaty obligation of Sri Lanka. However, we believe that the Government of Sri Lanka should commit itself to observing these principles. The Mission was not instructed to study conditions of detention in Sri Lanka, and we therefore are not in a position to report on how far those conditions in fact comply with the requirements of the Body of Principles. What is

154 LTTE members who voluntarily surrender themselves to police stations or army posts, as opposed to those captured in fighting, appear as a rule to be treated properly.

clear, however, is that the existing regulations governing the conditions of detention under the Emergency Regulations or the Prevention of Terrorism Act are wholly inadequate. We repeat our recommendation in Chapter III that regulations should be adopted to bring the conditions of detention into line with the Body of Principles. We hope that the Human Rights Commission will consider making recommendations to that effect to the Government, as it has power to do under s. 10 (e) of the Human Rights Commission of Sri Lanka Act.

The Mission does not believe that the present leaders of Sri Lanka condone the use of torture. However, we are not satisfied that the Government has yet taken effective measures to prevent acts of torture, as required by Article 2 of the Convention Against Torture. We were told that the use of torture by police is widespread, and evidence of a specialised centre for torture has been uncovered at Batalanda. There have as yet, however, been no convictions for torture. In addition, the admissibility of confessions to police officers in trials under the Emergency Regulations and the Prevention of Terrorism Act encourages the use of torture.

Finally, the Mission was concerned by the fact that - as the Judge Advocate-General accepted - hardly any prisoners are taken by either side in fighting between the security forces and the LTTE. 154 This may in part be because the LTTE, which kills almost all its prisoners, tries to inculcate among its cadres a determination to fight to the last man. This would not, however, account for the absence of prisoners who were incapacitated by wounds. This gives reason to believe that both sides are in breach of the Common Article 3 of the Geneva Conventions, which provides that in the case of armed conflict not of an international character occurring in the territory of a party to the Convention:

"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . ."

IX - THE PROPOSED NEW CONSTITUTION

Since taking office in 1994, the present Government has been working on drafts of a new Constitution to replace the present Constitution, adopted in 1978. A series of drafts has been circulated, and discussions have taken place between the Government and the Opposition and also with constitutional experts within and outside Sri Lanka. The Mission was given copies of the latest draft of the new Constitution, which was being considered at the time of our visit. However, no final draft had yet been adopted by the Government, and provisional drafts of different Chapters of the new Constitution were being revised and replaced fairly frequently. For this reason, we do not think that it would be very helpful to attach a draft of the material parts of the draft new Constitution as seen by us.

The most controversial part of the new Constitution is Chapter XV, which (as we understand it) enlarges the powers of the Provinces, originally devolved to them by the Thirteenth Amendment to the 1978 Constitution. The Government hopes that this further extension of powers will satisfy the Tamil community and enable the fighting to be brought to an end. This is clearly a political issue and it would be inappropriate for the Mission to express a view on it.

The new Constitution reverts to the pre-1978 system of a non-executive President required to act on the advice of the Prime Minister. One innovation is the introduction of a Constitutional Council, consisting of the Speaker, the Prime Minister, the Leader of the Opposition, seven Members of Parliament reflecting as far as practicable the different ethnic and interest groups, and two retired judges of the Supreme Court or the Court of Appeal nominated by the Speaker. The principal role of the Constitutional Council will be to appoint the members of certain important public bodies (not, however, including the Judicial Service Commission) and to approve appointments to certain public offices, including that of Attorney-General.

Another innovation is the proposed incorporation into the new Constitution of economic social and cultural rights. Chapter VI of the

draft contains Articles on 'Directive Principles of State Policy' and on the fundamental duties of citizens. The former set of Articles contain a broad list of economic, social, cultural and environmental objectives, while the latter contain a list of the duties of every citizen. Not surprisingly, the Chapter also contains an Article providing that the provisions of the Chapter do not create legal rights or obligations and are not enforceable in any court.

Fundamental Rights

A more significant step towards creating effective economic and social rights is a recent proposal to include certain economic and social rights in the Chapter on Fundamental Rights, which would be enforceable by the Supreme Court. The rights in question include certain rights of children (more extensive than the rights recognised by Article 24 of the ICCPR, though less extensive and detailed than those contained in the Convention on the Rights of the Child); the right to free and compulsory education between the ages of 5 and 14; the right to satisfactory, safe and healthy working conditions; and the right, within the available resources of the State, to health-care services, sufficient food and water, and appropriate social assistance.¹⁵⁵

The draft Chapter on Fundamental Rights is a considerable improvement on the present Constitution and corrects many of the defects pointed out in the preceding Chapter of this Report. Thus the new Chapter on Fundamental Rights recognises the right to life. However, the death penalty is retained and is not limited by the Constitution to the most serious crimes, and crimes committed by persons under 18 years of age are not excluded. This is contrary to Article 6 of the ICCPR, whose provisions Sri Lanka is under an obligation to observe.

Unreasonable delays in bringing arrested persons before a judicial authority or bringing accused persons to trial are prohibited (but not

¹⁵⁵ The proposals also include an Article corresponding to Article 8 of the ICCPR (the prohibition of slavery, servitude and forced labour).

delays in the hearing of habeas corpus applications). Double jeopardy is forbidden, but there is no constitutional guarantee of a right of appeal or of compensation for victims of unlawful arrest or detention, as required by Article 9 (5) of the ICCPR. The right of an accused person not to incriminate himself is recognised, as is the right of persons deprived of liberty to be treated with humanity and respect.

However, certain rights which are not subject to restriction under the ICCPR and which under Article 4 of the ICCPR are derogable only "in time of public emergency which threatens the life of the nation" and only "to the extent strictly required by the exigencies of the situation" (and in the case of retrospective criminal legislation, not derogable at all)¹⁵⁶ will, under the proposed Constitution, be subject to "such restrictions prescribed by law as are necessary in a democratic society in the interests of national security, public order or for the purpose of securing the rights and freedoms of others". While this test is stronger than the tests in the present Constitution (which do not include the word "necessary")¹⁵⁷ it is considerably weaker than the test for derogation under the ICCPR. Furthermore, two rights which under the existing Constitution are absolute¹⁵⁸ - namely the right to be heard at a fair trial by a competent court, and the right not to be punished with death or imprisonment except by order of a competent court¹⁵⁹ - will be subject to restriction under the proposed terms of the new Constitution.

The new Constitution will recognize the fundamental right to respect for a person's private and family life, home, correspondence and communications, as established by Article 17 of the ICCPR, though the rights under Article 23 (protection of families and the right to marry) are not covered by the new Constitution. The right to freedom of speech will remain subject to an unjustified exception for the protection of parliamentary privilege. The Constitution will include a new

156 See ICCPR, Arts 4.1, 4.2, 9, 10.1, 14.2, 14.3, 14.5, 14.6, 14.7, 15

157 See Constitution, Arts 15 (1), (7)

158 *ibid*, Art. 13 (3), (4). These provisions are not absolute in their application to members of the Armed Forces and the Police: *ibid*, Art. 15 (8).

159 The right not to be punished with death except pursuant to a final judgment of a competent court can not be derogated from under the ICCPR: see Arts 4.2, 6.2.

Article recognising the right to own property; there is no equivalent in the ICCPR.

The new Constitution contains an Article authorising derogations from fundamental rights (with certain exceptions) in terms very similar to those in Article 4 of the ICCPR. It is not altogether clear how the power of derogation is intended to fit in with the separate power to impose restrictions on the exercise of fundamental rights (which applies to all the rights capable of derogation). It would appear that derogation, as distinct from restriction, would be appropriate if it is intended to suspend some fundamental right entirely during the course of an emergency while restrictions would be possible at all times provided they satisfied the conditions laid down in the Constitution. Two of the fundamental rights which will be capable of derogation under the new Constitution - the prohibition of the death penalty except by order of a competent court, and the prohibition of retrospective criminal legislation - can not be derogated from under the ICCPR.¹⁶⁰

The protection given by the new Constitution to fundamental rights is, however, severely restricted by limitations on the powers of the Supreme Court to declare legislation unconstitutional. It is proposed to retain Article 16 of the present Constitution, which declares:

"All existing written law or unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this chapter".

Under the interpretation clause of the present Constitution,¹⁶¹ "written law" includes not only Acts of Parliament but subordinate legislation including "statutes made by a Provincial Council, Orders, Proclamations, Rules, By-laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same". "Existing" means existing at the date when the

¹⁶⁰ See ICCPR, Arts 4.2, 6.2, 15

¹⁶¹ Constitution, Art. 170, as amended by Art. 6 of the 13th Amendment. We have not seen a copy of the draft interpretation provisions of the new Constitution, and are therefore unable to say whether they are in similar terms.

Constitution comes into force. Thus the Supreme Court would have no power to declare invalid any Act of Parliament, Provincial statute, Emergency Regulation or other subordinate legislation in force at the date when the new Constitution takes effect on the ground that it breaches fundamental rights. We do not think that existing written law should be immune from challenge for violation of fundamental rights. Fundamental rights are human rights which belong to people because they are human. No state can be authorised to violate human rights and existing written law should not be enforceable by the State if it conflicts with basic human rights enshrined in the Constitution.

Nor is it clear why existing "unwritten law" (which presumably means the general principles of common or customary law as applied by the courts of Sri Lanka) should be exempt from the fundamental rights jurisdiction. It was suggested to us that this might be due to concern for conflict between some fundamental rights recognised by the Constitution and the rules of customary personal law among the Muslim community, but we do not regard this as a justification for the general exemption of unwritten law.

The power to invalidate new legislation is also very restricted. Under the present Constitution, the Supreme Court has power to determine whether any Bill is unconstitutional.¹⁶² However, this power can only be exercised by a petition filed within one week of the Bill being placed on the Order Paper of Parliament, and if the power is not exercised the constitutionality of the Bill can not be questioned.¹⁶³ Thus any challenge requires quick action at a very early stage of the legislative process. There is no power to challenge a Bill after it has been enacted.

The new Constitution re-enacts the existing provisions relating to Bills. It also creates a new power to challenge an Act of Parliament on the ground of unconstitutionality, but only within two years of its enactment. While the Mission warmly welcomes the extension of the period during which a Bill or Act can be challenged, we see no sufficient justification for imposing a cut-off date at all. This is particularly

¹⁶² Constitution, Art. 120. This power is, of course, not limited to inconsistency with the fundamental rights Chapter of the Constitution.

¹⁶³ *ibid*, Art. 121 (1), 124

important in relation to fundamental rights, as the impact of legislation on fundamental rights may not become apparent until an actual case arises. An individual will normally wish to file an action challenging legislation on the ground of violation of fundamental rights only when action is taken against him under the legislation. Such action may not be taken for a period of more than two years after enactment of the legislation. Legislation should not be allowed to operate if it is in violation of basic human rights embodied in the Constitution.

Neither the existing Constitution nor the new one prevents the Supreme Court from ruling on the constitutionality of subordinate legislation. However, the adoption of the new Constitution would appear, as the draft now stands, to regard subordinate legislation in force at the date of adoption as "existing written law" and therefore to exclude the power of the Supreme Court to invalidate it on the ground of inconsistency with fundamental rights. This would be unfortunate.

In summary, the Mission recognises and welcomes the fact that the draft (as seen by us) of the new Constitution brings the enshrined fundamental rights much more closely into line with the ICCPR, and we also welcome the inclusion as fundamental rights of certain economic and social rights. There are, however, still some omissions, and we are concerned that in some important respects it will be possible to impose restrictions on fundamental rights which are impermissible, except by derogation (and sometimes not even then), under the ICCPR. We are particularly concerned at the exclusion from the Supreme Court's fundamental rights jurisdiction of existing written and unwritten law and at the limited power to challenge Acts of Parliament for unconstitutionality.

Appointment and Removal of the Judiciary

The other provisions of the proposed new Constitution which the Mission considered were those relating to the appointment of the higher judiciary and their removal from office. The text of Chapters XV and XVI of the present Constitution is extensively redrafted but the substantive alterations are relatively minor. Perhaps the most important are the conversion of a single High Court into separate Regional High

Courts and the creation of Regional Judicial Service Commissions, which will have power to appoint and dismiss judges below the High Court level.

The new Constitution proposes to retain the power of the President to appoint the judges of the Supreme Court, the Court of Appeal, and the Regional High Courts. However, in all cases except that of the appointment of the Chief Justice the President must ascertain the views of the Chief Justice before making the appointment. The use of the words "ascertaining the views of", rather than "consulting" the Chief Justice, appears to be designed to distinguish the role of the Chief Justice from that under the Indian Constitution, where an obligation to "consult" the Chief Justice has been interpreted by the Supreme Court as an obligation to obtain his concurrence.¹⁶⁴ The present Constitution of Sri Lanka contains no obligation for the President to consult or ascertain the views of, the Chief Justice.¹⁶⁵

The power of the President to appoint two judges of the Supreme Court to sit with the Chief Justice as the members of the National Judicial Service Commission remains unaltered, except that one of the judges must have had experience as a judge of first instance.¹⁶⁶ The power to appoint the Secretary of the Commission is transferred from the President to the Commission itself.

Under the present Constitution, judges of the Supreme Court and Court of Appeal can be removed from office by order of the President, made after an address of Parliament, supported by a majority of the total number of Members of Parliament, for such removal on the ground of proved misbehaviour or incapacity. The procedure for investigation and proof of the alleged misbehaviour or incapacity is governed by Parliamentary Standing Orders.¹⁶⁷ In the only case in which this procedure has been adopted, a Parliamentary Select Committee was set up to carry out the investigation. In Chapter IV

164 [Chief Justice - please provide case reference.] Many jurists regard this decision as erroneous.

165 See Constitution, Arts 107 (1), 111 (2).

166 For the present powers, see *ibid*, Art. 112 (1).

167 See *ibid*, Art. 107 (2), (3).

above, we expressed the view that it was unsatisfactory for such an investigation to be carried out by a Parliamentary Committee. This criticism will in part be met by the new Constitution, under which the matter can only proceed if, prior to the reference of the allegations to a Parliamentary Committee, an inquiry has been held by a Committee of three persons who hold or have held office as a judge of the Supreme Court or the Court of Appeal, appointed by the Speaker, and the Committee has determined that a *prima facie* case of misbehaviour or incapacity has been established.¹⁶⁸ If the Committee finds that no *prima facie* case has been established, the matter must come to an end. Removal from office of judges of the High Courts will continue, as at present, to be made by the President on the recommendation of the National Judicial Service Commission.

We acknowledge that the proposed changes to the constitutional provisions for appointment and removal of the higher judiciary are improvements. However, we believe that they do not go far enough. We refer to our recommendations in Chapter IV. In particular, we have suggested that judicial appointments now made by the President should be made by the Judicial Service Commission, or by the President from a short list of names selected by the Commission; and that the Judicial Service Commission itself might be added to the list of bodies whose members are to be appointed by the Constitutional Council. We also believe that the proposed removal procedure, involving a judicial committee to determine whether there is a *prima facie* case followed by a parliamentary committee to determine whether misbehaviour or incapacity is proved, is inappropriate and is not consistent with the UN Basic Principles on the Independence of the Judiciary. The judicial committee should be solely responsible for the determination of misbehaviour or incapacity.

¹⁶⁸ Where the allegations concern the Chief Justice, the Committee will consist of three persons who hold or have held office as a judge of the highest court of any Commonwealth country.

Adoption of the new Constitution

Under the present Constitution, its replacement by a new Constitution would require the supporting votes of not less than two thirds of the total number of Members of Parliament, followed by approval by a majority in a referendum.¹⁶⁹ The People's Alliance Government has only a narrow majority in Parliament, and can not obtain a two thirds majority without obtaining the support of the UNP.

The Mission is concerned at statements which the President has made, suggesting that even if she is unable to obtain a two thirds majority in Parliament she will introduce the new Constitution if it is approved in a referendum. We believe that any such action would involve a serious infringement of the rule of law, and would cast doubt on the value of the constitutional protection of fundamental rights. The President seeks to justify this on the ground that the change to a system of proportional representation in the 1978 Constitution has made it impossible for any Government to enjoy the large parliamentary majority which enabled the Jayewardene government to introduce that Constitution, and that it has as a result become unreasonably difficult to alter the Constitution. We do not accept this as a justification. It can be said that one of the advantages of a proportional system of election is that it usually prevents any single party from obtaining a majority (often based on only a minority of the total vote) large enough to enable it to alter the national constitution unilaterally.

However, a duty also rests on opposition parties to act responsibly and in the national interest on questions of constitutional reform. At least in relation to those parts of it which the Mission has considered, the new Constitution appears to represent a considerable improvement over the present one in terms of human rights and the administration of justice. We would be sorry if the opportunity to achieve this improvement was lost as a result of partisan conduct.

¹⁶⁹ Constitution, Arts 82, 83, 85.

X - CONCLUSIONS AND RECOMMENDATIONS

Chapter III - Legislation and the Emergency

1. The President's power under the Public Security Ordinance to proclaim a state of emergency should be subject to challenge in the Supreme Court if there is no reason to believe that a state of emergency exists or is imminent.
2. There is insufficient Parliamentary control over the making of Emergency Regulations. All new regulations, or amendments to existing regulations, should be required to be laid before Parliament for approval. Except in cases of necessity, such regulations or amendments should not take effect until so approved.
3. Section 8 of the Public Security Ordinance (which provides that no Emergency Regulation shall be called in question in any court) should be repealed.
4. Section 9 of the Public Security Ordinance should be repealed in so far as it excludes civil or criminal liability for acts not in fact authorised by Emergency Regulations.
5. Fundamental rights under the Constitution should be liable to restriction on the grounds of national security only when a state of emergency has been proclaimed and then only to the extent strictly required by the exigencies of the situation.
6. The current situation in parts of Sri Lanka justifies the proclamation of a state of emergency. It is one which "threatens the life of the nation" within the meaning of Article 4 of the ICPPR.
7. Preventive detention can not be ruled out in principle. However, a much greater degree of judicial control is required than is provided by the existing Emergency Regulations. In particular

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- (a) the initial order of preventive detention should be subject to confirmation by a Magistrate within one month
 - (b) subsequent renewals of the order should be made by a Magistrate
 - (c) there should be a strict limit on the total duration of an order
 - (d) there should be a proper and speedy system of appeal to a judicial body against the making or renewal of an order.
8. The power of detention following arrest in all districts subject to Emergency Regulations should be limited to 7 days.
 9. The requirements that magistrates should be supplied with lists of detainees, should post the lists on notice boards, and should visit detention camps monthly are valuable in reducing "disappearances" but are not being properly observed. Steps should be taken to ensure observance of these requirements.
 10. Rehabilitation Orders should be made by the courts (and not by the Secretary to the Ministry of Defence) and should be limited to 2 years.
 11. The Regulation which requires all those who surrender voluntarily to serve a period of rehabilitation is unjustified and should be repealed.
 12. Emergency Regulations should prescribe minimum standards for conditions of detention which should comply with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly.
 13. Powers of detention under the Prevention of Terrorism (Temporary Provisions) Act should be abolished or made subject to the same restrictions as are recommended above for detention under Emergency Regulations, and should be made only when and where a state of emergency is in force.
 14. The power under the PTA to make restriction orders falling short of detention should be reviewed and, unless a clear case for its retention can be made out, should be repealed.

15. The exclusion of liability under the PTA for acts done in good faith but not in fact authorised by the Act should be repealed.
16. The exclusion by section 7 of the PTA power to grant bail to persons arrested on suspicion of "unlawful activity" leads to remands in custody for relatively minor offences. It also puts undue pressure on defendants to plead guilty in the expectation of receiving a suspended sentence rather than remain in custody pending a contested trial. The PTA should be amended to permit the courts to grant bail except in the most serious cases.
17. The Supreme Court has asserted its power to intervene in cases involving breaches of fundamental rights protected by the Constitution, despite the provisions of the Public Security Ordinance and the PTA purporting to oust the jurisdiction of the courts. The Supreme Court, in doing so, has shown independence and good judgment in balancing the interests of national security against the fundamental rights of petitioners.
18. Publicity for Emergency Regulations is very inadequate. All new Emergency Regulations, and amendments or rescissions of existing Regulations, should be published in Sinhala, Tamil and English language newspapers.
19. The Government should prepare and keep updated the text of the Emergency Regulations for the time being in force. This should be accessible to the public and as soon as possible should be accessible on the Internet.
20. There has been abuse of the power to make Emergency Regulations by introducing Regulations having no real connection with the Emergency (for example, by removing the application of existing environmental protection legislation from the generation of power and energy). This reinforces the case for allowing the validity of Emergency Regulations to be challenged in court (see para. 3 above).
21. The Indemnity Act (which gives retrospective immunity from suit for certain acts done "in good faith" before December 1988) has little practical importance but is in principle wholly unjustifiable and should be repealed.

22. The admissibility under Emergency Regulations and the PTA of confessions made to police officers encourages the use of torture and should be abolished.

Chapter IV - the Judiciary

23. A High Court should be opened in Jaffna as soon as possible.

24. Access to justice of Tamil-speaking parties to proceedings and lawyers is seriously restricted by the lack of interpreters, by delays in publishing legislation and Emergency Regulations in Tamil, and by the absence of Law Reports and textbooks in Tamil. Steps should be taken to remedy these problems. Judges should be encouraged to develop the ability to conduct trials in Tamil.

25. Recent delays in filling vacancies to the Court of Appeal were unfortunate. Consideration should be given to permitting newly promoted judges to continue hearing cases which they were hearing at the time of promotion.

26. The system of appointment and promotion of judges would be improved by selecting the Judicial Service Commission by methods which will make it more independent and by requiring appointments to the higher courts to be made by the Commission, or by the President from a short list of names selected by the Commission.

27. If the proposals in para. 26 are not adopted, constitutional force should be given to the conventions that the President consults the Chief Justice before making appointments and that the two senior judges of the Supreme Court and the Chief Justice make up the Judicial Service Commission.

28. The Secretary of the Judicial Service Commission should be appointed by the Chief Justice or by the Commission and not by the President.

29. In making appointments the desirability of increasing the number of women and Tamil judges should be borne in mind.

30. The Sri Lanka Judges Institute should be helped to provide
- (a) intensive training in Tamil and English for newly appointed judges who need it
 - (b) an intensive course of lectures and seminars for new judges
 - (c) specialised training in commercial law for new High Court judges
 - (d) a proper library to meet the needs of its own courses and of the judiciary.

The attention of foreign donor governments and organisations should be drawn to the needs of the Institute.

31. The present provisions for removal of judges of the Supreme Court and the Court of Appeal from office by a Parliamentary process should be replaced by a provision requiring investigation and proof of alleged misbehaviour or incapacity to be carried out by an appropriate judicial body.
32. There is a strong culture of judicial independence in Sri Lanka. The Supreme Court is vigorously independent and uses its fundamental rights jurisdiction under the Constitution freely and effectively.
33. There are very serious delays in the Court of Appeal. Action should be taken to cut these delays; such action should include a tougher attitude towards adjournments for the convenience of counsel and either an increase in the number of full-time judges or the use of retired judges on a part-time basis.
34. The delays in dealing with habeas corpus applications under the Court of Appeal's original jurisdiction are completely unacceptable. Habeas corpus applications should be treated by the Court as matters of the utmost urgency. The Court should insist on rapid responses from respondents, and should normally hear the evidence itself instead of referring cases to a lower court for inquiry and report.

Chapter V - Lawyers and Legal Services

35. Taking into account Sri Lanka's relatively poor economy, current arrangements for providing legal assistance to those charged with serious offences, and to petitioners in fundamental rights cases, are reasonably satisfactory.
36. Lawyers are not at present subject to intimidation or personal danger for political reasons.

Chapter VI - Disappearances and Extra-Judicial Executions

37. Between 1983 and the present day the security forces in Sri Lanka (including the armed forces, the police, and local militia units armed by the government) have been responsible for thousands of unlawful killings. The worst offences took place during the JVP insurgency in 1987 to 1990. However, hundreds of unlawful killings have also occurred in the course of the struggle against the LTTE. After a welcome decline in 1994 and 1995, there was a significant recurrence in 1996 (mainly in the Jaffna peninsula) and, though declining again, these incidents are still continuing.
38. Both the UNP Government, from 1991 onwards, and the present People's Alliance Government have taken some steps to reduce further violations of human rights linked to the emergency. In particular the Human Rights Task Force, created in 1991, proved to be a very effective weapon in protecting the lives of detainees and improving their conditions. The Emergency Regulations have been amended in ways which give greater protection to detainees.
39. However, steps so far taken to punish those responsible for the killings have been manifestly inadequate. A culture of impunity has developed. At the date of the Mission, not a single member of the security forces had been convicted of murder in any case arising out of the misconduct of those forces. Perpetrators of grave violations have been convicted of minor offences or, in most cases, not at all.

40. The Reports of the three Commissions of Inquiry appointed in 1994, which were finally delivered in September 1997, offer a last chance to escape from the culture of impunity. It is essential that
- (i) a number of target cases should be selected from the information provided by the Reports
 - (ii) further investigations into the target cases should be carried out as quickly and thoroughly as possible
 - (iii) members of the security forces under investigation should be suspended from duty
 - (iv) where the investigations produce sufficient evidence to justify changes, the cases should be prosecuted swiftly and vigorously.
41. The killing of detainees after they have been taken into custody appears to have stopped. However, other killings are still occurring as a result of failures in discipline. It is essential that all such cases be fully investigated and that there are quick and effective prosecutions wherever the evidence justifies them.

Chapter VII - the National Human Rights Commission

42. The Commission potentially has a great deal to contribute to human rights in Sri Lanka, and its creation is to be greatly welcomed. However, it is unfortunate that it has no woman member, and that a Chairman was appointed who does not have the confidence of local human rights organisations.
43. It is unfortunate that the Human Rights Task Force was wound up and its responsibilities transferred to the Human Rights Commission before the Commission was fully established. This created damaging uncertainty about the future of the work and staff of the Task Force.

Chapter VIII - International Obligations

44. There are a number of important respects in which the fundamental rights recognised by the present Constitution of Sri Lanka fall short of the standards required by the ICCPR. In particular:
- (i) the Constitution does not recognise the right to life
 - (ii) the death penalty is not restricted to the most serious crimes, and is not prohibited for crimes committed by persons under 18
 - (iii) there is no prohibition of slavery or of forced or compulsory labour
 - (iv) the provisions of the Constitution providing for freedom from arbitrary arrest, detention and punishment, and for the prohibition of retrospective legislation, are weaker than the equivalent provisions of Articles 9 and 15 of the ICCPR
 - (v) there is no provision requiring persons deprived of liberty to be treated with humanity and dignity
 - (vi) the provisions of the Constitution governing criminal proceedings provide very much less protection than does Article 14 of the ICCPR
 - (vii) the Constitution contains no provisions equivalent to Articles 17 (prohibition of arbitrary interference with privacy, family, home or correspondence) 23 (protection of families and the right to marry and 24 (protection of children) of the ICCPR
45. Some of the fundamental rights which are recognised by the Constitution are subject to restrictions which go beyond those authorised by the ICCPR
46. The present and previous Governments of Sri Lanka have been in serious breach of their obligations to ensure to all individuals subject to their jurisdiction the rights recognised by the ICCPR. These rights have been infringed by killings and torture by security

forces; by detention without trial; delays in habeas corpus proceedings; and by inadequate conditions of detention.

47. Although introduction of a power of detention without trial could have been the subject of a lawful derogation under Article 4.1 of the ICCPR, the Government has failed to give the Secretary-General of the UN notice of any such derogation, as required by Article 4.3 of the ICCPR. In the absence of such a derogation, detention constitutes a breach of the obligations of the Government under Article 9.
48. The fact that hardly any prisoners are taken by either side in fighting between the security forces and the LTTE gives reason to believe that both sides are in breach of Common Article 3 of the Geneva Conventions, enquiring combatants who surrender or are incapacitated to be treated humanely.

Chapter IX - The Proposed New Constitution

49. The draft Chapter on Fundamental Rights is a considerable improvement on the present Constitution and corrects many of the defects pointed out in para. above. However, it still does not fully comply with ICCPR standards. In particular, it does not restrict the death penalty to the most serious crimes or exclude crimes committed by persons under 18, nor does it give effect to Articles 23 and 24 of the ICCPR. Certain rights are subject to restrictions which are not permissible under the ICCPR, and two rights which are absolute under the present Constitution are subject to restriction under the draft.
50. The protection given by the draft new Constitution to fundamental rights is severely and unjustifiably restricted by the provision that "all existing written law or unwritten law shall be valid and operative notwithstanding any inconsistencies with" the provisions recognising fundamental rights.
51. The power to invalidate new legislation on the ground of unconstitutionality for a period of two years from its enactment is a major

improvement on the present situation (whereby a challenge can only be made at the Bill stage) but there is no sufficient justification for imposing a cut-off date at all.

52. The inclusion of certain economic and social rights in the Chapter on Fundamental Rights is welcome.
53. The proposed changes to the constitutional provisions for appointment and removal of the higher judiciary are improvements, but do not go far enough. We refer to our recommendations in paras. 26, 27 and 31 above. The proposed new removal procedure (involving both a judicial and a parliamentary committee) is inappropriate; the decision should be taken by a judicial committee alone.
54. In dealing with the adoption of a new Constitution, a responsibility rests on both the Government and the Opposition to act responsibly in the national interest and in accordance with existing constitutional procedures. In terms of human rights and the administration of justice, the new Constitution (although criticised above) is a considerable improvement on the present Constitution.

ANNEXES

The 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

CHAPTER III FUNDAMENTAL RIGHTS

Freedom of Thought, Conscience and Religion

10. Every person is entitled to freedom of thought, conscience and Religion, including the freedom to have or to adopt a religion or belief of his choice.

Freedom from Torture

11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Right to Equality

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office:

Provided further that it shall be lawful to require a person to have a

sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

(3) No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

(4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

Freedom from Arbitrary Arrest, Detention and Punishment, and Prohibition of Retroactive Penal Legislation

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

(5) Every person shall be presumed innocent until he is proved guilty:

Provided that the burden of proving particular facts may, by law, be placed on an accused person.

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

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

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.

Freedom of Speech, Assembly, Association, Occupation, Movement, etc.

14. (1) Every citizen is entitled to:

- (a) the freedom of speech and expression including publication;
- (b) the freedom of peaceful assembly;
- (c) the freedom of association;

(d) the freedom to form and join a trade union;

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;

(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(h) the freedom of movement and of choosing his residence within Sri Lanka; and

(i) the freedom to return to Sri Lanka.

(2) A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognised by paragraph (1) of this Article.

Restrictions on Fundamental Rights

15. (1) The exercise and operation of the fundamental rights declared and recognised by Articles 13 (5) and 13 (6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being to public security.

(2) The exercise and operation of the fundamental right declared and recognised by Article 14 (1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

(3) The exercise and operation of the fundamental right declared and recognised by Article 14 (1) (b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony.

(4) The exercise and operation of the fundamental right declared and recognised by Article 14 (1) (c) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy.

(5) The exercise and operation of the fundamental right declared and recognised by Article 14 (1) (g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business industry, service or enterprise whether to the exclusion complete or partial, of citizens or otherwise.

(6) The exercise and operation of the fundamental right declared and recognised by Article 14 (1) (h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy.

(7) The exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13 (1), 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

(8) The exercise and operation of the fundamental rights declared and recognised by Articles 12 (1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

Existing Written Law and Unwritten Law to Continue in Force

16. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognised by any existing written law shall not be a contravention of the provisions of this Chapter.

Remedy for the Infringement of Fundamental Rights by Executive Action

17. Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

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CHAPTER XV THE JUDICIARY

Establishment of Court &c.

105. (1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be

- (a) the Supreme Court of the Republic of Sri Lanka,
- (b) the Court of Appeal of the Republic of Sri Lanka,
- (c) the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or, amend the powers, duties, jurisdiction and procedure of such courts, tribunals and institutions.

(3) The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in

paragraph 1 (c) of this Article, whether committed in the presence of such court or elsewhere:

Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution to punish for contempt of itself.

(4) Parliament may by law provide for the creation and establishment of courts, tribunals or institutions for the adjudication and settlement of matters relating to the discipline of *bhikkus* or any dispute between *bhikkus* or any other dispute relating to the performance of services in, or in relation to, temples. Such law may, notwithstanding anything to the contrary in this Chapter or Chapter XVI, make provision

- (a) for the appointment, transfer, dismissal and disciplinary control of the member or members of such courts, tribunals or institutions by the President or by such other person or body of persons as may be provided for in such law;
- (b) for the exclusion of the jurisdiction of any other institution referred to in paragraph (i) of this Article in relation to such matters and disputes.

In this paragraph the expressions "*bhikku*" and "temple" shall have the same meanings as in the Buddhist Temporalities Ordinance, as at the commencement of the Constitution.

Public Sitings

106. (1) The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.

(2) A judge or presiding officer of any such court; tribunal or other institution may, in his discretion, whenever he considers it desirable

- (a) in proceedings relating to family relations,
- (b) in proceedings relating to sexual matters,
- (c) in the interests of national security or public safety, or
- (d) in the interests of order and security within the precincts of such court, tribunal or other institution, exclude therefrom such persons as are not directly interested in the proceedings therein.

Independence of the Judiciary

Appointments and Removal of Judges of the Supreme Court and Court of Appeal

107. (1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

(2) Every such Judge shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative.

(4) Every person appointed to be or to act as Chief Justice, President of the Court of Appeal or a Judge of the Supreme Court or Court of Appeal shall not enter upon the duties of his office until he takes and subscribes or makes and subscribes before the President, the oath or the affirmation set out in the Fourth Schedule.

(5) The age of retirement of Judges of the Supreme Court shall be sixty-five years and of Judges of the Court of Appeal shall be sixty-three years.

Salaries of Judges of the Supreme Court and Court of Appeal

108. (1) The salaries of the Judges of the Supreme Court and of the Court of Appeal shall be determined by Parliament and shall be charged on the Consolidated Fund.

(2) The salary payable to, and the pension entitlement of, a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment.

Acting Appointments

109. (1) If the Chief Justice or the President of the Court of Appeal is temporarily unable to exercise, perform and discharge the powers, duties and functions of his office, by reason of illness, absence from Sri Lanka or any other cause, the President shall appoint another Judge of the Supreme Court, or of the Court of Appeal, as the case may be, to act in the office of Chief Justice, or President of the Court of Appeal, respectively, during such period.

(2) If any Judge of the Supreme Court or of the Court of Appeal is temporarily unable to exercise, perform and discharge the powers, duties and functions of his office, by reason of illness, absence from Sri Lanka or any other cause, the President may appoint another person to act as a Judge of the Supreme Court or Court of Appeal, as the case may be during such period.

Performance or discharge of other Duties or Functions by Judges

110. (1) A Judge of the Supreme Court or Court of Appeal may be required by the President of the Republic to perform or discharge any other appropriate duties or functions under any written law.

(2) No Judge of the Supreme Court or Court of Appeal shall perform any other office (whether paid or not) or accept any place of profit or - emolument, except as authorised by the Constitution or by written law or with the written consent of the President

(3) No person who has held office as a permanent Judge of the Supreme Court or of the Court of Appeal may appear, plead, act or practise in any court, tribunal or institution as an attorney-at-law at any time without written consent of the President.

Appointment, Removal and Disciplinary Control of Judges of the High Court

111. (1) There shall be a High Court of Sri Lanka, which shall exercise such jurisdiction and powers as Parliament may by law vest or ordain.¹

(2) The Judges of the High Court shall be appointed by the President of the Republic by warrant under his hand and be

1 This provision was amended through the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85. Old paragraph (1) read as follows:

The highest Court of First Instance exercising criminal jurisdiction and created by law shall be called and known as "The High Court of the Republic of Sri Lanka" and shall exercise such jurisdiction and powers as Parliament may by law vest or ordain.

removable and be subject to disciplinary control by the President on the recommendation of the Judicial Service Commission established under this Chapter.

(3) Subject to the provisions of paragraph (2) of this Article, Parliament may by law provide for matters relating to the retirement of the Judges of such High Court.

111.A (1) Where the Minister in charge of the subject of Justice represents to the President that it is expedient that the number of the Judges exercising the jurisdiction and powers of the High Court in any judicial zone should be temporarily increased, the President may, by warrant, appoint one or more Commissioners of the High Court to exercise the jurisdiction and powers of the High Court within such judicial zone as is specified in the warrant of appointment of such Commissioner of the High Court.

(2) Every Commissioner of the High Court appointed under paragraph (1) shall hold office for the period specified in his warrant of appointment and shall be removable, and be subject to disciplinary control, by the President, on the recommendation of the Judicial Service Commission.

(3) Every Commissioner of the High Court appointed under paragraph (1) may, during his tenure of office, exercise, according to law, such jurisdiction and powers as is, or are, vested or ordained in the High Court by Parliament, and shall be invested with all the rights, powers, privileges and immunities (except such rights and privileges as relate to tenure of office) of a Judge of the High Court, and for this purpose, a reference to a "Judge of the High Court" in the Constitution or other written law shall, unless the context otherwise requires, be deemed to include a reference to a "Commissioner of the High Court".²

² Article 111 A was added through the Seventh Amendment to the Constitution; certified on 4th October 1983; L.D.-O. 33/83.

The Judicial Service Commission

112. (1) There shall be a Judicial Service Commission (in this Chapter referred to as the "Commission") which shall consist of the Chief Justice who shall be the Chairman, and two Judges of the Supreme Court appointed by the President of the Republic.
- (2) The quorum for any meeting of the Commission shall be two members.
- (3) The Commission shall have power to act notwithstanding any vacancy in its membership, and no act or proceeding by the Commission shall be, or be deemed to be, invalid by reason only of any such vacancy or any defect in the appointment of a member.
- (4) A Judge of the Supreme Court appointed as a member of the Commission shall, unless he earlier resign his office, or is removed therefrom as hereinafter provided or ceases to be a Judge of the Supreme Court, hold office for a period of five years from the date of his appointment, but shall be eligible for reappointment.
- (5) The President may for cause assigned remove from office any member of the Commission appointed by him.
- (6) The President may grant to any member of the Commission leave from his duties, and may appoint a person qualified to be a member of the Commission to be a temporary member for the period of such leave.
- (7) A member of the Commission may be paid such salary or allowance as may be determined by Parliament. Any salary or allowance payable to a member shall be charged on the Consolidated Fund and shall not be diminished during his term of office. The salary so payable shall be in addition to the salary or other emoluments attached to, and received from his substantive appointment.
- (8) The Judicial Service Commission may make

(a) rules regarding schemes for recruitment and procedure for the appointment of judicial officers, and scheduled public; and³

(b) provision for such matters as are necessary or expedient for the exercise, performance and discharge of the powers, duties and functions of such Commission.

Secretary to the Commission

113. (1) There shall be a Secretary to the Commission who shall be appointed by the President in consultation with the Cabinet of Ministers.

(2) No person holding the office of Secretary of the Commission shall be a judge of any Court of First Instance, either during or after his tenure of office as Secretary.

Fiscal for the whole Island

113. A There shall be a Fiscal who shall be the Fiscal for the whole Island, and shall exercise supervision and control over Deputy Fiscals attached to all Courts of First Instance.⁴

Appointment to other Judicial Offices

114. (1) The appointment, transfer, dismissal and disciplinary control of judicial officers, and (notwithstanding anything to the contrary in Chapter IX) of the scheduled public officers, is vested in the Commission.

3 The term " and scheduled public officers" was added through the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85.

4 Article 113 A was added the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85.

(2) It shall be competent to the Judicial Service Commission by Order published in the Gazette, to delegate its powers under paragraph (1) of this Article in respect of such class or category of judicial officers or scheduled public officers as may be specified, to a Committee of not less than three Judges, each of whom shall be a Judge of the Supreme Court or of the Court of Appeal, and one of whom shall be nominated by the Chief Justice as Chairman.

(3) Any judicial officer or scheduled public officer may resign his office by writing under his hand addressed to the Chairman of the Commission.

(4) The Commission may, by Order published in the Gazette, delegate to the Secretary to the Commission the power to make transfers in respect of scheduled public officers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such limitations as may be specified in the Order.⁵

(5) The Chairman of the Judicial Service Commission or any Judge of the Supreme Court authorised by the Chairman of the Commission she have full power and authority to inspect any Court of First Instance or the records, registers or other documents maintained in such court and to hold such inquiry as may be necessary.

(6) In this Article

“appointment” includes an acting or temporary appointment;

“judicial officer” does not include a Judge of the Supreme Court of the Court of Appeal or of the High Court;

5 In this paragraph, the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85 substituted the words “the power to make all transfers” of the words “the power to make transfers in respect of scheduled public officers.”

“scheduled public officer” means the Registrar of the Supreme Court, the Registrar of the Court of Appeal, the Fiscal, the Registrar of any Court of First Instance or any public officer employed in the Registry of the Supreme Court, the Court of Appeal or any Court of First Instance, included in a category specified in the Fifth Schedule or in such other categories as may be specified by Order made by the Minister in charge of the subject of Justice, and approved by Parliament, and published in the Gazette.⁶

Interference with Judicial Service Commission - an Offence

115. Every person who, otherwise than in the course of his duty, directly or indirectly, by himself or by any other person, in any manner whatsoever, influences or attempts to influence any decision of the Commission or of any member thereof, she be guilty of an offence and she, on conviction by the High Court after trial without a jury, be liable to a fine not exceeding one thousand rupees or to imprisonment for a term not exceeding one year or to both such fine and such imprisonment:

Provided that nothing in this Article shall prohibit any person from giving a certificate or testimonial to any applicant or candidate for any judicial office.

Interference with Judiciary - an Offence

116. (1) Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers

⁶ In this paragraph, the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85 substituted the words “the Registrar of the Court of Appeal, the Registrar of any Court of First Instance,” of the words “the Registrar of the Court of Appeal, the Fiscal, the Registrar of any Court of First Instance”.

and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions.

(2) Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers or functions of any judge, presiding officer, public officer Or such other person as is referred to in paragraph (1) of this Article, shall be guilty of an offence punishable by the High Court on conviction after trial without a jury with imprisonment of either description for a term which may extend to a period of one year or with fine or with both such imprisonment and fine and may, in addition, be disqualified for a period not exceeding seven years from the date of such conviction from being an elector and from voting at a Referendum or at any election of the President of the Republic or at any election of a Member of Parliament or any local authority or from holding any public office and from being employed as a public officer.

Immunity of Members of the Commission

117. No suit or proceeding shall lie against any member of the Commission for any act which in good faith is done or is purported to be done by him the performance of his duties or discharge of his functions under the Constitution.

CHAPTER XVI
THE SUPERIOR COURTS

The Supreme Court

General Jurisdiction of Supreme Court

118. The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions of the Constitution exercise:
- (a) jurisdiction in respect of constitutional matters;
 - (b) jurisdiction for the protection of fundamental rights;
 - (c) final appellate jurisdiction;
 - (d) consultative jurisdiction;
 - (e) jurisdiction in election petitions;
 - (f) jurisdiction in respect of any breach of the privileges of Parliament; and
 - (g) jurisdiction in respect of such other matters which Parliament may by law vest or ordain.

Constitution of the Supreme Court

119. (1) The Supreme Court shall consist of the Chief Justice and of not less than six and not more than ten other Judges who shall be appointed as provided in Article 107.

Constitutional Jurisdiction of the Supreme Court

- (2) The Supreme Court shall have power to act notwithstanding any vacancy in its membership, and no act or proceeding of the

Court shall be, or shall be deemed to be, invalid by reason only of any such vacancy or any defect in the appointment of a Judge.

120. The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;

(b) where the Cabinet of Ministers certifies that a Bill, which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill:

(c) where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) of Article 82; or

(d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires to be passed with the

special majority required by Article 84 or whether any provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

Ordinary Exercise of Constitutional Jurisdiction in Respect of Bills

121. (1) The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

(2) Where the jurisdiction of the Supreme Court has been so invoked no proceedings shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such reference or petition, whichever occurs first.

(3) The Supreme Court shall make and communicate its determination to the President and to the Speaker within three weeks of the making of the reference or the filing of the petition, as the case may be.

Special Exercise of Constitutional Jurisdiction in Respect of Urgent Bills

122. (1) In the case of a Bill which is, in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect under the hand of the Secretary to the Cabinet

(a) the provisions of Article 78 (1) and of Article 121, shall subject to the provisions of paragraph (2) of this Article, have no application;

(b) the President shall by a written reference addressed to the Chief Justice, require the special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. A copy of such reference shall at the same time be delivered to the Speaker;

(c) the Supreme Court shall make its determination within twenty-four hours (or such longer period not exceeding three days as the President may specify) of the assembling of the Court, and shall Communicate its determination only to the President and the Speaker.

(2) The provisions of paragraph (2) of Article 121 shall, mutatis mutandis, apply to such Bill.

Determination of Supreme Court in Respect of Bills

123. (1) The determination of the Supreme Court shall be accompanied by the reasons therefor, and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.

(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions

of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83, and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.

(3) In the case of a Bill endorsed as provided in Article 122, if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution, and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

(4) Where any Bill, or the provision of any Bill, has been determined, or is deemed to have been determined, to be inconsistent with the Constitution, such Bill or such provision shall not be passed except in the manner stated in the determination of the Supreme Court:

Provided that it shall be lawful for such Bill to be passed after such amendment as would make the Bill cease to be inconsistent with the Constitution.

Validity of Bills and Legislative Process not to be Questioned

124. Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into, or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever.

Constitutional Jurisdiction in the Interpretation of the Constitution

125. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation

of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

(2) The Supreme Court shall determine such question within two months of the date of reference and make any such consequential order as the circumstances of the case may require.

Fundamental Rights Jurisdiction and its Exercise

126. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognised by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules or court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.

(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

Appellate Jurisdiction

127. (1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgements and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognisance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court, and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance.

Right of Appeal

128. (1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which

involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

(3) Any appeal from an order or Judgement of the Court of Appeal, made or given in the exercise of its Jurisdiction under Article 139, 140, 141, 142 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.

(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament.

Consultative Jurisdiction

129. (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing act as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.

(2) Where the Speaker refers to the Supreme Court for inquiry and report all or any of the allegation or allegations, as the case may be, contained in any such resolution as is referred in Article 38 (2) (a), the Supreme Court shall in accordance with Article 38 (2) (d) inquire into such allegation or allegations and shall report its determination to the Speaker within two months of the date of reference.

(3) Such opinion, determination and report shall be expressed after consideration by at least five Judges of the Supreme Court, of whom, unless he otherwise directs, the Chief Justice shall be one.

(4) Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs.

Jurisdiction in Election and Referendum Petitions⁷

130. The Supreme Court shall have the power to hear and determine and make such orders as provided for by law on

(a) any legal proceeding relating to the words election of the President or the validity of a referendum;⁸

(b) any appeal from an order or judgement of the Court of Appeal in an election petition case:

Provided that the hearing and determination of a proceeding relating to the words election of the President or the validity of a referendum shall be by at least five Judges of the Supreme Court of whom, unless he otherwise directs, the Chief Justice shall be one.⁹

7 The Fourteenth Amendment to the Constitution substituted the words "election petitions" of the words "election and referendum petitions".

8 The Fourteenth Amendment to the Constitution substituted the words "election of the President;" of the words "election of the President or the validity of a referendum".

9 The Fourteenth Amendment to the Constitution substituted the words "election of the President shall be" of the words "election of the President or the validity of a referendum shall be".

Jurisdiction in Respect of the Breaches of Parliamentary Privileges

131. The Supreme Court shall have according to law the power to take cognisance of and punish any person for the breach of the privileges of Parliament.

Sittings of the Supreme Court

132. (1) The several jurisdictions of the Supreme Court shall be ordinarily exercised at Colombo unless the Chief Justice otherwise directs.

(2) The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several Judges of that Court sitting apart:

Provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court.

- (3) The Chief Justice may

(i) of his own motion; or

(ii) at the request of two or more Judges hearing any matter; or

(iii) on the application of a party to any appeal, proceeding or matter if the question involved is in the opinion of the Chief Justice one of general and public importance,

direct that such appeal, proceeding or matter be heard by a Bench comprising five or more Judges of the Supreme Court.

- (4) The judgement of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority.

Appointment of *ad hoc* Judges

133. (1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any sittings of the Court, the Chief Justice may with the previous consent of the President request in writing the attendance at the sittings of the Court as an *ad hoc* Judge, for such period as may be necessary, of the President of the Court of Appeal or any Judge of the Court of Appeal.
- (2) It shall be the duty of such a Judge who had been so requested, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdictions, powers and privileges, and shall perform the duties, of a Judge of the Supreme Court.

Right to be Heard by the Supreme Court

134. (1) The Attorney-General shall be noticed and have right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction under Articles 120,121,122,125,126,129(1) and 131.
- (2) Any party to any proceedings in the Supreme Court in the exercise of its jurisdiction shall have the right to be heard in such proceedings either in person or by representation by an attorney-at-law.
- (3) The Supreme Court may in its discretion grant to any other person or his legal representative such hearing as may appear to the Court to be necessary in the exercise of its jurisdiction under this Chapter.

Registry of the Supreme Court and Office of Registrar

135. The Registry of the Supreme Court shall be in charge of an officer designated by the Registrar of the Supreme Court who shall be subject to the supervision, direction and control of the Chief Justice.

Rules of the Supreme Court

136. (1) Subject to the provisions of the Constitution and of any law the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court including
- (a) rules, as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;
 - (b) rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules;
 - (c) rules as to the granting of bail;
 - (d) rules as to the stay of proceedings;
 - (e) rules providing for the summary determination of any appeal or any other matter before such Court by petition or otherwise, which appears to the Court to be frivolous and vexatious or brought for the purpose of delay;
 - (f) the preparation of copies of records for the purpose of appeal or other proceedings in the Supreme Court and Court of Appeal,
 - (g) the admission, enrolment, suspension and removal of attorneys-at-law and the rules of conduct and etiquette for such attorneys-at-law;

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- (h) the attire of Judges, attorneys-at-law, officers of court and persons attending the courts in Sri Lanka whether

established by the Constitution, or by Parliament or by existing law;

- (i) the manner in which panels of jurors may be prepared, and the mode of summoning, empanelling and challenging of jurors;
 - (j) proceedings of Fiscals and other ministerial officers of such courts and the process of such courts and the mode of executing the same;
 - (k) the binding effect of the decisions of the Supreme Court;
 - (l) all matters of practice and procedure including the nature and extent of costs that may be awarded, the manner in which such costs may be taxed and the stamping of documents in the Supreme Court, Court of Appeal, High Court and Courts of First Instance not specially provided by or under any law.
- (2) Every rule made under this Article shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in such rule.
- (3) All rules made under this Article shall as soon as convenient after their publication in the Gazette be brought before parliament for approval Any such rule which is not so approved shall be deemed to be rescinded as from the date it was not so approved, but without prejudice to anything previously done thereunder.
- (4) The Chief Justice and any three Judges of the Supreme Court nominated by him may amend, alter or revoke any such rules of court and such amendment, alteration or revocation of the rules will operate in the like manner as set out in the preceding paragraph with reference to the making of the rules of court.

The Court of Appeal

137. The Court of Appeal shall consist of the President of the Court of Appeal and not less than six and not more than eleven other Judges who shall be appointed as provided in Article 107.

Jurisdiction of the Court of Appeal

138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of any errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognisance, by way of appeal, revision and restitutio in integrum, of all causes, suit, actions, prosecutions, matters and things words of which such High Court, Court of First Instance, tribunal or other institution may have taken cognisance.¹⁰

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

- (2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain.

Powers in Appeal

139. (1) The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgement decree or sentence according to law or it may give directions to such Court of First Instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit.

¹⁰ In this paragraph, the Thirteenth Amendment to the Constitution; certified on 14th November 1987; L.D.-O. 61/87, substituted, the words "committed by any Court of First Instance", of the words "committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance"; and the words "of which such Court of First Instance", of the words "of which such High Court, Court of First Instance".

(2) The Court of Appeal may further receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require.

Power to Issue Writs, other than Writs of Habeas Corpus

140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.¹¹

Powers to Issue Writs of Habeas Corpus

141. The Court of Appeal may grant and issue orders Powers to in the nature of writs of habeas corpus to bring up such

(a) the body of any person to be dealt with according to law;
or

(b) the body of any person illegally or improperly detained in public or private custody,

and to discharge or remand any person so brought up or otherwise deal with such person according to law:

¹¹ This Proviso was added through the First Amendment to the Constitution; certified on 20th November 1978, L.D.-O. 91/78.

Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal:

Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such a court, direct the parties to make application in that court in respect of the custody of such minor child.

Power to Bring up and Remove Prisoners

142. The Court of Appeal may direct

(i) that a prisoner detained in any prison be brought before a court-martial or any Commissioners acting under the authority of any commission from 'the President of the Republic for trial or to be examined relating to any matter' pending before any such court-martial or Commissioners respectively; or

(ii) that a prisoner detained in prison be removed from one custody to another for purposes of trial.

Power to Grant Injunctions

143. The Court of Appeal shall have the power to grant injunctions and issue injunctions to prevent any irremediable mischief

which might ensue before a party making an application for such injunction could prevent the same by bringing an action in any Court of First Instance:

Provided that it shall not be lawful for the Court of appeal to grant an injunction to prevent a party to any action in any court from appealing to or prosecuting an appeal to the Court of Appeal or to prevent any party to take any action in any court from insisting upon any ground of action, defence or appeal, or to prevent any person from suing or prosecuting in any court, except where such person has instituted two separate actions in two different courts for and in respect of the same cause of action, in which case the Court of Appeal shall have the power to intervene by restraining him from prosecuting one or other of such actions as to it may seem fit.

Parliamentary Election Petitions

144. The Court of Appeal shall have and exercise jurisdiction to try election petitions in respect of the election to the membership of Parliament in terms of any law for the time being applicable in that behalf.

Inspection of Records

145. The Court of Appeal may, *ex mero motu* or on any application made, call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require.

Sittings of the Court of Appeal

146. (1) The Court of Appeal shall ordinarily exercise its jurisdiction at Colombo:

Provided however that the Chief Justice may from time to time when he deems it so expedient direct that the Court of Appeal shall hold its sittings and exercise its jurisdiction in any judicial zone or district, specified in the direction.

(2) The jurisdiction of the Court of Appeal may be exercised in different matters at the same time by the several judges of the Court sitting apart:

Provided that

- (i) its jurisdiction in respect of
 - (a) judgments and orders of the High Court pronounced at a trial at Bar, shall be exercised by at least three Judges of the Court; and
 - (b) other judgments and orders of the High Court, shall be exercised by at least two Judges of the Court;
- (ii) its jurisdiction in respect of its powers under Article 144 shall be exercised by the President of the Court of Appeal or any Judge of that Court nominated by the President or one or more of such Judges nominated by the President of whom such President may be one;
- (iii) its jurisdiction in respect of other matters, shall be exercised by a single Judge of the Court, unless the President of the Court of Appeal by general or special order otherwise directs.¹²

1 This provision was amended through the Eleventh Amendment to the Constitution; certified on 6th May 1987; L.D.-O. 47/85. The original provision read as follows:

" (2) The jurisdiction of the Court of Appeal may be exercised in different matters at the same time by the several Judges of the Court sitting apart:

Provided that

- (i) its jurisdiction in respect of judgements and orders of the High Court shall be exercised by at least three Judges of the Court;
- (ii) its jurisdiction in respect of judgements and orders of all other Courts of First Instance, tribunals and other institutions shall be exercised by at least two Judges of the Court;
- (iii) its jurisdiction in respect of its powers as contained in Articles 140, 141, 142 and 143 shall be exercised by not less than two Judges of the Court, unless, the President of the Court of Appeal by general or special order otherwise directs;
- (iv) its jurisdiction in respect of its powers under Article 144 shall be exercised by the President of the Court of Appeal or any Judge of that Court nominated by such President or one or more of such Judges nominated by such President, of whom such President may be one."

(3) In the event of any difference of opinion between two Judges constituting the Bench, the decision of the Court shall be suspended until three Judges shall be present to review such matter.

(4) The judgement of the Court of Appeal, shall when it is not an unanimous decision, be the decision of the majority.

Registry of the Court of Appeal and Office of Registrar

147. The Registry of the Court of Appeal shall be in charge of an officer designated as the Registrar of the Court of Appeal who shall be subject to the supervision, direction and control of the President of the Court of Appeal.

**Public Security Ordinance
Government of Ceylon**

CHAPTER 40 - PUBLIC SECURITY ORDINANCE
Ordinance No. 25 of 1947

AN ORDINANCE TO PROVIDE FOR THE ENACTMENT
OF EMERGENCY REGULATIONS OR THE ADOPTION
OF OTHER MEASURES IN THE INTERESTS
OF THE PUBLIC SECURITY AND THE PRESERVATION
OF PUBLIC ORDER AND FOR THE MAINTENANCE OF SUPPLIES
AND SERVICES ESSENTIAL TO THE LIFE OF THE COMMUNITY.

[16th June 1947]

PART I – General

1. This Ordinance may be cited as the Public Security Ordinance.
2. (1) Where, in view of the existence or imminence of a state of public emergency, the Governor-General is of the opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, the Governor-General may, by Proclamation published in the Gazette, declare that the provisions of Part II of this Ordinance shall, forthwith or on such date as may be specified in the Proclamation, come into operation throughout Ceylon or in such part or parts of Ceylon as may be specified.

(2) Where the provisions of Part II of this Ordinance have come into operation on any date by virtue of a Proclamation under sub-section (1), those provisions shall be in operation for a period of one month from that date, but without prejudice to the earlier revocation of the Proclamation or to the making of a further Proclamation at or before the end of that period.

(2A) (a) Where a further Proclamation is made under subsection (2) of section 2, at or before the expiration of a Proclamation made under that section, every

(i) regulation made under section 5; and

(ii) every order and rule made under any such regulation,

and in force, or deemed to be in force, on the day immediately preceding the coming into operation of such further Proclamation shall be deemed to be in force, from and after the date of the coming into operation of such further Proclamation:

Provided that the President may at any time prior to the coming into operation of such further Proclamation by Order declare that on the coming into operation of such further Proclamation, any such regulation, order or rule as is specified in such order, shall not be deemed to be in force, or shall be deemed to be in force, subject to such amendments, or modifications as are set out in such Order.

(b) Nothing in this section shall prejudice the power of the President to make regulations under section 5 during the continuance of a Proclamation under section 2, or to amend, vary or revoke any such regulation, order or rule in force, or deemed to be in force.

(3) Where a Proclamation is made under the preceding provisions of this section, the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by any such adjournment or prorogation as will not expire within ten days, a Proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit upon the day appointed by that Proclamation, and shall continue to sit and

act in like manner as if it had stood adjourned or prorogued to the same day.

The fact that the occasion of the making of a Proclamation under subsection (1) cannot be communicated to Parliament by reason that either House or both Houses of Parliament does not or do not meet when summoned to meet as provided by this subsection shall not in any way affect the validity or operation of that Proclamation or of the provisions of Part II of this Ordinance or anything done under that Part:

Provided that in such event, Parliament shall again be summoned to meet as early as possible thereafter.

3. Where the provisions of Part II of this Ordinance are or have been in operation during any period by virtue of a Proclamation under section 2, the fact of the existence or imminence, during that period, of a state of public emergency shall not be called in question in any court.
4. The expiry or revocation of any Proclamation under section 2 shall not affect or be deemed to have affected
 - (a) the past operation of anything duly done or suffered to be done under Part II of this Ordinance while that Part was in operation;
 - (b) any offence committed, or any right, liberty or penalty acquired or incurred while that Part was in operation;
 - (c) the institution, maintenance or enforcement of any action, proceeding or remedy under that Part in respect of any such offence, right, liberty or penalty.

PART II – Emergency Regulations

5. (1) The Governor-General may, upon the recommendation of the Prime Minister or any other Minister authorised by the Prime Minister to act on his behalf under this section in case of his

temporary absence or incapacity, make such regulations (hereinafter referred to as "emergency regulations") as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, emergency regulations may, so far as appears to the Governor-General to be necessary or expedient for any of the purposes mentioned in that subsection

- (a) authorize and provide for the detention of persons;
- (b) authorize
 - (i) the taking of possession or control, on behalf of Her Majesty, of any property or undertaking;
 - (ii) the acquisition on behalf of Her Majesty of any property other than land;
- (c) authorize the entering and search of any premises;
- (d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;
- (e) provide for charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the regulations, such fee as may be prescribed by or under the regulations;
- (f) provide for payment of compensation and remuneration to persons affected by the regulations;
- (g) make provision for the apprehension and punishment of offenders and for their trial by such courts, not being courts martial, and in accordance with such procedure, as may be provided for by the regulations, and for appeals from the orders or decisions of such courts and the hearing and disposal of such appeals.

- (3) Any emergency regulation may be added to, or altered or revoked by resolution of the House of Representatives or by regulation made under the preceding provisions of this section.
6. Emergency regulations may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorized by this Ordinance to be made, and may contain such incidental and supplementary provisions as appear to the Governor-General to be necessary or expedient for the purposes of the regulations.
 7. An emergency regulation or any order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any such regulation or any such order or rule shall, whether that provision shall or shall not have been amended, modified or suspended in its operation under section 5 of this Ordinance, to the extent of such inconsistency have no effect so long as such regulation, order or rule shall remain in force.
 8. No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.
 9. No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder shall be instituted in any court except by, or with the written sanction of, the Attorney-General; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision.
 10. Every document purporting to be an instrument made or issued by the Governor-General or other authority or person in pursuance of this Ordinance or of any emergency regulation, and to be signed by or on behalf of the Governor-General or such other authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by the Governor-General or that authority or person.

11. Notwithstanding anything in the Interpretation Ordinance or in any other law, every emergency regulation shall come into force forthwith upon its being made by the Governor-General, and shall be deemed to be as valid and effective as though it were herein enacted.

**The 1978 Constitution of the Democrat Socialist
Republic of Sri Lanka**

**CHAPTER XVIII
PUBLIC SECURITY**

Art. 155.

- (1) The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament.
- (2) The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution.
- (3) The provisions of any law relating to public security empowering the President to make emergency regulations which have the legal effect of over-riding, amending or suspending the operation of the provisions of any law, shall not come into operation, except upon the making of a Proclamation under such law, bringing such provisions into operation.
- (3A) Nothing in the preceding provisions of this Constitution shall be deemed to prohibit the making of emergency regulations, under the Public Security Ordinance or the law for the time being in force relating to public security, with respect to any matter set out in the Ninth Schedule or having the effect of overriding, amending or suspending the operation of a statute made by a Provincial Council.

(4) Upon the making of such a Proclamation the occasion thereof shall, subject to the other provisions of this Article be forthwith communicated to Parliament, and accordingly

(i) if such Proclamation is issued after the dissolution of Parliament such Proclamation shall operate as a summoning of Parliament to meet on the tenth day after such Proclamation, unless the Proclamation appoints an earlier date for the meeting which shall not be less than three days from the date of the Proclamation and the Parliament so summoned shall be kept in session until the expiry, or revocation of such or any further Proclamation or until the conclusion of the General Election whichever event occurs earlier and shall thereupon stand dissolved;

(ii) if Parliament is at the date of the making of such Proclamation, separated by any such adjournment or prorogation as will not expire within ten days a Proclamation shall be issued for the meeting of Parliament within ten days.

(5) Where the provisions of any law relating to public security have been brought into operation by the making of a Proclamation under such law, such Proclamation shall, subject to the succeeding provisions of this Article, be in operation for a period of one month from the date of the making thereof, but without prejudice to the earlier revocation of such Proclamation or to the making of a further Proclamation at or before the end of that period.

(6) Where such provisions as are referred to in paragraph (3) of this Article, of any law relating to public security, have been brought into operation by the making of a Proclamation under such law, such Proclamation shall expire after a period of fourteen days from the date on which such provisions shall have come into operation, unless such Proclamation is approved by a resolution of Parliament:

Provided that if

(a) Parliament stands dissolved at the date of the making of such Proclamation, or

(b) Parliament is at such date separated by any such adjournment or prorogation as it is referred to in paragraphs (4)(i) and (4)(ii) of this Article; or

(c) Parliament does not meet when summoned to meet as provided in paragraphs (4)(i) and (4)(ii) of this Article,

then such Proclamation shall expire at the end of ten days after the date on which Parliament shall next meet and sit, unless approved by a resolution at such meeting of Parliament.

(8) If Parliament does not approve any Proclamation bringing such provisions as are referred to in paragraph (3) of this Article into operation, such Proclamation shall, immediately upon such disapproval, cease to be valid and of any force in law but without prejudice to anything lawfully done thereunder.

(9) If the making of a Proclamation cannot be communicated to and approved by Parliament by reason of the fact that parliament does not meet when summoned, nothing contained in paragraph (6) or (7) of the Article, shall affect the validity or operation of such Proclamation:

Provided that in such event, Parliament shall again be summoned to meet as early as possible thereafter.

**Extract from the Emergency
(Miscellaneous Provisions and Powers)
Regulations**

N° 4 of 1994

**The Gazette of the Democratic Socialist Republic
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N° 843/12 - 4 November 1994

PART 2

**SUPERVISION, SEARCH, ARREST, DETENTION,
REHABILITATION AND SURRENDER**

17. (1) Where the Secretary is satisfied upon the material submitted to him, or upon such further additional material as may be called for by him, with respect to any person, that, with a view to preventing such person
- (a) from acting in any manner prejudicial to the national security or to the maintenance of public order or to the maintenance of essential services; or
 - (b) from acting in any manner contrary to any of the provisions of sub-paragraph (b) of Paragraph (2) of Regulation 32; or
 - (c) from committing, aiding or abetting the commission of any offence set out in Regulation 25 or Regulation 26,

it is necessary so to do, the Secretary may make order that such person be taken into custody and detained in custody for a period not exceeding three months and any such order may be extended from time to time for a period not exceeding three months at a time.

Provided however that no person shall be so detained upon an order under this regulation for a period exceeding one year. The period of detention of such person may be extended if such person is produced before a Magistrate prior to the expiration of his period of detention, accompanied by a report from the Secretary setting out the facts upon which the person is detained and the reason which necessitates the extension of such period of detention. Where the Magistrate is satisfied that there are reasonable grounds for extending the period of detention of such person he may make order that such person be detained for a further period of time as specified in such order, which period should not exceed three months and may be extended by the Magistrate from time to time.

(2) Where a person is produced before a Magistrate in compliance with the provisions of Paragraph (1) the Magistrate shall examine the material placed before him by the Secretary in his report. The report shall be prima facie evidence of its contents. The Secretary shall not be required to be present or called upon to testify before the Magistrate.

(3) Any police officer or any member of the armed forces shall have the right to carry into effect any order made under Paragraph (1) of this Regulation and to use all such force as may be necessary for that purpose.

(4) Any person detained in pursuance of an order made under Paragraph (1) of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorized by the Secretary and in accordance with instructions issued by him, and where such person is so detained in a prison established under the Prisons Ordinance all provisions of that Ordinance and all the rules made under that Ordinance shall apply to such person as though he were a civil prisoner within the meaning of that Ordinance:

Provided, however, that the Secretary may, where he considers it expedient to do by order direct that any provisions of the said Ordinance or any rules made thereunder which under the preceding provisions of this paragraph apply to such person, shall not

apply, or shall apply subject to such amendments or modifications as may be specified in such order.

(5) For the purpose of this regulation there shall be one or more Advisory Committees consisting of not less than three persons appointed by the President. The President may nominate one of such persons to be the Chairman.

(6) Where an Advisory Committee consists of three persons, the quorum for any meeting thereof shall be two, and where an Advisory Committee consists of more than three persons the quorum shall be three.

(7) Any person aggrieved by an order against him under this regulation may make his objections to such Advisory Committee.

(8) Any person aggrieved by an Order under this regulation is entitled to be informed of his right to make objections in writing, to such Advisory Committee as aforesaid.

(9) At any meeting of an Advisory Committee held to consider such objections as aforesaid shall be presided over by the Chairman. It shall be the duty of the Chairman to inform the objector of the grounds on which the order under this regulation has been made against him and to furnish him with such particulars, as are in the opinion of the Chairman sufficient to enable him to present his case.

(10) The Advisory Committee may regulate its procedure for the conduct of its meetings.

(11) The report of the Advisory Committee with respect to any such objections as aforesaid shall be submitted to the Secretary who may after consideration thereof, confirm or revoke the order to which the objections relate.

18. (1) Any police officer or any member of the armed forces may search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable grounds for suspecting to be concerned in, or to be committing or to have committed, an offence under any emergency

regulation; and may search, seize, remove detain any vehicle, vessel, article, substance, or thing whatsoever used in, or in connection with, the commission of the offence:

Provided however, that any person arrested or detained in any area or areas outside the Northern and Eastern Provinces in respect of which a proclamation under Section 2 of the Public Security Ordinance is applicable by a member of the armed forces shall forthwith, and at any event before the expiry of twenty-four hours from such arrest or detention be handed over to the custody of the officer-in-charge of the nearest police station.

(2) Any person conducting a search under Paragraph (1) of this regulation may question any other person present in the premises, place, vehicle or vessel searched, or the person who is searched, in regard to any matter connected with or relating to the purpose of the search.

(3) Every person who is questioned under Paragraph (2) of this regulation shall furnish such information as is within his knowledge in regard to the matter on which he is questioned.

(4) The person residing in, or in charge of, any premises, place, vehicle or vessel which is to be searched under this regulation, shall on demand of the person conducting the search, allow him free ingress thereto and afford all reasonable facilities for a search therein.

(5) A person conducting a search under this regulation may, in order to effect an entrance into the premises, place, vehicle or vessel to be searched, open or break open any outer or inner door or window.

(6) Whenever it is necessary to cause a female to be searched, the search shall be made by another female.

(7) It shall be the duty of the arresting officer to report the arrest made under Paragraph (1), where the arresting officer is a police officer to the Superintendent of Police of the Division within which the arrest is made, and where the arresting officer is a member of the armed forces, to the Commanding officer of the area, within which the arrest is made, within twenty-four hours of such arrest.

(8) Where any person is taken into custody, under the provisions of this regulation it shall be the duty of the arresting officer, to issue to the spouse, father, mother or any other close relative as the case may be, a document in such Form as specified by the Secretary, acknowledging the fact of the arrest. It shall be the duty of the holder of such document to return the same to, or produce the same before, the appropriate authority when such arrested person is released from custody.

Provided that, where any person is taken into custody and it is not possible to issue a document as set out above, it shall be the duty of the arresting officer, if such officer is a police officer, to make an entry in the Information Book, the reasons why it is not possible to so issue a document, and if the arresting officer is a member of the armed forces to report the reasons why it is not possible to issue a document to the officer-in-charge of the police station, whose duty it shall be to make an entry of such fact along with the reasons therefore, in the Information Book.

(9) Where any person shall without reasonable cause fail to issue a document acknowledging the fact of arrest as required by Paragraph (8) or wilfully omits to make such an entry as is referred to in the proviso to Paragraph (8), or to report the fact that the document was not issued and the reasons therefore, he shall be guilty of an offence and upon conviction after trial before the High Court be liable to a term of imprisonment extending to two years, and a fine.

(10) Where any property is seized or detained under the provisions of this regulation the person effecting the seizure or detention shall issue a receipt in respect of such property to the person from whose custody such property was seized or detained.

19. (1) The provisions of sections 36, 37 and 38 of the Code of Criminal Procedure Act, No. 15 of 1979, shall not apply to, and in relation to, any person arrested under Regulation 18.

(2) Any person taken into custody in pursuance of the provisions of Regulation 18 may for the purpose of investigation of the offence in relation to which such person was arrested be kept in detention upon an order made by a police officer not below the rank of a

Deputy Inspector-General of Police or if the person had been taken into custody by a member of the armed forces in any Administrative District within the Northern or Eastern Provinces, upon an order made by an officer not below the rank of Brigadier, Commodore or Wing Commander of the Army, Navy or Air Force, as the case may be, in a place authorised by the Secretary for a period not exceeding sixty days reckoned from the date of his arrest under that regulation, and should at the end of the period be released unless such person is detained under the provisions of Regulation 17, or is produced before a court of competent jurisdiction. Where such person is detained in a prison established under the Prisons Ordinance, the provisions of Regulation 17 (3) shall, *mutatis mutandis*, apply to, and in relation to, such person:

Provided however, that when any person is arrested in pursuance of the provisions of Regulation 18 in any area or areas outside the Northern and Eastern Provinces in respect of which a Proclamation under Section 2 of the Public Security Ordinance is applicable in respect of any offence committed in any such area, he shall not be detained under these provisions for a period in excess of seven days, unless investigations made during the period of seven days, requires such person to be detained for a further period, and in such instance the officer who issues the detention order may extend the period of detention for a further period of fourteen days. However if a detention order under Regulation 17 has not been obtained in respect of the person so arrested either within seven days or within the extended period of fourteen days, as the case may be, then he shall be produced before a Magistrate in accordance with the provisions hereinafter set out or be released.

(2A) Where any person is detained under the provisions of paragraph 2, no order for the detention of such person shall be made unless the fact of the arrest of such person has been notified to the Officer-in-Charge of the nearest Police Station forthwith or in any event no later than 24 hours of such arrest. Any person who fails to inform of the fact of such arrest shall be guilty of an offence and upon conviction after trial before the High Court be liable to a term of imprisonment extending up to 02 years and a fine.

(3) Where no reasonable cause exists for the further detention of any person arrested under the provisions of Regulation 18, such person shall, within forty-eight hours of his arrest if such arrest was made in any area outside the Northern or Eastern Provinces in respect of which a Proclamation under Section 2 of the Public Security Ordinance is applicable, or within seven days if such arrest was made in any area within the Northern and Eastern Provinces, be released from custody upon production of such person before a magistrate.

(4) The Secretary shall cause to be published in the Gazette a list, with the addresses of all places authorised by him as places of detention for the purposes of Regulations 17 and 19, and shall also notify the existence and the address of such places of detention to the Magistrate within whose jurisdiction such places of detention are located.

(5) The officer-in-charge of any place authorised by the Secretary as a place authorised for detention for purposes of Regulation 17 or 19 shall furnish once every fourteen days to the magistrate within whose local limits of jurisdiction such places of detention is located a list containing the names of all persons detained at such place. The Magistrate shall cause such list to be displayed on the notice board of the court.

(6) The Magistrate within whose jurisdiction any such authorised place of detention is situated, shall visit such place of detention at least once in every month and it shall be the duty of the officer-in-charge of that place, to secure that every person detained therein, otherwise than by an order of a Magistrate, is produced before such visiting Magistrate.

(7) The production of any person in conformity with the provisions of Regulation 19(6) shall not affect the detention of any person.

(8) No person shall be detained at any place other than a place of detention authorised by the Security and where any person had been detained contrary to this regulation the person or persons responsible for such detention shall be guilty of an offence and upon conviction after trial before the High Court be liable to

imprisonment for a period not less than six months and not exceeding five years and to a fine.

(9) Where a person who has been arrested under the provisions of regulation 18 or detained in pursuance of the provisions of regulation 19, or has surrendered in terms of the provisions of regulation 22 is produced before a court of competent jurisdiction, such court shall order that such person be remanded in the custody of the Fiscal in a prison established under the Prisons Ordinance.

(10) The provisions of section 115 of the Code of Criminal Procedure Act, No. 15 of 1979, shall not apply to, and in relation to, any person who is produced before a magistrate under the provisions of paragraph (9), or appears before a Magistrate in any other manner and is detained or remanded in the custody of the Fiscal in any prison for reason of being suspected or accused of any offence under any emergency regulation. Such person shall remain in such custody for a continuous period of three months and shall not be released at any time prior to the expiry of such period, except in accordance with the provisions of regulation 54.

20. (1) The Minister in charge of the subject of Defence or the Secretary may make a Rehabilitation Order to the effect that any person who has been detained under the provisions of regulations 17 or 19 of these regulations, or under the provisions of section 9 of Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, as the case may be, in the interest of the welfare of such persons, be subject to rehabilitation for such period as is specified in the Order under the supervisions of the Commissioner-General of Rehabilitation, appointed under regulation 21 of these regulations:

Provided that upon the making of a Rehabilitation Order under this regulation the Order made under Regulations 17 or 19, and the Order made under Section 9 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, shall be deemed to be revoked.

(2) A person subject to rehabilitation as aforesaid shall be released from the custody of the Commissioner-General of Rehabilitation upon the revocation of the rehabilitation Order.

(3) The Minister or the Secretary may prior to making an Order under Paragraph (1), or Paragraph (2) consult the Advisory Board appointed under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or the Advisory Committee appointed under Regulation 17(4) of these regulations, as the case may be, or any other Administrative Board appointed by the Minister or Secretary for this purpose.

21. (1) The President may by Order appoint by name or by office any person, to be the Commissioner-General of Rehabilitation for any area or areas in Sri Lanka in respect of which a Proclamation under Section 2 of the Public Security Ordinance is applicable. It shall be the duty of the Commissioner-General of Rehabilitation to execute and co-ordinate all activities relating to rehabilitation.

(2) The Commissioner-General of Rehabilitation, shall subject to the direction and control of the Committee of Secretaries and State Secretaries appointed for the purpose of monitoring rehabilitation programmes, exercise, perform and discharge all or any of the following powers, duties and functions in order to:-

(a) establish and maintain, Youth Development and Training Centres for the rehabilitation of Youth assigned to such Centres;

(b) provide vocational, technical and other training to the youth at such Youth Development and Training Centres;

(c) certify the levels of training received by the youth at such Youth Development and Training centres;

(d) make recommendations, in consultation with the Secretary to the Ministry of the Minister in charge of the subject of Youth Affairs and Sports, to the Secretary regarding the release of youth who have completed their training;

(e) arrange financial assistance for youth who have completed their training at such Youth Development and Training Centres, so as to enable them to commence business enterprises, utilising the training they have received; and

(f) provide sports and recreational facilities and cultural programmes for the benefit of the youth at the Youth Development and Training Centres.

(3) The Commissioner-General of Rehabilitation may appoint by name or by office any person to be Deputy Commissioner, or Assistant Commissioner as may be necessary for the performance of his duties under these regulations in consultation with the Minister in charge of the subject of Youth Affairs and Sports.

(4) The Commissioner-General of Rehabilitation may delegate to any Deputy Commissioner or Assistant Commissioner appointed under Paragraph (3) any power, duty or function conferred or imposed, on, or assigned to such Commissioner-General, by or under these regulations.

22. (1) Any person who surrenders (hereinafter referred to as the "surrendee") to any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorised by the President by Order, in connection with any offence under the Explosives Act, the Offensive Weapons Act, No. 18 of 1966, the Firearms Ordinance, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or under Chapter VI, Chapter VII or Chapter VIII of the Penal Code or under any emergency regulation, or through fear of terrorist activities shall be required to give a written statement to the officer or person authorized in that behalf to the effect that he is surrendering voluntarily.

(2) There shall be approved from time to time by the Secretary to the Ministry of the Minister in-charge of the subject of Defence, Centres to be known as "Protective Accommodation and Rehabilitation Centres" (hereinafter referred to as "the Centre") for the purpose of receiving and keeping surrendeeds.

(3) The officer or person to whom a person surrenders in terms of paragraph (1), shall within ten (10) days of such surrender take steps to hand over the surrendee to the Commissioner-General of Rehabilitation who shall assign such surrendee to a Centre.

(4) The officer or any other person to whom a person surrenders in terms of paragraph (1) shall inform the Secretary to the Ministry of the Minister in-charge of the subject of Defence, within a period of ten days of the surrender and handing over of the surrendee to the Commissioner-General of Rehabilitation, that a voluntary surrender has been made and such person was handed over as contemplated in paragraph (3) above.

(5) On being assigned to a Centre the Commissioner-General of Rehabilitation shall endeavour to provide the surrendee with an appropriate vocational, technical or other training during his stay at the centre. He shall within a period of two months from the date of taking over of such surrendee report to the Secretary to the Ministry of the Minister in-charge of the subject of Defence indicating the nature of the rehabilitation being carried out in respect of the surrendee.

(6) When the Secretary to the Ministry of the Minister in-charge of the subject of Defence received the report from the officer or person to whom a person surrendering in terms of paragraph (4), he shall make an order authorizing the Commissioner-General of Rehabilitation to keep such surrendee in a Centre and to rehabilitate him for a period not exceeding twelve months in the first instance. Such period will be computed from the date of handing over of such surrendee by the officer or person as the case may be, to the Commissioner-General of Rehabilitation.

(7) A surrendee assigned to a centre may, with the permission of the officer in-charge of the Centre, be entitled to meet his parents, or relations or guardian as the case may be, once in every two weeks.

(8) The Commissioner-General of Rehabilitation shall prior to the expiration of the period of rehabilitation report to the Secretary to the Ministry of the Minister in-charge of the subject of Defence on the suitability of releasing the surrender or whether he need be rehabilitated for a further period.

(9) At the end of the period of twelve months the Secretary to the Ministry of the Minister in-charge of the subject of Defence, after perusal of the report submitted by the Commissioner-General of Rehabilitation, may

(a) order the release of such person; or

(b) extend the period of rehabilitation for periods of three months at a time, so however that the aggregate period of such extensions shall not exceed twelve months. Such extensions shall be made on the recommendation of the Commissioner-General of Rehabilitation and the Administrative Board appointed by the Secretary to the Ministry of the Minister in-charge of the subject of Defence in terms of regulation 20(3). (i.e. the processing committee)

(10) At the end of the extended period of rehabilitation the surrendee shall be released.

(11) The Superintendent of Police of the Division in-charge of the place where the person surrendered may, after the expiration of three months from the date of his being handed over to the Centre, with prior written approval of Secretary to the Ministry of the Minister in-charge of the subject of Defence, investigate the involvement of any surrendee who is suspected of being connected with, or concerned in the commission of an offence set out in paragraph (1).

(12) (a) Where at the end of any trial a surrendee is found guilty of the offence in connection with which he is charged or indicated, the Court may in determining the sentence to be imposed on him, take into consideration the fact of his surrender.

(b) The Court may where appropriate, order that the accused be rehabilitated for further period as may be determined by Court, at a Centre.

(13) A surrendee subject to rehabilitation by Order of Court may, if he acts in a manner prejudicial to, his rehabilitation programme or the interest of other surrendeers at the Centre, on production by the Commissioner-General of Rehabilitation before the court which sentenced him, be sentenced to imprisonment in lieu of such further rehabilitation after such summary inquiry as the court thinks fit.

23. Every member of the armed forces, who is for the time being engaged in escorting any prisoner or in guarding any prison or any other place where prisoners are confined or are employed in work, or in assisting in the quelling of any disturbance or violence on the part of any prisoners, or in recapturing any escaped prisoner or in enforcing or assisting in the enforcement of the any lawful order, shall be deemed to have all the powers and rights vested in a police officer by virtue of Section 77 (5) of the Prisons Ordinance and the rules relating thereto made under that Ordinance.

International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

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

**PART III
DETENTION AND RESTRICTION ORDERS**

9. (1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time:

Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months.

- (2) (a) At any time after an order has been made in respect of any person under subsection (1), the Minister may direct that the operation of such order be suspended and may make an order under subsection (1) of section 11.
- (b) The Minister may revoke any such direction if he is satisfied that the person in respect of whom the direction was made has failed to observe any condition imposed or that the operation of the order can no longer remain suspended without detriment to public safety.

10. An order made under section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise.
11. (1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in the commission of any unlawful activity referred to in subsection (1) of section 9, he may

make an order in writing imposing on such person such prohibitions or restrictions as may be specified in such order in respect of

- (a) his movement outside such place of residence as may be specified; or
- (b) the places of residence and of employment of such person; or
- (c) his travel within or outside Sri Lanka; or
- (d) his activities whether in relation to any organisation, association or body of persons of which such person is a member, or otherwise; or
- (e) such person addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organisation, association or body of persons, or from taking part in any political activities,

and he may require such person to notify his movements to such authority, in such manner and at such times as may be specified in the order.

(2) Where the Minister makes a restriction order in respect of any person while an order of detention in respect of such person is in force, such restriction order shall, unless otherwise specified, take effect upon the expiry of the detention order.

(3) Every order made under subsection (1) shall be in force for such period, not exceeding three months, as may be specified therein:

Provided, that the Minister may, by order in writing, extend such period from time to time for periods not exceeding three months at a time so however that the aggregate of such periods does not exceed eighteen months.

(4) Where an order is made under subsection (1), the Minister may by notice in writing served on the person to whom such order relates, vary, cancel or add to any prohibitions or restrictions imposed by such order on such person and the prohibitions or

restrictions so varied or added to shall, unless earlier cancelled, continue in force for the unexpired portion of the period specified in such order or the period as extended under subsection (3).

(5) An order made by the Minister under subsection (1) shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise.

12. Any person who contravenes or acts in breach of any prohibition or restriction imposed on him by an order under section 11 shall be guilty of an offence and shall on conviction be liable to a term of imprisonment of either description for a period of five years.

**Presidential Directions dated 18 July 1995 issued
under the HRTF Regulations**

**Directions issued by Her Excellency the President
under Regulation 8 of the Emergency (Establishment of a
Human Rights Task Force) Regulations N° 1 of 1995**

I, Chandrika Bandaranaike Kumaratunga, President, being of the opinion that it is necessary to issue directions to the Heads of the Armed Forces and the Police Force to enable the Human Rights Task Force (hereinafter referred to as "the HRTF") to exercise and perform its powers, functions and duties and for the purpose of ensuring that fundamental rights of persons arrested or detained are respected and such persons are treated humanely, do hereby direct, in terms of regulation 8 of the Establishment of the Human Rights Task Force, Regulations N° 1 of 1995, the heads of the armed forces and of the police as follows:

1. Every member of the armed forces and of the police force shall assist and facilitate the HRTF and any person authorised by the HRTF in the exercise of its powers, duties and functions under these regulations and also ensure that the fundamental rights of persons arrested or detained are respected.
2. No person shall be arrested or detained under any Emergency Regulation or the Prevention of Terrorism Act N° 48 of 1979 except in accordance with the law and proper procedure and by a person who is authorised by law to make such arrest or order such detention.
3. At or about the time of the arrest or if it is not possible in the circumstances, immediately thereafter as circumstances permit:

- (i) the person making the arrest or detention shall identify himself to the person arrested or any relative or friend of such person upon inquiry being made, by name and rank;
- (ii) every person arrested or detained shall be informed of the reason for the arrest;
- (iii) the person making the arrest or detention shall issue, to the spouse, father, mother or any other close relation as the case may be a document in such form as specified by the Secretary to the Ministry of the Minister in charge of the subject of Defence, acknowledging the fact of arrest. The name and rank of the arresting officer, the time and date of arrest and the place at which the person will be detained shall also be specified. It shall be the duty of the holder of such document to return the same to, or produce the same before, the appropriate authority when the person so arrested or detained is released from custody:

Provided that, where any person is taken into custody and it is not possible to issue a document as set out above, it shall be the duty of the arresting officer, if such officer is a police officer, to make an entry in the Information Book giving reasons as to why it is not possible to so issue a document, and if the arresting officer is a member of the Armed Forces to report the reasons why it is not possible to issue a document to the officer in charge of the police station, whose duty it shall be to make an entry of such fact along with the reasons therefore in the Information Book.

- (iv) the person arrested shall be afforded reasonable means of communicating with a relative or friend to enable his whereabouts being known to his family.
4. When a child under 12 years or a woman is sought to be arrested or detained, a person of their choice should be allowed to accompany such child or woman to the place of questioning. As far as possible any such child or woman so sought to be arrested or detained should be placed in the custody of a women's unit of the armed forces or the police force or in the custody of another woman military or police officer.

5. A statement of a person arrested or detained should be recorded in the language of that person's choice who should thereafter be asked to sign the statement. A person who desires to make a statement in his or her own handwriting should be permitted to do so.
6. (1) The members of the HRTF or any person authorised by it should be permitted access to the person arrested or detained under the Prevention of Terrorism Act N° 48 of 1979 or under a regulation made under the Public Security Ordinance (Chapter 40), and should be permitted to enter at any time any place of detention, police station or any other place in which such person is detained in custody or confined.

(2) Every officer who makes an arrest or order of detention as the case may be, shall forthwith, and in any case not later than forty-eight hours from the time of such arrest or detention, inform the HRTF or a Regional Coordinator or any person specially authorised by the HRTF, of such arrest or detention as the case may be, and the place at which the person so arrested or detained is being held in custody or detention.

Colombo, 18 July 1995

List of Interviewees

Mission to Sri Lanka 14 - 23 September 1997

- The Chief Justice of Sri Lanka (The Hon. G. P. S. de Silva)
- The President of the Court of Appeal (The Hon. D. P. S. Gunasekara)
- The Attorney-General (The Hon. S. N. Silva) and members of his staff
- The Human Rights Commission of Sri Lanka (Justice Seneviratne, Chairman, Professor Arjuna Aluvihare, Dr. A. T. Ariyaratne, Mr T. Suntheralingam,
- Mr. Javed Yusuf
- Brig. Samarakoon, Judge Advocate-General, and Capt. Fernando, Advocate-General for the Navy
- Justice Grero, Legal Adviser to the Ministry of Defence
- Mr Ranil Wickremasinghe, MP, leader, UNP, with Mr. Tyrone Fernando, MP, and other representatives of the UNP
- Justice J. F. A. Soza, Director, The Sri Lanka Judges' Institute
- The Executive Committee of the Bar Association of Sri Lanka
- Mr. Charles Abeyesekera, Director, INFORM
- Ms. Radhika Coomaraswamy, Director, International Centre for Ethnic Studies

- Mr. Wimal Fernando, Movement for the Defence of Democratic Rights
- Mr Ganeshalingam and Ms. Sherine Xavier, Home for Human Rights
- Mr. Raja Goonesekere, lawyer
- Professor Sabithri Goonesekere, Professor of Law, University of Colombo
- Mr. G. G. Ponnambalam, General Secretary, All Ceylon Tamil Congress
- Dr. K. Sritharan and Mr. Rajan Hoole, University Teachers for Human Rights
- Mr. Neelan Thiruchelvam, MP
- Mr. K. Tiranagama, General Secretary, Lawyers for Human Rights and Development
- Dr. Deepika Udugama, Director, Centre for Human Rights, University of Colombo
- Mr. Warnakulasuriya, Chairman, Legal Aid Commission
- Ms. Suriya Wickremasinghe, Secretary, Civil Rights Movement; Member, CIJL Advisory Board.

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P.N. BHAGWATI Former Chief Justice of India

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SIR ROBIN COOKE	President of the Court of Appeal (New Zealand)
MARIE JOSE CRESPIN	Member, Conseil Constitutionnel du Senegal
PARAM CUMARASWAMY	Chairman, Standing Committee on Human Rights, International Bar Association; past President, Malaysia Bar Council
JULES DESCHÊNES	Former Chief Justice, Superior Court of Quebec (Canada)
ENOCH DUMBUTSHENA	Former Chief Justice (Zimbabwe)
DIEGO GARCIA-SAYAN	Andean Commission of Jurists; Member, UN Working Group on Disappearances (Peru)
STEPHEN KLITZMAN	Chairman, Committee on International Human Rights, American Bar Association (USA)
PABLITO SANIDAD	Chairman, Free Legal Assistance Group (Philippines)
BEINUSZ SZMUKLER	President, American Association of Jurists (Argentina)
SURIYA WICKREMASINGHE	Barrister (Sri Lanka)
ABDERAHMAN YOUSOUFI	Deputy Secretary-General, Arab Lawyers Union (Morocco) Vice President, Arab Organization for Human Rights

Director

Mona A. Rishmawi



For most of the period since 1983 there has been a state of conflict in the Northern and Eastern provinces of Sri Lanka between the Government and militant Tamil separatist. There has also been internal political violence within the majority Sinhalese community, which began in 1971 and reached a very high level between 1987 and 1990. As a result, the Government assumed emergency powers which have continued for almost all the time since 1971. During the course of these conflicts, many killings and other violations of human rights have been carried out both by Government forces and their opponents.

This Mission's report explores the state of legislation, the legal system, the legal protection of human rights, the independence of the judiciary and lawyers, and the investigation and prosecution of those suspected of violations of human rights in Sri Lanka. Some of these matters are directly linked to the state of emergency. Others are broader.

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