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HUMAN SECURITY AND THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ENFORCEMENT OF LANGUAGE RIGHTS POLICY IN SRI LANKA

Mohamed Mowjoon Atham Bawa¹

Abstract

Human security is about protecting people, however it has gone ahead of the traditional security definitions and focusing on evolutionary changes in the human security infrastructure. The arguments over human security are not new. Human security is a comparable undisciplined argument for a return to enlightenment liberalism. United Nations Commission on Human Security defines human security as the protection of "the vital core of all human lives in ways that enhance human freedoms and fulfilment." As such, this encompassing approach does not distinguish "freedom from fear" and "freedom from want" for individual citizens. This paper will explain 2 key points which are language rights as human rights in the Sri Lankan context and National Institutions. It is based on during the civil war the Sri Lankan citizens were not able to enjoy the language access efficiently therefore the innocent people were not able to express themselves in their own language and were treated as terrorists rather than the normal citizens of Sri Lanka.

Human Security adalah suatu konsep perlindungan manusia, terkait dengan hal ini ditinjau kembali kepada pengertian human security secara tradisional dengan memfokuskan kepada perubahan dari konsep human security. Perdebatan terkait human security ini bukan lah hal baru. Human Security adalah suatu perdebatan multidisiplin yang mengindikasikan adanya liberalisme. United Nations Commission on Human Security mendefinisikan human security sebagai perlindungan dari inti kehidupan manusia yang meningkatkan kebebasan dan pemenuhan kebutuhan manusia. Namun, pendekatan ini tidak membedakan terkait "kebebasan dari rasa takut" dan "kebebasan dari kebutuhan" dari setiap warga negara. Tulisan ini akan menjelaskan 2 hal penting yaitu hak berbahasa sebagai bentuk hak asasi manusia dalam konteks masyarakat Sri Lanka dan Institusi Nasional. Hal ini disebabkan selama perang saudara di Sri Lanka, masyarakat Sri Lanka tidak bebas berbahasa sehingga masyarakat awam tidak bebas berbahasa dalam bahasa mereka sendiri bahkan diperlakukan seperti teroris tidak selayaknya warga negara Sri Lanka.

Keywords: Human Security, Human Rights, Language Rights, social and cultural rights

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I. BACKGROUND

Human security is about protecting people, however it has gone ahead of the traditional security definitions and focusing on evolutionary changes in the human security infrastructure. In the literature the term human security has been defined in different ways by various authors. This paper will focus on language rights as human rights of individuals in the Sri Lankan context and evaluates the role of national human rights institutions in the enforcement of language rights policy in Sri Lanka.

The arguments over human security are not new. At its core, human security is a comparably undisciplined argument for a return to enlightenment liberalism.² Many of the basic principles of human security are rudimentary reflections of Montesquieu, Rousseau and Condorcet. The debate over the association between the individual and state as the focus of security is not recent so observation on past perspectives is constructive.

For Montesquieu, this was a singular focus on freedom and the perceived rights of individuals over the dictated security provided by the state. Security for Adam Smith³ meant the protection of the individual from 'sudden or violent attack on one's person or property' this security being the most important prerequisite for a successful and 'opulent' society. Similarly, Condorcet described a societal contract in which the security of the individual was the central principle. If freedom from fear is not guaranteed, he argued, and then individuals could not be effective members of a political relationship.

This liberal perspective was widespread, but not unanimous. Although in agreement, over the vital role of individual safety, others believed that this could best be achieved as a consequence of the security of the state, thus, acting as protector from both external and internal threats. For Hobbes, it meant little whether a man's insecurity was at the hands of a local thief or an invading army. Protection from either, he believed, was the absolute responsibility of the state. For this protection,

² E. Rothschild, 1995, What is Security?, *Daedalus*, vol. 124, no. 43, pp. 53-90.

³ Rothschild, E., 'Economic Security and Social Security', UNRISD Conference on Why human security?, Rethinking Social Development, Center for History and Economics, Cambridge, Massachusetts, 1995.

the citizen should give up any and all individual rights to his country, his protector as security prevailing over liberty.⁴

While also looking at the role of the state in providing individual security, Kant envisioned a higher authority still. He proposed a Universalist international order: a global society, based primarily on the moral imperative of a common good as seen by its member nations.⁵ As a middle ground between the two, Grotius proposed a more moderate international dynamic, one not guided by supranational law, but by a balance of power amongst states and a social contract between them and their citizens.

For Grotius, the mutual interests of independent but co-existing state entities would ensure the security of all. Although each gave rise to a different school of international thought (Hobbes to realism, Kant to global security, Grotius to international security), all based the primary responsibility of protecting individual security in the hands of the state. This would become the dominant worldview, overtaking more liberal thinking, until the end of the Cold War.

Apart from all these arguments the United Nations Commission on Human Security defines human security as the protection of "the vital core of all human lives in ways that enhance human freedoms and fulfilment."⁶ As such, this encompassing approach does not distinguish "freedom from fear" and "freedom from want" for individual citizens. To achieve this protection, nonetheless, requires far more than just protecting people and their fundamental freedoms. While there must be short-term protection from severe situations and threats, there must also exist the will and ability to sustain security and stability by the successful integration of political, social, environmental, economic, military, and cultural systems and processes that allow individuals to prosper over time.

Regarding human security the 1994 United Nations Development

⁴R. Ullman, Redefining Security, *International Security*, vol. 8, no. 1, pp. 129–53; and Thomas Hobbes, *The Leviathan* 1983.

⁵H. Haftendorn, The Security Puzzle: Theory Building and Discipline Building in International Security, *International Security Quarterly*, vol. 35, no. 1, pp. 3–17 1991.

⁶Commission on Human Security, *Human Security Now* (United Nations Publications, 2003), 4.

Programme (UNDP) report tried to recognize a conceptual shift that needed to take place following the decline of the bipolar threat of the Cold War:

The concept of security has for too long been interpreted narrowly: as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threat of nuclear holocaust. It has been related to nation-states more than people. . . . Forgotten were the legitimate concerns of ordinary people who sought security in their daily lives. For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime [or terrorism], social conflict, political repression and environmental hazards. With the dark shadows of the Cold War receding, one can see that many conflicts are within nations rather than between nations.⁷

With the fall of the Berlin Wall, it should have become clear that despite the macrolevel stability created by the East-West military balance of the Cold War, citizens were not safe. They may not have suffered from outright nuclear attack, but they were being killed by the remnants of proxy wars, the environment, poverty, disease, and hunger, violence, and human rights abuses. Ironically, the faith placed in the realist world view, and the security it provided, masked the actual issues threatening the individual. The protection of the person was all too often negated by an over attention to the state. Allowing key issues to fall through the cracks, "traditional security" failed at its primary objective: protecting the individual.

This new type of instability led to the challenging of the notion of traditional security by such concepts as cooperative, comprehensive, societal, collective, international, and human security. Although these concepts moved away from a focus on interstate relations, human security takes the most dramatic step by making the referent object not the state, society, or community, but the individual. This shift is shown in table 1 which is meant to direct research and policy towards the actual issues threatening people's lives.⁸

⁷ UNDP, *Human Development Report*, 3 and 22-23.

⁸ Taylor Owen, "Challenges and Opportunities for Defining and Measuring Human Security," *Disarmament Forum*, 3 June 2004.

Table 1: Traditional security versus human security

Type of Security	Referent Object	Responsibility to Protect	Possible threats
Traditional security	The state	The integrity of the state	Interstate war Nuclear proliferation Revolution
Human security	The individual	The integrity of the individual	Disease Poverty Natural disaster Violence Landmines Human rights abuses

II. LANGUAGE RIGHTS AS HUMAN RIGHTS IN THE SRI LANKAN CONTEXT

As illustrated in table 1, threat of human rights abuses are considered in human security. Language rights have been recognised as one of the main elements of economic, social and cultural rights. Language plays a major role in the life of an individual, community and country and provides ethnic identity. Therefore it is the responsibility of the state to recognize an individual's right to use his or her own language and transact business in the selected language. The failures to assist the recognition and identity of the person through the use of his or her language have lead to many problems in Sri Lanka.

On the other hand they are explicitly recognized as fundamental rights under the Constitution and not implemented with pure mind which causes conflicts among different linguistic communities in the country. The present Constitution provides judicial remedy against any infringement of language rights and fundamental rights are recognised in the Constitution by executive or administrative action. The Supreme Court holds the sole power in this regards.

For nearly 3 decades Sri Lanka suffered from armed conflict which was the consequence of ethnic tension in the country. The main roots of the conflict were the denial of language rights of the Tamil speaking minority, discrimination in employment opportunities both in public sectors and private sectors as well as discriminations in the administration services. Throughout the history there have been a number of initiatives and negotiations formulated between the representatives of the Tamil speaking population and the government of Sri Lanka however no agreements were implemented by the government and the promises have become just broken promises in the end.⁹

In Sri Lanka separatist militant organization called the "Liberation Tigers of Tamil Eelam" (LTTE) fought for independent Tamil state called "Tamil Eelam" in the North and East of the island. This organization claimed to fight on behalf of the Tamil speaking population to achieve acceptable and better recognition of their identity and equality in the country. The conflict has become an internal conflict between the government and LTTE continued and described as one of the longest-running civil wars in Asia. In May 2009 the government of Sri Lanka declared war against LTTE and claimed they killed the leader of the organization. The civil war has killed around 40000 people, and about 300000 people were injured severely and partially during the war. The human rights groups have accused both the LTTE and the Sri Lankan military of human rights violations, including abduction, extortion, and the use of child soldiers.¹⁰

Further the 19th session of the UN Human Rights Council, in Geneva from February 27 to March 23, passed decision against Sri Lanka demanding international inquiry into war crimes carried out by the Sri Lankan government of President Mahinda Rajapakse in 2009, at the end and after the civil war.¹¹

⁹ Atham Bawa, MM., "Towards a Novel Approach Healing Language Rights of Minority: The Case of Sri Lanka". The 3rd CILS International Conference on Human Security, Indonesia, 2012.

¹⁰ Report of the Secretary-General's internal review panel on United Nations action in Sri Lanka, 2012.

¹¹ "Lanka war crimes: UNHRC to debate on US motion" available at <http://expressbuzz.com/world/lanka-war-crimes-unhrc-to-debate-on-us-motion/374938.html>

The next section introduces national institutions and the role of national institutions in Sri Lanka in the effective realization of language rights of Tamil speaking population. This section also evaluates the Sri Lankan context in terms of Paris Principles.¹²

III. INTRODUCTION TO NATIONAL INSTITUTIONS

A range of institutions concerned with human rights which includes religious institutions, trade unions, and the mass media, NGOs, government departments, the courts and the legislature. On the other hand "national human rights institution" refers to a body whose specific functions are to promote and protect human rights. National human rights institutions take many forms in terms of their mandate, their organisational composition and the political and legal traditions within which they function. However the key direction is to advise governments on matters of human rights policy.

While no two institutions are exactly the same, all share some common attributes. They are often administrative in nature. Many also have quasi-judicial powers, such as in resolving disputes, although national human rights institutions are neither courts nor law-making bodies. As a rule, these institutions have ongoing, advisory authority in respect to human rights at the national and/or international level. They do their work either in a general way, through opinions and recommendations, or by considering and resolving complaints submitted by individuals or groups.

In some countries, the Constitution provides for the establishment of a national human rights institution. More often, such institutions are created by legislation or decree. While many national institutions are attached to the executive branch of government in some way, the actual level of independence that they enjoy depends on a number of factors, including membership and the manner in which the institutions operate.

Most existing national institutions can be classified into three groups "human rights commissions", "ombudsmen" and "specialized"

¹² General Assembly resolution 48/134 of 20 December 1993

national institutions. When establishing a mechanism that meets the requirements of the Convention, States parties must take into account the principles relating to the status and functioning of national institutions that protect and promote human rights. An international workshop of national human rights institutions, held in Paris in 1991, first drafted these Principles, known as the "Paris Principles," which were then adopted by the United Nations General Assembly in 1993.¹³

Following these principles twelve countries in Asia-Pacific region established national human rights institutions (NHRIS) which includes Sri Lanka, India and Malaysia.¹⁴

The Paris Principles are a set of core minimum recommendations adopted by the United Nations General Assembly relating to the status and functioning of national institutions for the protection and promotion of human rights. According to the Paris Principles, any mechanisms established to protect and promote the realization of human rights must:

Be independent of the Government, with such independence guaranteed either by statutory law or constitutional provisions; be pluralistic in their roles and membership; have as broad a mandate as possible, capable, in the context of the Convention, of collectively promoting, protecting and monitoring the implementation of all aspects of the Convention through various means, including the ability to make recommendations and proposals concerning existing and proposed laws and policies and have adequate powers of investigation, with the capacity to hear complaints and transmit them to the competent authorities.

However in the case of Sri Lanka human rights commission is the primary body which advises the government in protecting and promoting the human rights; however the body is selected by the president of the country and in most of the situations pushed by the officials and the relevant parties in the government. Theoretically this body is supposed to make recommendations and policy changes about the promotion and the protection of human rights however they are nominated by the state parties which suit their needs. The power of investigation of this body is also been limited by the state. The functionality of this body is also

¹³ General Assembly resolution 48/134 of 20 December 1993

¹⁴ Burdekin, B., "National Human Rights Institutions in The Asia-Pacific Region", 2007.

controlled by the state by forcing expected outcomes form investigations and the functioning.

Be characterized by regular and effective functioning; be adequately funded and not subject to financial control, which might affect their independence; and be accessible to the general public. In the Sri Lankan context, functioning of the commission has been dominated by the officials and the personals in the ruling party. Under international human rights law state is required to take special means to protect children during war as they are more vulnerable compare to others affected by the civil war.¹⁵ Children surrenders were placed in government detention without trial under the name of "rehabilitation" and also they transferred from one centre to another which further complicates the situation where the family members or relatives were not given any information about the children.

The principles also confirm a wide variety of functions in promoting and protecting human rights which includes research, public education and promoting the ratification of international human rights treaties.¹⁶ While national human rights institutions should have as broad as mandate as possible, specified either in the constitution or in legislation, the Paris Principles insist on that these institutions should:

Monitor the implementation of human rights obligations of the State party and report annually (at least); however, before, during and after the final stages of the civil war disappearances were carried out by the agent of the state. The victims of this were journalists, community activists, suspected LTTE and human rights defenders. These individuals were removed in white vans and never came back. This violates the right to liberty and security stated in ICCPR art.9.¹⁷

Report and make recommendations to the Government, either at the Government's request or on its own volition, on human rights matters, including on legislation and administrative provisions, the violation of human rights, the overall human rights situation in the country and initiatives to improve the human rights situation;

¹⁵ ICCPR art.24, ICESCR art.10, Convention on the Rights of the Child (CRC).

¹⁶ *Ibid.*

¹⁷ ICCPR art.9.

The initiatives advised by the human rights commission have been neglected by the government for decades and even in the present situation.

Promote harmonization of national law and practice with international human rights standards; encourage ratification of human rights treaties; jurisprudence of the International Court of Justice and other Tribunals established by the UN Security Council provide substantiation that the obligation to make a distinction between civilians and combatants is a customary law obligation in respect of both international and non-international armed conflicts. Further, International humanitarian law requires parties involved in the conflict to take all feasible precautions to minimize civilian casualties.¹⁸ The allegations point to the violation of this provision is that the Sri Lankan armed forces did not provide sufficient instructions in advance to the civilians about the targets of attacks. Moreover the government placed restrictions on basic medical supplies through humanitarian bodies organised by UN and ICRC ships.

Among 7, ICRC principles, humanity, universality, unity, impartiality and neutrality have been violated because Tamil speaking people have been tortured, abducted, prisoned, raped and killed because they are of that specific minority. Shelling of hospitals and humanitarian objects is another allegation against the government that the wounded and sick people were not given proper treatment and in some cases they were simply buried. This violates common article 3 of the Geneva Convention.¹⁹

Contribute to reports that States parties are required to submit to the United Nations treaty bodies on the implementation of human rights treaties; international human rights law guarantees the right to physical security of the person.²⁰ These rights include protection against sexual

¹⁸ Rules 15-20, ICRC study.

¹⁹ Common article 3 of the Geneva Convention states that (1) 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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

²⁰ ICCPR, art.6 and art.9

and gender based violence and abuses. A number of violations of these provisions taken by the government; for example preventable deaths in Menik Farm of individuals²¹ within the power and control of the government due to the fact that the government did not provide enough food, water and health care in the initial phases of reception and detention. The government did not guarantee the physical security of Internally Displaced People (IDP) in camps which led to the access of paramilitary groups to the camps and stimulated cruel treatments including rape of women and children by the Criminal Investigation Department (CID) officers or Terrorist Investigation Department (TID) officers.

Cooperate with regional and United Nations human rights bodies as well as with human rights bodies of other States; during the later stages of the war in Sri Lanka the accountability of the state has been violated. Even though Sri Lanka has been signatory to a number of treaties including international humanitarian law and human rights law, it is the responsibility of the government to do an independent assessment regarding any allegations and war crimes and prosecute those who have involved any of the allegations identified and proofed.

Assist in the formulation of human rights education programmes; and Raise public awareness about human rights and efforts to combat discrimination. The Paris Principles explicitly recommend the promotion of human rights education programmes. It is essential that individuals, private entities and government entities know about human rights and the corresponding responsibilities if those rights are to be respected and effectively monitored. In Sri Lanka human rights education programmes have been ignored by the government for several decades in integrating in to the school curriculum where the seeds of the awareness of human rights be planted effectively. Funding for schools have been

²¹ Menik Farm in Sri Lanka was the largest camp for people displaced from the conflict in Sri Lanka in 2009. The Government-run Menik Farm was set up in May 2009 to shelter thousands of people fleeing from the final stages of the civil war; Sri Lanka: IDPs and returnees remain in need of protection and assistance, A profile of the internal displacement situation, internal displacement monitoring centre, Norwegian refugee council, 14 January, 2011: [http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/03D15A8CBF11229DC12578180036CD93/\\$file/Sri+Lanka+-+January+2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/03D15A8CBF11229DC12578180036CD93/$file/Sri+Lanka+-+January+2011.pdf)

limited in all circumstances.

Monitoring national law and practice is common for national human rights institutions to have a mandate to ensure that national law conforms to human rights standards, as recommended by the Paris Principles. This can be achieved by examining existing laws, and by monitoring and commenting upon the development of new laws. However in the Sri Lankan context the monitoring processes are generally performed by the government appointees whose functions are limited by the ruling and implementing officials.

A number of institutions dedicate resources to monitoring proposed legislation so that they might consider and, if necessary, comment upon compliance of the proposed law with human rights obligations. Depending on the degree of impact that a proposed law may have on human rights, national institutions might also raise public awareness so that individuals and organizations can, if they choose, make submissions to the Government.

In Sri Lanka, the 1979 Prevention of Terrorism Act (PTA) imposes severe limits on courts' jurisdiction and authority to prevent abusive detention and torture. However during civil war emergency regulations and the PTA are used disproportionately in Tamil majority areas and against Tamil speaking suspects and lacking the repeal or radical reform of these laws continued political alienation of Tamils is virtually assured. In other words the enforcement of Acts is minimal or absent or the authorities use the Acts and regulations beyond their objectives and try to mis-interpret to satisfy their goals to achieve.

Moreover the provisions of the Prevention of Terrorism Act (PTA)²²

²² PTA On Warrants of Arrest states: PART II - INVESTIGATION OF OFFENCES
6.(1) Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorised in writing by him in that behalf may, without a warrant ... notwithstanding anything in any other law to the contrary -
(a) arrest any person;
(b) enter and search any premises;
(c) stop and search any individual or any vehicle, vessel, train or aircraft; and
(d) seize any document or thing...

PTA on Duration and Place of Detention states: DETENTION AND RESTRICTION ORDERS

9. (1) ... the Minister may order that such person be detained for a period not ex-

and the emergency regulations allowed authorities to hold detainees for up to 12 months and for up to 2 years with the name given as “rehabilitation”. The PTA offers discretion to authorities to hold detainees where they opt and to move detainees from one centre to another while under investigation. This transfer of detainees violates art.49 of section III under GC IV²³. Further Sri Lanka’s security services frequently hold detainees in unofficial places and forces the culture of torture and other means of ill-treatment as tolerated, in these cases law enforcement authorities ignore regulations to protect the rights of the individuals who have been arrested and detained.

Another important role of national institutions is monitoring Government practices and policies to ensure that they comply with international obligations, national laws on the rights of persons including relevant case law, national human rights strategies or action plans, and any applicable codes of practice.

In Sri Lanka the disappearances and abductions have been continuing and increasing rapidly,²⁴ in December 2011, two political activists travelling in the North had disappeared. There was almost no progress in resolving past cases of disappearances, including that of cartoonist Prageeth Ekneligoda who went missing in 2010. As regards the safety of human rights activists, the Foreign Office report said the environment for rights defenders in Lanka was difficult throughout 2011. On December 10, 2011 a group of 42 rights activists from South Sri Lanka were

ceeding 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... the aggregate period of such detention shall not exceed a period of eighteen months...9. (1) ... 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... the aggregate period of such detention shall not exceed a period of eighteen months...

²³ Art. 49. States that “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand”.

²⁴ The report for 2011 released by Foreign Secretary William Hague

prevented from participating in a Human Rights Day rally in Jaffna. On December 9, 2011 two Tamil rights activists, Lalith Kumar Weeraraj and Kugan Muruganandan, had disappeared while visiting Jaffna.

Typically States establish national human rights action plan outlining the strategy or actions to be taken to implement obligations under human rights instruments to improve human rights situation within the country. States often consult the national human rights institution when developing these strategies or actions plans.

Moreover, the committee on economic, social and cultural rights (ESCR) reported that discrimination in relation to the ESCRs of minorities remains the central issue in the armed conflict. The committee explicitly mentioned the absence of statistics related to northern and eastern province.²⁵ In the same report it is also noted that significant portion of Tamil speaking minority do not enjoy ESCRs.²⁶

It also noted the absence of mechanisms to prosecute discrimination in employment for minority groups.²⁷ Moreover the committee recommended that the state party adopt policies and implement relevant measures to combat discrimination in employment against minority groups in both private and public sectors.²⁸ Strong emphasis was placed on the assessment of the enjoyment of ESCRs throughout the country without any discrimination on behalf of the minority specially the Tamil speaking minority. Some of the evidence indicated in the report include policies adopted which discriminate against employment for the Tamil speaking minority in both private and public sectors and equal pay for work of equal value.²⁹

²⁵ The absence of statistics does not allow an appropriate assessment of the needs of Tamil speaking minorities. It also prevents human rights organisations of evaluating Sri Lanka's record on the protection of ESCR.

²⁶ United Nations, *Committee on Economic, Social and Cultural Rights*, E/C.12/1/Add.24, (16 June 1998)

²⁷ At page 3 of the report available at <http://www.unhcr.org/refworld/country,,CESCR,,LKA,,3ae6ae5f14,0.html>

²⁸ At page 5 of the report available at <http://www.unhcr.org/refworld/country,,CESCR,,LKA,,3ae6ae5f14,0.html>

²⁹ More information available in the report, United Nations, *Committee on Economic, Social and Cultural Rights*, E/C.12/1/Add.24, (16 June 1998)

With regard to the treatment of prisoners, torture is widespread and common in Sri Lanka. Common methods of torture include beatings with boots or blunt objects, electric shock, sexual assault (including rape) and sexual humiliation; suspension; and application or forced inhalation of irritating or volatile substances, such as chilli powder or petrol fumes. The root cause is the shortcomings in the legal procedure and the lack of political willingness this in turn brings unfair trials. In these cases Convention Against Torture (CAT) ³⁰ Act has been poorly implemented and the actions against violation of human rights in consultation with the international human rights bodies have been neglected by the government of Sri Lanka.

Although public inquiries and research are resource-intensive, conducting public enquiries or studies on particular issues can help promote respect for rights and raise public awareness. Such studies might be undertaken at the exclusive discretion of a national human rights institution, or launched by the Government, through, for example, an attorney general or rights-specific focal point, or as a result of a series of grievances that might have raised systemic issues.

Consistent with the recommendations made in the Paris Principles, a common function of national human rights institutions is to help resolve disputes concerning alleged violations of human rights. A mandate to help resolve disputes should also be accompanied by powers to gather information and evidence. Institutions might also be empowered to undertake fact-finding missions that are either linked to the development of Government policies or to the conduct of judicial proceedings. A mandate to conduct inquiries and studies should be accompanied by powers to gather information and evidence needed to fulfil this function effectively. National human rights institutions lacking investigative

³⁰ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994 (Convention against Torture Act) defines torture as: "any act which causes severe pain, whether physical or mental, to any other person, being an act which is – (a) done for any of the following purposes that is to say: (i) obtaining from such other person or a third person, any information or confession; or (ii) punishing such other person for any act which he or a third person has committed[d] or is suspected of having committed; or (iii) intimidating or coercing such other person or a third person; or done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity."

powers will need some form of authority to gather information.

International human rights law warrants freedom of assembly and association³¹ however emergency powers and military necessity restrained assemblies and association of groups including the ability of IDP's to meet with international organizations or NGOs at screening of public security.³² This kind of incidents obstructs the legitimate assessment of public security and prevented contacts with survivors of the conflict.

Violations of equal rights to women especially gender based violence in camps were not investigated by the government. The government failed to take necessary to make the camps safe for people specially women. On the other hand as signatory to International Covenant on Civil and Political rights (ICCPR) and International Covenant on economic, Social and Cultural Rights (ICESCR), the state is obliged to ensure equal rights to women to enjoy all civil, political, economic, social and cultural rights.³³ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines gender-based violence as

*"violence that is directed against a woman because she is a woman or that affects women disproportionately and include acts that inflict physical, mental or sexual harm or suffering" represents discrimination against women.*³⁴

Serious rapes at Menik farm were not investigated and the suspicion was simply put on to the LTTE.

National institutions can also provide shadow reports, that is, alternative reports to those of the Government, particularly if the institution believes its submissions are not being taken into account adequately or appropriately in the Government's report. Increasingly, treaty-monitoring bodies consult directly with representatives of national human rights institutions during the reporting process. However in the Sri Lankan context the independent power of making reports which shadows the government reports have been minimal for decades and the reporting is biased by the ruling parties.

³¹ ICCPR art.21 and art.22.

³² Menik farm incident.

³³ ICCPR art.2(1), art.3, ICESCR art. 2(1), art 3.

³⁴ CEDAW, recommendation 19.

Moreover, the Paris Principles call for national institutions to have adequate powers of investigation and the ability to hear complaints and the international human rights law protects freedom of expression and opinion by motivating the freedom to communicate information and to hold and express opinions.³⁵ However the Sri Lankan government closed the conflict area to independent journalists and forced an array of threats to those which credibly violates this provision.

With respect to human rights law the government violated the rights to life and physical security and integrity of the person, freedom of assembly and associations, the rights of women, special protection of children, and the ban on disappearance and the right to effective remedy. According to a number of human rights treaties to which Sri Lanka is a party, the state has the obligation to carry out fair investigations of any human rights violations. Specifically Article 2(3) of the ICCPR requires the state to present effective remedy to the victims of human rights violations.

UN Human Rights Council interprets this provision which requires the state to investigate all violations of the Covenant and in the case of coarse violations or those constituting international crimes to bring all alleged perpetrator to justice.³⁶ In relation to state accountability the United Nations does not preserve "one-size-fits-all formulas and the importation of foreign models but supports national assessments, national participation and national needs and aspirations."³⁷ In turn, it does not mean that the international standards have been ignored but it is required to incorporate international standards in Sri Lankan approach accountability and the advancements of the approach should be assessed against the international standards and the comparative models utilised in similar situations in other countries.

³⁵ ICCPR art.19.

³⁶ Human Rights Committee, General Comment 31(2004), paras 15,18; Umetaliev et al. V Kyrgyzstan, communication No. 1275/2004, views of 30 Oct. 2008, paras. 9.4-9.6. the government of Sri Lanka received confirmation of obligation to investigate and prosecute and provide remedy to the victims of human rights violations. Under the optional protocol the committee found that Sri Lanka violated provisions of IC-CPR.

³⁷ Secretary-General's 2004 report, Executive summary.

However, the **Lessons Learnt and Reconciliation Commission** (LLRC) which was appointed by the government of Sri Lanka to address the concerns of the panel of experts appointed by the UN was biased as it was influenced by the government and did not genuinely address the violations. The LLRC is not the only commission established to address similar violations. These establishments were according to the *Commissions of Inquiry Act* (1948)³⁸ which aimed to provide a framework for oversight of the administration of public services and the conduct of public officials not as a mechanism to address human rights violations however the clause related to public safety and welfare is broad and serve as the legal basis for the creation of commissions of inquiry into human rights violations and power the president with the control over the commissions and acutely challenge their independence and impact.

Moreover the history shows that the commissions created for inquiry which called for accountability did not offer genuine assessments. The 1977 Sansoni commission's legitimate assessment regarding human rights violations of Tamil speaking population still linger.³⁹ This experience again illustrates the questionable? validity of the LLRC.

Further, The Secretary-General's Panel of Experts on Sri Lanka was established in 23 May 2009 which underlined the importance of government's accountability to address allegations of violations international humanitarian law and human rights law committed during the last stages of the military operations between the Government and the **Liberation Tigers of Tamil Eelam** (LTTE). This commission is distinct from other commissions such that the commission is not an investigative or fact-finding body rather it is an advisory body tasked with advising the Secretary-General on the modalities, applicable international standards, and comparative experience with regard to accountability processes in

³⁸ The *Commission of Inquiry Act* No. 17 of 1948 does not grant a commission appointed under this Act any judicial or similar powers such as powers to arrest, detain, charge, try, convict or impose punishment. A commission of inquiry established under the 1948 Act and composed of or including international members, could in this regard make only recommendations for prosecution, which would be taken up for consideration by prosecutorial authorities through their regular procedures.

³⁹ Sansoni Commission focused on the investigation of language rights of Tamil population, where Tamil is the first language of the population.

order to address alleged violations of international human rights and humanitarian law committed during the military operations.⁴⁰

Conventionally the UN was indisposed to allow the use of force in peacekeeping operations and expect the peacekeepers to carry out specific activities such as monitoring buffer zones and would only use force in self defence. Most importantly the Security Council is now mandating operations to protect civilians under imminent threat of violence. The Security Council is increasingly focused on the need to protect civilians in conflict situations. The laws are in place. The challenge remains their effective implementation. While the UN is actively working to promote the rule of law to try to prevent and respond to conflict, primary responsibility lies with States. States have acknowledged their responsibility to protect their populations. The challenge now, both for the UN and its Member States, is to translate those words into actions.

In the light of international human rights obligations, the conventional approach considers that only states are bound by them, however the contemporary practice in the Security Council and in the reports of special rapporteurs, it is considered that under specific situations non-State parties can also be bounded by international human rights law and voluntarily or not obliged to respect, protect and fulfil human rights.⁴¹ In the Sri Lankan context the Security Council has called in an array of resolutions and in a Special Rapporteur indicated that

*"[a]s a non-State actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights], but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights." Moreover, "[t]he international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to 'treat it like a State'."*⁴²

⁴⁰ "Patricia O'Brien Current International Humanitarian Law Issues at the United Nations" Under-Secretary-General for Legal Affairs. The Legal Counsel, 2011, St. Petersburg, Russian Federation.

⁴¹ "International Legal Protections of Human Rights in Armed Conflict", UN Human Rights. Office of the High Commissioner, New York and Geneva, 2011 at http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

⁴² The Special Rapporteur further indicated that "[i]t is increasingly understood, however, that the human rights expectations of the international community operate to

On one hand the government of Sri Lanka, as a state which is bound by international treaties and domestic legal framework violated human rights, Geneva conventions, UN obligations etc.. On the other hand the LTTE which does not have the status to act like the government and does not have signatory to treaties etc. violated human rights from various points of view. However, the LTTE as a non-state entity which can not formally bound by human rights treaties, it is accepted that they need to exercise and respect fundamental human rights of persons in the area of the battle field; which includes right to life and physical security and integrity of the person and freedom from torture.

Even though the wide spread terrorist attack by the LTTE across the island has come to an end and people are trying to lead harmonious life in some parts of the country, the serious violations of human rights and credible allegations of war crimes still remains in the country. The government as the state party bound by an array of international as well as domestic treaties and acts however, in most of the circumstances the government tried to find gaps in the legal framework and try to manipulate the laws and treaties to one side and tries to defend itself and try to avoid getting punishment against its negative performance before, during and after final stages of the civil war.

However the urgent need of all citizens of Sri Lanka is to formulate independent national human rights institutions and the effective monitoring functions under the Convention and the functional mechanisms for complain management.

An effective complain management can be carried out via mediation and conciliation procedures in order to ensure that the affected people and their representative organizations have access to the process.

At the most basic level, many national human rights institutions can help enforce the realization of rights by providing mediation and conciliation services. An aggrieved person can directly contact conciliation or mediation officer of a national human rights institution to discuss his/her concerns. Such officers are asked to register the complaint and are often empowered to provide general advice on options available to the

protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights." See E/CN.4/2006/53/Add.5, paras. 25-27.

aggrieved person and, depending on the wishes of that person, to initiate communications with the other party involved in the dispute. This may include informal telephone or face-to-face discussions, although many national institutions do not accept anonymous or unsigned complaints. More often, the national institution will have to rely on more formal requests, such as written communications. Depending on the nature of the dispute and the outcome of initial discussions, a meeting of the parties involved might be organized during which the mediator or conciliator will attempt to resolve the matter.

At the next step of this process, national human rights institutions keep records of mediation and conciliation processes as a way of tracking the patterns through which disputes are resolved. Records might also be included in the annual report, be used to launch a special report, be included in a shadow report to treaty bodies, and/or be used to train conciliation and mediation staff and establish consistent practices and results. These records should be kept secure and any references to past actions should not identify the parties involved.

Mediation and conciliation may also be linked to other grievance-resolution mechanisms so that a failure to resolve a grievance at this level will lead to action by the national institution at a higher level.

Failing successful mediation or conciliation, or failing adherence by one or both of the parties to the terms of the settlement of a dispute, some national human rights institutions have mechanisms through which they, or the parties to a dispute, may initiate proceedings before a tribunal, including a national human rights tribunal. The ability to initiate such proceedings, and the tribunal itself, must be established by statutory authority. A national human rights tribunal can act as a bridge between formal legal proceedings and the more informal process of investigation and conciliation. Intervention in legal proceedings is another possible role of national human rights institutions to intervene in proceedings that are held within the normal judicial system.

The Human Rights Commission of Sri Lanka was established under the Human Rights Commission of Sri Lanka Act No. 21 of 1996 has the authority to entertain complaints relating to infringements of fundamental rights by executive or administrative actions. Since the linguistic rights have been recognised in the Constitutional provisions on

fundamental rights, they could be the subject of inquiry by the Commission. However, the Commission can make recommendations but those recommendations are not of enforceable nature similar to the judgments of the Supreme Court.

The Parliamentary Commissioner for Administration established by the 1978 Constitution also has the power to investigate and report upon complaints of infringement of fundamental rights and other injustices by public officers and officers of public institutions and local authorities.⁴³ However they all have become non-enforceable nature of implementation.

Moreover the Sri Lankan parliament passed the Official Languages Commission Act No. 18 of 1991. The enactment of this Act was a step forward ensuring the effective implementation of the languages policy contained in the Constitution. The general objectives of the Commission include:

- i. To recommend principles of policy, relating to the use of the Official Languages and to monitor and supervise compliance with the provisions contained in Chapter IV of the Constitution;
- ii. To take all such actions and measures as are necessary to ensure the use of the languages referred to in Article 18 of the Constitution in accordance with the spirit and intent of Chapter IV of the Constitution;
- iii. To promote the appreciation of the Official Languages and the acceptance, maintenance and continuance of their status, equality and right of use; and
- iv. To conduct investigations and to take remedial action.

The Commission also highly influences to ensure the implementation of the provisions of the Constitution relating to languages. These include:

- a) initiate reviews of any regulations, directives, administrative practices, which affect or may affect the status or use of any of the relevant languages;
- b) issue or commission such studies or policy paper on the status or use of the relevant languages as may deem necessary or desirable;
- c) undertake such public educational activities, including, sponsoring

⁴³ Art. 156 of the Constitution of 1978.

or initiating publications or other media presentations, on the status or use of the relevant languages as it may consider desirable;

- d) Do all such other things as are necessary for or incidental to, the attainment of the objectives of the Commission or necessary for or incidental to, exercise of any powers of the Commission.⁴⁴

The Commission has the power to investigate complaints arising from any act or omission in the administration of the affairs of any public institution relating to the status and use of any of the relevant languages. Towards the investigation of complaints, it has the power to summon witnesses and compel the production of documents. The Act also provides for taking judicial action in Provincial High Courts against the failure to implement any recommendations made by the Commission. Similarly any wilful failure or neglect to transact business in a particular relevant language by a public officer can be the subject of prosecution in a Magistrate Court.

The inefficient nature of the implementation of the Tamil language as an Official Language in the Districts⁴⁵ other than those coming under the Northern and Eastern Provinces⁴⁶ there is an enormous gap between constitutional provisions and their effective applications. One of the obvious reasons for this position is the lack of sensitivity of the responsible administrative staff in implementing the policies and procedures with regards to the language rights policies.

In terms of the implementation of the official languages policy as expressed in the Constitution, the situation was not very satisfactory, though there have been some developments compared to the position in the past. The Department of Census and Statistics has put out population data with linguistic competence as well as the percentage distribution of employees in the state sector, provincial sector and semi-government sector and their ethnicity. These give an approximate picture of the status of implementation of the official languages policy.⁴⁷

In summary, the link between the access to Tamil language and the

⁴⁴ Section 7 of the Official Languages Commission Act, 1991.

⁴⁵ Districts are the administrative areas of the country.

⁴⁶ North and eastern provinces are the dominant Tamil speaking areas of the country.

⁴⁷ Census of Public and Semi-Government Sector Employment, 2006 at pp 21-22; Census of Public and Semi-Government Sector Employment, 2006 at pp 23-24; Census of Public and Semi-Government Sector Employment, 2006 at p 23.

disaster of the country was high. During the civil war the Sri Lankan citizens were not able to enjoy the language access efficiently therefore the innocent people were not able to express themselves in their own language and were treated as terrorists rather than the normal citizens of Sri Lanka. In this circumstance the national human rights institutions could have acted effectively and have used available resources and power in the right way to provide genuine application of proposed policies and procedures. In this way the world condemned state of the government could have been avoided and the prosperity of the people could have been offered to the citizens of Sri Lanka.

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