

GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues



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**FRIEDRICH
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GSP+ and Sri Lanka:
Economic, Labour and Human Rights Issues

Centre for Policy Alternatives
and
Friedrich Ebert Stiftung

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GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues

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Foreword

The issue of the extension of the EU's GSP Plus trade concession to Sri Lanka, is on the face of it a straightforward and clear cut one. The objectives of the concession are identified as good governance, sustainable development and poverty reduction. The EU seeks to realise these objectives through the ratification and effective implementation of a number of international human rights instruments, labour standards and UN conventions dealing with environment protection and governance principles. Consequently, extension entails a process of ascertaining as to whether the objectives of the concession have been achieved, if not in full, in substantial measure.

In the case of Sri Lanka, however, the issue has been embroiled in controversy and contention and impacts on the economy, foreign policy and governance. Accordingly, the Centre for Policy Alternatives (CPA) and the Friedrich Ebert Stiftung (FES) contribute this publication to the public discussion of the issue in the spirit of constructive civil society engagement with policy debate and formulation, as well as in the hope that it will help to clarify misunderstanding, ambiguity and distortion surrounding it. This is an issue on which our two organizations have been engaged for some time, in this spirit and with this hope.

Sri Lanka has submitted its application to the EU for an extension of the concession. As part of the extension process, the GSP Committee of the European Commission decided on 22 September 2008 to initiate an investigation as per the terms of the GSP facility, to ascertain as to whether Sri Lanka has effectively implemented three specific human rights instruments, namely the International Convention on Civil and Political Rights (ICCPR), the Convention Against Torture and the Convention on Child Rights. The Sri Lankan government has firmly rejected any suggestion of

an investigation as an affront to national sovereignty and dignity and is proposing a hefty relief package worth several million US dollars, mainly to the apparel industry – the sector of the economy that benefits most from the concession and therefore the one to lose most if it was not extended. The importance of the concession to the apparel sector rests on the trade and employment statistics in respect of Sri Lanka's trade with the EU. The EU is the largest market for Sri Lankan exports, valued at US \$ 2.8 billion in 2007 and 36% of all exports. The apparel sector accounts for 40% of total exports and the EU is its second largest market.

An issue, which can be settled by a “win/win” resolution, with both the trade concession extended and human rights and labour standards strengthened, appears to be heading towards a “zero-sum” outcome. What may well have been assumed to be a straightforward, even “technical” process as maintained by some EU members, has now been distorted into a political one with all the overtones of a “North- South” confrontation pitting perspectives of universalism and globalisation against those of national sovereignty, dignity and security. The principal reason for this is the worsening human rights situation in the country on account of the ongoing conflict and the culture of impunity with regard to it. Consequently, the extension of GSP Plus has come to be interpreted as a seminal occasion for substantive censure of the Sri Lanka government in respect of its record of human rights protection on the one hand and on the other, as an exercise in contemporary imperialism motivated by the objective of regime change against a government and by extension, a country, strenuously engaged in combating the world's most vicious terrorist group.

The political atmospherics and grandstanding have obscured the opportunity presented not only to secure an important trade concession, but to advance governance and human rights protection at the same time as well – areas in which, irrespective of where the responsibility for shortcomings and lacunae are to be apportioned – there can be no denying that much needs to be done as a matter of national priority. Moreover, as in the case of the ICCPR, the necessary legislative action can still be taken, since the main opposition political party has promised support.

It is also interesting to note the positive involvement of the international Trade Union Confederation (ITUC) in developing a set of concrete and measurable benchmarks to engage some of the key concerns arising out of core conventions of the ILO.

GSP Plus is a salutary example of the interconnectedness of human rights, governance, trade and the economy in the contemporary world. CPA and the FES sincerely hope that this publication will contribute to the appreciation of this and its ramifications as well as most importantly, to yet ensuring the “win/win” outcome we are convinced has always been, and still is, possible, on this issue.

Paikiasothy Saravanamuttu
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Colombo, October 2008

Introduction

There have recently been speculation and media reports about the European Union's system of tariff preferences known as the 'GSP Plus' programme, of which Sri Lanka is presently a beneficiary country. The tariff preferences create massive advantages in particular to our apparel industry, and have implications for the wellbeing and employment for thousands in that important sector of our economy. It is vital, therefore, that Sri Lanka retains this privilege.

The controversy relates to the fact that Sri Lanka's continued beneficiary status comes up for renewal in 2008, and whether Sri Lanka continues to qualify for the GSP Plus benefits in terms of the requirements that are set out for this by the European Union. One of the important requirements to qualify is that the beneficiary country is placed under a general obligation to 'ratify and fully implement' a set of twenty-seven international conventions. Key international human rights conventions listed under the relevant EU law are the International Covenant on Civil and Political Rights (ICCPR), the core ILO conventions, the Convention on Torture (CAT) and the Convention on the Rights of the Child (CRC). Given concerns raised about whether Sri Lanka's laws and practices meaningfully implement the rights guaranteed by these international instruments, the EU has decided that it would be undertaking an investigation to ascertain the situation prior to arriving at a decision with regard to the renewal of GSP Plus for Sri Lanka.

While the Government of Sri Lanka has made a formal application for renewal, it has also announced that it would resist any investigation by the EU, which it claims would not be consistent with Sri Lanka's national sovereignty and dignity. It has also declared if GSP Plus on such terms will not be available, it would explore alternative markets as well as a package of financial relief for the garment industry.

We believe that it is both possible and desirable that a less confrontational resolution of this issue is devised whereby the occasion of the GSP Plus renewal may be used as an opportunity to work constructively towards ensuring a stronger legal framework for the recognition and realisation of fundamental international human rights, including through constitutional amendment where necessary.

This publication is a constructive intervention into this debate in the context of the commencement of the formal process for the renewal of Sri Lanka's status as a

beneficiary country. The publication comprises three substantive chapters dealing with several key areas that have been the subject of particularly intensive debate regarding the renewal of GSP Plus for Sri Lanka.

'Has GSP+ contributed to Poverty Reduction and fostered 'Sustainable Development' in Sri Lanka?' by Dr. Muttukrishna Saravanathan and H.M.P. Sanjeevani assesses the economic impact of GSP Plus on Sri Lanka in the light of the objectives of the scheme itself.

'Benchmarks for Sri Lanka to achieve compliance with international legislation on core labour standards (with reference to ILO Conventions No. 87 and No.98)' by the International Trade Union Confederation (ITUC) addresses the issues relating to legal and in practice, compliance of Sri Lanka with international labour standards, particularly those relating to freedom of association, protection of the right to organise and collective bargaining, required by the GSP Plus scheme.

'GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements' by Rohan Edrisinha and Asanga Welikala addresses the issues relating to the GSP Plus requirement of 'ratification and full implementation' of the ICCPR within Sri Lanka from a legal and constitutional perspective.

We hope that the publication would serve as a useful reference tool for the conduct of a more informed debate in this regard.

Centre for Policy Alternatives (CPA)
Friedrich Ebert Stiftung (FES)

28th October 2008

Chapter 1

Has GSP+ Contributed to Poverty Reduction and Fostered 'Sustainable Development' in Sri Lanka?

Muttukrishna Sarvananthan* & H.M.P.Sanjeewanie

Background

Sri Lanka is poised to apply for the renewal of the Generalised Scheme of Tariff Preferences Plus (GSP+)¹ of the European Union (EU) before 31st October 2008. The European Commission (EC) introduced a Generalised Scheme of Tariff Preferences (GSP) in 2003 for low and middle-income countries to mitigate the impact of the removal of quotas in 2004 for garments exports to EU countries. While least developed countries had duty free access to the EU markets under the GSP, middle-income countries like Sri Lanka had a very low tariff barrier. By mid-2005, the EC introduced a new GSP+ to contribute to poverty reduction and promote 'sustainable development' and 'good governance' in low and middle-income countries. From middle-income countries, the GSP+ has admitted about 6400 descriptions of goods to the EU market without customs duties (see Council Regulation (EC) No.980/2005

* Principal Researcher, Point Pedro Institute of Development, Point Pedro, Sri Lanka. <http://pointpedro.org> Corrections, comments and suggestions are welcome to sarvi@pointpedro.org This study was originally undertaken on honorary basis at the request of labour in the apparel industry and subsequently permission was granted to Friedrich Ebert Stiftung (FES) for publication. H.M.P. Sanjeewanie worked as a Research Associate at the later stage of the study and was involved in the publication and dissemination processes.

¹ "Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the function of the Community's generalized system of preferences for the ten year period from 2006-15" (COM (2004) 461 - Official Journal C 242 of 29.4.04)

of June 27, 2005).² The least developed countries were afforded duty free access for 7,200 goods. Currently, there are 14 beneficiary countries.³ The GSP+ scheme is renewable every three years and is up for renewal by the end of 2008 for the period 2009-2011.

Objective

Three core objectives of the GSP+ are poverty reduction and the promotion of 'sustainable development' and 'good governance' in beneficiary countries. 'Good governance' is specifically defined as the ratification and effective implementation of 16 core conventions on human and labour rights; and ratification and implementation of 11 conventions on good governance and environment. However, what constitutes 'sustainable development' is inadequately specified as special incentive arrangements based on the UN Millennium Declaration of 2000 and the Johannesburg Declaration of 2002.⁴ This paper proposes to primarily investigate whether or not GSP+ has reduced poverty and promoted sustainable development in Sri Lanka. Thus, good governance is not the focus of this paper though human rights and economics could be complementary to each other (see for example, Seymour and Pincus, 2008). In the recent past, there has been considerable public debate primarily in the media about the link between governance issues and the renewal of GSP+ facility. However, there is a lack of debate on the poverty reduction and sustainable development objectives of the GSP+. It is this lacuna that this paper proposes to fill.

Sri Lanka, a middle-income GSP+ beneficiary country is eligible to export 6,400 goods at zero duty to European countries, currently numbering 27. However, Sri Lanka exports only around eight items of considerable value to the EU countries, out

² Council Regulation (EC) No 9792/08 of 14 July 2008 available at <http://register.consilium.europa.eu/pdf/en/08/st09/st09792.en08.pdf>

³ Out of the initially qualified fifteen countries, (namely Bolivia, Columbia, Ecuador, Peru, Venezuela, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Moldova, Georgia, Mongolia and Sri Lanka), Moldova was removed from the beneficiary list in March 2008 because it was afforded greater concessions under a different scheme.

⁴ Council Regulation (EC) No 9792/08 of 14 July 2008 available at <http://register.consilium.europa.eu/pdf/en/08/st09/st09792.en08.pdf>

of which apparel accounts for around 50% of the total value of exports (see Table 6). Therefore, this paper would primarily focus on apparel exports to EU countries. Note that 'apparel' and 'garment' are used interchangeably in this paper.

Methodology

The period of study is chosen as 2002 to 2007 (six years) in order to observe the changes during the GSP (2003 to mid-2005) and GSP+ (mid-2005-2007) regimes in comparison to the pre-GSP time (2002). This study uses primary data from a comprehensive survey undertaken by the Department of Labour of Sri Lanka and Oxfam in 2006 covering apparel factories in eighteen districts (out of 25); an opinion survey of apparel factory workers undertaken by Pradeep Peiris for the Friedrich Ebert Stiftung (FES) in August 2008; and secondary data derived from official sources and few other independent surveys and research studies. The opinion survey was undertaken during the latter half of July 2008 among apparel factory workers of the Biyagama and Katunayake Free Trade Zones (FTZs) and non-FTZ apparel factory workers in Colombo and Kalutara districts. The total number of interviewed workers was 501 – divided into 345 females and 156 males. Interviewed workers were middle and lower level employees. Hence, this study comprises an objective analysis based on primary and secondary data and subjective value judgments of middle and lower strata employees working in the apparel factories.

Most of the data from foregoing sources are modified for clarity, comparability and technical soundness. For instance, official exports data in Sri Lankan rupees (LKR) are converted into US dollars (USD) in order to find out the changes in real terms. Sometimes LKR value/s may show an increase, not due to any increase in volume or unit price of exported item/s, but simply due to the depreciation of the rupee (i.e. higher rupees realised for every dollar worth of export). Besides, some primary data are not incorporated for analysis because of inconsistencies in responses and/or low responses in relation to the total sample size.

For the purpose of this paper, 'sustainable development' is defined as enduring contribution to economic and social development of the country at the macro level as well as sustained enhancement of the economic and social wellbeing of

employees and their households and indirect beneficiaries of the particular industry, i.e. apparel industry. It is important to note that almost two-thirds of the employees in the apparel industry are women mostly drawn from rural areas (Department of Labour and Oxfam, 2008) and, therefore, the sustainable development of this industry has the potential to contribute to gender equity and equitable growth among geographical spheres.

Introduction

Export of apparels has been the single largest source of net foreign exchange earnings to the country for more than a decade. Net private remittances from abroad, tea exports revenue and earnings from tourists are the second, third and fourth largest sources of foreign exchange earnings to the country respectively (see the Annual Reports of the Central Bank of Sri Lanka). Thus, apparel exports contribute significantly to the external sector of the economy, primarily the balance of payments. Besides, it reportedly employs around 250,000 people directly and a further 50,000 indirectly, thereby contributing to employment generation.⁵

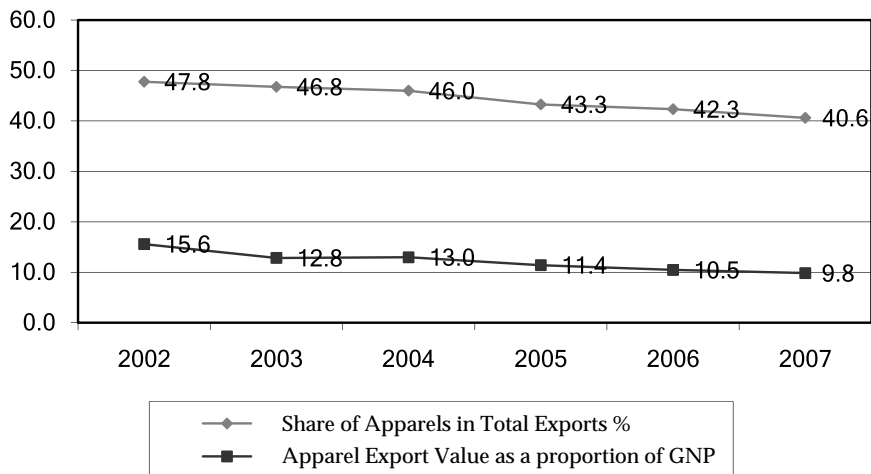
Contribution of apparel exports to the national economy

Between the period 2002 and 2007, the annual total export value of Sri Lanka has increased by 65% from USD 4,703 million in 2002 to USD 7,746 million in 2007. During the same time period, total export value of apparels increased by only 40% from USD 2,246 million in 2002 to USD 3,145 million in 2007 (see Table 1). Both total exports and apparel exports have consistently increased year-on-year in absolute values. However, export creation of non-apparels has been greater than the export creation of apparels. As a consequence, the share of apparels in total exports has declined from almost 48% in 2002 to almost 41% in 2007 (see Table 1). Besides, this

⁵There is no authentic estimate of the total number of employees working in the garments industry because of the considerable sub-contracting involved. Often, there are conflicting estimates flaunted by different stakeholders for vested interests. Because of this, it is very difficult to get an authentic estimate unless a census of garments workers is undertaken. In this conflicting scenario the figures quoted here could be conservative.

share has consistently declined year-on-year. Furthermore, apparel exports value as a share of the Gross National Product (GNP) has also consistently declined (barring 2004) from 15.6% in 2002 to 9.8% in 2007⁶, a significant drop of 5.75% (see Table 1).

Graph 1
Apparel Exports by Sri Lanka
2002 - 2007



Source: Derived from Table 1

The foregoing figures indicate that, although apparel exports have been contributing higher value to the national economy in absolute terms, in relative terms the contribution has consistently been less and less. It is a positive development that Sri Lanka's apparel exports have increased in absolute terms in spite of the phasing out of the Multi Fibre Arrangement (MFA) that resulted in quota-free textiles and garments exports (since January 2005). As we shall note later, this was primarily as a result of duty free access to the EU under the GSP+. However, it is clear that Sri Lanka's export basket has diversified into newer items away from apparels. Reduction in the over dependence of the export basket on a single item (viz apparels) is also a positive development as regards sustainable development of the economy and society.

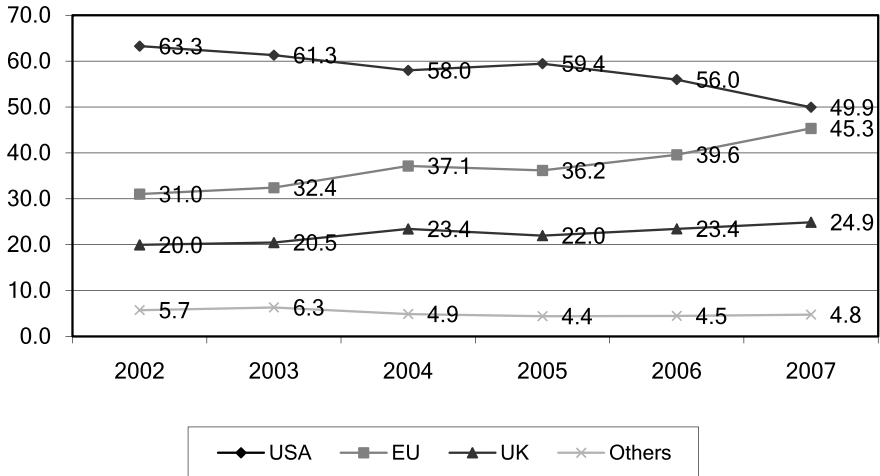
⁶These percentages are worked out by converting the GNP in LKR value into USD value using the average exchange rate during each year.

Apparel exports to the European Union

United States has been and is the single largest market for Sri Lanka's apparel exports in absolute dollar value and as a proportion of the total apparel exports since the inception of the industry in Sri Lanka. However, Sri Lanka's apparel exports to USA have declined consecutively in 2006 and 2007 in absolute dollar value (see Table 2). Besides, USA's share of the total apparel exports of Sri Lanka has been consistently declining (barring 2005) during the period under review (2002-2007) (see Table 2).

The EU, particularly UK, has been and is the second largest market for Sri Lanka's apparel exports. Apparel exports to the EU have consistently increased in absolute dollar value during the reference period. Further, EU's share in the total apparel exports of Sri Lanka has also consistently increased (barring 2005) (see Table 2). Among the European Union countries, UK is the major market for Sri Lanka's apparel exports followed by Italy and Germany (see Table 2).

Graph 2
Apparel Exports by Destination
2002 - 2007 (percentages)



Source: Derived from Table 2

Apparel exports to other countries have fluctuated both in terms of absolute dollar value and as a proportion of the total apparel exports during the 2002-2007 period (see Table 2).

Apparel exports to USA have increased by only 10.5% from USD 1,421 million in 2002 to USD 1,570 million in 2007. But apparel exports to the EU have more than doubled (105%) from USD 697 million in 2002 to USD 1,425 million in 2007. On the other hand, while USA's share in Sri Lanka's apparel exports has declined from 63% in 2002 to 50% in 2007, EU's share has increased from 31% in 2002 to 45% in 2007 (UK and Italy accounting for most of the increase). The highest rise in Sri Lanka's apparel exports to the EU has been in 2007, 2004 and 2006 (descending order) (see Table 2). Further, the share of Sri Lanka's apparel exports to 'other countries' has also declined in the latter four years (2004-2007) compared to the former two years (2002&2003).

Foregoing figures confirm that duty free access under the GSP+ (in 2006&2007) and tariff concessions under the preceding GSP (in 2004&2005) have helped Sri Lanka to export more apparel, inter alia, to EU countries, particularly UK and Italy. Nevertheless, as noted in Table 1, the overall growth in exports of apparel by Sri Lanka during the period 2002-2007 has been far less than the growth in exports to the EU (see also Table 3). Thus, there has been apparel export diversification to the EU from USA. Moreover, apparel trade creation has been far less than apparel trade diversification.

Sri Lanka's apparel exports to the US have experienced negative growth in 2002, 2006 and 2007, though negligible in the former two years. Even during the years in which there was positive growth (2003-2005), it was quite small. On the other hand, Sri Lanka's apparel exports to the EU countries have shown significant growth in 2004 and 2007, considerable growth in 2003 and 2006, negligible growth in 2005 and marginal negative growth in 2002. Annual growth in Sri Lanka's apparel exports to Italy was the greatest and consistent, followed by to UK albeit having negligible negative growth in 2002 and marginal negative growth in 2005. However, annual growth in apparel exports by Sri Lanka to all countries was small between 2003 and 2007 (see Table 3). Hence, despite significant growth in apparel exports to the EU between 2002 and 2007, overall apparel exports during the same period have grown by only small amounts.

Therefore, gains in the EU markets due to the GSP and GSP+ were accompanied by losses in non-EU markets. Thus, net gain to Sri Lanka resulting from GSP and GSP+ has been quite small. This reveals that Sri Lankan apparel exporters have been more active in taking advantage of the duty free access to the EU markets rather than improving their competitiveness in non-EU markets, which is reflected in their vigorous lobbying for the renewal of GSP+ facility. This smacks of over dependence on trade concessions, which does not augur well for sustainable development of the industry or the Sri Lankan economy.

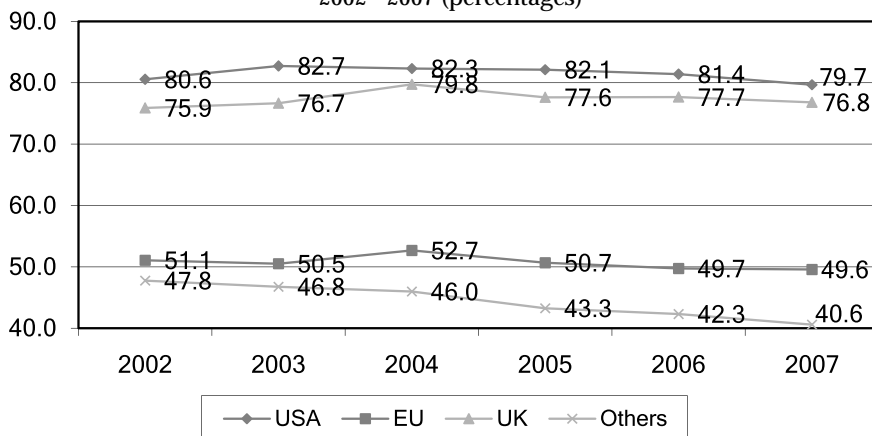
The two largest markets for Sri Lanka's apparel exports are USA and the UK. Together, they accounted for 83% of the total apparel exports from Sri Lanka in 2002 and remained at over 80% until 2005. However, as a result of the duty free access under the GSP+, the combined share of USA and the UK had dropped to little less than 80% in 2006 and little less than 75% in 2007, exclusively due to drops in the share of the USA (see Table 2).

Out of Sri Lanka's total exports to USA in dollar value, apparels accounted for over 80% during the period under consideration. Similarly, out of Sri Lanka's total exports to the UK in dollar value, apparels accounted for over 75% during the period under consideration. However, in the case of EU countries as a whole, apparels accounted for only around 50%. Hence, while Sri Lanka's exports to USA and the UK are over dependent on just one item (apparels), Sri Lanka's exports to the EU consist of a variety of goods including, of course, apparels (see Tables 4 & 6).

It is also noteworthy that, while the share of apparels in total exports to the EU has been consistently declining (barring 2004) from 51% in 2002 to 49.5% in 2007, share of apparels in total exports to the UK has fluctuated between 76% (2002) and 80% (2004) during the period 2002-2007 (see Table 4). If we take the GSP+ period (i.e. 2006 & 2007) into consideration, the increase in non-apparel exports to the EU countries (as a whole) and UK (on its own) have been greater than the increase in apparel exports (see Tables 4&5). Therefore, apprehension that there could be a severe loss of employment in the apparel industry if the GSP+ facility is not renewed beyond 2008 might be misplaced.

Graph 3

Apparel Exports as a share of Total Exports
2002 - 2007 (percentages)



Source: Derived from Table 4

Annual growth in total exports to the US has been higher than the annual growth in apparel exports to the US in 2004, 2005 and 2006. Conversely, negative growth in apparel exports to the US has been higher than the negative growth in total exports to the US in 2007. Only in 2003 was growth in apparel exports higher than the growth in total exports to the US (see Table 5).

Therefore, there has been export product diversification to the EU countries under the GSP (2003-2005) and GSP+ regimes (2006&2007). Hence, the assertion that severe loss of employment would result if the GSP+ facility were not extended beyond 2008 could be hype.

Composition of Sri Lanka's exports to the EU countries

Sri Lanka exports only about eight goods of considerable value to the EU countries. The items that recorded highest annual growth in 2007 in descending order were boiler machinery & parts (783%), electronic products (265%), electrical machinery & parts (53%), frozen fish (44%), bulk tea (25%), apparels (23%) and diamonds (14%) (see Table 6). Foregoing figures indicate that, although apparels accounted for

almost 50% of the total exports to EU countries in 2007 in absolute dollar value, the rate of growth in apparel exports was far less than many other goods.

In absolute monetary value, diamond⁷ exports was the second largest after apparels. Whilst apparels are high volume low value exports, diamonds are low volume high value exports. Furthermore, net foreign exchange earnings from diamond exports would be greater than from apparel exports, because a bulk (70%) of the raw materials for the latter are imported (see below). The same could apply (in absolute value) where the third largest export good is concerned, viz. tyres and tubes, which are made out of locally produced natural rubber. Thus, value added in many other export goods to the EU countries could be greater than the value added in apparel exports.

Therefore, the presumption and claim that apparel is the holy grail of Sri Lanka's exports to the EU countries is contentious. Low value addition (in monetary terms) of the apparel sector contributes little to sustainable development in Sri Lanka. However, the apparel sector contributes substantially to society and the economy in terms of employment creation.

Trade data discrepancy

The Textile Quota Board claimed earlier this year that Sri Lanka's total apparel exports to all countries were much higher in value than the quantities reported to Customs (Jayasekera, 2008). The allegation was that apparel exports are under-invoiced in order to retain part of the proceeds of apparel exports abroad. However, using the partner country data comparison method⁸ this study finds no such under-

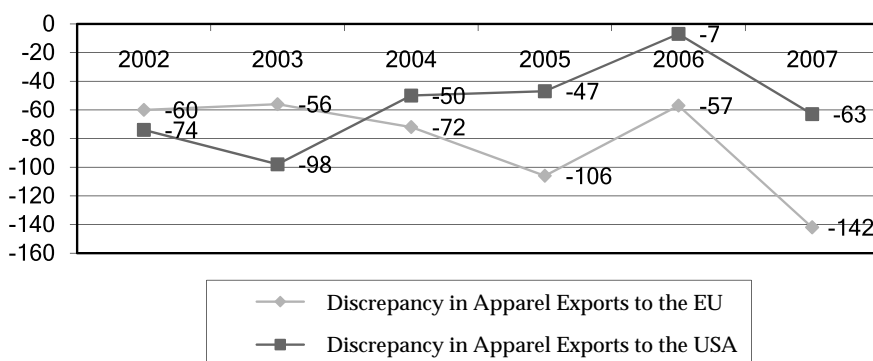
⁷ I presume this refers to precious (gem) stones (like blue sapphires, rubies, emeralds, etc) rather than diamonds because Sri Lanka is devoid of the latter mineral resource.

⁸ One country's export is an import of its partner country. By comparing the value of an exported good reported by the source country and the value of the same good imported by its partner country, one can detect whether or not false invoicing is taking place. However, certain adjustment to data has to be made for such comparison because exports are reported in a free-on-board (fob) value and imports are reported in cost, insurance and freight (cif) value. Thus, value of imports will include freight and insurance costs in addition to the cost of the good. The general practice by the UN Statistical Division is to add 10% to the export value in order to determine the import value of the same good, which is what this author has done in Table 7.

invoicing of apparel exports to the EU and the US (both markets accounting for over 95% of apparel exports of Sri Lanka).

In the case of the US there was hardly any discrepancy between the total exports data reported by Sri Lanka and corresponding total imports data reported by USA. However, there have been small amounts of over-invoicing of apparel exports to the US by Sri Lanka (see Table 7, rows 12&16). On the other hand, there have been small amounts of over-invoicing of total exports to EU countries in 2002 and 2003, which have increased substantially during the GSP (2004 & 2005) and GSP+ (2006 & 2007) regimes. Nevertheless, over-invoicing of apparel exports to the EU has been less than the over-invoicing of total exports, even less in relative terms during the GSP+ regime (2006 & 2007) (see Table 7, rows 4&8). Hence, relatively, over-invoicing of other export items has been greater than over-invoicing of apparel exports to the EU during GSP+ regime. Theoretically, it is plausible that the discrepancy in Sri Lanka's export data and the EU's import data is due to under-invoicing of imports by European importers rather than over-invoicing by Sri Lankan exporters. However, since imports from Sri Lanka are duty-free there is no incentive for European importers to under-invoice at their end. Hence, we could safely conclude that the discrepancy in partner country data comparison is due to over-invoicing by the Sri Lankan exporters.

Graph 4
Trade Data Discrepancy
2002 - 2007 (USD)



Source: Derived from Table 7

It is beyond the scope of this study to investigate the reasons for a significant increase in over-invoicing of exports to EU countries during the GSP and GSP+ regimes, which has more than tripled in 2007 (USD 314 million) compared to 2002 (USD 98 million). One plausible reason could be that such over-invoicing of exports is to facilitate the import into Sri Lanka of a more-than-required quantity of raw materials (fabric and accessories) – to be sold subsequently in the local market either as raw material or as finished products⁹. It is important to investigate the reasons for a significant increase in the partner country trade data discrepancy between 2004 and 2007 and to find out whether GSP or successive GSP+ has in any way contributed to this hike.

Profile of apparel industry workers

This section outlines the results of a survey of apparel producing factories jointly undertaken by the Department of Labour and Oxfam (Australia) in 2006. The unpublished final report (dated January 2008) was made available to the author. Altogether, five hundred and thirty one factories were surveyed – small 125 (23.5%); medium 222 (42%); large 122 (23%); extra large 35 (6.5%); and unclassified 27 (5%)¹⁰ (Department of Labour and Oxfam, 2008: 10). Although 531 factories were surveyed, only 504 were included in data analysis (27 factories that were unclassified in terms of size were discarded). However, all the factories (504) that were surveyed did not answer all the questions in the comprehensive questionnaire due to inapplicability of certain questions or otherwise.

Out of the total number of employees in the surveyed apparel factories (177,339), small firms employed 4.5% (8,095); medium size firms employed 22.5% (40,042);

⁹ Imported raw materials for export-oriented industries are not subjected to import duty or domestic taxes (VAT, excise duty, etc) payments. However, if companies sell part of the raw materials or finished products in the domestic market due to lack of orders from abroad (or any other reason) they should pay the import duty plus domestic taxes before releasing them to the domestic market. Anecdotal evidence suggests that a lot of raw materials and finished products from the apparel sector are leaked to the domestic market without payment of import duty and domestic taxes on raw materials.

¹⁰ Small firms are defined as having less than 100 employees; medium size firms have 101-500 employees; large firms have 501-1,000 employees and extra large firms have over 1,000 employees.

large firms employed 41.5% (73,700); and extra large firms employed 31.5% (55,502).¹¹

Besides, 67% (119,299) of the total employees in the surveyed factories were females and 33% (58,040) were males. Further, 64% of the total employees were in the age group 19-29 years and almost the same proportion was unmarried. Moreover, 37% of the total employees were employed for less than one year and 45% were employed between 1-5 years (Department of Labour and Oxfam, 2008: 23-26), which indicates a high staff turnover.

Remuneration

Small, medium and large firms generally pay higher salaries than extra large firms to all categories of employees other than the 'pattern makers' and 'technicians' (Department of Labour and Oxfam, 2008: 29). In addition to basic salaries, many firms pay overtime, provide meals during work time, transport to and from the factory, attendance allowance, bonuses, medical facilities, accommodation, uniforms, etc. A bulk of the firms (all sizes) provides the foregoing perks free-of-charge but some do so at subsidised rates and few at cost price. The share of extra large firms providing these perks is greater than the share of other size firms (Department of Labour and Oxfam, 2008: 30&31).

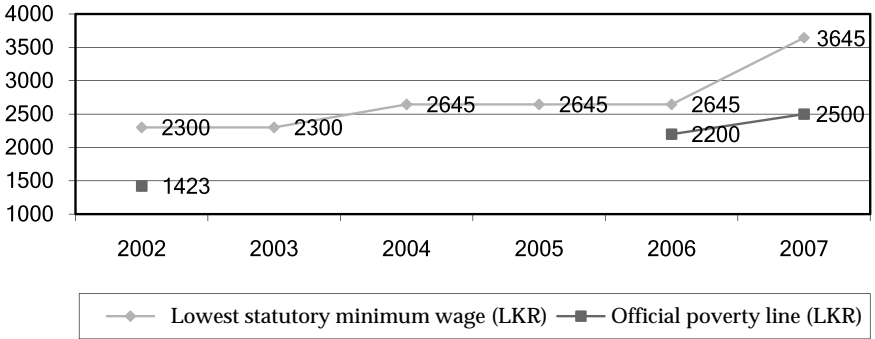
The range of basic salaries of different categories of employees in the surveyed apparel factories in 2006 was generally lower than the range of minimum wages set by the Wages Board of the garments manufacturing trade. The salaries of 'cutters', 'machine operators' and 'supervisors' were an exception (see Table 8). However, not all firms were paying lower than the minimum wages set by the Wages Board. For example, the lowest wage paid in the surveyed factories to 'checkers' was LKR 2,848, which is below the lowest minimum wage set by the Wages Board – i.e. LKR 3,306 (Grade III). However, the highest wage paid to 'checkers' in the surveyed factories was LKR 3,912, which is higher than the maximum wage set by the Wages Board –

¹¹The foregoing numbers of employees represent 504 factories that were classified by size – number of employees in 27 factories that were unclassified is not included.

i.e. LKR 3,386 (see Table 8). A similar variance can be observed in the wages of some other categories of employees as well (see Table 8).

The national poverty line in Sri Lanka in 2006 was about LKR 2,200 per person per month, according to the Department of Census and Statistics (see Table 9). Therefore, wages received by many workers in apparel factories were only marginally higher than the threshold wages of the poor in 2006.

Graph 5
 Lowest Statutory Minimum Wage & Official Poverty Line
 2002 - 2007



Source: Derived from Table 9

However, the take-home pay of many apparel industry workers is higher than the basic salaries noted above because of the involuntary overtime work they do. Almost 42% of the respondents work ten-hour shifts (nearly the same proportion by females and males) and another 22% work twelve-hour shifts (22% of females and 21% of males). Further, large (28% do twelve-hour shifts and 36% do ten-hour shifts) and medium (18% do twelve-hour shifts and 51% do ten-hour shifts) size factory workers do longer hours than small (12% do twelve-hour shifts and 27% do ten-hour shifts) factory workers. A highest proportion of small factory workers (43%) do eight-hour shifts, which is the legal limit (Peiris, 2008: figures 7.7 & 7.8). Although a highest proportion of workers (54%) has indicated that they do overtime in order to earn more money (51% of females and 59% of males), 35% indicated that overtime was not an option but compulsory (37% of females and 30% of males) (Peiris, 2008: figure 7.11).

Hence, it is clear that a higher proportion of female workers is forced to work overtime. Women workers who do nightshift overtime work were found to have greater prevalence of anaemia with low mean haemoglobin concentration (Amarasinghe, 2007: 68). Hence, compulsory overtime work has resulted in an occupational health hazard to female workers. It is also the case that, whilst the highest proportion of workers who do overtime in order to earn more money is in small factories (68%), the highest proportion who do overtime because it is compulsory are in large (40%) and medium (36%) factories (Peiris, 2008: figure 7.12).

Whilst the lowest statutory minimum wage in 2006 was LKR 2,645, the average lowest wage in the surveyed garments factories was only LKR 895. Thus, there is a stark discrepancy in the lowest statutory minimum wage and the average lowest wage. Moreover, growths in the lowest statutory minimum wage during the periods 2002-2004 and 2005-2007¹² were lower than the growth in the value of apparel exports to the EU. That is, during the period 2002-2004 the lowest statutory minimum wages increased by 15%, while the value of apparel exports to the EU increased by 41.5%. Similarly, the lowest statutory minimum wage increased by almost 38% during the period 2005-2007, while the value of apparel exports to the EU increased by 43.5% (see Table 9). We can see from the above that the rise in the lowest statutory minimum wage was very much higher during the GSP+ period, i.e. 2005-2007, in comparison to the previous period (2002-2004). Thus, the gap between the rise in statutory minimum wages and the growth in apparel exports had dropped drastically during the GSP+ period. Nonetheless, according to Table 8, most of the workers in the apparel sector get much lower wages than the statutory minimum wages.

Besides, almost 70% of the respondents were unaware of the statutory minimum wages set by the Wages Board for apparel workers. The proportion of female workers unaware of their statutory minimum wages (73%) was higher than that of male workers (62%). Moreover, greater proportions of workers in the small (89%) and medium (72%) size factories were unaware of their statutory minimum wages than workers in large factories (62%) (Peiris, 2008: figures 7.5 & 7.6).

¹²The reason for taking these time periods for consideration is that last three revisions of statutory minimum wages took place in 2000, 2004 & 2007. Therefore, 2002 and 2003 statutory minimum wages were the same as set in 2000. Similarly, 2004, 2005 and 2006 data were the same as the revised wages in 2004. Then, the 2007 data refers to the revised wages in 2007.

The overall result emanating from Tables 8 & 9 is that, despite a significant increase in the statutory minimum wages during the GSP+ period, most apparel sector workers are getting lower basic wages than the statutory minimum wages, notwithstanding the fact that the value of apparel exports to the EU had increased significantly during the GSP+ period. This has taken place during a time of an unrelenting rise in the cost of living since about mid 2006, continuing to date. Although the wages of middle and lower level workers in the apparel industry are low, executive and managerial level employees' salaries are handsome. But since the former category of employees is overwhelming in terms of number, out of the share of the total wage bill in the total production cost (14.6%) 12.2% is accounted for by the wages of middle and lower level employees and only 2.4% is accounted for by the salaries of executive and managerial level employees (Department of Labour and Oxfam, 2008: 40).

However, 49% of the respondents said they receive higher salaries now compared with before joining the apparel industry. A higher proportion of male workers (59%) said the same than female workers (43%) (Peiris, 2008: figure 7.1). This is presumably because, although basic salaries have not risen much, take-home pay has risen significantly. On the other hand, 16% said they receive lower salary than before (13% females and 21% males) (Peiris, 2008: figure 7.1). Further, while 64.5% of the respondents in medium size factories and 50% of the respondents in small size factories said they receive higher salaries than before, only 32% of the respondents in large factories said the same. As a corollary, a higher proportion of workers in large factories (19%) receive lower salaries than before (Peiris, 2008: figure 7.2). The validity of the foregoing results is contentious because the number of respondents to this question was only 155 out of the total sample of 501.

Therefore, we may argue that the GSP+ might not have contributed to any increase in the welfare of lower and middle level workers (a bulk of them women) who comprise over 90% of the total workforce in the apparel industry. Hence, we could also argue that the GSP+ has contributed to neither poverty reduction nor 'sustainable development' in Sri Lanka in terms of improving the well being of the workers (particularly in the middle and lower levels) and their families.

In these circumstances, one might wonder why workers have sought employment in apparel factories if they were not receiving reasonable basic wages. A recent opinion

survey of workers in the apparel industries revealed that almost 60% of the respondents had chosen to work there due to a lack of alternative employment—higher among female (63%) than male (50%) workers. Only 11.5% indicated that they opted to work in the industry because it provides 'good salary' (Peiris, 2008: figure 1.1).

Composition of cost of production

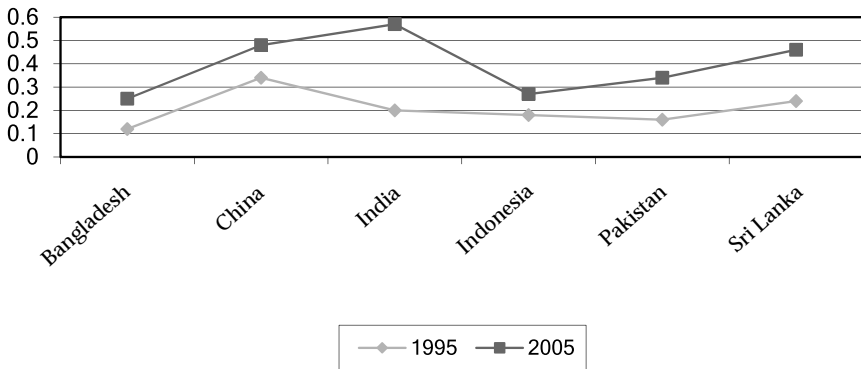
Four major challenges faced by the respondent apparel firms in the post-MFA (January 2005) period were higher labour costs in comparison to other South Asian countries, cost of utilities (electricity, water, gas and telecommunications), low productivity and a lack of orders. That is, 60.2% of the firms cited higher labour cost; 44.1% cited high utility charges; 36.7% cited low productivity; and 35.5% cited lack of orders as the major problems encountered during the post-MFA period. Ironically, it is the extra large firms that cited the first three problems most. Thus, 84.4% of the extra large firms cited high labour cost, 56.3% cited high utility charges and 43.8% cited low productivity as the most pressing problems faced. On the other hand, it is the medium size firms that cited lack of orders as the most pressing problem (Department of Labour and Oxfam, 2008: 37).

Although most apparel-manufacturing firms cited higher labour cost and utility charges as the biggest problems faced by them, a decomposition of the cost of production does not lend support to their claim. Raw materials (fabrics and accessories) account for 69.5% of the total cost of production, labour accounts for 14.6%, finance, transport & overheads 13.7%, and utility bills account for only 2.3% of the total production cost. Furthermore, in extra large firms, the cost of raw materials account for 81.1%, the total wage bill accounts for 10.1%, finance, transport & overheads account for 7.3% and utilities accounts for only 1.5% of the total cost of production (Department of Labour and Oxfam, 2008: 40). Thus, in extra large firms labour and utility costs were less than the average of all sized firms surveyed.¹³ Apparel manufacturers and exporters often claim that there are labour shortages in the industry, said to be highest in the machine operator category (Department of

¹³ Extra large firms employed 31% of the total employees in all 504 firms surveyed.

Labour and Oxfam, 2008: 32). Naturally, in the context of lower than statutory minimum wages paid to workers, there would not be many takers for jobs in the apparel industry.

Graph 6
Hourly Wage Rates
(USD per hour)



Source: Derived from Table 10

Furthermore, the cost of production in the apparel industry of Sri Lanka is claimed to be one of the highest in the region, particularly the labour cost (see Table 10). However, cheap labour is not the only competitive advantage that is required in the apparel trade. Hourly wage rates in the world's top 10 apparel and textiles exporting countries in 1995 (China – \$0.34, Hong Kong – \$4.90, Italy – \$16.65, Germany – \$21.95, South Korea – \$7.65, Taiwan – \$6.38, USA – \$12.26, France – \$16.45, Belgium-Luxembourg – \$25, UK – \$11.71) were far higher than that of Sri Lanka's (\$ 0.24) (Birnbaum, 2000: 6). In fact, lead-time¹⁴ is a critical factor in the apparel trade in terms of competitive advantage. Besides, a direct comparison of wages between countries is not appropriate due to differences in exchange rate regimes and inflation during different time periods. It is also important to note that rises in

¹⁴Refers to the time between when an order is placed for a consignment of apparels and the point at which it reaches the retail shop floor.

average hourly wages in India (185%), Pakistan (113%) and Bangladesh (108%) between 1995 and 2005 have been significantly higher than in Sri Lanka (92%)¹⁵ (see Table 10). The foregoing data indicate that rises in wages of apparel workers in countries that are not beneficiaries of GSP+ (India and Pakistan) have been higher than that of beneficiary countries such as Bangladesh and Sri Lanka. Besides, if we juxtapose the wage increases between 1995 and 2005 with the rise in cost of living between the same time periods in Sri Lanka, we can argue that wages in real terms have dropped and, therefore, the wage rise may not have contributed to poverty reduction.

Is the apparel industry labour intensive?

The apparel industry is popularly referred to as a labour intensive industry. However, the apparel industry in Sri Lanka is labour intensive only in terms of the volume of labour and not in terms of the value of labour involved. As noted above, labour costs account for less than 15% of the total cost of production of apparels. However, the industry reportedly employs around 250,000 employees throughout the country. Hence, the notion and argument that the apparel industry is labour intensive and that, therefore, cheap labour is the only or primary comparative and competitive advantage is dubious.

Dignity of labour

It is widely perceived that workers in the apparel industries of most countries are exploited not only in terms of low wages but also poor working conditions and a lack of labour rights. Thus, apparel factories are portrayed as 'sweatshops'. In certain countries apparel factories are accused of using child and slave (prisoners, for example) labour. Although apparel factories in Sri Lanka do not employ child or slave labour, many could indeed be considered as sweatshops because of very low wages (even below the statutory minimum wages), poor working conditions and a

¹⁵ India and Pakistan are not beneficiaries of the GSP+, whereas Bangladesh qualifies under the least developed country status.

stifling of the rights of employees (Solidarity Centre, 2001; Hanifa, 2003). For example, almost 59% of respondents said they get only 14 days of annual paid leave (65% of females and 45% of males) and only 8% said they get 21 days of annual paid leave¹⁶ (6% of females and 11% of males) (Peiris, 2008: figure 8.1).

Furthermore, only 2.5% of the factories that responded had trade unions and another 26.5% had employees'/workers' councils. These are also recognised by the industry — to a limited extent — for collective bargaining purpose (Department of Labour and Oxfam, 2008: 34). Yet, only about 30% of the employees have the right to organize themselves into collective bodies and the rest are devoid of any collective power to negotiate with employers — which is one of the fundamental rights under various ILO conventions to which Sri Lanka is a signatory.

Health and nutrition

Almost 51% of the workers who were questioned for the opinion survey claimed their health condition to be 'same as before' (53% of females and 47% of males), but almost 26% claimed their health status to be better than before they joined the apparel factory (27% females and 22% males). Nevertheless, almost 16% of respondents felt their health condition has deteriorated since they joined the present occupation (15.5% females and 17% males) (Peiris, 2008: figure 2.1). Proportion of workers feeling worse than before was higher in small and medium size factories (18% and 17% respectively). In contrast, proportion of workers feeling better was higher among large factory workers (31%) (Peiris, 2008: figure 2.2).¹⁷ However, 41% of the respondents said they visit a doctor more often now than before they joined the present job (40% females and 42% males) (Peiris, 2008: figure 2.4). There appears to be inconsistency between the responses to the question about the workers' present health status and the current frequency of visits to the doctor. Further, 66.5% of the respondents felt that their work at apparel factory affected their health to a certain

¹⁶ According to labour regulations, apparel industry workers are entitled for 14 days of paid annual leave and 7 days of paid casual leave per calendar year. Annual leave is planned and casual leave is unplanned.

¹⁷ India and Pakistan are not beneficiaries of the GSP+, whereas Bangladesh qualifies under the least developed country status.

extent (70% of females and 58% of males) while 2.5% of the respondents felt their health was severely affected (1.5% of females and 5% of males) (Peiris, 2008: figures 6.7 & 6.8).

As regards changes in food intake, almost 60% of the respondents said that the number of meals they take per day has not changed since they joined the apparel factory (58% females and 63% males). However, 34% of apparel workers have reduced the number of meals they take per day, particularly women (39% of females and 23.5% of males). Further, the decrease in the intake of meals was higher in large and medium size factories (Peiris, 2008: figures 3.1 & 3.2). Moreover, only 9% of the respondents eat meat, 17% eat eggs, 22% eat fish, 38% eat green leaves and 56% drink milk every day (Peiris, 2008: table 3.3). Hence, nutritional standards of apparel workers seem to have deteriorated since joining the apparel factory. These results were confirmed by an earlier study undertaken by the National Institute of Occupational Safety and Health (NIOSH) of the Department of Labour (Amarasinghe, 2007).

The nutritional status of women workers in the apparel industry in Sri Lanka was found to be worse than of workers in other occupations and industries. A descriptive cross-sectional study to detect the prevalence of iron deficiency anaemia among female workers in five randomly selected apparel factories in the Katunayake Free Trade Zone was undertaken during mid-2004. Six hundred and fifty two female workers were selected randomly in the five factories. The results of this study revealed that 44.7% of female apparel industry workers were anaemic with low mean haemoglobin concentration. Besides, 34.2% of female apparel industry workers were affected by chronic malnutrition as measured by the Body Mass Index (BMI), taking 18.5 as the cut-off value. The foregoing results were worse than those that applied to women in the same age group in the overall population of the country. Moreover, out of the total anaemic female apparel industry workers, 55% were married. Among the unmarried workers, 41% were anaemic (Amarasinghe, 2007: 68).

The abovementioned health and nutritional status of apparel workers reveals that female workers are worse off than their male counterparts. Given that females account for nearly two-thirds of the total labour force in the apparel industry, the situation is grave. Women's health conditions affect their children and, therefore,

the worsening health of women jeopardises the health of future generations. The fact that declining health and nutritional standards is higher in large and medium size factories aggravates the problem because they employ a bulk of the industry's labour.

However, almost 65% of the respondents admitted to spending more money on clothing now than before they joined the apparel factory (almost the same proportion of female and male respondents admitted to this) and 33% said they spend the same as before. Workers in large and medium size factories have increased spending on clothing more than the workers in small factories have (Peiris, 2008: figures 3.4 & 3.5). Similarly, spending on entertainment/leisure has remained the same (51% of respondents – 58% females and 34% males) or has increased (33% of respondents - 26% females and 48% males) (Peiris, 2008: figures 4.1). These results are paradoxical because they indicate that workers tend to give priority to spending on clothing and entertainment/leisure than to food. This calls for awareness raising and public education among apparel workers. The poor or unhealthy eating habits of Sri Lankans are a perennial problem that needs to be addressed by concerned public authorities.

In sum, we can safely conclude that GSP+ has neither contributed to poverty reduction or sustainable development in Sri Lanka. It is unacceptable that the condition of workers in large and medium factories is worse than that of workers in small factories because, presumably, the former are greater beneficiaries of the GSP+ and make higher profits.

Living and working conditions

A bulk of the respondents opined that they are either 'satisfied' (68%) or 'very satisfied' (13%) with the present boarding place. There was only a minor difference between women (68.8%) and men (67.5%) who are 'satisfied' with the current boarding place. However, a slightly higher proportion of men (15%) than women (12%) were 'very satisfied' (Peiris, 2008: figure 5.7).

A majority of respondents (54%) felt that the sanitary facilities in the apparel factory were the same as in their homes or previous places of work (54% females and 52% males). Another 33% felt it was better than their homes or previous places of work

(33% females and 34% males). Sanitary facilities were better for workers in large (37% of respondents) and medium (31% of respondents) factories than in small factories (23% of respondents) (Peiris, 2008: figures 6.3 & 6.4). Similarly, ventilation and noise levels in apparel factories were same (46% of respondents) or better (37% of respondents) than their respective homes or previous work places (Peiris, 2008: figures 6.5).

Conclusions

The data presented in this paper highlight that the apparels industry in Sri Lanka has hardly contributed to poverty reduction or 'sustainable development' either at the macroeconomic level or micro level — i.e., at the lower and middle level of employees and their families — in spite of the duty free access to European markets under the GSP+. Therefore, it is doubtful whether two of the triple objectives of the GSP+ have been attained in the case of Sri Lanka, which is one of fourteen beneficiary countries in the first phase (2006-2008) of the GSP+.

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Table 1: Share of Apparels in Total Exports
2002-2007

Year	Total Exports in Value USD Million	Total Apparel Exports in Value USD Million	Share of Apparels in Total Exports %	Apparel Export Value as a proportion of GNP
2002	4,702.59	2,246.45	47.77	15.58
2003	5,132.88	2,400.04	46.76	12.83
2004	5,771.00	2,654.15	45.99	12.97
2005	6,351.00	2,747.70	43.26	11.40
2006	6,892.83	2,917.11	42.32	10.46
2007	7,745.51	3,144.76	40.60	9.83

Source: Central Bank of Sri Lanka, Annual Report 2007, Statistical Appendix Table 68. (2003-2007 data)

Central Bank of Sri Lanka, Annual Report 2006, Statistical Appendix Table 69. (2002 data)

Note: 2007 data are provisional. All data are converted into USD from LKR values using the average exchange rate during each year.

Table 2: Apparel Exports
2002-2007

Country / Region	USD Million	2002	2003	2004	2005	2006	2007
	%						
USA	Value	1421.14	1470.68	1538.91	1633.09	1632.53	1569.86
	Share	63.26	61.28	57.98	59.43	55.96	49.92
EU	Value	696.57	777.85	985.77	993.73	1154.47	1425.47
	Share	31.01	32.41	37.14	36.17	39.58	45.33
UK	Value	448.06	491.04	621.52	603.44	683.60	782.05
	Share	19.95	20.46	23.42	21.96	23.43	24.87
Italy	Value	37.94	73.91	109.69	139.30	172.31	276.70
	Share	1.69	3.08	4.13	5.07	5.91	8.80
Germany	Value	77.32	73.94	81.00	84.82	109.57	140.31
	Share	3.44	3.08	3.05	3.09	3.76	4.46
Other Countries	Value	128.74	151.51	129.48	120.88	130.10	149.47
	Share	5.73	6.31	4.88	4.40	4.46	4.75
All Countries	Value	2246.45	2440.04	2654.15	2747.70	2917.11	3144.76
	Share	100.00	100.00	100.00	100.00	100.00	100.00

Source: Central Bank of Sri Lanka, Annual Report 2007, Statistical Appendix Table 74. (2003-2007 data)

Central Bank of Sri Lanka, Annual Report 2006, Statistical Appendix Table 75. (2002 data)

Note: 2007 data are provisional. All data are converted into USD from LKR values using the average exchange rate during each year.

**Table 3: Annual Growth in Apparel Export Value (%)
2002-2007**

Country / Region	2002	2003	2004	2005	2006	2007
USA	(-) 0.05	3.49	4.64	6.12	(-) 0.03	(-) 3.84
EU	(-) 1.24	11.67	26.73	0.81	16.18	23.47
UK	(-) 0.10	9.59	26.57	(-) 2.91	13.28	14.40
Italy	41.94	94.81	48.41	26.99	23.70	60.58
Germany	(-) 0.88	(-) 4.37	9.55	4.72	7.63	28.06
Other Countries	(-) 0.38	17.69	(-) 14.54	(-) 6.64	7.63	14.89
All Countries	(-) 3.78	8.62	8.77	3.52	6.17	7.80

Source: Derived from the foregoing Table and Central Bank of Sri Lanka, Annual Report 2005 Statistical Appendix Table 75. (2002 data)

**Table 4: Apparel as a share of Total Exports
2002-2007**

Country/Region	USD Million	2002	2003	2004	2005	2006	2007
USA	Total Exports	1764.01	1777.40	1869.30	1988.10	2005.50	1970.00
	Apparel Exports	1421.14	1470.68	1538.91	1633.09	1632.53	1569.86
	Apparel / Total	80.56	82.74	82.33	82.14	81.40	79.69
EU	Total Exports	1363.59	1539.70	1871.20	1960.70	2321.10	2875.00
	Apparel Exports	696.57	777.85	985.77	993.73	1154.47	1425.47
	Apparel / Total	51.08	50.52	52.68	50.68	49.74	49.58
UK	Total Exports	590.31	640.50	779.20	777.30	880.10	1018.00
	Apparel Exports	448.06	491.04	621.52	603.44	683.60	782.05
	Apparel / Total	75.90	76.67	79.76	77.63	77.67	76.82
All Countries	Total Exports	4702.59	5132.88	5771.00	6351.00	6892.83	7745.51
	Apparel Exports	2246.45	2440.04	2654.15	2747.70	2917.11	3144.76
	Apparel / Total	47.77	46.76	45.99	43.26	42.32	40.60

Source: Central Bank of Sri Lanka, Annual Report 2007, Statistical Appendix Table 81. (2003-2007 data)

Central Bank of Sri Lanka, Annual Report 2006, Statistical Appendix Table 82. (2002 data)

Note: 2007 data are provisional. All data are converted into USD from LKR values using the average exchange rate during each year.

Table 5: Growth in Total Export and Apparel Export Values (%)
2002-2007

Country / Region	USD Million	2002	2003	2004	2005	2006	2007
USA	Total Exports	(-) 8.41	0.76	5.17	6.36	0.88	(-) 1.77
	Apparel Exports	(-) 0.05	3.49	4.64	6.12	(-) 0.03	(-) 3.84
EU	Total Exports	8.33	12.92	21.53	4.78	18.38	23.86
	Apparel Exports	(-) 1.24	11.67	26.73	0.81	16.18	23.47
UK	Total Exports	2.42	8.50	21.65	(-) 0.24	13.23	15.67
	Apparel Exports	(-) 0.10	9.59	26.57	(-) 2.91	13.28	14.40
All Countries	Total Exports	(-) 2.36	9.15	12.43	10.05	8.53	12.37
	Apparel Exports	(-) 3.78	8.62	8.77	3.52	6.17	7.80

Source: Derived from the foregoing Table and Central Bank of Sri Lanka, Annual Report 2005, Statistical Appendix Table 82. (2002 data)

Table 6: Sri Lanka's Exports to the EU by Items
2006 & 2007 (USD Millions)

Goods	2006	2007	Growth %
Apparels	1,155.72	1,421.75	23.02
Diamonds	227.94	260.56	14.31
Tyres & tubes	150.77	152.09	0.94
Frozen Fish	64.66	92.81	43.54
Electrical machinery & parts	42.39	64.71	52.65
Electronic products	15.67	57.16	264.77
Boiler machinery & parts	6.07	53.59	782.87
Tea (bulk)	42.36	53.10	25.35
Others	593.35	716.95	20.83
Total	2,298.93	2,872.82	24.96

Source: Sri Lanka Customs, cited in Athukorala (2008).

Note: There are small discrepancies in the total figures of this table and previous tables because the Central Bank data are adjusted for time lags in reporting by the Customs Department.

Table 7: Sri Lanka's Total & Apparel Exports to EU & USA and EU's & USA's Total & Apparel Imports from Sri Lanka 2002-2007

USD Million	2002	2003	2004	2005	2006	2007
SL's total exports to the EU (fob value)	1,364	1,540	1,871	1,961	2,321	2,875
Add 10% for freight and insurance	1,500	1,694	2,058	2,157	2,553	3,163
EU's total imports from SL (cif value)	1,402	1,620	1,928	1,961	2,357	2,849
DISCREPANCY	(-) 98	(-) 74	(-) 130	(-) 196	(-) 196	(-) 314
SL's apparel exports to the EU (fob value)	697	778	986	994	1,154	1,425
Add 10% for freight and insurance	766	856	1,084	1,093	1,270	1,568
EU's apparel imports from SL (cif value)	706	800	1,012	987	1,213	1,426
DISCREPANCY	(-) 60	(-) 56	(-) 72	(-) 106	(-) 57	(-) 142
SL's total exports to the USA (fob value)	1,764	1,777	1,869	1,988	2,006	1,970
Add 10% for freight and insurance	1,940	1,955	2,056	2,187	2,207	2,167
USA's total imports from SL (cif value)	1,924	1,926	2,080	2,215	2,282	2,178
DISCREPANCY	(-) 16	(-) 29	24	28	75	11
SL's apparel exports to the USA (fob value)	1,421	1,471	1,539	1,633	1,633	1,570
Add 10% for freight and insurance	1,563	1,618	1,693	1,797	1,796	1,727
USA's apparel imports from SL (cif value)	1,489	1,520	1,643	1,749	1,789	1,664
DISCREPANCY	(-) 74	(-) 98	(-) 50	(-) 47	(-) 7	(-) 63

Source: Central Bank of Sri Lanka, Annual Report 2007, Statistical Appendix Tables 74 & 81. (2003-2007 data)
Central Bank of Sri Lanka, Annual Report 2006, Statistical Appendix Tables 75 & 82. (2002 data)
Rows 3, 7, 11 & 15 - United Nations Statistical Division, New York.

<http://comtrade.un.org/db/dqBasicQueryResults.aspx?px=H2&cc=TOTAL&r=97&p=144&rg=1&y=2007&so=8>

<http://comtrade.un.org/db/ce/ceSearch.aspx?it=Apparels&rg=1&r=97&p=144&y=2002&px=H2>

<http://comtrade.un.org/db/dqBasicQueryResults.aspx?px=H3&cc=61.62&r=842&p=144&rg=1&y=2007&so=8>

Note: (a) Export figures are from the Central Bank of Sri Lanka and import figures are from the UN Statistical Division. (b) Apparel import figures are calculated from HS-61 and HS-62 items (HS=Harmonised System). (c) All figures are rounded up to nearest full amount.

**Table 8: Basic Salaries in the
Apparel Industry by Category of Employees - 2006**

Category of Employees	Range of Salaries in 2006 (LKR per month)	Category of Employees	Range of Minimum Wages in 2006 (LKR per month)
Checkers Grade III	2,848 – 3,912	Grade I (a)	3,480 – 3,620
Cutters Grade II	3,250 – 5,550	Grade I (b)	3,450 – 3,570
Helpers Grade III	2,560 – 4,340	Grade II	3,335 – 3,435
Ironers Grade III	2,563 – 4,200	Grade III	3,306 – 3,386
Machine operators G III	3,100 – 4,950	Grade IV	3,250 – 3,310
Pattern makers Grade I (a)	850 – 3,650	Grade V	2,645
Technicians	2,452 – 3,800		
Packers Grade IV	2,130 – 2,980		
Line leaders Grade I (b)	2,543 – 3,500		
Supervisors Grade I (b)	4,593 – 6,450		
Others	345 – 1,564		

Source: Department of Labour and Oxfam (Australia), (2008), Table 2.23, pp29.

Gazette of the Democratic Socialist Republic of Sri Lanka, (2004).

Note: Minimum wages set by the wages board for each category of employees have a range because it varies depending on the number of years of service in the same factory.

Grade I (a) refers to designers, tailors, design punchers and diskette makers.

Grade I (b) refers to leaders or section supervisors.

Grade II refers to cutters, cutters (hand), machine minders and final checkers.

Grade III refers to checkers and sorters, ironing operators (male) odd job operators (female), stamping operators (female), ironing operators (female), sewing machine operators, electric iron operators, issuing operators (female), embroidery machine/hand operators.

Grade IV refers to laying out men, laying out women, packers, cellophane bags and cardboard box makers unskilled workers and stores labourers.

Grade V refers to learners and apprentices.

**Table 9: Growth in Lowest Statutory Minimum Wage in the
Apparel Sector vis-à-vis Growth in Apparel Export Values to the EU 2002-2007**

	2002	2003	2004	2005	2006	2007
Lowest statutory minimum wage (LKR)	2300	2300	2645	2645	2645	2645
Official poverty line (LKR)	1423				c2200	c2500
Average lowest wage (LKR)					893	
Growth in lowest statutory minimum wage (%)		15.0			31.81	
Growth in Apparel Exports to the EU (%)		41.52			43.45	

Sources: Gazette of the Democratic Socialist Republic of Sri Lanka, (2000, 2004 & 2007).

Central Bank of Sri Lanka, Annual Report, various years.

Department of Census and Statistics. - http://www.statistics.gov.lk/poverty/monthly_poverty/index.htm

Department of Labour and Oxfam (Australia), (2008).

Table 10: Labour Costs in Apparel Industry in Selected Countries
1995 & 2005

Country	1995 USD per hour	2005 USD per hour	Percentage rise between 1995&2005
Bangladesh	0.12	0.25	108%
China	0.34	0.48	41%
India	0.20	0.57	185%
Indonesia	0.18	0.27	50%
Pakistan	0.16	0.34	113%
Sri Lanka	0.24	0.46	92%
Thailand	0.72	1.24	72%

Sources: Birnbaum, David, (2000: 208) for 1995 data.

Sri Lanka Garment Buying Office Association, cited in Oxfam (2005: 20) for 2005 data.

Chapter 2

Benchmarks for Sri Lanka to achieve compliance with international legislation on core labour standards (with reference to ILO Conventions No. 87 and No. 98)

International Trade Union Confederation (ITUC)*

a. Introduction

Sri Lanka has enjoyed access to the GSP Plus regime with effect from 2005. However the government of Sri Lanka has yet to demonstrate that it is sincerely committed towards complying with core labour standards. Many inconsistencies in national laws and practices continue to exist and systematic non-enforcement of labour laws is widely prevalent. The findings of ILO supervisory bodies over recent years provide a solid body of evidence pertaining to such lapses and violations. However the Sri Lankan judiciary has now argued that there exist constitutional impediments to the application of certain provisions of ILO Conventions – a misunderstanding that must be resolved speedily by a clarification on the part of the government.

In consequence of the above failings there is clear evidence of “sweatshop conditions” continuing unabated despite the GSP Plus regime. Yet the government of Sri Lanka has failed to address adequately many recommendations of the ILO Committee on Freedom of Association (CFA) regarding several ILO cases. Ironically all these ILO CFA cases refer to the apparel sector, which exports approximately one half of its products to the EU under the GSP Plus tariff facility.

*The ITUC is the world's largest membership-based civil society body. It represents 168 million workers in 155 countries and territories and has 311 national affiliates. <http://www.ituc-csi.org>
<http://www.youtube.com/ITUCCSI>

These negative developments give rise to serious questions concerning the implementation of ILO and UN instruments. Particularly during this key year of 2008 whilst the application of the GSP Plus regime over 2006-08 is subject to evaluation and the new GSP Plus regime for 2009-11 introduced, it is essential that a strong and sincere commitment be displayed by the government of Sri Lanka if the country is to demonstrate its respect for core labour standards.

Under these circumstances it is essential that as a first step, the key enabling rights dealing with ILO Conventions No. 87 and No. 98 be examined with the objective of getting the fundamentals right in order to enable the creation of an atmosphere that is conducive for the fostering of the principles of all the core ILO Conventions. This requires an objective and constructive engagement of the prevailing situation aimed at systematic and gradual improvement over a given period of time, followed by a process of close review and monitoring by the EU and relevant social stakeholders assisted by the expertise of the ILO.

In keeping with this objective, a set of concrete and measurable benchmarks are provided herewith, drawn primarily from the ILO supervisory body findings and based on addressing the corresponding situation on the ground. They seek to critically engage the situation towards achieving positive development.

The benchmarks seek to ensure that the citizens of Sri Lanka have the ability to exercise the rights enshrined in core ILO Conventions and thus enabling them to address practical social conditions at the work place level. The effective implementation of the core Conventions of the ILO holds the key to improving the prevailing situation, guaranteeing the wide distribution of the economic benefits of the EU GSP to relevant social sectors and promoting decent work.

b. Constitution

Achieving Constitutional Consistency

The Government must issue a statement urgently to clarify that full exercise of the rights recognised by ILO Conventions is consistent with the Constitution of Sri Lanka and that there is nothing in the Constitution of Sri Lanka that can be

construed so as to impede the full exercise of the rights recognised by international labour Conventions ratified by the State.

Background: In the cases of *Singarasa v. Attorney General (2006)* and *The Joint Apparel Association Forum and Others v. Sri Lanka Ports Authority and Others (2007)*, the Supreme Court of Sri Lanka clearly held that certain provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Conventions of the ILO are inconsistent with the Constitution of Sri Lanka.

A complaint to the ILO Governing Body Committee on Freedom of Association was pursued in September 2006 by Sri Lankan trade unions and two international Global Union Federations challenging an order of the Supreme Court that overruled certain principles of ILO Conventions No. 87 and No. 98 (Case No.2519). The Supreme Court of Sri Lanka failed to take cognisance of the ruling of the ILO supervisory body that was adopted at the 300th Session of the Governing Body of the ILO in November, 2007.

Further the Supreme Court ruled the unions were not entitled to seek redress from an external body while their matter was pending before the Court, despite obligations arising out of ratification of ILO Conventions and the Constitution of the ILO expressly providing for such remedy and supervision.¹

In view of these negative and restrictive developments arising out of judicial interpretations, it is imperative that the unfettered right to exercise provisions of core ILO conventions and the right to invoke the supervision of the ILO supervisory bodies, in terms of the Constitution of the ILO, be guaranteed by the Government of Sri Lanka. The Government must clarify urgently that the position of the Supreme Court of Sri Lanka cannot be interpreted in such a way as to impede the exercise of rights enshrined in ILO Conventions, and ensure that such rights are honoured and observed in good faith.

Recommendation: the Government must issue a statement urgently to clarify that full exercise of the rights recognised by ILO Conventions is consistent with the

¹A report discussing the argument that an inconsistency exists between the Constitution of Sri Lanka and the ICCPR/ILO Conventions was prepared earlier this year – see “‘GSP plus’ privileges: the need for constitutional amendment”, Rohan Edrisinha and Asanga Welikala, 15th February 2008, Colombo.

Constitution of Sri Lanka and that there is nothing in the Constitution of Sri Lanka that can be construed so as to impede the full exercise of the rights recognised by international labour Conventions ratified by the State.

c. Statutory Laws and Practices

Restrictions on the Public Sector

1. Restrictions on the rights of public officers to join organisations of their own choosing should be removed, consistent with the requirements of ILO standards.

Background: The Trade Unions Ordinance of Sri Lanka imposes serious legal restrictions on public sector unions with regard to their right to federate and confederate. Section 21(1) (b) of the Trade Unions Ordinance provides that the Registrar is to refuse to register any trade union of peace officers or government staff officers unless the rules of the union contain a provision declaring that "the union shall not be affiliated to or amalgamated or federated with any other trade union whether of public officers or otherwise ...".

The Trade Unions Ordinance restricts the registration of public service trade unions, unless, inter alia, they restrict membership of the union or for any office, solely to public servants who are employed in any one specified department or service of the Government, or specified class or category (section 21(1) (a)). Similarly, Chapter XXXV of the Establishment Code, too restricts public officials from joining trade unions by: (a) prohibiting public officers from becoming members of any trade union which permits persons who are not public officers to be members; and (b) prohibiting any person who is not a public officer being appointed to be a patron or office bearer, or admitted to membership of any organisation of officers, except as provided for under the Trade Unions Ordinance.

The ILO Committee of Experts on the Application of Conventions and Recommendations has repeatedly held that it is admissible for first-level organisations of public servants to be limited to that category of workers, subject to two conditions: (i) that their organisations are not also restricted to employees of any

particular ministry, department or service; (ii) that they may freely join federations and confederations of their own choosing, including organisations of workers in the private sector.

In 1998, with regard to Sri Lanka, the ILO Committee of Experts on the Application of Conventions and Recommendations reiterated that provisions stipulating that different organisations must be established for each category of public servants, as is the case under section 21, are incompatible with the right of workers to establish and join organisations of their own choosing.²

Articles 2 and 5 of ILO Convention No. 87 guarantee the right of public servants to join and establish organisations of their own choosing. The ILO Committee of Experts on the Application of Conventions and Recommendations in the year 2000 and the following years have noted that section 21 of the Trade Unions Ordinance and the Establishment Code restricted membership in a union to public servants who are employed in any one specified department or service of the Government, or specified class or category and that public officers are prohibited from becoming members of any trade union which permits persons who are not public officers to be members.

In response to the repeated calls of the ILO, in 2003 the government informed the ILO Committee of Experts on the Application of Conventions and Recommendations that it would take necessary action to ensure that organisations of government staff officers may join confederations of their own choosing including organisations of workers in the private sector and that first-level organisations of public employees may cover more than one ministry or department in the public service.

However the government is yet to rectify these flagrant inconsistencies in the Trade Unions Ordinance.³

²ILO General Survey on Freedom of Association and Collective Bargaining, 1994, paragraph 86 and ILO CEACR 1998/69th Session Report.

³Giving effect to these changes was an important item in the European Union Generalised System of Preferences "Special Benefits Scheme Road Map on Core Labour Standards" (effective from 1st January 2004) that the government agreed to honour as a mandatory obligation – see EU GSP Special Benefits Scheme, Road Map on Core Labour Standards, para 1.2, Annex.

Recommendation: the Trade Unions Ordinance should be amended in order to enable public sector workers to form and join trade unions of their own choosing. This should include the forming and joining of federations and confederations irrespective of whether they are organisations of public or private sector. The right to choose should rest solely upon the discretion of workers.

Union certification procedures for the purpose of collective bargaining

2. Introduction of a four week time period to conclude holding all union certification polls and giving effect to interconnected polling procedures.⁴

Background: Despite the law (Industrial Disputes [Amendment] Act No.56 of 1999) providing for the recognition of unions for the purpose of collective bargaining upon the showing of a sufficient minimum representation at a workplace, these provisions remain unenforced.

In practice, the unduly long time period before holding a poll enables employers to expose and target those who are behind a union organising effort. In the worst cases, union representatives have been physically assaulted and faced death threats. Often such activists are fired by employers in the long period of the run-up to the poll. This creates a situation where workers fear to identify themselves with the union or associate themselves with the activities of the union, thus resulting in the union losing the poll.

Furthermore in order to strengthen the 1999 Industrial Disputes (Amendment) Act (IDA), which provides *inter-alia*, provisions for such encouragement of union recognition for the purpose of collective bargaining, it needs to be reinforced with regulations to clarify some gray areas regarding the category or class of workers who are eligible to participate in such certification polls.

Currently the law only provides for the requirement of a membership not less than 40 per centum of workers on whose behalf such trade union seeks to bargain. Recent experience shows that in defining “*workmen on whose behalf such trade union seeks to bargain*” employers tend to interpret this requirement so as to include the executive,

⁴Ibid, para 1.3.2.

managerial, and staff of plants that are sometimes located in other distant premises as well. This makes it increasingly difficult for unions to reach the 40 percent of this undefined and varying figure of total workers. This leaves sufficient room for manipulation of these “eligible voters” by the employers, to make the task beyond the reach of unions.

In order to avoid a situation as described above, the labour enforcement authorities need to bring in necessary regulations as provided for by the IDA. In doing so the regulations should be formulated to exclude workers of higher supervisory authority, or such categories.

Recommendation: In order to remedy the above situation, all union certification polls should be held within four weeks of the original request of the union for union certification. Furthermore, the Industrial Disputes Act should be amended to give effect to express and specific administrative measures for polling procedures leading to collective bargaining, in order to give due legal effect so that workers can seek such legal protection as a right. The Government should issue a clear and categorical statement that the clause “Workmen on whose behalf such trade union seeks to bargain” obviously applies to the workers in the specific workplace where the trade union claims membership and seeks recognition.

3. Lowering the 40 per cent threshold for compulsory recognition of trade unions and enabling joint claims of unions for recognition for the purpose of collective bargaining.

a. Lowering the 40 per cent threshold for compulsory recognition

Background: on behalf of Sri Lankan trade unions, international and global trade union bodies have repeatedly raised this matter before the ILO Committee of Experts on the Application of Conventions and Recommendations and the ILO Governing Body Committee on Freedom of Association on several occasions.⁵ The 40 per cent threshold established in the law for the compulsory recognition of trade unions constitutes in practice the threshold required for a trade union to be

⁵ International Labour Conference, 93rd and 96th Sessions in 2005 and 2007 – Report of the Committee of Experts on the Application of Conventions and Recommendations.

established at the workplace with employers engaging in various tactics in order to avoid such recognition (in particular, changing the lists of employees, as the vote carried out to determine the representation is based on a list furnished by the employer).

The ILO Governing Body Committee on Freedom of Association in Case No. 2380 on the denial of the right to freedom of association and collective bargaining in Sri Lanka recommended that the Government shall ensure and amend legislation, in the event of unions being unable to represent 40 per cent of the workers.⁶ It further held that the 40 per cent requirement shall not preclude unions from being recognised for the purpose of collective bargaining.

Though the ILO has not established a specific minimum number of members that a government may require in order for a union to be recognised or to be considered as a bargaining agent, case decisions of the ILO over the years show that the ILO in several instances has held that even a 30 per cent minimum requirement is excessive.⁷ In this context the Sri Lankan requirement of 40 per cent is, relatively, a very high threshold.

Recommendation: The new threshold to be established in the law for the compulsory recognition of trade unions should be lowered to 25 per cent of the workers on whose behalf such trade unions seek to bargain. In this context, the purpose of lowering the threshold would be to facilitate both the general recognition of a trade union by the employer and the right of the union to make bargaining demands, not to establish exclusive collective bargaining rights.

b. Enabling joint claims of unions for recognition for the purpose of collective bargaining

Background: having carefully examined the issues on the threshold for union recognition and the relevant circumstances, in 2005 the ILO Committee of Experts on the Application of Conventions and Recommendations informed the government that according to section 32A (g) of the Industrial Disputes (Amendment) Act No. 56 of 1999 no employer shall refuse to bargain with a trade union, which has in its

⁶ILO Governing Body Committee on Freedom of Association Case No.2380, Report No.344, Vol. XC, 2007, Series B, No.1, para 192.

⁷Freedom of Association – Digest of Decisions of Principles of the Freedom of Association Committee of the Governing Body of the ILO Fifth (revised) edition. paragraph 288.

membership not less than forty per cent of the workmen on whose behalf such trade union seeks to bargain. Further, the ILO Committee of Experts on the Application of Conventions and Recommendations recommended that if no trade union covers more than 40 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit so that they may negotiate at least on behalf of their own members. The ILO requested the Government to indicate in its next report the measures taken or contemplated so as to promote collective bargaining in accordance with the above observation.

Hitherto the government has not taken any measures to heed the aforementioned request of the ILO Committee of Experts on the Application of Conventions and Recommendations in order to rectify these lapses in the law and its practice.⁸

Recommendation: If no trade union covers more than the new minimum threshold to be fixed in keeping with the requests of the ILO supervisory bodies, collective bargaining rights should be granted to all the unions in this unit so that they may negotiate at least on behalf of their own members.

Anti-union discrimination

4. The adoption of statutory measures to enable trade unions to have direct access to the courts in order to have their complaints on unfair labour practices/anti-union discrimination examined by the judicial authorities.

Background: victimisation of union activists continues because of the inaction of labour enforcement authorities. Many complaints have gone unattended. In spite of a series of reports by unions and individual workers of unfair labour practices, the labour enforcement authorities have continued to fail in filing complaints against employers who are alleged to have committed serious offences of unfair labour practices since the adoption of the most recent law in this regard in 1999. These unfair labour practices have to a large extent turned workers away from associating with unions, fearing threats of insecurity to employment.

⁸ See ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Sri Lanka, International Labour Conference 93rd and 96th Sessions in 2005 and 2007.

The local law on industrial disputes authorises action before courts only to be initiated by the government's Department of Labour or anyone who has been granted sanction by the Commissioner General of Labour. This situation has resulted in the government neither prosecuting errant employers nor granting sanction to affected victims of anti-union discrimination to file cases on their own behalf. This mandatory requirement of having to go through the arbitrary discretion of government authorities has in practice made the law defunct and impotent.

Taking the above practical situation into consideration and recognising the importance of efficient and rapid proceedings to redress anti-union discrimination acts, the ILO Committee of Experts on the Application of Conventions and Recommendations in 2005 and 2007 repeatedly held that trade unions should be able to have direct access to the courts in order to have their complaints examined by the judicial authorities if they so wish. This would enable victims of anti-union discriminations to seek direct legal redress and make justice practically exercisable. Many other statutes in Sri Lanka do provide for such direct action remedy in addition to state prosecution.

Recommendation: In line with the recommendations of the ILO Committee of Experts on the Application of Conventions and Recommendations, the Industrial Disputes Act should be amended so as to enable workers and trade unions to be given the right to file a complaint directly to the Magistrate's Court in instances of anti-union discrimination in order to ensure they have unfettered access to legal remedy in cases of victimisation. In doing so, the filing of private complaints before the Magistrate's Court should not be subject to any form of state sanction or control.

5. Adoption of necessary changes to the Industrial Disputes Act, clearly specifying a fixed maximum period of time for the Department of Labour to institute action before the Magistrate's Court on Complaints of Unfair Labour Practices/Anti-Union Discrimination.

Background: At present, offences of unfair labour practices such as anti-union discrimination are tried before the Magistrate's Court (the lowest judicial body). A complaint can be made to the Magistrate's Court only by the Department of Labour (the labour enforcing authority). There are no time limits imposed on labour enforcement authorities, within which such complaints should be made to the

Magistrate's Court. This gives wide discretion to labour authorities to delay issues until the union is made defunct. The only option available to unions to expedite the process is to obtain a Writ from a higher Court, which is a time consuming and an expensive legal exercise often beyond their reach.

The non-specification of a fixed time period to file a complaint before the Magistrate's Court upon the notification by the union over the committing of an alleged offence of unfair labour practice has virtually made the entire law on offences of unfair labour practices of no use whatsoever. It only results in the union activists jeopardising their prospects for employment.

The supervisory bodies of the ILO have also frequently and in a decisive manner demonstrated their concern regarding situations in which the measures taken to eliminate or prevent acts of anti-union discrimination have proved to be ineffectual or insufficiently persuasive or where the examination of complaints in this regard has been insufficiently expeditious. In this connection, the ILO Committee on Freedom of Association has stated that:⁹

Respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial.¹⁰

Hitherto no constructive action has been pursued by the government in complying with this requirement.¹¹

Recommendation: it is essential that a maximum time period for the filing of complaints before the Magistrate's Court by labour authorities be clearly specified. Such a period of time should not be in excess of four weeks. The means of redress should be expeditious, inexpensive and fully impartial in law and practice.

⁹Bernard Gernigon, Alberto Otero and Horacio Gudío - ILO Principles concerning right to strike, p. 40.

¹⁰Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Fourth (revised) edition para 741.

¹¹Yet this was an important requirement to be complied with by Sri Lanka under the 2004 EU GSP Road Map on Core Labour Standards, para 1.3.3., Annex.

6. Strengthening the law on anti-union discrimination.

Background: legal provisions on anti-union discrimination were first introduced to Sri Lanka in 1999. This came in response to some issues that arose out of an ILO Governing Body Committee on Freedom of Association Case on Sri Lanka (Case No.1621). However the provisions of anti-union discrimination set out in this law¹² seeks to address a very minimal scope and stood to be of use only with regard to some limited issues.

As a result, many issues falling under the purview of anti-union discrimination could not be dealt with, nor did the local labour laws provide for any plausible provisions to address these situations. This made the predicament of victimised workers precarious and made the exercise of universally recognised fundamental workplace rights such as freedom of association, organising and collective bargaining a very costly - and at times, impossible - task.

The results of the aforementioned situation is visible in the prevailing low rate of unionisation and the extremely few and negligible number of collective bargaining agreements especially in export industries. Workers in the Sri Lankan apparel industry who contribute to a significant part of the country's exports that are produced for European markets under the zero duty GSP tariff regime bear the brunt of these sweatshop working conditions. Victimisation, arbitrary dismissals and various sorts of discrimination have effectively kept unions and genuine collective bargaining out of the reach of workers in these export sectors.

The aforementioned working atmosphere that fails to offer basic and minimum safeguards that are necessary for the exercise of fundamental workers' rights and to ensure decent work has effectively disempowered workers and forced them to toil under precarious working atmospheres.

Official research findings of the government stand testimony to the consequences of this disempowerment that has led to the subduing of the ability to bargain and

¹² Industrial Disputes (Amendment) Act No. 56 of 1999.

engage in genuine collective action. The government's own study¹³ findings reveal alarmingly low nutrition levels, severe anaemia, chronic malnutrition, declining body mass index, etc. among apparel sector workers, fuelled by low wages and intense workload. The non enforcement of anti-union discrimination laws and their inadequacy to provide cover for wide and a vital range of union discrimination instances have made workers shun collective action or involvement with unions due to severe repercussions if noticed by employers.

If anti-union discrimination laws are not revised and defined to engage practical situations, workers will continue to be part of the vicious cycle of the sweatshop conditions.

In many instances manifestations of collective action or strike action have been followed by mass dismissals or retrenchments. Such harsh repressive action having no deterrence from labour laws certainly drives workers away from exercising their collective actions due to fear of losing employment. Such an atmosphere is not at all conducive for collective bargaining or free association and leaves the workers with no option other than putting up with sweatshop conditions.

Recommendation: the law on anti-union discrimination / unfair labour practices should be amended progressively in order to expressly provide for the following:

- a) Legislation should grant special protection to certain persons, for example, to the members of a trade union which has applied for registration/union certification or which is in the process of being established, or to the founding members of a trade union or to trade union officers and leaders.¹⁴

¹³ June 2007, Labour Gazette (Official publication of the Sri Lanka Department of Labour) Dr. N.C. Amarasinghe (National Institute for Occupational Safety and Health), Nutritional Status of the Female Garment Factory Workers in the Katunayake Free Trade Zone, Sri Lanka. The study found that “*the Body Mass Index (BMI) of female factory workers, showed that (34.2%) of the surveyed sample is suffering from some form of chronic malnutrition. The study further states the Iron Deficiency Status, Iron Stores Status and Nutritional Status of female garment workers in the FTZ in Katunayaka, Sri Lanka are poor than their age-specific counterparts in the general population of the country and should be considered as an occupational health problem. This study revealed that in terms of Iron Deficiency Anaemia, female garment workers are the most affected occupation in the country and the status of iron store depletion is alarming.*”

¹⁴ *Freedom of association and collective bargaining*. General Survey of the reports of Conventions No.87 and 98. Report III (Part 4B), International Labour Conference, 81st Session 1994, Geneva. para 207.

b) No one should be penalised for carrying out or attempting to carry out a legitimate strike.¹⁵

c) Not according a favourable or unfavourable treatment to a given organisation as compared with others.¹⁶

d) Both government authorities and employers should refrain from any discrimination between trade union organisations, especially as regards recognition of their leaders who seek to perform legitimate trade union activities.¹⁷

7. Increasing the fine for contraventions of provisions concerning anti-union discrimination to a degree that would result in creating a dissuasive character in the law.

Background: Current laws dealing with offences of unfair labour practices/anti-union discrimination are improperly enforced while the present maximum fine of US \$187 (approximate) fails to provide sufficient discouragement to the committing of such offences.

In this regard, the ILO Committee of Experts on the Application of Conventions and Recommendations in 2005 and 2007 repeatedly urged the government to provide information on the dissuasive character of the quantum of fine in particular by indicating the relationship of the amount of the fine to the average wage or other objective indicators. Despite these requests by the ILO, the government has neither raised the quantum of penalty nor provided the necessary information which the ILO supervisory bodies are insisting on.

The government in April 2008 decided in principle to raise fines stipulated in most labour related statutes. However despite several appeals and much concern expressed by the ILO supervisory bodies the government failed to revise the fine for

¹⁵ *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) edition. Geneva. Para 690.

¹⁶ *Ibid.*, para 304.

¹⁷ *Ibid.*, para 307.

the violation of anti-union discrimination laws, which continues to stand at a maximum of 20,000 rupees (about US \$200 at the time of writing).

Recommendation: the fine for antiunion discrimination should be increased substantially to a degree that would result in creating a dissuasive character in the law, such as a level ranging from a minimum of 20,000 rupees up to a much higher specified maximum level. Furthermore, a continuing penalty for each day of default of a conviction of a sufficiently dissuasive level, such as 1,000 rupees per day, should be enacted and enforced.

Compulsory arbitration

8. Introduction of an amendment to the Industrial Disputes Act to guarantee that the reference of labour disputes to compulsory arbitration is done only at the request of both parties to the dispute.

Background: the ILO of Committee of Experts on the Application of Conventions and Recommendations on several occasions including in 2005 and 2007 recalled that in its previous comments, it had expressed concern over the broad authority of the Minister to refer disputes to compulsory arbitration under the Industrial Disputes Act, and had requested the Government to indicate the measures taken to ensure that workers' organisations can organise their programmes and activities without interference by public authorities.

Under section 4(1) of the said Act the Minister may, if he or she is of the opinion that an industrial dispute is a minor dispute, refer it by an order in writing for settlement by arbitration to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference. Moreover, under section 4(2), the Minister may, by an order in writing, refer any industrial dispute to an industrial court for settlement.

The ILO Committee of Experts on the Application of Conventions and Recommendations considered that the powers granted to the Minister under sections 4(1) and 4(2) can give rise to compulsory arbitration contrary to Article 3 of the Convention. It therefore requested the Government to take the necessary measures to amend these provisions so as to ensure that any reference of labour

disputes to compulsory arbitration is only at the request of both parties to the dispute or in the case of essential services in the strict sense of the term or in the case of public servants exercising authority in the name of the State. The ILO requested the Government to keep it informed of further developments in this regard. Despite these repeated requests no positive response aimed at resolving this inconsistency in the local law has been communicated to the ILO by the government.

Recommendation: necessary measures should be taken to amend sections 4(1) and 4(2) of the Industrial Disputes Act that can give rise to compulsory arbitration, so as to ensure that any reference of labour disputes to compulsory arbitration is only at the request of both parties to the dispute or, in the case of essential services, in the strict sense of the term or in the case of public servants, exercising authority in the name of the State.

Restrictions on the right to strike

9. The introduction of new amendments to the Trade Unions Ordinance setting out clearly the instances in which the right to strike that is recognised by this statute can be restricted in keeping with the requirements laid down by the recommendations of the ILO Governing Body Committee on Freedom of Association Case No. 2519 on Sri Lanka.

Background: Sri Lanka's labour law system traditionally recognises workers' right to strike.¹⁸ However the extent of the practical exercises of this right and its precise limitations are yet to be defined in law. In the 1990s and until very recently, emergency decrees invoking civil war conditions prohibited strikes in government interpreted essential sectors from time to time. The government then defined such sectors extremely broadly, calling nearly every economic activity "essential." The result was a clear violation of the right to strike.

¹⁸ For example in the Court of Appeal, Order in Case No. 104/86 reported in Sri Lanka Law Reports [1990-2SLR Part 2], Justice Sarath Silva, the present Chief Justice held as follows in the Case of Rubberite Company Vs. Labour Department: "*The basic right of workmen to strike to express their grievances and to win their demands is not only consistent with the international obligations undertaken by the Government of Sri Lanka in ratifying the Covenant on Economic, Social and Cultural Rights but also consistent with the accepted standards in other national and regional jurisdictions. Therefore, I hold that under our law, workmen have a basic right to strike as a measure of Collective Action directed against the employer to express their grievances and to win their demands.*"

The situation deteriorated further as a result of several arbitrary judicial interferences with the exercise of the right to strike since mid 2006. The Supreme Court of Sri Lanka has held principles of ILO Conventions No. 87 and No. 98 on the right to strike are inadmissible in Sri Lanka. It has also held no enabling laws exist in order to provide for the guaranteeing of principles of ILO Conventions No. 87 and No. 98 in this regard.

The aforementioned inconsistency with the core Conventions of the ILO and the violation of conditions necessary for the free and voluntary exercise of the right to collective bargaining as required by Conventions No. 87 and No. 98 was challenged by Sri Lankan trade unions and two global union federations¹⁹ before the ILO Governing Body Committee on Freedom of Association (Case No.2519).

In the aforementioned case the ILO body held that it is inclined to view the restriction placed on the port workers' action by the injunction issued by the Supreme Court of Sri Lanka as contrary to the principles set out above.²⁰

The Supreme Court of Sri Lanka in December 2007 failed to take cognisance of the ILO Committee on Freedom of Association recommendations on the principles of the right to strike. These determinations of Supreme Court of Sri Lanka have now clarified an inconsistency between local laws and the application of conventions. These circumstances warrant clear and specific changes to statutory provisions in order to enable conditions that are necessary for the free and voluntary exercise of the right to collective bargaining as required by Conventions No. 87 and No. 98.

Convention No. 87 of the ILO on Freedom of Association and Protection of the Right to Organise, for the purpose of the Convention, defines workers' organisations as any organisation "*for furthering and defending the interests of workers*". This definition is clearly of fundamental importance not only in that it sets down guidelines for differentiating such organisations from those of other types, but also because it specifies that the purpose of such organisations is for "*furthering and defending the*

¹⁹London-based International Transport Workers Federation (ITF) and the Brussels-based International Textiles, Garments and Leather Workers Federation (ITGLWF).

²⁰348th Report of the ILO on Committee on Freedom of Association, adopted by the Governing Body of the ILO at its 300th Session (Geneva, November 2007), paragraph 1142.

interests of workers” thereby demarcating the boundaries within which the rights and guarantees recognised by the Convention are applicable, and consequently protected in so far as they achieve or seek to achieve stated objectives.

In this regard, the ILO considers that the right to trade union action such as strikes or similar types of organised workers' manifestations forms an important ingredient of the right to freedom of association and collective bargaining. Similarly the ILO Conventions on Collective Bargaining strongly emphasise that the right to strike or trade union action is an essential element in protecting the fundamental prerequisite of the free and voluntary nature of the collective bargaining process.

In accordance with the principles of the ILO some types of trade union actions such as slow down in work (go-slow strike) or when work rules are applied to the letter (work-to-rule) are often just as paralysing as a total stoppage. The ILO Committee on Freedom of Association has strongly held and interpreted them to be an accepted form of trade union “strike action” in accordance with the provisions of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, provided that they are conducted in a peaceful manner.²¹

Recommendations:

(i) The Trade Unions Ordinance and the Public Security Ordinance should be amended as necessary to provide for clear and precise provisions setting out the instances in which the right to strike may be restricted or prohibited:

(a) in the public service only for public servants exercising authority in the name of the State; or

(b) in essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

²¹ILO Committee on Freedom of Association Cases Nos. 997, 999 and 1029 Turkey - Paragraphs 496-497. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the of the ILO, 1996).

In the determination of situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.²²

(ii) The Trade Unions Ordinance should be amended to recognise and expressly provide that, regardless of whether the action in question is a work-to-rule or actually a go-slow, it should always be recognised that the right to strike by workers is a legitimate means of defending their economic and social interests, and that various types of strike action (strikes, tools-down, go-slow, working to rule and sit-down strikes) fall within the scope of this principle; restrictions regarding these various types of strike action may be justified only if the strike ceases to be peaceful.²³

(iii) The Trade Unions Ordinance should be amended in order to expressly provide that any judicial intervention on the right to strike should be subject to the guarantees, limitation and principles set out Recommendation No.(i) and the scope of the right to strike should cover all actions described in Recommendation No.(ii).

Consistency with the ILO Constitution

10. Workers and trade unions should be entitled in legal processes to invoke provisions of the ILO supervisory bodies as established in the Constitution of the ILO.

Background: the role of supervisory bodies of the ILO has largely shaped the effective application of principles of ILO Conventions No. 87 and No. 98 in Sri Lanka. They have contributed immensely to the assertion of the right to freedom of association and collective bargaining and in making local laws and practices comply with essential benchmarks of the ILO.

²² 348th Report of the ILO on Committee on Freedom of Association, adopted by the Governing Body of the ILO at its 300th Session (Geneva, November 2007), paragraph 1141.

²³ Op. cit., para.1143.

However in 2007, the Supreme Court of Sri Lanka in the portworkers' union action case²⁴ which subsequently became the subject of the ILO Governing Body Committee on Freedom of Association Case,²⁵ held that “*The Unions have been registered under the laws of Sri Lanka and have no status except the recognition given to Unions by the laws of Sri Lanka. In the circumstances, whilst proceedings are pending in the highest Court of this country, the Unions should not seek redress from an external body*” The Supreme Court subsequently penalised unions by denying costs, citing the filing of an ILO Committee on Freedom of Association complaint as a reason.

This is clear proof of constitutional impediment and the existing lacuna in the statutory law. This also proves clearly that the highest court in the land has imposed express restrictions in seeking redress from ILO supervisory bodies in certain instances.

Standing strongly with the complainant unions the ILO Committee on Freedom of Association held “*that although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, the Committee has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [see Digest of decisions and principles of the Freedom of Association Committee, fifth edition, 2006, para. 30 of Annex 1]. The Committee, while bearing in mind the fact that certain matters raised in the complaint are currently pending before the courts, and while respecting the independence of the courts and due legal processes under way, shall therefore proceed with its examination of the case*”.²⁶

The ILO has very clearly endorsed the right of organisations of workers and employers to refer complaints to its supervisory bodies. Unfortunately the absence of any statutory provisions in this regard and the decision of the Supreme Court in the portworkers' union action case has imposed restrictions amounting to penal sanctions as evident in the said case.

²⁴ SC Application No.248/2006.

²⁵ Case No.2519.

²⁶ 348th Report of the ILO on Committee on Freedom of Association, adopted by the Governing Body of the ILO at its 300th Session (Geneva, November 2007), paragraph 1139.

Without specific provisions the right to invoke the provisions of ILO supervisory bodies in domestic law will remain weak and serve to deny workers' organisations the protection of those procedures of the ILO.

Recommendation: the Trade Unions Ordinance should be amended to expressly provide for the right to invoke the provisions of the ILO supervisory process by organisations of workers and employers as set out in the Constitution of the ILO.

Summary of Benchmarks

Constitution

Achieving Constitutional Consistency

The Government must issue a statement urgently to clarify that full exercise of the rights recognised by ILO Conventions is consistent with the Constitution of Sri Lanka and that there is nothing in the Constitution of Sri Lanka that can be construed so as to impede the full exercise of the rights recognised by international labour Conventions ratified by the State.

Statutory Laws and practices

Restrictions on the Public Sector

1. Restrictions on the rights of public officers to join organisations of their own choosing should be removed, consistent with the requirements of ILO standards.

Union certification procedures for the purpose of collective bargaining

2. Introduction of a four week time period to conclude the holding of all union certification polls and giving effect to interconnected polling procedures.
3. Lowering the 40 per cent threshold for compulsory recognition of trade unions and enabling joint claims of unions for recognition for the purpose of collective bargaining.

Anti-union discrimination

4. The adoption of statutory measures to enable trade unions to have direct access to the courts in order to have their complaints on unfair labour practices/anti-union discrimination examined by the judicial authorities.
5. Adoption of necessary changes to the Industrial Disputes Act, clearly specifying a fixed maximum period of time for the Department of Labour to institute action before the Magistrate's Court on complaints of Unfair Labour Practices/Anti-Union Discrimination.
6. Strengthening the law on anti-union discrimination/unfair labour practices.

7. Increasing the fine for contraventions of provisions concerning anti-union discrimination to a degree that would result in creating a dissuasive character in the law.

Compulsory arbitration

8. Introduction of an amendment to the Industrial Disputes Act to guarantee that the reference of labour disputes to compulsory arbitration is done only at the request of both parties to the dispute.

Restrictions on the right to strike

9. The introduction of new amendments to the Trade Unions Ordinance which set out clearly the instances in which the right to strike that is recognised by this statute can be restricted in keeping with the requirements laid down by the recommendations of the ILO Governing Body Committee on Freedom of Association Case No. 2519 on Sri Lanka.

Consistency with the ILO Constitution

10. Workers and trade unions should be entitled in legal processes to invoke provisions of the ILO supervisory bodies as established in the Constitution of the ILO.

Appendix I

Freedom of Association and Protection of the Right to Organise Convention (No.87), 1948

Freedom of Association and Protection of the
Right to Organise Convention (No.87), 1948

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at its Second Session, endorsed these principles and requested the International Labour Organisation to continue every effort in order that it may be possible to adopt one or several international Conventions;

adopts this ninth day of July of the year one thousand nine hundred and forty-eight the following Convention, which may be cited as the Freedom of Association and Protection of the Right to Organise Convention, 1948:

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

PART III. MISCELLANEOUS PROVISIONS

Article 12

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946, other than the territories referred to in paragraphs 4 and 5 of the said article as so amended, each Member of the Organisation which ratifies this Convention shall communicate to the Director-General of the International Labour Office with or as soon as possible after its ratification a declaration stating:

- a) the territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;
- b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 13

1. Where the subject-matter of this Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory may, in agreement with the government of the territory, communicate to the Director-General of the International Labour Office a declaration accepting on behalf of the territory the obligations of this Convention.

2. A declaration accepting the obligations of this Convention may be communicated to the Director-General of the International Labour Office:

a) by two or more Members of the Organisation in respect of any territory which is under their joint authority; or

b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

3. Declarations communicated to the Director-General of the International Labour Office in accordance with the preceding paragraphs of this Article shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration

indicates that the provisions of the Convention will be applied subject to modifications it shall give details of the said modifications.

4. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

5. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

PART IV. FINAL PROVISIONS

Article 14

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 16

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this

Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 17

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 18

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 19

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 20

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 21

The English and French versions of the text of this Convention are equally authoritative.

Appendix II

Right to Organise and Collective
Bargaining Convention (No.98),
1949

Right to Organise and Collective Bargaining Convention (No.98), 1949

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention,

adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Right to Organise and Collective Bargaining Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to--
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate --

- a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
- b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
- c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
- d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 10

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or

subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 14

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.

Chapter 3

GSP Plus and the ICCPR: A critical appraisal of the official position of Sri Lanka in respect of compliance requirements

Rohan Edrisinha & Asanga Welikala*

a. Introduction

A vigorous public debate over the continued enjoyment by Sri Lanka of the benefits under the General System of Preferences scheme (Special Incentives Arrangement for Sustainable Development and Good Governance) of the European Union has been going on in the media and other fora for about two years now. More popularly known as the 'GSP Plus' (or 'GSP+') scheme, the EU's tariff relief scheme for deserving countries which comply with identified international standards has considerable implications for the Sri Lankan export sector, in particular, the apparel industry. Sri Lanka has enjoyed the benefits of the scheme for several years, and the scheme was last extended following the tsunami of December 2004. Sri Lanka's beneficiary status is up for renewal again in late 2008. The economic impact of GSP Plus in relation to Sri Lanka is discussed elsewhere in this publication. This chapter focuses on the state of compliance of the Government of Sri Lanka with the International Covenant on Civil and Political Rights (ICCPR), as a condition precedent to the continued qualification of Sri Lanka for the GSP Plus scheme.

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One of the requirements to qualify for the GSP Plus scheme of tariff relief is that the beneficiary country is placed under a general obligation to 'ratify and fully implement' the international conventions listed in Annex III of the European Council Regulation (EC) No. 980/2005 of 27th June 2005, which sets out the scheme of generalised tariff preferences. One of the key human rights instruments listed under Part A of Annex III of the Regulation is the ICCPR.

In the context especially of escalating armed conflict since 2006, the deterioration of the legal and political climate relating to human rights protection has attracted international attention. More specifically, the decision of the Supreme Court in the case of *Singarasa v. Attorney General* (S.C. Spl. (LA) No. 182/99; SCM 15th September 2006) holding that while the accession of Sri Lanka to the ICCPR was legal, valid, and bound the State at international law, it created no additional rights as recognised in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation, proved to be hugely controversial. The Supreme Court in that case also went on to hold that the accession to the First Optional Protocol to the ICCPR, which allows individuals to address complaints of violations of ICCPR rights to the Human Rights Committee, was invalid and unconstitutional.

While the First Optional Protocol to the ICCPR is not one of the instruments that is included as a requirement of the GSP Plus scheme, the Supreme Court's opinion that the ICCPR itself created no justiciable rights under Sri Lankan domestic law raised questions as to whether, in the light of this decision, Sri Lanka could be considered as having not only ratified, but also fully implemented the ICCPR, so as to re-qualify for GSP Plus in 2008. It should be noted at the outset that under international law, the ICCPR and its First Optional Protocol are two separate treaties, and the GSP Plus framework only obliges a beneficiary country to ratify and fully implement the ICCPR.

In response, the Government of Sri Lanka adopted several measures. In addition to an intensified campaign of diplomatic lobbying, the specific legal measures the Government adopted in order to meet the criticisms of the *Singarasa* judgment were two-fold. Firstly, it enacted a piece of legislation called the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, to purportedly give effect to the rights recognised by the ICCPR at domestic law that were not already recognised by the Constitution or by existing law.

Secondly, the Government engaged the consultative jurisdiction of the Supreme Court under Article 129 (1) of the Constitution and sought an Advisory Opinion from the Court as to the extent of compliance of the Sri Lankan Constitution and law with the rights contained in the ICCPR. Article 129 provides, *inter alia*, that '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 as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report its opinion to the President thereon.' The Supreme Court communicated its Advisory Opinion to the Government in March 2008, following a hearing in which the Attorney General as well as several intervenient petitioners were allowed by the Court to make oral and written submissions.

It has become clear, however, that the Government would not initiate any constitutional amendment to give effect either to the ICCPR within Sri Lanka, or to facilitate access to the UN Human Rights Committee in the light of the Supreme Court's declaration that the accession to the First Optional Protocol was unconstitutional.

This chapter is a critical discussion of the ICCPR Act, the Advisory Opinion of the Supreme Court, and most importantly, the Annexure to the Advisory Opinion (entitled 'Reference under Article 129 – SC 01/2008: Legislatives [*sic*] Compliance with the ICCPR') that lists the provisions of the Sri Lankan Constitution and law on the basis of which the Supreme Court arrived at the main conclusion that the Sri Lankan Constitution and law are in compliance with and give recognition to the rights established by the ICCPR.

The chapter is structured in five parts, including this introduction. In Part B, we outline our general observations on the overarching issues and considerations that apply to an attempt to enact the ICCPR into domestic law and to ensure that rights recognised by the ICCPR are meaningfully and effectively made available to individuals within the territory and subject to the jurisdiction of Sri Lanka. Part C is a critical review of the Supreme Court's Advisory Opinion. In Part D, we comment on the specific provisions of the Sri Lankan Constitution and law that are suggested by

the Government, with the concurrence of the Supreme Court in the Annexure to its Advisory Opinion, as being in compliance with and giving effect to certain of the rights recognised by the ICCPR. Finally, Part E contains a set of brief conclusions.

For convenience of reference, unless otherwise indicated or the context so requires, the ICCPR Act, No. 56 of 2007 will be referred to in this chapter as the 'ICCPR Act'; the Supreme Court's Advisory Opinion under Article 129 in SC Ref. 01/2008 will be referred to as the 'ICCPR Advisory Opinion'; and the Annexure to the ICCPR Advisory Opinion as the 'Annexure to the ICCPR Advisory Opinion.'

b. General Observations

General Obligations undertaken by Sri Lanka upon accession to the ICCPR

Part II of the ICCPR comprising Articles 2, 3, 4 and 5 set out the general nature of the obligations undertaken by State Parties in respect of the substantive rights contained in Part III and certain other provisions. These important provisions, establishing the foundation upon which substantive civil and political rights are to be protected, secured, promoted and enjoyed, relate to matters such as equality of treatment and the prohibition of negative discrimination on any basis; to undertake legislative and other measures to give effect to ICCPR rights; to ensure access to competent courts for the vindication of such rights; and for effective administrative implementation of remedies.

Moreover, there are procedural and substantive controls established for the invocation of derogations from treaty obligations during a state of national emergency, including official proclamation and communication to the Secretary General of the United Nations; for requirements such as necessity and proportionality of derogating measures; and an enumeration of rights from which there can be no derogation under any circumstances.

Finally there is provision to ensure that there is no activity that is aimed at the destruction of rights recognised by the ICCPR, and to allow the constitutional orders of individual States to provide for fundamental human rights the scope and nature of which may exceed the rights recognised by the ICCPR, or be subject to restrictions less stringent than the limitations recognised by the ICCPR.

In our view, there is no comparably coherent legal basis for the recognition and protection of fundamental human rights under the Constitution, the recent ICCPR Act, or the ordinary laws of Sri Lanka. In fact, the constitutional framework for the protection of fundamental rights is weak for a number of reasons more fully set out below, and some of the legal provisions advanced by the Government of Sri Lanka, and endorsed by the Supreme Court as being in fulfilment of ICCPR rights are considerably inadequate for meaningful fulfilment, and in some cases have no relation to the apposite right. Consequently, we are of the view that the Government's fulfilment of undertakings upon accession to the ICCPR is incomplete and inconsistent with the letter and spirit of what is contemplated by the ICCPR.

Article 16 of the Constitution: Validation of laws inconsistent with Fundamental Rights and the Constitution

One of the key criticisms about the constitutional provision for the protection of fundamental rights in Sri Lanka relates to Article 16 of the Constitution. This provision, which is incongruously part of the chapter on fundamental rights (Chapter III), states that all existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights declared and recognised by the Constitution (Article 16 (1)). By ensuring the continuation in force of existing laws inconsistent with constitutionally declared fundamental rights, this provision undermines not merely the protection of the limited number of fundamental rights that are in fact recognised by the Constitution, but also undermines the principle of constitutional supremacy.

In practical terms this means, for example, that provisions of the criminal law (the Penal Code of 1889), or provisions in laws on land and succession to land that are discriminatory against women, remain legally valid even though these provisions may be inconsistent with the bill of rights in the Constitution. It also makes it impossible to challenge the constitutionality of these outdated legal provisions in the courts on the ground that they are inconsistent with the present Constitution. Therefore such laws or legal provisions remain legally valid and operative even though they may be inconsistent with the bill of rights in the Constitution.

We note that Part II of the ICCPR outlined above is intended to deal with precisely this kind of anomaly within the constitutional systems and political processes of

ICCPR State Parties and to ensure uniform and consistent protection of civil and political rights. In the absence therefore of a comparably coherent legal basis, and the continuation in force of Article 16, it is difficult to conclude that Sri Lanka has fulfilled the undertaking to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR. It follows from this whether the Government has successfully met the EU criteria for the GSP Plus scheme in respect of not only ratification but also full implementation of the ICCPR.

The need for constitutional amendments for giving full effect to the ICCPR regime

We would also argue that the most appropriate method of full implementation of ICCPR rights is through appropriate amendments to the Constitution, not only in the enumeration of ICCPR rights at domestic law, but also to enhance the scope of those ICCPR rights which are in principle recognised by the Sri Lankan Constitution and law through the more progressive textual formulations found in the ICCPR (including in the framework for restrictions where permissible), as well as to extinguish anomalies such as Article 16. The Government appears to have resolved that constitutional amendment is not necessary at this stage, inevitably raising questions as to the depth of its commitment to ensuring meaningful availability of ICCPR rights within Sri Lanka.

A further point in this regard pertains to the First Optional Protocol to the ICCPR, which allows individual complaints to be communicated to the treaty body, the Human Rights Committee at Geneva. This was a salutary right of access to an international forum through which internationally recognised rights could be protected and upheld, and it will be recalled that several important communications were submitted by authors from Sri Lanka since 1998 in which the Committee had occasion to uphold such complaints in cases where the Sri Lankan judicial and administrative protection of ICCPR rights were found to be inadequate. We have already noted how the Supreme Court has in the case of *Singarasa v. Attorney General* (2006) held that the accession to the First Optional Protocol by Sri Lanka was invalid and unconstitutional. If the Government is bound by the reasoning of the Supreme Court in this case, but is nonetheless committed to ensuring access to the international enforcement machinery of the ICCPR in the form of the Human Rights Committee, then it is incumbent on the Government to promulgate an amendment

to the Constitution to ensure access to the Human Rights Committee. It is now quite clear that the Government has no intention of doing so.

Use of Directive Principles of State Policy

We also note that the Government and the Annexure to the ICCPR Advisory Opinion make reference to the Directive Principles of State Policy set out in Article 27 of the Constitution in claiming implementation of ICCPR provisions. It is difficult to regard Article 27 as implementing any aspect of the ICCPR, as the principles set out therein are directory, and not mandatory, guidelines for the making of policy and law by Parliament and the President and Cabinet of Ministers.

Article 29 of the Constitution provides emphatically that these principles are merely aspirational and not justiciable, and do not confer or impose legal rights or obligations, are not enforceable in any court or tribunal, and no question of inconsistency with such principles shall be raised in any court or tribunal. Consequently, there has been extremely sparse judicial use of these principles in Sri Lanka, and it is doubtful in the extreme the extent to which successive governments have regarded themselves as being guided, let alone bound by these principles in law and policy making. In these circumstances, the contention that Article 27 is in fulfilment of such peremptory principles of international human rights law as are contained in the ICCPR is, to the say the least, tenuous.

Textual Formulation and Scope of Rights including Framework for Enforcement and Restrictions

Subject to the specific comments set out in relation to discrete ICCPR rights and purportedly corresponding provisions of the Sri Lankan Constitution and law below, we would make some preliminary observations of a general nature with regard to the textual formulation and contemplated scope of rights as between the ICCPR and domestic law.

In general, the number of civil and political rights recognised by the ICCPR and the nature and extent of their reach are formulated in terms that are far more progressive and facilitative of full realisation and enjoyment than the chapter on fundamental rights of the Sri Lankan Constitution, or indeed the wholly inadequate new ICCPR Act of 2007. It goes without saying that many of the provisions of ordinary law cited

by the Government do not have regard to the human rights protection implications of the ICCPR.

Viewed against international best practice in the design and structure of constitutional bills of rights aimed at guaranteeing, protecting and promoting human rights, the Sri Lankan bill of rights is incomplete and structurally incoherent. The lack of a coherently conceptualised theory underpinning the Constitution that seeks to maximise the enjoyment of human rights by Sri Lankans makes hermeneutical interpretation of the bill of rights as a whole difficult. This is reflected in the fundamental rights jurisprudence of the Supreme Court over the last three decades.

This lack of theoretical coherence in the Supreme Court's fundamental rights case law is also partly due to its role as a court of first instance in respect of fundamental rights, rather than as a constitutional court that enunciates general principles in the interpretation of the bill of rights. A major drawback of having the Supreme Court as the court of first instance is that there can be no further appeals from its determinations. In terms of Article 126 of the Constitution, the Supreme Court has exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental rights set out in Chapter III of the Constitution or any language rights set out in Chapter IV. In addition to the observation above, other limitations of Article 126 relate to the coverage only of violations by executive or administrative action. This excludes legislative and judicial action as well as the horizontal application of the bill of rights to private actors. While the requirement of *locus standi* has in general been liberalised over the years to facilitate access rather than technicality, this also suffers from a lack of conceptual coherence in the Supreme Court's jurisprudence.

It is not clear from the text of Chapter III the basis on which the fundamental rights selected for inclusion were chosen, the order in which they appear was determined, or why certain textual formulations were adopted when more liberal options were available. The three instruments of the International Bill of Rights, *viz.*, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) had been well-established in international law by the time the

Constitution was drafted in 1977 – 78, as had other regional instruments such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950). These could have provided useful guidance in designing the bill of rights, but apart from some textual evidence that the drafters drew from the UDHR and ICCPR, it is clear the design and drafting was informed by political considerations other than a principled pursuit of human rights protection and promotion. The right to life for example is not recognised in the bill of rights. The result is that the bill of rights resembles a randomly cherry-picked cluster of inchoate rights that cannot at the conceptual level amount to a proper bill of rights compatible with modern expectations.

Thus, for example, temporary policy considerations that were relevant at the time of drafting find incongruous expression in the fundamental rights chapter such as where Articles 13 (7) and 14 (2) deal with citizenship policy concerning the categories of persons falling under the Indo-Ceylon Agreement (Implementation) Act No. 14 of 1967.

The absence of a proper rationalisation of constitutional values is evident elsewhere in the fundamental rights chapter as well, as we have already noted in relation to Article 16, which is wholly inconsistent with constitutionalism and the central object of a constitutional bill of rights when it validates all existing law notwithstanding inconsistency with fundamental rights.

Perhaps the most serious structural weakness of the bill of rights is in relation to the way it deals with restrictions, especially in states of emergency when fundamental rights are most vulnerable and therefore require strong constitutional protection and regulation of governmental action. The provision on permissible restrictions is Article 15, which is not only an example of the incoherence of the chapter of which it is a part, but from the perspective of human rights protection, it is also the weakest provision in the chapter.

An elementary safeguard in human rights instruments including the ICCPR is the distinction made between 'limitations' and 'derogations.' This is in recognition that some human rights may legitimately be limited in their enjoyment and exercise, and that in exceptional circumstances such as states of emergency, some rights may require to be temporarily suspended. From the recognition of these necessities and

the consequent distinction between limitations and derogations flow a set of detailed rules that govern the substantive and procedural dimensions of limitations and derogations, including the constitutional enumeration of absolutely non-derogable rights.

Similar to the ICCPR, the Sri Lankan chapter on fundamental rights adopts an older approach in the design of bills of rights, which involves attaching restrictions based on different justifications to specific rights. Article 15 employs the term 'restrictions' and in its enumeration of permissible restrictions encompasses both limitations (e.g. restrictions for the protection of the rights of others) and derogations (i.e., restrictions based on national security).

However, the Sri Lankan bill of rights does not follow the ICCPR in expressly setting out a list of non-derogable rights. These are identified by implication: Article 10 (freedom of thought and conscience), Article 11 (prohibition of torture), Article 13 (3) (right to be heard at a fair trial by a competent court, with or without legal representation) and Article 13 (4) (right to due process and fair trial prior to imposition of punishment, but excluding pre-trial detention) are not subject to any restriction by Article 15, and are thereby to be considered absolute rights.

It is to be further noted that the rights which are not susceptible to restriction under the Constitution are not as extensive as those provided for by the ICCPR Article 4 (2), and more significantly, are also inconsistent with ICCPR standards in terms of the content of protection. For example, whereas Article 4 (2) recognises the Article 15 prohibition of retroactive criminal liability as a non-derogable right under the ICCPR, Article 15 (1) of the Constitution permits restrictions on the apposite prohibition in Article 13 in the interests of national security. Likewise, the substantive controls of necessity and proportionality in relation to any attempted restriction strongly established by Article 4 (1) of the ICCPR are nowhere to be found in the Sri Lankan Constitution.

The effectiveness of a bill of rights is assessed not only in terms of the list of the rights enumerated therein but also, very importantly, in the light of the restriction or limitation clause which sets out how such rights may be curtailed. Most restriction clauses including that contained in the ICCPR have a requirement that the restrictions be reasonable or necessary thereby introducing an objective

proportionality requirement. The Sri Lankan Constitution does not include a reasonableness requirement in its restriction clause thereby providing the political branches of government with considerable latitude with respect to the Imposition of restrictions on rights. Though the Supreme Court has in some cases by interpretation imposed a reasonableness requirement, this has proved *ad hoc* and has not introduced change that is general and universally applicable.

The only procedural safeguard provided by Article 15 of the Constitution for the imposition of restrictions on fundamental rights is that they are required to be prescribed by law, which includes emergency regulations having an overriding effect over ordinary legislation. It is to be noted that even in older instruments such as the ICCPR, restrictions have to meet requirements other than prescription by law and includes higher thresholds of substantive justification such a necessity in a democratic society and proportionality. While reference is made in Article 15 (7) to 'the just requirements of the general welfare of a democratic society', this is set out as a separate ground of restriction rather than as an inherent justificatory requirement of restrictions that are aimed at securing national security and other aims.

Furthermore, the omnibus nature of Article 15 (7) has the effect of undermining many of the limits on permitted restrictions enumerated in its other sub-sections. Thus it permits restrictions as may be prescribed by law (which includes emergency regulations) in the interests of national security, public order and the protection of public health and morality, for recognition of the rights of others, and for meeting the just requirements of the general welfare of a democratic society, on the following fundamental rights: the right to equality (Article 12), key rights of personal liberty (Article 13 (1) and (2)), and the entirety of Article 14, which includes *inter alia* the freedoms of expression, assembly, association, occupation and movement.

A final point to note in respect of restrictions on fundamental rights permitted under the Sri Lankan Constitution is with regard to emergency regulations having the quality of law, and overriding the provisions of any ordinary law. Emergency regulations are executive-made law under the provisions of the Public Security Ordinance and Chapter XVIII of the Constitution, both as amended from time to time. States of emergency during which these presidential powers of law-making come into operation have been more the norm than the exception in Sri Lanka during the past thirty years. Abuse and excess of authority through the use of

emergency regulations under successive governments have been extensive and well documented. Successive Presidents have promulgated emergency regulations that have had little bearing on national security or the maintenance of essential supplies, or that are overbroad in terms of their scope. The escalation of armed conflict during the past several months has made this a particular concern of the present, and in a time of crisis when fundamental human rights are most vulnerable, there can be very little confidence that emergency regulations will not be made which are in effect not in derogation of international human rights standards as protected by the ICCPR. For example, the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 1474/5 of 6th December 2006, currently in force, have been widely criticised as inconsistent with international human rights standards including those relating to the freedoms of expression, movement and association, yet continue to be in force.

Omissions and Problematic Features of the ICCPR Act, No. 56 of 2007

The stated official position of the Government of Sri Lanka is premised on the argument that the Sri Lankan constitutional and legal system is substantially in conformity with the rights recognised by the ICCPR, which has, in our view unfortunately, been endorsed by the Supreme Court in its ICCPR Advisory Opinion. The ICCPR Act is also premised on much the same footing. Its long title and preamble make clear that the Act is to give effect to certain articles of the ICCPR only, and that a substantial part of the civil and political rights referred to in the ICCPR have been already given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament. This is in fact not the case, as demonstrated by our general comments above, and specific observations to follow.

The ICCPR Act contains only four main substantive rights-conferring provisions in sections 2, 4, 5 and 6: viz., the right to be recognised as a person before the law; entitlements of alleged offenders to legal assistance, interpreter and safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively. These provisions are formulated in terms substantially and significantly different from the corresponding provisions of the ICCPR.

Section 4 corresponds to the ICCPR provisions of Article 14 (2), (3), (5), and (7) but without Article 14 (3) (c), which establishes a minimum guarantee to be tried without undue delay in criminal trials; or Article 14 (1), (4), and (6), which includes the presumption of innocence in criminal trials and investigations. These omissions are presumably for the reason that the issues they concern are addressed by other Sri Lankan constitutional and statutory provisions.

Reiterating the concern we have raised before, this approach results in a considerable divergence of standards of human rights protection as between domestic Sri Lankan law and the ICCPR. For example, the presumption of innocence until proved guilty according to law is expressed as an absolute right in Article 14 (2) ICCPR, whereas in the apposite Article 13 (5) of the Sri Lankan Constitution, the presumption is subject to a proviso that the burden of proving particular facts may by law be placed on an accused, and moreover, Article 15 (1) permits the presumption to be overturned by law including emergency regulations in the interests of national security.

Section 6 corresponds with Article 25 ICCPR but does not mention the prohibition on racial discrimination or unreasonable restrictions that must govern the right to participate in public affairs either directly or through freely elected representatives, and to access services provided by the State to the public. Section 6 (2) states that the expression 'conduct of public affairs' shall not include the conduct of any affairs which are entrusted exclusively to any particular authority by or under any law, which is not a curtailment contemplated by Article 25 of the ICCPR. Crucially and inexplicably, section 6 does not incorporate Article 25 (b).

We would further point out that the constitutional framework as a whole does not facilitate public participation in law or policy-making. Despite constitutional provisions that declare that sovereignty is in the people, constitutional provisions with respect to law and policy-making and the Establishments Code consisting of the rules and regulations of the public service in the country, deny public engagement in the process. Draft legislation is not made available to the public for public comment, legislation is often labeled as urgent in the national interest and enacted within a few days, there is no requirement that emergency regulations are accessible to the public and generally, the public does not know in advance what Bills will be presented in Parliament.

The Act also contains an elaborate provision, section 3, prohibiting the propagation of war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and which is now made a cognizable and non-bailable offence. The purpose of section 3 appears to be to give effect to Article 20 of the ICCPR. There can arise a tension between this provision of the ICCPR and its Article 19, relating to the freedom of expression. The latter right is formulated in the ICCPR in wider terms than the corresponding right to speech in Article 14 (1) (a) of the Sri Lankan Constitution, to include the right to hold opinions without interference, to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice. Therefore the restriction on freedom of expression contained in Article 20 ICCPR must be read in the textual context of Article 19 ICCPR, whereas section 3 of the Sri Lankan ICCPR Act has no corresponding constitutional framework governing the freedom of expression in Article 14 (1) (a) of the Constitution, that can deliver the appropriate balance between the freedom of expression and the need to prohibit speech promoting war and communal hatred.

With respect, Article 20 of the ICCPR is hardly the most important provision therein, and it is even questionable to what extent it enjoys the legal quality of a fundamental human right. In this context, it is noteworthy that the Government should be so concerned to enact this provision in the broadest possible terms, including through the establishment of an offence, punishment, and trial procedure, when indeed there are far more important provisions from the perspective of fundamental human rights that ought to have engaged the Government's more pertinent attention.

These divergences in the respective formulations and standards of human rights protection reflected as between the ICCPR and the Sri Lankan ICCPR Act, and indeed other constitutional and statutory provisions, are in addition to significant omissions, such as the right to self-determination which constitutes Article 1 and Part I, common to the ICCPR and the ICESCR. While the Government have gone to considerable trouble to enumerate provisions of domestic law that are purportedly in conformity with many other ICCPR provisions, we note that the Government's position as endorsed by the ICCPR Advisory Opinion is that the right to self-determination requires no specific legislative or constitutional recognition, on the

basis of a highly outdated political position on the right to self-determination (reflected in UN Resolution 2625) which holds that the right is exhausted once colonies achieve independence, and which does not take into account much of the policy and scholarly debates on this issue over the past several decades.

Likewise, the right to privacy is established in forceful terms by Article 17 of the ICCPR. The Government has not claimed that this important fundamental right is constitutionally recognised in Sri Lanka, and has instead alluded to various common law and statutory provisions. This is a matter of serious concern, given that intelligence and covert operations in the context of escalating conflict are often conducted extra-legally in Sri Lanka, and without any judicial protection being afforded against the abuse or arbitrary use of powers in the absence of a constitutional right to privacy. Moreover, cordon and search operations and *en masse* detentions that have recently become common, purportedly in the exercise of emergency powers and / or anti-terrorism legislation, and having the effect of discriminatory treatment and violation of the fundamental rights of ethnic minorities, would be more difficult to execute, had a right to privacy in terms recognised by the ICCPR been established by the Constitution.

In sum, the position of the Government and of the Supreme Court is that the fundamental rights chapter of the Constitution, the ICCPR Act and various other provisions of domestic law, including judicial decisions, substantially give effect to the provisions of the ICCPR. We are unable to agree that this constitutes a systematic and coherent approach to giving effect to the ICCPR within Sri Lanka, and that this means individuals will have meaningful access to these critical rights. To the extent the existing provisions of Sri Lankan law give effect to provisions of the ICCPR as claimed by the Government, their location in a multiplicity of laws as well as widely different procedures of enforcement (i.e., in some cases by the Supreme Court, in others through the High Court in the exercise of criminal and civil jurisdiction, and still others presumably through the District Courts) would serve to defeat the purposes of human rights protection through confusion and unnecessary complication. In any event, the unprincipled selectivity which characterises this attitude is certainly inappropriate to the task of implementing an international instrument as fundamental as the ICCPR.

Burgeoning Rule of Law Crisis

We would make a final comment about the sense of crisis that currently pervades the Rule of Law and human rights protection in Sri Lanka. The escalation in armed conflict, exemplified by the abrogation of the Ceasefire Agreement in January 2008, has featured over the past few years a marked increase in extra-judicial killings, abductions, clampdown on dissent and democratic freedoms, and the consolidation of a culture of impunity.

Furthermore the Rajapakse Administration has since 2005 embarked on a systematic and consistent campaign to undermine the Seventeenth Amendment introduced to promote good governance, the depoliticisation of key institutions and the rule of law. The President has not only not appointed members to the independent Constitutional Council that is charged under the Constitution to either recommend or approve of nominees to independent Commissions, but also unilaterally and in direct violation of the Constitution appointed persons to various offices and the independent commissions. Judges of the appellate courts, members of the Human Rights Commission and other important commissions have therefore been appointed in recent years in violation of the Constitution.

In this context, the meaningful implementation of the rights recognised by the ICCPR assumes critical importance, including the right of access to the Human Rights Committee. For reasons outlined in this chapter, we do not believe that the current approach to doing so would have any real impact on strengthened human rights protection or good governance in the sense of the policy objectives of the EU set out in the European Council Regulation (EC) No. 980/2005 of 27th June 2005, and would therefore call for a more systematic response from the Government to the full implementation of the ICCPR in a way that can inspire public confidence in democratic institutions and in the Government's commitment to these objectives.

c. The Supreme Court's ICCPR Advisory Opinion

General Observations on the Article 129 Reference on the ICCPR

As observed at the outset, in March 2008, the President submitted a reference under Article 129 (1) of the Constitution to obtain the opinion of the Supreme Court on two questions of law. As reproduced in the Court's Advisory Opinion these were as follows (at p.2; see Appendix I to this chapter for a reproduction of the opinion):

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to civil and political rights in the International Covenant on Civil and Political Rights (ICCPR) of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?
2. Whether the said rights recognised in the Covenant are justiciable through the medium of legal and constitutional process prevailing in Sri Lanka?

Four intervenient petitioners, viz., the Centre for Policy Alternatives (CPA), Rohan Edrisinha, Lal Wijenayake, and the Legal Aid Commission, were permitted by Court to make submissions. Since under the terms of Article 129 intervenient petitions will not be heard as of right, it was positive that the Supreme Court allowed intervenient petitioners to make submissions in this matter of major public importance. The single day hearing was held on 17th March 2008, although with respect to the Court, a strong argument can be made that the array of issues raised by the two questions in the presidential reference, as the present discussion amply demonstrates, justified a longer and more deliberative hearing.

Moreover, Article 129 (1) only requires that opinions on a reference made under it be reported to the President, and it has generally been the practice that unless made informally available, such opinions are not made public. We wish to observe at once that we find this to be wholly unsatisfactory, in that this provision, together with Article 129 (4) which provides that every proceeding under Article 129 (1) shall be held in private unless the Court for special reasons directs otherwise, are grounded in a culture of governmental secrecy and convenience at odds with such

requirements of modern notions of participatory democracy as transparency and accountability of the governmental decision-making process. This is especially so with regard to judicial determinations and consequent executive policy and decision-making so clearly requiring public participation and open debate as the implementation of the ICCPR within domestic jurisdiction.

The Unpublished Annexure to the ICCPR Advisory Opinion

By some mysterious process, the ICCPR Advisory Opinion was published in the press (*The Nation*, 30th March 2008; *Daily Mirror*, 31st March 2008), but significantly, without the schedule of legal provisions which was alluded to in the opinion in the following terms: “On the basis of the submissions of the Additional Solicitor General, the observations of Court and submissions of other counsel, for purposes of clarity a comprehensive schedule annexed hereto was prepared with two columns. The column on the left gives the particular Article of the Covenant and the column on the right gives the legislative compliance within Sri Lanka and the relevant pronouncements made by the Supreme Court and the other Courts to further strengthen the guarantee of rights recognised in the Covenant” (at p.5).

The fact that this schedule (i.e., the Annexure to the ICCPR Advisory Opinion), which is critical to any informed debate about the Court's reasoning was not disclosed, although the Advisory Opinion itself seemed to have been the subject of a convenient institutional seepage, adds particular credence to the point made above with regard to transparency and open government. What is the competing policy consideration that requires the Annexure, which constitutes the actual pith and substance of the Supreme Court's opinion – to the effect that the Sri Lankan legal system is in compliance with the human rights standards protected by the ICCPR – be shielded from public scrutiny other than to protect both the Government and the Court from critique and open debate? We would keenly reject the notion that foreclosing such critique and debate is legitimate in a democracy.

Since the Annexure was not made publicly available, it was difficult for some time to assess the Supreme Court's claims in respect of the compliance of Sri Lankan law with the ICCPR, until we were opportunely able to secure a copy confidentially. Unfortunately, however, the treatment of ICCPR Articles 13 and 14 (1) and (2) are missing in the copy of the document we were able to obtain, and consequently, we

are unable to offer any comment in these respects. We have reproduced this document as Appendix II to this chapter. While it bears some resemblance to earlier documents produced by the Attorney General's Department for the purposes of negotiations with the European institutions on GSP Plus (which were also not made public), and especially those parts dealing with the ICCPR in Annex 'A' to the *National Report of the Government of Sri Lanka to the Human Rights Council for the Universal Periodic Review (2008)* (which is a public document available electronically from the Office of the High Commissioner for Human Rights at http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/SRI_SRI_UPR_S2_2008_SRILANKA_uprsubmission.pdf), the Annexure to the ICCPR Advisory Opinion reflects a more elaborate exposition of the Sri Lankan constitutional and legal provisions and case law than its predecessors.

The part of the Advisory Opinion that was published in the press only dealt with the Court's inadequate and disappointing reasoning in rejecting the arguments of three of the intervenient petitioners: CPA, Wijenayake, and Edrisinha. The Supreme Court dismissed all of the submissions on several specific matters made by counsel for the intervenient petitioners, mainly on the ground that many of these submissions were based on hypotheses. The Court came to the conclusion that "...the legislative measures referred to in the communication of...the President dated 4.3.2008 and the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the Covenant" and "that the aforesaid rights recognised in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka." (at p.13)

It is difficult to agree with the Supreme Court given that the opinion did not contain a full and reasoned basis on which its conclusions can be defended. For example, in relation to the ICCPR Act No. 56 of 2007, the Court confined itself to reiterating the claims made in the preamble – which together with the title, as noted earlier, is a total misnomer given the substance of the Act – and did not consider the fact that the ICCPR Act contains only four main substantive rights-conferring provisions in Sections 2, 4, 5 and 6 (*viz.*, the right to be recognised as a person before the law;

entitlements of alleged offenders to legal assistance, interpreter and safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively), and that these provisions are formulated in terms substantially and significantly different from the corresponding provisions of the ICCPR.

Given that none of the fundamental issues relating to the recognition of ICCPR rights at domestic law were given any serious judicial consideration and settlement, it is to be expected that this debate will continue. For our part, we would wish to draw attention to the following matters.

The Arguments of Interventient Petitioners and the Reasoning of the Supreme Court in the ICCPR Advisory Opinion

As required by Article 129 (3), the matter was heard by a five-judge panel of the Supreme Court including the Chief Justice. The bench comprised Silva CJ, and Amaratunga, Marsoof, Somawansa, and Balapatabendi, JJ.

In its introductory remarks, the Court observed that at the time of Sri Lanka's accession to the ICCPR on 11th June 1980, "...the currently operative Constitution was in force as the Supreme law of the Republic" and further that, "As stated in the Preamble to the Covenant the rights recognised and enshrined therein stem from the Universal Declaration of Human Rights. We have to state as a basic premise that the fundamental rights declared and recognised in Chap. III of the Constitution are based on the Universal Declaration of Human Rights" (at p.3).

The assertions that the preamble to the ICCPR makes reference to the UDHR, and that at least some of the fundamental rights recognised by Chapter III of the Sri Lankan Constitution relate to apposite provisions of the UDHR are, of course, undeniable. However, by itself, this observation has very little value to the judicial exercise the Court was asked to perform by the presidential reference, which was to determine the extent of compliance of the Sri Lankan legal system with the ICCPR. Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were drafted as necessary legal elaborations, in the form of rights, of the broad declaratory principles of the UDHR, and the task before the Court was not to discover the provenance of the rights recognised by either the ICCPR or the Sri Lankan Constitution, but to establish the number, form, nature, and scope of civil

and political rights presently recognised by the Sri Lankan Constitution and law, and further to determine, through a process of adjudicatory reasoning, whether those formulations complied with the standard of protection afforded by the specific formulations of those rights in the ICCPR.

The Court also observed that Article 3 of the Constitution states that in the Republic of Sri Lanka sovereignty is in the people, that sovereignty includes fundamental rights, and that Article 4 (d) stipulates that all organs of government have a duty of respecting, securing and advancing constitutionally recognised fundamental rights, which cannot be restricted save in the manner set out in the Constitution. In the Court's view, this is "...a unique feature of the Constitution which entrenches fundamental rights as part of the inalienable Sovereignty of the People. Thus the fundamental rights acquire a higher status as forming part of the Supreme Law of the land..." (at p.4).

Once again, this is not a concern that has direct relevance to the question at hand, which is essentially one of evaluation between what is provided by the ICCPR and what is recognised by the Sri Lankan Constitution and law. While of course the constitutional injunctions in Articles 3 and 4 (d) are salutary, the real question arising out of the reference in this regard is whether the Sri Lankan constitutional foundation for the protection of fundamental rights set out therein conforms with the requirements set out in Part II of the ICCPR. As discussed above, we do not believe this to be the case.

The Court described the constitutional framework for the enforcement of fundamental rights set out in Articles 118 (b) and 126 of the Constitution, and observed how the Supreme Court had expanded the scope of protection: "The Court has permitted public interest litigation covering matters that transcend the infringement of fundamental rights. Directions have been issued in connection with matters of general importance as to liberty, personal security and administrative action connected with a wide array of matters that impact on the natural environment, particularly with regard to water, air and noise pollution" (at p.4).

While we do agree, and in most cases, welcome the fact that the Supreme Court has displayed a progressive attitude on the question of *locus standi*, and further that in some cases judicial development of fundamental rights has indeed taken place, we

do not regard this as the same thing as the full textual elaboration of fundamental human rights in the constitutional instrument itself. Our specific concerns with regard to the scope of civil and political rights that are in fact available and justiciable under the Sri Lankan Constitution and the law are more fully set out in Part D of this chapter.

The Court also opined that, “It has to be emphasised in this connection that Parliament enacted special legislation titled 'International Covenant on Civil and Political Rights (ICCPR) Act No. 56/2007 to give legislative recognition in respect of certain residual rights and matters in the Covenant that have not been appropriately contained in the Constitution and other operative laws. The preamble to the said Act states as follows:

AND WHEREAS a substantial part of the civil and political rights referred to in that Covenant have been given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament.

AND WHEREAS it has become necessary for the Government of Sri Lanka to enact appropriate legislation to give effect to those civil and political rights referred to in the aforesaid Covenant, for which no adequate legislative recognition has yet been granted” (at pp.5-6).

The Court concluded that, “This enactment has been made by the Parliament of Sri Lanka in compliance with the obligation as contained in Article 2.2 of the Covenant, which requires a State Party to 'adopt such law or other measures as may be necessary to give effect to the rights recognised in the Covenant'” (at p.6).

This was the sum total of the Supreme Court's examination of the ICCPR Act and of the fundamental issues of international and constitutional law engaged by Article 2 (2) of the ICCPR. In the light of the concerns we have raised earlier in this discussion, it is not only deeply disappointing, but also astonishing that this was the Court's casual attitude with respect to a matter of such fundamental importance.

The Court concluded its preliminary remarks with the observation that it has, “...in several decided cases relied on the provisions of the Covenant to give a purposive meaning to the provisions of the Constitution and other applicable law so as to ensure to the People that they have an effective remedy in respect of any alleged infringement of rights recognised by the Constitution” (p.6).

While it is no doubt true that in some occasions the Supreme Court has indeed made reference to the ICCPR in especially fundamental rights decisions, we would reiterate here our general observation above about the nature of the body of fundamental rights case law over the past three decades. Because the Supreme Court sits as a court of first instance, and because the attitudes of particular benches vary widely, it is often difficult to determine broad precedent-based trends in the Supreme Court's fundamental rights jurisprudence as in apex courts that function as constitutional arbiters in such matters elsewhere. Consequently, the fact that some judges have utilised the ICCPR in their reasoning does not necessarily mean that a future court would always follow suit. In any event, we would strenuously argue that while judicial incorporation of international human rights norms is entirely to be welcomed, it is certainly not the same thing as constitutional incorporation and the spirit of solemn commitment envisaged by Article 2 (2) of the ICCPR.

The Court remarked that 'Counsel for the Intervient Respondents did not detract from the general premise' (at p.6) as discussed above. Presumably, this was for the reason that they approached the questions in the reference from an angle very different to that of the Court, and the Court's adoption of the Government's 'general premise' was not necessarily a matter that required contestation in view of the more salient submissions they wished to focus on, within the course of the hearing of a few hours.

The Court then went on to 'briefly deal' (at p.6) with the submissions of the intervenient petitioners, the major portion of which was devoted to dealing with the submissions on 'seven specific matters' by the third intervenient petitioner, Wijenayake, represented by Dr. Jayampathy Wickremaratne, PC. The Court dealt with the submissions of the first and second intervenient petitioners, CPA and Edrisinha represented by Mr. M.A. Sumanthiran within this framework, and his submissions on the right to self-determination separately at the end. It should be noted here that there is a mismatch between the 'seven specific matters' set out in the written submissions of Dr. Wickremaratne, and the seven submissions as discussed by the Court. The mismatch occurs when the Court deals separately (as submissions 4 and 5 respectively) with the submission on pre-enactment review being inconsistent with ICCPR Article 2 (3) on the one hand, and on the other, an argument that committee-stage amendments to parliamentary bills are not susceptible to

judicial review. In fact, in Dr. Wickremaratne's written submissions, the argument about judicial review of committee-stage amendments is part of the broader submission that pre-enactment review in law and practice does not afford an 'effective remedy' within the contemplation of ICCPR Article 2 (3). The resulting position is that the Court in its opinion does not deal with Dr. Wickremaratne's actual seventh submission relating to the death penalty on minors at all.

In this part of the discussion we shall only comment on the Court's responses to the submissions of counsel for the intervenient petitioners, and will further comment on the specific provisions of the ICCPR, the Sri Lankan Constitution and law, as part of our discussion on the Annexure to the ICCPR Advisory Opinion in Part D of this chapter, below.

Prohibition of Retroactive Criminal Liability

Article 15 (1) read with Article 13 (5) and (6) of the Constitution are inconsistent with ICCPR Article 15 (1), which is a guarantee that is non-derogable in terms of ICCPR Article 4 (2) (It should also be noted that there is a mistake in the text of the opinion with respect to ICCPR Article 4 (2), which sets out the non-derogable provisions, when the text refers to 'Article 42', which concerns the Inter-State reporting procedure. This is clearly inadvertent and contrary to context, and we should proceed on the basis that the Supreme Court meant ICCPR Article 4 (2).

The essence of the submission was that the prohibition against retroactive criminal liability, which is established in absolute and non-derogable terms by the ICCPR, is subject to restriction by law (which includes emergency regulations made by the executive) under the Sri Lankan Constitution in the interests of national security whereas the ICCPR admits no restriction on this guarantee. This made the Sri Lankan constitutional provision inconsistent with the ICCPR.

The Court's response was as follows: "When questioned by Court Dr. Wickremaratne was unable to point to any specific instance where a law has been enacted by the Parliament of Sri Lanka or any Regulation has been promulgated in the interests of national security to created [sic] an ex post facto offence. In the circumstances we are of the opinion that the submission of Dr. Wickremaratne is based on a hypothetical premise" (at p.7).

The Court regarded it as sufficient for the purposes of consistency with the ICCPR standard that “If and when a law is sought to be made to create an ex post facto offence, the constitutionality of that law would be considered by this Court on the basis of the firm guarantee as contained in the Article 13 (6) [of the Constitution]....In the case of *Weerawansa v. Attorney General* (2000) 1 SLR 387, this Court has specifically held that Sri Lanka is a party to the Covenant and a person deprived of liberty has a right of access to the judiciary” (at p.7).

Thus the Court's position was that if any future law or emergency regulation made under Article 15 (1) of the Constitution sought to introduce retroactive criminal liability, the Supreme Court would interpret the guarantee against such liability to be found in Article 13 (6) of the Constitution to prevail over such law. This finding is problematic for three reasons. Firstly, the Court does not seem to be aware that in constitutional democracies, constitutional construction and adjudication is very often undertaken on the basis of hypotheses and the prospective consequences of measures. Indeed, it would seem that the framework for pre-enactment judicial review of legislation in the Sri Lankan Constitution itself envisages that constitutional argumentation necessarily anticipates future events. In this context, the Court's dismissive allusion to 'hypotheses' is misplaced.

Secondly, given the structure and text of the fundamental rights chapter, it would strain any notion of judicial construction for a future Supreme Court to come to a finding in the way the present Court asserts it will. Article 13 (6) sets out in the form of a fundamental right the prohibition against retroactive criminal liability (subject to certain provisos). Article 15 is the restrictions clause of the Sri Lankan bill of rights, which enumerates the type of restriction which may be imposed upon fundamental rights identified therein. The essential purpose of Article 15 therefore is to establish the permissible grounds on which incursions into fundamental rights may be made, and moreover, it must be presumed on a plain reading of the provisions that the Constitution envisages the prohibition in Article 13 (6) to be removed in the interests of national security. While an activist Court may very well act in the manner described in the present Advisory Opinion, it is not the same thing as the cast iron guarantee to be found in the ICCPR which entertains no limitations or derogations from the prohibition even in a state of emergency.

The third concern arises directly out of the second, in that the approach of the Court relies too much on the goodwill of a future Court, and is inconsistent with the first principles of constitutional supremacy whereby fundamental rights guarantees are to be enshrined in the text of legal instruments and not on the predilections of officials even if they are judges. For these reasons, we cannot agree with the opinion of the Court that Article 15 (1) of the Constitution is consistent with ICCPR Article 15 read with Article 4 (2).

Article 16 of the Constitution

The submission was that Article 16 (1) of the Constitution which allows the continuation in force of pre-existing law notwithstanding inconsistency with fundamental rights, ensured the continuing validity of certain personal laws. Mr. M.A. Sumanthiran representing the first and second intervenient petitioners, CPA and Edrisinha, submitted that certain provisions of these laws discriminate against women. The Court observed that, “The matters on which submissions were made do not relate to any state action affecting rights of person [sic]. The instance of alleged discrimination is in personal Family law” (at p.8).

Noting that Article 27 of the ICCPR provided for the cultural, religious and linguistic rights in States with ethnic, religious or linguistic minorities, the Court observed that, “These are customary and special laws that are deeply seated in the social milieu of the country...In our view it could not be contended that the provisions of Article 16 (1) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women [sic]. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law” (at p.8).

This of course is an old, familiar and yet disingenuous argument about Article 16, that it is essential for protecting the integrity of Sri Lanka’s customary and personal laws (i.e., Kandyen law, *Thesawalamai* and Muslim law). But we would point out that if this was the need, then Article 16 could easily be reformulated more narrowly to capture only these laws within its scope rather than all existing law, even if

inconsistent with the Constitution. Article 16 protects ALL law from constitutional scrutiny not merely the personal laws of the country. The Supreme Court offered no justification or response to the intervenients' submissions that such a sweeping protection of existing law that may be inconsistent with the bill of rights was unacceptable.

The Court in its consideration of ICCPR Article 27 also did not give adequate weight to the principle of non-discrimination which is established in Part II of the ICCPR and which applies to both rights and limitations provided in Part III. This ensures that Article 27 of the ICCPR does not operate so as to facilitate sexual or other form of discrimination on the basis of any ethnic, cultural, religious, or linguistic particularity. Moreover, the Court's assertion that 'The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws' is untenable in the face of the fact that by its accession, Sri Lanka is bound by the human rights standards established by the ICCPR.

Presidential Immunity

The submission was that the immunity from suit granted to the President of the Republic *qua* Head of State under Article 35 (1) was inconsistent with ICCPR Article 2 (3) which requires that an effective remedy is available to persons whose rights have been violated. While this immunity does not apply to acts of the President in a ministerial capacity under Article 44 (2), to impeachment proceedings under Article 129 (2), or to proceedings under Article 130 relating to a Presidential election petition, the Supreme Court has also held in *Karunathilaka v Dayananda Dissanayake* (No. 1) (1999) 1 SLR 157 that Article 35 is a shield only for the doer but not for the act. Where a person relies on an act done by the President in order to justify his own conduct, Article 35 does not shield that conduct.

However, Dr. Wickremaratne argued, an order made by the President cannot be impugned when no such other person is involved. For example, an order made by the President under emergency regulations cannot be the subject of a fundamental rights application (*Satyapala v. Attorney General*, SC Application No.40/84, SCM 11th May 1984; *Mallikarachchi v. Shiva Pasupati* (1985) 1 SLR 74). The resulting position is that where an act or omission of the President results in the infringement of a person's right, such person cannot take proceedings against the President in view of Article 35.

However, ICCPR Article 2 (3) requires the State Party to ensure that there is an effective remedy for persons whose rights or freedoms under the ICCPR are violated. Dr. Wickremaratne therefore 'submitted that Article 35 of the Constitution is inconsistent with ICCPR Article 2 (3) to the extent that the former shuts out judicial review of official acts of the President that are violative of a person's rights' (*vide* written submissions on behalf of the third intervenient petitioner).

The Court observed that in *Mallikarachchi v. Shiva Pasupati* (1985) the Supreme Court had stated that immunity for Heads of State was not unique to Sri Lanka, and that immunity ceases when the incumbent leaves office. The Additional Solicitor General, the Court noted, furnished Court with several instances where the former President was impleaded in pending actions, whereas Dr. Wickremaratne, the Court said, "...was unable to point to any instance where a person aggrieved of an infringement of any of his rights has been denied a remedy in view of the immunity granted to the Head of State by Article 35 (1) of the Constitution" (at p.9).

Indeed, in a landmark decision handed down on 8th October 2008, the Supreme Court has held the previous President liable for abuse of power in respect of an impugned alienation of State land and ordered her to pay compensation (*Mendis and Senanayake v. Chandrika Bandaranaike Kumaratunga and Others* (2008) SCM 8th October 2008). The Supreme Court has now it seems clearly established that once the holder of the office of President relinquishes office s/he may be made a party to legal proceedings with respects to acts and omissions while in office.

Furthermore in a fundamental rights application which has cited the present President as a respondent for failing to constitute the Constitutional Council under the Seventeenth Amendment to the Constitution, notwithstanding the *prima facie* application of the immunity clause due to the fact that the President in this instance was acting *qua* President, the Supreme Court has issued notice on the President.

Judicial Review of Legislation

Dr. Wickremaratne made lengthy submissions both written and oral on this issue. Article 80 (3) of the Constitution precludes any challenge to the constitutionality of legislation post-enactment, even if the impugned law is manifestly unconstitutional or inconsistent with fundamental rights, which results in the denial of an effective

remedy to those affected as required by ICCPR Article 2 (3). Although Article 121 (1) of the Constitution read with Article 123 enables pre-enactment review, for various reasons including the short time period of one week within which challenges are allowed by the Constitution, and the lack of effective access to information relating to the legislative process which enables citizens' exercise of the right to challenge a proposed law in practice, including the fact that committee-stage amendments to parliamentary bills are not susceptible to judicial scrutiny at all, the "Submission of Dr. Wickremaratne was that this provision is not an effective window to review constitutionality of legislation" (at p.10).

The Court's response, however, was remarkably simplistic. It held, "It is to be noted that there is no provision in the Covenant which mandates judicial review of legislation. Article 2 (3) of the Covenant...provides that the State should ensure that any person whose rights or freedom are violated have an effective remedy through a competent judicial authority. The submission is hypothetical since it is based on the premise that there will be a Law enacted by Parliament in derogation of the rights recognised in the Covenant and it would not be challenged by any citizen before this Court prior to enactment" (at p.10).

Apart from the Court's peculiar aversion to 'hypotheses' already mentioned, and which refuses to acknowledge that pre-enactment review is in practice hindered by closed and secretive law and policy-making processes in Sri Lanka, this cavalier assertion (for it cannot be called reasoning) is a radical, if not flippant, departure from one of the best-known and well-entrenched principles of constitutionalism. This principle is that entrenching fundamental rights in a supreme constitution requires that all ordinary laws and governmental conduct to be consistent with the constitution, and further that any inconsistency must be judicially reviewable at any time and be struck down where necessary. The drafters of the ICCPR had this clearly in contemplation as part of the legal mechanisms within a State Party that could ensure an 'effective remedy' within the meaning of Article 2 (3), not least for the reason that the principle had been well established in both the common law and civilian legal traditions of the world.

The Court's dismissal of the 'hypothesis' that Parliament will enact law that could be unconstitutional and inconsistent with ICCPR rights (and without pre-enactment review being engaged) is plainly untenable, given that there is in fact legislation and

even constitutional amendments that would, at the least, require justification as to consistency with the Constitution both substantively and procedurally. Dr. Wickremaratne's example was the Land Grants (Special Provisions) Act. Another example is the provisions of the Seventeenth Amendment to the Constitution which altered the powers of the National Police Commission, established at law previously by the Thirteenth Amendment as an intrinsic element of a scheme of devolution, that should have only been enacted through a special amendment procedure involving consultation and consent of Provincial Councils. That procedure was not followed, and there was no pre-enactment review which settled the balance between the fundamental constitutional principles of devolution and ensuring the independence of public institutions.

In the best traditions of the Bar, Dr. Wickremaratne's written submissions placed before the Court the main argument made in some quarters against allowing post-

enactment review, the generation of uncertainty, but suggested the manner in which this could be mitigated through the examples of constitutional provisions and judicial doctrines developed elsewhere. The Court did not engage with this part of his submissions at all.

Judicial Review of Committee-stage Amendments to Bills

As noted earlier, the submission in this respect was that committee-stage amendments to parliamentary bills are not subject to judicial review, and the only requirement under Article 77 (2) of the Constitution is that the Attorney General, in practice an officer of the Attorney General's Department present in Parliament, certifies constitutionality to the Speaker. The Court's view was that, "...amendments are generally made at Committee Stage in Parliament with regard to matters of incidental or procedural nature" (at p.10) and then merely went on to reiterate the provisions of Article 77 (2).

As mentioned before, this particular submission was made as a part of the broader argument about the need for comprehensive judicial review for compliance with ICCPR Article 2 (3), and not as a separate submission as reflected in the Advisory Opinion. For reasons best known to itself the Court chose to regard it as a separate submission, and then merely rejected it by simply reiterating the constitutional provision upon which the submission was made. The court chose not to deal with

the intervenient petitioners' main submission on the issue of the constitutional prohibition of judicial review of legislation- that it failed to effectively protect the supremacy of the constitution, ensure that all legislation was compatible with the the bill of rights, and therefore undermined the full and effective implementation of rights recognised in the ICCPR.

Prohibition on Imprisonment for Failure to fulfil Contractual Obligations

Both Dr. Wickremaratne and Mr. Sumanthiran submitted that certain provisions of the Agrarian Services Act, No. 58 of 1979 (as amended), the Co-operative Society Law, No. 05 of 1972, and the Civil Procedure Code provide for imprisonment for failing to fulfil a contractual obligation, in contravention of ICCPR Article 11 which prohibits the imposition of the punishment of a term of imprisonment solely for failure to fulfil a contractual obligation.

In respect of the Agrarian Services Act and the Co-operative Society Law, the Court agreed with the highly technical distinction between statutory and common law obligations made by the Additional Solicitor General, observing that under these two statutes, "...penal sanction would not attach to pure contractual obligations but to statutory obligations" (at p.11). However, the submission was to the effect that a non-derogable guarantee similar to ICCPR Article 11 was nowhere to be found in the Sri Lankan Constitution and law, and in these circumstances, Parliament was free to enact legislation in a manner inconsistent with ICCPR Article 11 in future, i.e., to punish by way of imprisonment the failure to perform a contract. Once again therefore, the Court did not directly address the submission.

Moreover, in the opinion of the Court, "Arrest and imprisonment is provided for in Section 298 of the Civil Procedure Code only in respect of a judgment debt, where there are circumstances that establish an intent to defraud and so on. Hence the instances cited by Counsel do not amount to an inconsistency with Article 11 of the Covenant" (at p.11). Our specific observations on this issue are made in the commentary on the Annexure to the ICCPR Advisory Opinion, below.

Procedure for the Removal of Superior Court Judges

The submission was that Article 107 (3) of the Constitution requires Parliament to provide, *inter alia*, for the investigation and proof of the alleged misbehaviour or

incapacity and the right of the judge concerned to appear and to be heard, by law or by Standing Orders, and further that under Standing Order 78A of Parliament, the investigation of the alleged misbehaviour or incapacity would be conducted by a Select Committee of Parliament. In this context, it was argued that a framework that allows the investigation of allegations against judges by Members of Parliament affects the independence of the judiciary and is thus inconsistent with ICCPR Article 14 (1), which entitles a person to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Dr. Wickremaratne further submitted that, “The Treaty Body of the ICCPR, namely, the Human Rights Committee in its concluding observations on Sri Lanka made on 01.12.2003 (CCPR/CO/79/LKA) expressed concern that the procedure for the removal of Judges of the Supreme Court and the Court of Appeal set out in Article 107 of the Constitution, read with Standing Orders of Parliament, is incompatible with Article 14 of the ICCPR, in that it allows Parliament to exercise considerable control over the procedure for removal of Judges. The Committee recommended that the independence of the Judiciary be strengthened by providing for Judicial, rather than Parliamentary, supervision and discipline of judicial conduct. A copy of the said observations is annexed (Annex II). Paragraph 16 is the relevant paragraph.” (*vide* written submissions on behalf of the third intervenient petitioner).

While the Court found that this submission had 'merit' and that “...the process of impeachment of Superior Court Judges can be held like a sword of democles [*sic*] over incumbent Judges who would be placed in peril of an inquiry to be held within Parliament by a Panel consisting of Members of Parliament”, it felt nonetheless that “...this by itself does not amount to an inconsistency with Article 14 of the Covenant which mandates equality before the courts of law and fair and public hearing by [a] competent, independent and impartial tribunal” (at p.11).

We note that both Article 107 and Standing Order 78A, in addition to the concluding observations of the Human Rights Committee reproduced above, have long been the focus of critical attention because together they fall far short of international standards and best practice with regard to ensuring the independence of the judiciary. It is also interesting, if not wholly surprising given the present Court's hostility to the recognition of the competence of the Human Rights Committee in the *Singarasa Case*, to note that the Supreme Court made no reference at all to the views

of the ICCPR treaty body in coming to its conclusion on this specific submission. Nonetheless, it is noteworthy that the views of the Human Rights Committee adduced by the Government in support of the claim that no legislative enactment was necessary in respect of the right to self-determination recognised by ICCPR Article 1, were uncritically adopted by the Court in its Annexure to the ICCPR Advisory Opinion (see below).

Prohibition on the Death Penalty for Minors

As mentioned at the outset, Dr. Wickremaratne's seventh specific submission, for whatever reason, escaped the attention of the Court and consequently finds no consideration in the Advisory Opinion. For the sake of completeness, we reproduce the relevant submission here.

“VII. Article 6(5) of the ICCPR – Death penalty not to be imposed for crimes committed by persons below 18 years of age – Section 281 of the Code of Criminal Procedure

1. Section 281 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 52 of 1980 states as follows:

“Where any person convicted of an offence punishable with death, appears to the court to be under the age of eighteen years, the court shall pronounce on that person in lieu of the sentence of death the sentence provided by section 53 of the Penal Code.”

- 2 . Thus, it is the age of the offender at the time of the pronouncement of sentence and not the age at the time of the commission of the offence that is material.
- 3 . The provision is also discriminatory and arbitrary. Where a person commits an offence punishable with death at a time when the person is less than 18 years of age but is convicted before the person attains the age of 18 years, death penalty cannot be imposed. But, if the trial had been delayed for reasons beyond the person's control and the person is convicted at a time when he/she is over 18 years of age, death penalty can be imposed.

4 . Article 6(5) of the ICCPR is in the following terms:

“Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

There are no permissible restrictions and the above provision is non-derogable.

5 . In the matter of *Johnson v Jamaica*, Application No. 592/1994, the Human Rights Committee held that the imposition of death sentence on a person who was under 18 years of age at the time of the commission of the offence but over 18 year at the time of the imposition of death sentence, was a violation of Article 6(5) of the ICCPR. Since the imposition of death sentence was void *ab initio*, it was further held that his detention on death row constituted a violation of Article 7 of the ICCPR (Freedom from torture or cruel, inhuman or degrading treatment or punishment). Pages 144 and 145 of M. Novak's *U.N. Covenant on Civil and Political Rights, CCPR Commentary* which refers to the case are annexed (Annex III).

6 . It is respectfully submitted that the Sri Lankan law on the matter is inconsistent with Article 6(5) of the ICCPR.”

Right to Self-Determination

The submission of Mr. Sumanthiran in this regard was that there is no specific constitutional or statutory recognition in Sri Lanka to give effect to the right to self-determination recognised by Article 1 of the ICCPR.

The Court dealt with this in the following manner: “The Additional Solicitor general quite correctly submitted that the right to self determination does not require enforcement through legislative means, as established by the Human Rights Committee. This position is fortified by the Declaration of Principles of International Law contained in United Nations General Assembly Resolution 2625 (XV). Referring to the phrase 'All people' in Article 1 of the Covenant Mr. Sumanthiran submitted that there should be statutory recognition of what he described as 'internal self determination'...We have to note that in terms of

Article 3 of the Constitution 'in the Republic of Sri Lanka sovereignty is in the People and is inalienable'. This sovereignty is reposed in the People as a whole and it cannot be contended that any group or part of the totality of People should have a separate right of self determination" (at p.12).

It is extremely disappointing that this complex question was disposed of with such brevity by the Court (relying on an unspecified opinion of the Human Rights Committee), given that the submission availed it of the opportunity to make a far-reaching pronouncement. Moreover, despite the wealth of scholarship and comparative constitutional experiences to draw from, the Court ostensibly regards the concepts of sovereignty and self-determination as one and the same thing. Therefore an opportunity to engage in a comprehensive judicial discussion that could have contributed to the ongoing debate on these fundamental questions within Sri Lanka was, we strongly believe, dissipated. The best example of what the Court could have done is the celebrated Advisory Opinion of the Supreme Court of Canada on the question of the secession of Quebec, on a reference by the Governor General.

d. Specific Comments on Constitutional and Legal Provisions Adduced in Support of Compliance with the ICCPR

In this part, we offer a commentary on the relationship between the Sri Lankan constitutional and statutory provisions which were submitted by Government, and endorsed by the Supreme Court, as being in conformity and effective of discrete ICCPR provisions. These comments, which are confined to the issues which in our opinion require comment, should be construed and understood in the light of the broader general observations and commentary on the Supreme Court's ICCPR Advisory Opinion set out above. We also make reference to those ICCPR provisions which are either not dealt with or dealt with inadequately by the Sri Lankan Constitution and law. For convenience of reference, we reproduce a breakdown of the provisions of the Sri Lankan Constitution and law mentioned in the Annexure to the ICCPR Advisory Opinion before specific comments on each provision of the ICCPR. As already stated, the Annexure itself is reproduced as Appendix II to this chapter.

ICCPR Article 1

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 1	Unspecified view of the Human Rights Committee that Article 1 does not require specific domestic legislative incorporation
	UNGA Resolution 2625
	Constitution of Sri Lanka, 1978: Articles 3; 4

Commentary: We are unable to offer a concrete response with regard to the assertion in the Annexure that 'As established by the Human Rights Committee under the ICCPR, the right to self determination does not require enforcement through legislative means' due to the fact that there is no specific reference(s) for this claim.

The Annexure also claims that, 'However Sri Lanka's consistent position has been that the concept applies only in a decolonization context and cannot be applied or be interpreted in a manner prejudicial to the sovereignty and territorial integrity of an Independent State. This position is fortified by the Declaration of Principles of International Law contained in UNGA Resolution 2625 (XXV)'.

The position that the right to self-determination is exhausted once former colonies have achieved independence, and drawing upon a Cold War-era UNGA resolution (better known as the 'Friendly Relations Resolution') to buttress this position is, in our view, an unduly restrictive and regressive policy. This is especially so given the fact that Sri Lanka has faced fundamental constitutional problems leading to armed conflict on ethnicity-based claims to self-determination, which would require a more open attitude to the developments in international law, policy, and practice, as well as the massive scholarly literature and debates in the post-Cold War world order in relation to the concept of self-determination, where the sanctity of the principles contained in the Friendly Relations Declaration encounters increasing scepticism in the light of more recent international political developments.

It is further claimed that Articles 3 and 4 of the Constitution vest sovereignty in the people, which while textually unassailable does not answer the question, in the context of violent conflict, as to how the collective right to self-determination has been successfully implemented by Sri Lanka. We would also note that while the concepts of sovereignty and self-determination are closely related, they are not the same.

ICCPR Articles 2, 3

ICCPR	Annexure to the ICCPR Advisory Opinion
Articles 2, 3	Constitution of Sri Lanka, 1978: Articles 12 (1), (2), (3); 27; 126
	Parliamentary Commissioner for Administration Act, No.17 of 1981 as amended by Act No. 26 of 1994: Section 10
	Human Rights Commission of Sri Lanka Act, No. 22 of 1996: Sections 2, 10, 11, 14, 26
	Grant of Citizenship to Persons of Indian Origin Act, No. 35 of 2003: Section 2

Commentary: As discussed in detail in Part B of this chapter, ICCPR Articles 2 and 3 are pivotal provisions of the deeper legal foundation of the entire treaty regime comprising Part II of the ICCPR. They include the positive obligations undertaken by State Parties to the ICCPR, where not already provided for by existing legislative or other measures, to undertake the necessary steps, in accordance with the State's constitutional processes, to give effect to the ICCPR. For reasons already discussed, we are not of the opinion that the policy of the Government of Sri Lanka is in accordance or conformity with these provisions.

The provisions of the Constitution of Sri Lanka cited by the Annexure to the ICCPR Advisory Opinion relate to the right to equality, to the Supreme Court's fundamental rights jurisdiction, and to the Directive Principles of State Policy. We

have already set out the weaknesses of these constitutional provisions, especially in comparison to the scope and objectives of the framework of obligations set out in Part II of the ICCPR.

There is then reference to the functions of the Ombudsman. To the extent this has relevance for ICCPR Article 2 (3), it should be noted that there is no perceptible effect the office of the Ombudsman has had on good government and administration in Sri Lanka, despite efforts in 1994 to strengthen the legislative framework. We would in particular point to section 11 of the cited Act (as amended), which concerns matters not subject to investigations by the Ombudsman. These include *inter alia* the exercise, performance or discharge of any power, duty or function under the Public Security Ordinance (i.e., emergency powers), and functions of legal advisors to the State and its instrumentalities. The effectiveness of this office has been hampered by case overload and inefficiency, and following the non-implementation of the Seventeenth Amendment, appointments to this office would also become unconstitutional.

The latter concern with regard to appointments applies with even greater force to the Human Rights Commission of Sri Lanka. This institution has been undermined in the recent past through the concomitant enervation of the Seventeenth Amendment and has been almost entirely unable to perform its functions with the requisite independence, impartiality and despatch.

ICCPR Article 4

ICCPR	Annexure to ICCPR Advisory Opinion
Article 4	Constitution of Sri Lanka, 1978: Article 15 (7)

Commentary: We have already dealt extensively with the 'omnibus' nature of Article 15 (7) of the Constitution and how it serves to further undermine even the weak regime governing restrictions on fundamental rights. Therefore, the reference to Article 15 (7) of the Constitution in the Annexure to the ICCPR Advisory Opinion cannot be regarded as an adequate response to the comprehensive regulatory framework for derogations during states of emergency set out in Article 4 of the ICCPR. For reasons already discussed above,

the Sri Lankan constitutional and statutory framework for the restrictions of fundamental rights during states of emergency falls short of the substantive legal standards established by Article 4.

We would also wish to observe that compounding the inadequacy of the conceptual distinction between 'limitations' (to be understood as an attenuation, or a partial and temporary disability imposed on the exercise of a fundamental right) and 'derogations' (i.e., a temporary but complete suspension of some fundamental rights that may be allowed under states of emergency) in the constitutional text, is the practice with regard to promulgation and execution of emergency regulations, and the exercise of emergency powers in Sri Lanka. Officials at all levels, more often than not, do not have the training or capacity to exercise emergency powers in a manner that respects fundamental rights and, certainly, to appreciate the difference between rights that are merely restricted as opposed to suspended. In a state of emergency and escalating violence as in the present, the adverse consequences for human rights protection are immediate and considerable.

There is also no practice in Sri Lanka of formal communication to the Secretary General upon the operationalisation of derogations under a state of emergency. This is a critical omission.

ICCPR Article 5

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 5	'Imposes a Negative obligation'

Commentary: There is no mention in any domestic instrument of the provisions especially in Article 5 (2) whereby if the legal and constitutional order of a State Party allows greater scope for fundamental rights than the ICCPR, or more stringent control over their restriction than the ICCPR, nothing in the ICCPR shall be construed as a pretext for limiting such recognition or for broadening the scope of such restrictions. This is perhaps of limited relevance for Sri Lanka under the present constitutional dispensation, but is a salutary provision nonetheless. It is to be

presumed that the comment 'imposes a negative obligation' reflects the position of the Government that it is under no obligation to give legislative recognition to ICCPR Article 5, and with which we do not agree.

ICCPR Article 6

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 6 (1)	Constitution of Sri Lanka, 1978: Articles 11; 13 (4)
	<i>Sriani Silva v. Iddamalgoda</i> (2003) 2 SLR 63, 75-77
	SC (FR) 38/2007 (sound pollution) SC (FR) 89/2007 (air pollution) SC (FR) 81/2006 (salinity of water)
	Penal Code, 1889, as amended: Chapter XIV
Article 6 (2)	Penal Code, 1889, as amended: Murder
Article 6 (4)	Constitution of Sri Lanka, 1978: Article 34 (1)
	Code of Criminal Procedure Act, No. 15 of 1979: Section 312
Article 6 (5)	Penal Code, 1889, as amended: Sections 53, 54

Commentary: Article 6 of the ICCPR provides for the pivotal right to life in elaborate terms. It is specified as an absolutely non-derogable right in Article 4 (2) of the ICCPR. The right to life is not recognised by the Constitution of Sri Lanka. The death penalty remains on the statute book, and Sri Lanka is not a signatory to the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

The Annexure rightly draws attention to the important case of *Sriani Silva v. Iddamalgoda* (2003), in which the Supreme Court held that an implied right to life, unless the deprivation of life is consequent to a court order, may be inferred from Articles 13 (4) and 11 of the Constitution. As acknowledged above, such judicial development of the text of the Constitution in respect of fundamental rights must be welcomed, especially where they promote human rights. However, the point nevertheless remains that international best practice requires that a positive right to

life be recognised expressly in the Constitution, in like manner as ICCPR Article 6 (1). In its absence, there is nothing to prevent the decision in *Sriani Silva* being overturned by a future Court.

We find the various references to pending cases and the public health provisions of the Penal Code in support of the proposition that the 'quality of life has been improved by the Supreme Court' to be neither directly relevant nor particularly persuasive. The 'quality of life' on such matters as sound and air pollution or salinity of water is not the issue addressed by the right established by ICCPR Article 6 (1); it is the non-derogable (under ICCPR Article 4 (2)) recognition of the basic condition of human dignity that every human being has the inherent right to life. Furthermore, this right must be protected by law, and in international best practice, this means a constitutionally expressed and protected, non-derogable right.

We note that there is no reference in the Annexure to ICCPR Article 6 (3), which provides that when deprivation of life constitutes the crime of genocide, it is understood that nothing in ICCPR Article 6 authorises any State Party to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (to which Sri Lanka acceded on 12th October 1950). Similarly, there is no reference to the encouragement to the abolition of the death penalty in ICCPR Article 6 (6).

Article 34 (1) of the Constitution and Section 312 of the Code of Criminal Procedure are adduced in fulfilment of ICCPR Article 6 (4), which establishes that a person sentenced to death shall have the right to seek a pardon or commutation of the sentence. Article 34 (1) of the Constitution provides for the presidential discretion of a grant of pardon for any offender convicted of any offence or for commutation of sentence. Section 312 of the Code of Criminal Procedure provides that the President, may, without the consent of the person sentenced, commute any sentence of death, rigorous imprisonment or simple imprisonment. These provisions of the Sri Lankan Constitution and law, respectively, therefore concern an administrative discretion conferred on the President of the Republic, and is not addressed from the perspective of the person sentenced to death. *Per contra*, the material difference in ICCPR Article 6 (4) is that it establishes a non-derogable right for such a person to seek a pardon or commutation of such sentence.

ICCPR Article 7

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 7	Constitution of Sri Lanka, 1978: Article 11
	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994: Sections 2, 3

Commentary: Sri Lanka has both acceded and enacted into domestic law the UN Convention on Torture as mentioned in the Annexure to the ICCPR Advisory Opinion. In addition, Article 11 of the Constitution of Sri Lanka guarantees the freedom from torture, or cruel, inhuman or degrading punishment treatment or punishment as a justiciable fundamental right, which furthermore is not subject to any restriction on any basis under Article 15. This is consonant with this right being established as a non-derogable right under Article 4 (2) ICCPR.

However, a significant omission in the Sri Lankan Constitution and law is the particular prohibition in Article 7 of the ICCPR that no one shall be subjected without his free consent to medical or scientific experimentation. Moreover, the divergence between the letter of the law and the practice is significant, with credible reports of torture and physical abuse frequently documented by human rights groups (see inter alia detailed reports of the Asian Human Rights Commissions at <http://notorture.ahrchk.net/>) and UN bodies, including the UN Special Rapporteur on Torture (see Report of the Mission to Sri Lanka, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G08/111/35/PDF/G0811135.pdf?OpenElement>). As the respected columnist and attorney at law Kishali Pinto Jayawardene has pointed out, "It is now very clear that the Convention Against Torture and other Inhuman and Degrading Punishment Act No. 22 of 1994 (the CAT Act) has signally failed in its intent to bring about an improved deterrent regime in regard to practices of torture in Sri Lanka...As repeatedly pointed out in this column previously, Sri Lanka's High Courts have handed down only three convictions during the fourteen years of the CAT Act's

existence.” (see 'The Abject Failure of the CAT Act', The Sunday Times, 19th October 2008, available at:

<http://www.sundaytimes.lk/081019/Columns/focus.html>)

ICCPR Article 8

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 8	Abolition of Slavery Ordinance, No. 20 of 1844: Section 2

Commentary: While the aforementioned Ordinance has abolished the specific practice of slavery in Sri Lanka, Article 8 (2) of the ICCPR also mentions the prohibition of servitude, and Article 8 (3) establishes detailed requirements with regard to forced or compulsory labour in countries such as Sri Lanka, where imprisonment with hard labour is a criminal punishment. The prohibitions on slavery and servitude in Articles 8 (1) and (2) are non-derogable rights under Article 4 (2) of the ICCPR. Apart from the reference to servitude, therefore, it can be concluded that in principle, Sri Lankan law meets the ICCPR requirements.

ICCPR Article 9

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 9	Constitution of Sri Lanka, 1978: Articles 13 (1), (2), (3), (4)
	Code of Criminal Procedure Act, No. 15 of 1979, as amended: Sections 17, 23, 32-33, 37, 53, 54, Chapter XXXIV
	Civil Procedure Code: Section 298
	Bail Act, No. 30 of 1997: Sections 2, 4-5, 21

Commentary: The constitutional and procedural law provisions cited in the Annexure to the ICCPR Advisory Opinion *ex facie* correspond with Article 9 of the ICCPR (although we cannot see the relevance of Section 298 of the Civil Procedure

Code in this regard). We would emphasise the general point made above, however, that while the ICCPR does not contemplate specific limitations on the provisions of its Article 9, Article 15 of the Sri Lankan Constitution, in particular Article 15 (1) and (7) permits restrictions to be placed on critical rights to security and liberty of the person (Article 13 (1), (2), (5) and (6) of the Constitution) in favour of a wide array of competing interests including national security (see our general observations on the restrictions clause (Article 15 of the Constitution) in Part B, above), without the requisite substantive controls contemplated by the ICCPR.

In the case of restrictions imposed in the interests of national security, emergency regulations (i.e., executive law-making with what is in practice minimal parliamentary supervision) would have the quality of law overriding the procedural protections established by the Code of Criminal Procedure as well as any other law. This is an illustration of how ICCPR rights that seem superficially to be recognised by the Sri Lankan Constitution and law, prove on closer examination to contain a lesser standard of human rights protection than what is contemplated by the ICCPR.

ICCPR Article 10

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 10	Constitution of Sri Lanka, 1978: Article 11
	Human Rights Commission of Sri Lanka Act, No. 22 of 1996: Section 11(d)
Article 10 (2)	Code of Criminal Procedure Act, No 15 of 1979 as amended: Sections 24-30
	Subsidiary Legislation of General Application, Vol.1 (Cap.54): General Rules Relating to Prisons: pp.766-860 Rules 177-181: Rules as to separation and classification of prisoners Rules 190-216: Rules relating to unconvicted prisoners and civil prisoners

Commentary: We would reiterate the comments made above with regard to ICCPR Articles 7 and 9. The Annexure has cited Article 11 of the Constitution, which more properly corresponds with ICCPR Article 7, as compliance of ICCPR Article 10. The reason why the ICCPR has two discrete rights in its Articles 7 and 10 is that Article 7 is a general and non-derogable guarantee of the freedom from torture, whereas Article 10 relates more specifically to the humane treatment of persons deprived of their liberty.

Furthermore, we note that the reference in the Annexure to Section 11 (d) of the Human Rights Commission Act pertains to one of the powers of the Commission to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for improving their conditions of detention. This is most definitely not the same thing as what is contemplated by Article 10 of the ICCPR, which establishes a positive right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Such a positive right is not expressly recognised in the Sri Lankan legal provisions cited in the Annexure to the ICCPR Advisory Opinion.

There seems to be no connection bar the most tenuous between the cited provisions of the Code of Criminal Procedure and ICCPR Article 10 (2), which provides for such matters as segregation of accused persons from convicted persons in recognition of their unconvicted status, the segregation of juvenile accused from adults, and bringing juveniles as speedily as possible to adjudication. Chapter IV, Part A, of the Code of Criminal Procedure, within which Sections 24 – 30 are located, provides the rules for arrest generally, and more specifically in the cited sections, provisions concerning search of a place entered by a person sought to be arrested; procedure where ingress is not available; general powers of search of a person or place; search of an arrested person; power to break open doors and windows for purposes of liberation; prohibition against unnecessary restraint; and the mode of searching women. In these circumstances, we find it absurd that these legal provisions are advanced as complying with the requirements of ICCPR Article 10 (2).

Certain rules of secondary legislation relating to the treatment of prisoners are also cited in the Annexure. While these relate to the matters contemplated by ICCPR

Article 10 (2), we would strongly argue as a legal proposition that subordinate legislation cannot be advanced as implementing rights guaranteed by the ICCPR.

These are administrative rules that are susceptible to change and amendment at executive discretion, which are moreover, subject to practically nonexistent legislative oversight in Sri Lanka.

Finally, there is an injunction in ICCPR Article 10 (3) that in States Parties to the ICCPR, the fundamental policy objective and essential aim of the penitentiary system should be the reformation and social rehabilitation of prisoners. Such a normative principle does not find expression in the Sri Lankan Constitution and relevant laws.

ICCPR Article 11

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 11	'Imposes a negative obligation'
	Civil Procedure Code: Section 298

Commentary: We do not understand what is meant by the observation 'imposes a negative obligation' in the Annexure. To the extent it is contended that ICCPR Article 11 does not articulate a right, we would straightaway dispute the observation.

Section 298 of the Civil Procedure Code (implausibly cited by the Annexure to the ICCPR Advisory Opinion in relation to Article 9 ICCPR, see above) provides that, once a writ is issued for the execution of a decree for the payment of money, subject to certain conditions, a warrant for the arrest of a judgment-debtor may be issued by a competent court on the application of the judgment-creditor. But as we saw in the discussion on the ICCPR Advisory Opinion in Part B, above, the Supreme Court held with the Additional Solicitor General's submission that a distinction could be made between purely common law and statutory contractual obligations, and further, that Section 298 of the Civil Procedure Code was engaged only if, *inter alia*, intention to defraud was shown.

We would observe that ICCPR Article 11 does not make the Additional Solicitor General's (highly technical) distinction between 'purely common law' and

'statutory' contractual obligations, and also does not provide for an exception to the application of the right where intention to defraud is demonstrated. This seems therefore to be a domestic legal provision in contravention of Article 11 of the ICCPR, which is furthermore an absolutely non-derogable right under Article 4 (2) ICCPR.

ICCPR Article 12

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 12	Constitution of Sri Lanka, 1978: Articles 14 (1) (h), (i)
	<i>Rodrigo v. SI Kirulapone and Others</i> (2007) SC (FR) 297/07, SCM 3 rd December 2007
	<i>Somawansa and 205 Others v. Attorney General</i> (2006) SC Spl. 1-205/2006

Commentary: The constitutional provisions cited by the Annexure to the ICCPR Advisory Opinion correspond with Article 12 of the ICCPR. However, Article 14 (1) (i) of the Constitution only guarantees the right to return to Sri Lanka, whereas Article 12 (2) of the ICCPR also includes the freedom of a person to leave any country, including his own.

The limitations permitted by Article 12 (3) of the ICCPR on the rights of freedom of movement and choice of residence, and freedom of entry and return, are somewhat similar to the restrictions contemplated by the Sri Lankan Constitution in Article 15 (6) and (7) in respect of these rights, albeit with the following key differences. Firstly, the freedom of movement and choice of residence may be restricted under Article 15 (6) of the Constitution in the interests of the national economy, for which there is no corresponding provision in the ICCPR.

Secondly, the limitations clause of the ICCPR (Article 12 (3)) in respect of these rights mentions the concept of necessity, and consistency with other rights recognised by the ICCPR, as substantive requirements for the imposition of restrictions, whereas the Constitution of Sri Lanka does not explicitly mention the

term necessity, or any requirement of consistency with other rights. Elsewhere in this chapter we have pointed out that the concept of necessity as a mechanism of substantive control over restrictions on fundamental rights is absent in the text of the Sri Lankan Constitution.

Thirdly, Article 15 (7) of the Constitution introduces the 'just requirements of the general welfare of a democratic society' as a separate and distinct ground of restriction. There is no corresponding ground of restriction in Article 12 or in any other provision of the ICCPR. Indeed, where the concept of 'necessity in a democratic society' is employed by the ICCPR (for e.g. in Article 21), it is intended to serve as a restraint or control on the imposition of restrictions on fundamental rights through substantive official justification, rather than as a separate ground of restriction *per se*. We would stress the importance of the last observation as illustrating a critical difference in the scope of corresponding rights as formulated in the ICCPR and under the Sri Lankan Constitution. In this instance, as in many others, the ICCPR formulation of a right is broader, and restrictions more difficult to justify and impose, than in the case of the Sri Lankan Constitution.

In view of the fact that *Rodrigo v. SI Kirulapone and Others* (2007) has been referred to in the Annexure, we would like to reiterate an observation we make throughout this chapter with regard to the gap between the law and the practice in Sri Lanka. In this case, the Supreme Court held that permanent security roadblocks in the city of Colombo violated the fundamental right to freedom of movement, and issued an order that they must be removed. While this order was obeyed at first instance by the concerned authorities, within a short time the permanent security roadblocks were back in place. Thus an administrative measure continues in operation despite the Supreme Court having declared it to be in violation of fundamental rights. This naturally raises questions regarding the extent to which ICCPR human rights standards, even where they are reflected in the Sri Lankan Constitution and enforced by the Supreme Court, are in practice fully implemented.

ICCPR Article 13

Explanatory Note: As stated above, in the copy of the Annexure to the ICCPR Advisory Opinion that we have been able to obtain, the Government's response to

Article 13 of the ICCPR, which relates to rights of aliens lawfully within the territory of States Parties is missing. We would therefore not comment on this aspect.

ICCPR Article 14

Explanatory Note: In the copy of the Annexure to the ICCPR Advisory Opinion in our possession, the Government's response to ICCPR Articles 14 (1), 14 (2), 14 (3) (a), 14 (3) (b), 14 (3) (c), and 14 (3) (d) are missing. We do not propose therefore to extensively comment on these aspects, apart from draw attention to our discussion above with regard to the ICCPR Act in which we have dwelt on some of the issues included in ICCPR Article 14, and further to point to some of the provisions of the Sri Lankan Constitution that have a bearing on these rights.

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 14 (3) (e)	ICCPR Act, No. 56 of 2007: Section 4 (1) (d)
Article 14 (3) (f)	ICCPR Act, No. 56 of 2007: Section 4 (1) (e)
Article 14 (3) (g)	ICCPR Act, No. 56 of 2007: Section 4 (1) (f)
Article 14 (4)	ICCPR Act, No. 56 of 2007: Section 5 (1), (2)
Article 14 (5)	Constitution of Sri Lanka, 1978: Articles 127, 139
	Code of Criminal Procedure Act, No. 15 of 1979, as amended: Chapter XXVIII
	Judicature Act, No. 2 of 1979: Sections 14, 16
Article 14 (6)	Delictual liability for malicious prosecution
Article 14 (7)	Code of Criminal Procedure Act, No 15 of 1979: Chapter XXVII, Sections 314, 315

Commentary: Article 14 (3) (a) is part of the set of minimum guarantees ensured in full equality by the ICCPR for accused persons in criminal trials, and relates to the right to be informed promptly and in detail in a *language understood by the accused* of the nature and cause of the charge. Article 24 (2) of the Constitution provides that any party or applicant or legal representative may initiate proceedings and submit to court pleadings and other documents, and participate in the proceedings in court, in *either of the National Languages*, which in Sri Lanka are Sinhala and Tamil (Article 19). This is narrower than the ICCPR formulation.

Nevertheless, section 4 (1) (e) of the ICCPR Act states that a person charged of a criminal offence shall be entitled to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted. This seems to be less unequivocal than the commitment to status given to the two National Languages in respect of judicial proceedings established by Article 24 (2) of the Constitution. However, it is possible to construe the right contained in section 4 (1) (e) of the ICCPR Act as additional and supplementary to Article 24 (2) of the Constitution.

Subject to the observations made before with regard to Section 4 of the ICCPR Act in its relation to Article 14 of the ICCPR (see Part B of this chapter, above), the statutory provisions cited by the Annexure to the ICCPR Advisory Opinion, read together with Section 4 of the ICCPR Act, in respect of Article 14 (3) (d) of the ICCPR are unobjectionable. As mentioned in the Annexure, ICCPR Articles 14 (3) (e), (f), and (g) correspond almost wholly to Sections (4) (1) (d), (e) and (f) of the ICCPR Act.

Article 14 (4) of the ICCPR, which deals with considerations relating to criminal proceedings against juveniles, are within the contemplation of Section 5 (2) of the ICCPR Act.

Articles 127 and 139 of the Constitution and the relevant provisions of the Code of Criminal Procedure are consonant with the requirements of ICCPR Article 14 (5), (6) and (7), dealing with the general right of appeal according to procedure established by law against both conviction and sentence in criminal cases, delictual remedies and principles of double jeopardy.

We would like to add, despite our incomplete information in respect of some aspects of ICCPR Article 14, and subject to the caveats about the gap between law and

practice, that this is an area in which the Sri Lankan Constitution and law conform very closely with what is contemplated by the ICCPR. The Constitution provides the broad substance of the rights and the enabling institutional framework, which are then statutorily elaborated in great detail. This is the model approach to implementing international standards.

ICCPR Article 15

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 15	Constitution of Sri Lanka, 1978: Article 13 (6)

Commentary: Article 13 (6) of the Constitution as a matter of textual formulation of the positive right is in accordance with Article 15 of the ICCPR. Significantly, however, this right as articulated in the ICCPR contains no limitation clause, and is also mentioned as an absolutely non-derogable right under ICCPR Article 4 (2), whereas Article 13 (6) of the Constitution is subject to restriction in the interests of national security under Article 15 (1) of the Constitution. The non-derogable quality of this right, taken together with the absence of a right-specific limitation clause in the ICCPR, would seem to suggest that the Sri Lankan constitutional provisions contravene an absolute general obligation of Sri Lanka under Part II of the ICCPR.

ICCPR Article 16

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 16	ICCPR Act, No. 56 of 2007: Section 2

Commentary: Article 16 of the ICCPR concerns the right to recognition as a person before the law, and is a non-derogable right under ICCPR Article 4 (2). This right is now established in identical terms by Section 2 of the ICCPR Act, No. 56 of 2007, although ideally and in accordance with international best practice, this should be included in the constitutional bill of rights rather than in a provision of ordinary law. Why it is important that the right should be constitutionally recognised is that

ordinary law such as the ICCPR Act may be overridden by emergency regulations during a state of emergency. Consequently, Section 2 of the ICCPR Act may be restricted or suspended and thereby does not conform to the ICCPR requirement of non-derogability. Thus, the suggestion that Section 2 of the ICCPR complies with ICCPR Article 16 cannot be accepted.

ICCPR Article 17

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 17	Common law delictual right to sue for damages loss of reputation
	Post Office Ordinance, No. 11 of 1908: Sections 71, 75
	Computer Crimes Act, No 24 of 2007: Sections 3, 8, 10

Commentary: Article 17 of the ICCPR deals with the right not to be subject to arbitrary or unlawful interference with a person’s privacy, family, home or correspondence, and to the protection of the law against such interferences. Further to our comments on this matter before (see discussion on the ICCPR Act as part of our general observations in Part B, above), we note that the Annexure only refers to the private law rights and other statutory provisions aimed at specific offences. The right to privacy is not guaranteed as a fundamental right by the Sri Lankan Constitution, which we view this as a serious omission.

The ICCPR recognises (as in other domestic jurisdictions) the right to privacy as a human right, but neither forecloses private law remedies for breaches of privacy, nor does it assume that privacy as a human right should only apply where other private law and statutory regulation of privacy is unavailable. What is expected is that a right to privacy is established as a fundamental public law right over and above and in addition to any existing private law and statutory regulation. For these reasons we would strenuously argue that the provisions of law adduced by the Government are insufficient for the purposes of compliance with ICCPR Article 17.

ICCPR Article 18

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 18 (1)	Constitution of Sri Lanka, 1978: Article 10, 14 (1) (e)
Article 18 (2)	<i>Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Case</i> (2001) SC Det. 2/2001 <i>New Wine Harvest (Incorporation) Case</i> (2003) SC Det. 19/2003
Article 18 (3)	Constitution of Sri Lanka, 1978: Article 15 (7)
Article 18 (4)	Age of Majority Ordinance, No. 7 of 1865 as amended Common Law Law of Persons

Commentary: Article 18 (1) of the ICCPR relates to the freedom of thought, conscience and religion, for which the corresponding provisions in the Sri Lankan Constitution are Articles 10 and 14 (1) (e). It should also be noted that ICCPR Article 18 in its entirety is a non-derogable right under ICCPR Article 4 (2). Article 10 of the Constitution (the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of a person's choice) is not subject to any restrictions, whereas Article 14 (1) (e) (the right to manifest religion or belief in worship, practice and teaching, etc.) may be restricted on any of the grounds listed in Article 15 (7) of the Constitution. This follows the distinction between the two aspects of this right (i.e., reflected in Article 10 and 14 (1) (e) of the Constitution), and distinction therefore of treatment in respect of restrictions, to be found in ICCPR Article 18 (3).

The formulation of this set of rights in the Sri Lankan Constitution is thus broadly consonant with the ICCPR, subject to the following differences. Firstly, the ICCPR imposes an obligation on States Parties to the ICCPR, that the rights enumerated therein apply to all persons in the territory and subject to the State's jurisdiction and no distinction is made as between citizens and other persons. Such a distinction is

not made in the Sri Lankan bill of rights. Accordingly, while the right under Article 10 of the Constitution is available to all persons, those under Article 14 (1) (e) are only exercisable by Sri Lankan citizens. In view of the peremptory provisions of Article 2 (1) of the ICCPR, it is doubtful whether the Sri Lankan Constitution can continue this distinction in conformity with the ICCPR.

Secondly, Article 18 (2) of the ICCPR states that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. There is no correspondingly explicit provision in the Sri Lankan Constitution, although case law of the Supreme Court (for e.g. those cited in the Annexure to the ICCPR Advisory Opinion) indicates this is an implicit condition for the exercise of this right. It should also be noted that the Supreme Court in a series of decisions has given a narrow interpretation to 'religion' and religious practices in a way that impairs fuller recognition of religious freedom and activity in line with international standards.

Thirdly, Article 18 (4) states that the States Parties to the ICCPR undertake to respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Again there is no similar provision in the Sri Lankan Constitution. The vague allusions to broad branches of private law in the Annexure are inadequate, and in any case, does not answer the question of how such a fundamental right has been given recognition in Sri Lanka consonant with the ICCPR standard.

Fourthly, the secular character of the Sri Lankan State is, at least arguably, impaired by Article 9 of the Constitution (an entrenched provision requiring a special procedure for amendment in terms of Article 83), which provides that the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14 (1) (e). The Supreme Court has not always struck a balance that gives appropriate weight to Articles 10 and 14 (1) (e) in respect of minority religions (see *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka (Incorporation) Case* (2003) SC Spl. Det. 19/2003). Obviously, there is no such privileging of a religion envisaged by the ICCPR.

Fifthly, the limitations clause relating to this right in the ICCPR, Article 18 (3), introduces the substantive control through the concept of necessity, which as discussed before, is not a requirement of the Sri Lankan restrictions framework under Article 15 of the Constitution. While the Sri Lankan Constitution follows the ICCPR in permitting restrictions only on the right to manifest religion, Article 15 (7) allows restrictions based *inter alia* on national security and the just requirements of the general welfare of a democratic society, which are not grounds for restriction on the non-derogable right in Article 18 (1) allowed by Article 18 (3) of the ICCPR.

ICCPR Article 19

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 19 (1)	Constitution of Sri Lanka, 1978: Articles 10, 14 (1) (a), 14 (1) (b), 27
	Penal Code 1889, as amended: Sections 290 – 292
	Profane Publications Act, No. 41 of 1981
Article 19 (2)	<i>Environmental Foundation Ltd. v. Urban Development Authority</i> (2005) SCM 23 rd November 2005
Article 19 (3)	Constitution of Sri Lanka, 1978: Articles 15 (2), (7)

Commentary: Article 19 of the ICCPR relates to the freedom of expression and opinion, and is formulated in wider terms than the corresponding right to speech in Article 14 (1) (a) of the Sri Lankan Constitution, to include the right to hold opinions without interference, to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice. Article 14 (1) (a) only establishes the freedom of speech and expression including publication, although the case law of the Supreme Court has taken a liberal approach to what constitutes 'expression'. Accordingly, the right to vote (*Karunathilaka v. Dayananda Dissanayake (No. 1)* (1999) 1 SLR 157) and non-speech forms of political protest (*Amaratunga v. Sirimal* (1993) 1 SLR 264) have been held to be within the ambit of freedom of expression. The Court

has also held on occasion that freedom of expression includes the freedom to receive and disseminate some forms of information, although a specific right to information is absent as a fundamental right in the Sri Lankan Constitution (for e.g. in the case cited in the Annexure).

These pronouncements of the Supreme Court, however, do not ameliorate the absence or vitiate the need for a more robust textual formulation of the freedom of expression, and for the introduction of the freedom of information to the Constitution, in line with international standards including the ICCPR. It must also be stated (to reiterate our general observations on the interpretation of the bill of rights) that the Supreme Court has no uniformly liberal record in this respect. In many instances, its judgments have been regressive and out of step with international standards, including in a recent case in which it imposed its own views on culture and morality in a challenge involving the banning of a film meant for adult audiences. Similarly, the wholly arbitrary and retrograde use of the powers under the law of contempt of court has had a directly adverse impact on the freedom of expression and the media. Parliament has also used its power to punish for contempt oppressively against newspapers and journalists in the past, although not recently.

As observed in relation to other rights, the requirement of necessity in Article 19 (3) for the restriction of this right is absent in the Sri Lankan framework for restrictions. Likewise, the provision in Article 15 (7) of the Constitution of meeting the just requirements of the general welfare of a democratic society is not allowed as a distinct ground of restriction in the ICCPR, although other grounds of restriction enumerated in this provision are allowed by the ICCPR. Article 15 (1) imposes specific grounds of restriction on the freedom of expression such as the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation, or incitement to an offence. Excepting defamation and incitement to an offence, covered by ICCPR Articles 19 (3) (a) and 20 respectively, none of these other grounds for restriction are recognised by the ICCPR. This also underscores a tangential issue not directly the subject of this chapter: the statutorily unregulated nature of the law relating to parliamentary privilege and contempt of court in Sri Lanka, which has occasioned the use of these powers in a manner inimical to the freedom of expression as envisaged by the ICCPR.

It is also to be noted that the rights under Article 14 (1) (a) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

The freedom of expression has been particularly vulnerable under circumstances of emergency, with prior censorship imposed during times of acute crisis through emergency regulations. The Supreme Court has generally displayed a tendency to favour the State in fundamental rights challenges in this respect (for e.g. *Sunila Abeyssekera v. Ariya Rubesinghe and Others* (2000) 1 SLR 314). In this context, we would like to restate the concerns we have repeatedly raised in this chapter about the use and misuse of emergency powers.

Finally, we find it perplexing as to why the Annexure, purporting to demonstrate the compliance of Sri Lankan law with the standard of protection for the freedom of expression guaranteed by ICCPR Article 19, should adduce Sections 290 – 292 of Penal Code and the Profane Publication Act in this respect. Of the cited provisions of the Penal Code, all of which concern offences relating to religion (and, we might add, of a rather archaic nature), only Sections 291A and 291B concern speech acts, and which seek to restrict speech wounding the religious feelings of others, provided that malicious and deliberate intention is proved. It is only through an ignorance of contemporary international standards governing the freedom of expression, including the standard established by Article 19 of the ICCPR that these provisions can be regarded as corresponding to ICCPR Article 19 (3) (a) or (b). The Profane Publications Act is an unsatisfactory piece of legislation, not least for the fact that it is susceptible to abuse by not providing a definition of what constitutes 'profanity' or a 'profane publication' and in the way it allows police interference.

Article 14 (1) (b), which guarantees the freedom of peaceful assembly is also mentioned in the Annexure as promoting freedom of expression, presumably because it allows public protest. In our view, this matter is better dealt with in relation to ICCPR Article 21 (see below). For reasons already discussed at length in Part B above, we do not regard Article 27 (enumerating 'Directive Principles of State Policy') as in any way a satisfactory means of implementing ICCPR rights within Sri Lanka.

ICCPR Article 20

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 20 (1)	ICCPR Act, No. 56 of 2007: Section 3
Article 20 (2)	ICCPR Act, No. 56 of 2007: Section 3

Commentary: We would merely reiterate our observations made in relation to Section 3 of the ICCPR Act, No. 56 of 2007 in Part B of this chapter, above.

ICCPR Article 21

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 21	Constitution of Sri Lanka, 1978: Article 14 (1) (b)

Commentary: Article 21 of the ICCPR concerns the right of peaceful assembly, as does the corresponding Article 14 (1) (b) of the Constitution. The contemplated restrictions on this right are negatively formulated in Article 21 of the ICCPR, and require conformity with law and, specifically, the justification of necessity in a democratic society. These requirements do not feature in the framework for restrictions under the Sri Lankan Constitution. Grounds for restriction set out in Articles 15 (3) and (7) of the Sri Lankan Constitution, over and above those recognised by the ICCPR, are the interests of racial and religious harmony and the just requirements of the general welfare of a democratic society.

The rights under Article 14 (1) (b) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

ICCPR Article 22

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 22 (1)	Constitution of Sri Lanka, 1978: Articles 14 (1) (c), (d)
Article 22 (2)	Article 15 (4)

Commentary: Article 22 of the ICCPR relates to the freedom of association, including the right to form and join a trade union. The corresponding provisions of the Sri Lankan Constitution are Articles 14 (1) (c) and (d). The contemplated restrictions on this right are negatively formulated in Article 22 of the ICCPR, and require the prescription of law and, specifically, the justification of necessity in a democratic society. These requirements do not feature in the framework for restrictions under the Sri Lankan Constitution. Grounds for restriction set out in Articles 15 (4) and (7) of the Sri Lankan Constitution, over and above those recognised by the ICCPR, are the interests of racial and religious harmony or national economy, and the just requirements of the general welfare of a democratic society.

The rights under Article 14 (1) (c) and (d) are only available to Sri Lankan citizens and not all persons within the territory and subject to the jurisdiction of the Sri Lankan State as required by Article 2 (1) of the ICCPR.

ICCPR Article 23

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 23 (1)	Constitution of Sri Lanka, 1978: Article 27
	Prevention of Domestic Violence Act, No. 34 of 2005
	Evidence Ordinance: Sections 120 (2), (3), (4)
Article 23 (2) and (3)	General Marriages Ordinance Penal Code
Article 12 (4)	Constitution of Sri Lanka, 1978: Article 12 (1) Maintenance Ordinance, as amended

Commentary: For reasons already mentioned, we are of the opinion that Article 27 of the Constitution (Directive Principles of State Policy) cannot constitute implementation of obligations undertaken under the ICCPR. Moreover, the suggestion that Article 12 (1) of the Constitution fulfils the requirements of ICCPR Article 23 (4) is misleading, because the ICCPR provision is a specific one aimed at

ensuring the equality of rights and responsibilities between spouses as to marriage, whereas Article 12 (1) of the Constitution is the general equality clause of the Sri Lankan bill of rights, and which is furthermore, in terms of Article 17 (1) enforceable only against executive and administrative actions of the State.

While it may be the case that the various other laws cited in the Annexure seek to address the issues addressed by ICCPR Article 23, we would once again reiterate the point that constitutional recognition is the most appropriate method of giving effect to the rights contained in it.

ICCPR Article 24

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 24	Constitution of Sri Lanka, 1978: Articles 12 (4), 27
	ICCPR Act, No. 56 of 2007: Section 5
	Children and Young Persons Ordinance
	National Child Protection Authority Act, No. 50 of 1998

Commentary: For reasons already mentioned, we are of the opinion that Article 27 of the Constitution (Directive Principles of State Policy) cannot constitute implementation of obligations undertaken under the ICCPR. Moreover, Article 12 (4) of the Constitution is a power-conferring provision, in the nature of a proviso to the general equality clause set out in Article 12 (1), which allows for positive discrimination or affirmative action measures through law, subordinate legislation or executive action for the advancement of women, children or disabled persons. It is thus emphatically not a rights-conferring provision.

As rightly mentioned in the Annexure, the provisions of Article 24 (2) and (3) have now been given effect to by Section 5 of the ICCPR Act, No. 56 of 2007, which includes several other rights of the child. We note also that Sri Lanka has enacted into domestic law the UN Convention on the Rights of the Child. However, Article 24 (1) of the ICCPR is not reproduced in the ICCPR Act. This provision states that every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as

are required by his status as a minor, on the part of his family, society and the State. Nonetheless, it is conceivable that Section 5 (2) of the ICCPR Act is intended to cover these concerns in what is a more modern formulation of the best interests and rights of the child.

We must, however, point out that although the scope of rights contemplated by ICCPR Article 24 may now be available statutorily, the more appropriate form in which they should be given recognition is through the Constitution itself.

ICCPR Article 25

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 25	Constitution of Sri Lanka, 1978: Article 4 (e), 88, 89
	ICCPR Act No. 56 of 2007: Section 6 (a)
	Supreme Court Determination 12/2003

Commentary: Article 25 of the ICCPR is an important provision concerning rights of political participation, for which there is no comparable provision in the Sri Lankan Constitution and law. Article 4 of the Constitution, which sets out the manner of exercise and enjoyment of sovereignty, states in sub-section (e) that the franchise shall be exercised at the election of the President, Members of Parliament and at referenda by every citizen over the age of eighteen years who is a qualified elector. This has been extended by way of judicial interpretation to elections to Provincial Councils and local authorities in the Supreme Court determination mentioned in the Annexure.

However, it must be borne in mind that Provincial Councils are devolved institutions established by the Constitution (Thirteenth Amendment to the Constitution), and it is deeply unsatisfactory that Article 4 (e) does not mention elections to these bodies. Local authorities are governed by ordinary statute in Sri Lanka. While these observations may seem strictly speaking tangential to a discussion about ICCPR Article 25, we would nonetheless argue that the spirit of the provision is to ensure both public participation in government through periodic elections as well as the democratic legitimacy of institutions, and in that context, the fact that Article 4 (e) of the Constitution does not mention elections to the second tier of devolved government in Sri Lanka is a major lacuna.

More to the point, the chapter on fundamental rights of the Sri Lankan Constitution (Chapter III) does not provide for the right to vote as a fundamental right. *Per contra*, Article 25 (b) of the ICCPR provides that every citizen (incidentally the only occasion where the ICCPR speaks of 'citizens' as opposed to the more general 'every person within the territory and subject to the jurisdiction of a State') shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. This is a powerful restatement of the key procedural rights of democracy in a pivotal international human rights instrument.

In Section 6 of the ICCPR Act, Article 25 (a) has been incorporated (as Section 6 (1) (a)), as well as Article 25 (c) (as Section 6 (1) (b)); the latter in slightly different and perhaps broader terms than in the ICCPR. That is, where Article 25 (c) provides for access, on general terms of equality to public service, section 6 (1) (b) provides for access to services provided to the public by the State.

It is inexplicable therefore, why in Section 6 of the ICCPR Act, when incorporation of ICCPR Article 25 was attempted, and in the absence of a comparable provision in the Constitution, the critical sub-section (b) to Article 25 reproduced above has been left out.

The ICCPR Act also omits the references in Article 25 to the prohibition of unreasonable restrictions, the general principle of equality, and crucially given its importance to the entire regime of rights in the ICCPR, the reference to Article 2 of the ICCPR (discussed above). There is also the limitation on Section 6 (1) (a) imposed by Section 6 (2), which is alien to the ICCPR (discussed above).

For these reasons and due to the omission of Article 25 (b), it is possible to deduce that there has been an attempt, for whatever reason, to downplay the significance of ICCPR Article 25 in the ICCPR Act. Further evidence of this is the marginal note to Section 6, which describes the section as concerning 'Right of access to benefits provided [*sic*]', which of course is not the purpose of Article 25. In the absence of a constitutional provision in Sri Lanka corresponding to Article 25, we are at a loss to understand these omissions in domestic legislation advanced as an implementation measure of the ICCPR.

Articles 88 and 89, which concern the right and disqualification are unobjectionable.

ICCPR Article 26

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 26	Constitution of Sri Lanka, 1978: Articles 12 (1), (2), (3)

Commentary: Article 26 of the ICCPR is the general right to equality before the law without discrimination of any kind, the corresponding provision for which in the Sri Lankan Constitution is Article 12. The standard and concept of equality, and the formulations used, as between the ICCPR and the Sri Lankan Constitution are broadly equivalent. While the two provisos to Article 12 (2) in the Sri Lankan Constitution are not found in the ICCPR, it does not seem that they are repugnant to the provisions of Article 26 of the ICCPR. The provision for limited affirmative action (positive discrimination) in Article 12 (4) of the Sri Lankan Constitution with regard to women, children and disabled persons is also not generally understood to be contrary to the right to equality.

ICCPR Article 27

ICCPR	Annexure to the ICCPR Advisory Opinion
Article 27	Constitution of Sri Lanka, 1978: Articles 10, 14 (1) (e), 14 (1) (f), 18-25, 27
	Official Languages Commission Act, No. 18 of 1991: Sections 2, 6-7
	Penal Code of 1889, as amended: Sections 290-292

Commentary: Article 27 of the ICCPR is a provision in the form of a group right, of special importance to pluralistic societies such as Sri Lanka, which provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There is no comparable single provision in the Constitution of Sri Lanka that acknowledges the group or community rights of minorities in terms similar to Article 27 of the ICCPR, although of course, discrete provisions of the Constitution and law speak to some of the issues encapsulated in Article 27.

We would reiterate our observations above in relation to the constitutional provisions highlighted by the Annexure to the ICCPR Advisory Opinion, and add that in respect of Articles 18 to 25 of the Constitution (which encompasses the entirety of Chapter IV: Language, as amended by the Thirteenth Amendment), the provisions of the Constitution are more impressive on paper than in practice. Furthermore, it is significant to note in the light of Sri Lanka's ethnic conflict and its evolution, that even today, Sri Lanka's Constitution does not provide for parity of status of the Sinhala and Tamil languages. Article 18 (as amended by the Thirteenth Amendment) of the Constitution declares that Sinhala is '*the*' official language of Sri Lanka while Tamil is '*an*' official language. The Official Languages Commission also has not had a demonstrable impact in implementing the language provisions of the Constitution. We would reiterate our previous comments in respect of the cited provisions of the Penal Code.

e. CONCLUSION

It is clear therefore that the bill of rights in the Constitution of 1978, the ICCPR Act of 2007, and the other statutory provisions cited in the Annexure to the ICCPR Advisory Opinion, taken as a whole, fail to comply with the requirement of ratification and full implementation of the ICCPR. The Sri Lankan legal regime falls short of the international standard in terms of the constitution and law on their face or in terms of their substance and content. The Supreme Court's reasoning in its ICCPR Advisory Opinion, for the reasons canvassed above, was fundamentally flawed because it failed to realise that mere recognition of a right in a bill of rights or a law is inadequate. The textual formulation of the right, the limitations that may be imposed on such right, and the mechanisms to ensure that the scope and extent of the right cannot be limited unreasonably or disproportionately are key to assessing whether the rights are effectively protected and implemented. The Supreme Court's Advisory Opinion represented a cursory and superficial review of the bill of rights

and other law and failed to subject the texts to the critical scrutiny that was required for a comprehensive evaluation of whether the Sri Lankan legal regime was compatible with the ICCPR.

It must be stressed, however, that we have argued that the legal regime fails the test of implementation of the ICCPR in terms of the content and substance and domestic law of the country. The other aspect of implementation, i.e., the practical application of the law on the ground, has not been discussed in detail except with respect to the violation of the Seventeenth Amendment to the Constitution. The serious violations of human rights in the form of abductions, extra-judicial killings, the culture of impunity, and the gap between the law as declared and the law as practically applied – important considerations that are outside the scope of this chapter – also raise serious concerns about the full implementation of the ICCPR in the country.

Appendix I

Advisory Opinion of the Supreme
Court on the International Covenant
on Civil and Political Rights (ICCPR)

**THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

**In the matter of a Reference under
Article 129(1) of the Constitution.**

S.C.Ref: No.01/2008

1. Centre for Policy Alternatives
(Guarantee) Ltd., Colombo 7
2. Rohan Edirisirha, Colombo 7
3. Lal Wijenayake, Attorney at Law
Kandy
4. Legal Aid Commission, Colombo 12

Intervient Petitioners

BEFORE :	Sarath N Silva,	Chief Justice
	R.A.N.G.Amaratunga	Judge of the Supreme Court
	Saleem Marsoof	Judge of the Supreme Court
	A.M. Somawansa	Judge of the Supreme Court
	D.J.De S. Balapatabendi	Judge of the Supreme Court

COUNSEL: M.A.Sumanthiran with Ms. H. Vamadeva and Ms. Erniza Tegal
for the 1st and 2nd Intervient Petitioners.

Dr. Jayampathy Wickremaratne P.C., with Ms. Pubudini
Wickremaratne for the 3rd Intervient Petitioner.

Nuwan Peiris, Mahesha de Silva, for the 4th Intervient
Petitioner.

P.A.Ramayake P.C., Addl. Solicitor General with Ms. Bimba
Tillekeratne, D.S.G., N. Pulle, S.S.C and Rajiv Goonetillake S.C.,
for Attorney General

Court assembled for hearing on 17.03.2008 at 11.00 a.m

His Excellency the President has been pleased to make a reference in terms of Article 129(1) of the Constitution to obtain the opinion of this Court on the following questions :

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to Civil and Political Rights in the International Covenant, on Civil and Political Rights of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?
2. Whether the said rights recognised in the Covenant are justiciable through the medium of legal and constitutional process prevailing in Sri Lanka?

Article 129(4) of the Constitution provides that the proceedings in connection with such a reference shall be held in private, unless the Court for special reasons directs otherwise. Considering the public importance of and interest in the matter in respect of which His Excellency was pleased to make reference we decided that the questions be considered at a public sitting of the Court of which advance notice was given to enable interested parties to appear and make submissions, to assist Court in considering the opinion to be given. Notice was issued on the Attorney General, as required by Article 134(1) of the

Constitution. Four parties named above intervened and Counsel representing them were permitted to make submissions.

Addl. Solicitor General representing the Attorney General made comprehensive submissions on the question stated above.

The International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on 16.12.1966 and came into force on 23.3.1976. Sri Lanka acceded to the Covenant on 11.6.1980. At the time of accession the currently operative Constitution was in force as the Supreme Law of the Republic.

As stated in the Preamble to the Covenant the rights recognized and enshrined therein stem from the Universal Declaration of Human Rights. We have to state as a basic premise that the fundamental rights declared and recognized in Chap. III of the Constitution are based on the Universal Declaration of Human Rights.

Article 3 of the Constitution states that in the Republic of Sri Lanka Sovereignty is in the People and that sovereignty includes fundamental rights.

Article 4 of the Constitution which sets out the exercise of Sovereignty reads as follows :

4(d) *"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided;"*

It is thus seen that fundamental rights declared and recognized by the Constitution form part of the Sovereignty of the People and have to be respected,

secured and advanced by all organs of Government. This is, in our opinion a unique feature of the Constitution which entrenches fundamental rights as part of the inalienable Sovereignty of the People. Thus the fundamental rights acquire a higher status as forming part of the Supreme Law of the land and cannot be abridged, restricted or denied except in the manner and to the extent expressly provided for in the Constitution itself.

Article 118(b) of the Constitution vests jurisdiction in the Supreme Court for the protection of fundamental rights and Article 126(1) vests in the Court an 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 recognized by Chapter III or Chapter IV of the Constitution. Article 126(2) gives a right to any person who alleges an infringement to invoke the jurisdiction of the Court by a petition. The Supreme Court Rules enable any person in indigent circumstances to invoke this jurisdiction by addressing a letter directly to the Chief Justice. Such a person is thereafter granted legal aid for the effective presentation of his case.

Article 126(4) of the Constitution empowers the Court to grant just and equitable relief in respect of any alleged infringement and also to make directions. The Court has permitted public interest litigation covering matters that transcend the infringement of individual rights. Directions have been issued in connection with matters of general importance as to liberty, personal security and administrative action connected with a wide array of matters that impact on the natural environment, particularly with regard to water, air and noise pollution.

It is in the general background of the matters stated above that we have considered the specific questions stated in the reference.

Addl. Solicitor General in a thorough and comprehensive submission presented to Court an account of specific legislative compliance in relation to each Article of the Covenant. Counsel agreed on the correctness of the submissions made with regard to such legislative compliance. On the basis of the submissions of the Additional Solicitor General, the observations of Court and submissions of other counsel, for purposes of clarity a comprehensive schedule annexed hereto was prepared with two columns. The column on the left gives the particular Article of the Covenant and the column on the right gives the legislative compliance within Sri Lanka and the relevant pronouncements made by the Supreme Court and the other Courts to further strengthen the guarantee of rights recognized in the Covenant.

It has to be emphasized in this connection that Parliament enacted special legislation titled "International Covenant on Civil and Political Rights (ICCPR) Act No. 56/2007 to give legislative recognition in respect of certain residual rights and matters in the Covenant that have not been appropriately contained in the Constitution and the other operative laws. The preamble to the said Act states as follows :

"AND WHEREAS a substantial part of the civil and political rights referred to in that Covenant have been given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament.

AND WHEREAS it has become necessary for the Government of Sri Lanka to enact appropriate legislation to give effect to those civil and political rights referred to in the aforesaid Covenant, for which no adequate legislative recognition has yet been granted."

This enactment has been made by the Parliament of Sri Lanka in compliance with the obligation as contained in Article 2.2 of the Covenant, which requires a State Party to "adopt such law or other measures as may be necessary to give effect to the rights recognised in the Covenant".

Furthermore the Supreme Court has in several decided cases relied on the provisions of the Covenant to give a purposive meaning to the provisions of the Constitution and other applicable law so as to ensure to the People that they have an effective remedy in respect of any alleged infringement of rights recognized by the Constitution.

Counsel for the Interventient Respondents did not detract from the general premise stated above. Counsel for 1, 2 and 3 Interventient Petitioners made specific submissions on certain alleged inconsistencies with the rights recognised by the Covenant. We would now briefly deal with the submissions made by Counsel :

Dr. Wickremaratne, representing the 3rd Interventient Petitioner made submissions on seven specific matters. They are briefly as follows :

- i). That the provisions of the Article 15(1) read with Article 13(5) and (6) of the Constitution are inconsistent with the guarantee in Article 15(1) of the Covenant, which is a non-derogative in terms of Article 42 of the Covenant. The gravamen of Dr. Wickremaratne's submission is that in terms of Article 15(1) of the Covenant, a person shall not be held guilty of a criminal offence on account of any act or omission

which did not constitute a criminal offence at the time when it was committed. In other words that no one shall be held guilty of an offence created ex post facto.

As submitted by Addl. Solicitor General, Article 13(6) of the Constitution specifically incorporates a guarantee as contained in Article 15(1) of the Covenant. However, the submission of Dr. Wickremaratne is that Article 15(1) of the Constitution enables a restriction of the right guaranteed by Article 13(6) to be prescribed by law in the interests of national security. The submission is that such a restriction is not permissible in terms of the Covenant. When questioned by Court Dr. Wickremaratne was unable to point to any specific instance where a law has been enacted by the Parliament of Sri Lanka or any Regulation has been promulgated in the interest of national security to create an ex post facto offence. In the circumstances we are of the opinion that the submission of Dr. Wickremaratne is based on a hypothetical premise. If and when a law is sought to be made to create an ex post facto offence, the constitutionality of that law would be considered by this Court on the basis of the firm guarantee as contained in Article 13(6) that there shall be no enactment of ex post facto offences. In the case of *Weerawansa vs Attorney General - 2000 1 Sri L.R. page 387*, this Court has specifically held that Sri Lanka is a party to the Covenant and a person deprived of liberty has a right of access to the judiciary. The only instance of ex post facto penal legislation in Sri Lanka is contained in the Offences against Aircraft Act No. 24 of 1982, which was enacted by Parliament after a Sri Lankan national hijacked an Alitalia aircraft and brought the ransom to Sri Lanka. The law was enacted by the Sri Lankan Parliament based on the International Covenants that were already in operation to ensure that the instance of hijacking is appropriately prosecuted and if found guilty punished.

ii).Dr. Wickremaratne submitted that Article 16(1) of the Constitution, which provides for existing law to continue in force notwithstanding any inconsistency with the provisions of the Constitution, ensure the continued validity of certain personal laws, specifically governing Muslim and Tamil persons in respect of specific matters. It was submitted by Mr. Sumanthiran that certain provisions of the personal laws discriminate, especially against women. The matters on which submissions were made do not relate to any state action affecting rights of person. The instance of alleged discrimination is in personal Family Law.

These are customary and special laws that are deeply seated in the social milieu of the country. It is to be noted that Article 27 of the Covenant makes a specific reservation that

"in states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language."

In our view it could not be contended that the provisions of Article 16(1) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law.

iii). Dr. Wickremaratne submitted that the immunity granted by Article 35(1) Constitution to the President as the Head of State is inconsistent with the provisions of Article 2(3) of the Covenant which vests any person whose rights and freedom are violated with an effective remedy. Whilst it was conceded that there would be no objection to the personal immunity from suit or prosecution of the Head of the State; the inconsistency complained of is that in the case of ministerial acts of the President proceedings could be instituted against Attorney-General in terms of Article 35(3) of the Constitution, there is no such remedy in respect of acts performed as Head of State.

In the case of Malikarachchi vs Siva Pasupathy - 1985 i Sri LR page 74 at 77 this Court stated that the provisions of Article 35(1) are not unique to Sri Lanka and that there are similar provisions in other countries and further that the immunity would cease when the incumbent President ceases to hold office. Addl. Solicitor General has referred to several instances where the former President is now impleaded in our Courts. Dr. Wickremaratne was unable to point to any instance where a person aggrieved of an infringement of any of his rights has been denied a remedy in view of the immunity granted to the Head of the State by Article 35(1) of the Constitution.

iv). Dr. Wickremaratne submitted that Article 80(3) of the Constitution which provides that the validity of the enactment of any law by Parliament cannot be challenged after it is certified by the Speaker of Parliament denies an effective remedy to a person who alleges that the law derogates from any right recognised by the Covenant and as such it is inconsistent with Article 2(3) of the Covenant.

Article 121(1) of the Constitution empowers any citizen to challenge the constitutionality of a Bill within one week of the Bill being presented to Parliament.

for failing to fulfil a contractual obligation, in contravention of Article 11 of the Covenant.

We are inclined to agree with the submission of the Adcl. Solicitor General that in regard to the Agrarian Services Act and the Cooperative Societies Law penal sanction would not attach to pure contractual obligations but to statutory obligations.

Arrest and imprisonment is provided for in Section 298 of the Civil Procedure Code only in respect of a judgment debt, where there are circumstances that establish an intent of defraud and so on. Hence the instances cited by Counsel do not amount to an inconsistency with Article 11 of the Covenant.

vii). Dr. Wickremaratne submitted that the provisions of Article 107 of the Constitution which provides for impeachment before Parliament of any Judge of a Superior Court, read with Rule 78A of the Standing Orders of Parliament which provides for inquiry to be held by a panel consisting of Members of Parliament erodes the independence of the judiciary which has to be assured in terms of Article 14 of the Covenant. Dr. Wickremaratne submitted that in other countries an impeachment could be based only on an inquiry carried out by an independent panel of Judges or retired Judges.

There is merit in the submission of Dr. Wickremaratne that the process of impeachment of Superior Court Judges can be held like a sword of Damocles over incumbent Judges who would be placed in peril of an inquiry to be held within Parliament by a Panel consisting of Members of Parliament. However, this by itself does not amount to an inconsistency with Article 14 of the Covenant which mandates equality before the courts of law and a fair and public hearing by competent, independent and impartial tribunal.

Upon such challenge this Court is empowered in terms of Article 123 to determine whether any provision of the Bill is inconsistent with the Constitution. Submission of Dr. Wickremaratne was that this provision is not an effective window to review constitutionality of legislation.

It is to be noted that there is no provision in the Covenant which mandates judicial review of legislation. Article 2(3) of the Covenant cited by Dr. Wickremaratne provides that the State should ensure that any person whose rights or freedom are violated have an effective remedy through a competent judicial authority. The submission is hypothetical since it is based on the premise that there will be a Law enacted by Parliament in derogation of the rights recognised in the Covenant and it would not be challenged by any citizen before this Court prior to enactment.

v). Dr. Wickremaratne submitted that an amendment to a Bill made at the Committee Stage of Parliament cannot be challenged by any citizen before this Court.

It is to be noted that amendments are generally made at the Committee Stage in Parliament with regard to matters of incidental or procedural nature. In any event Article 77(2) of the Constitution specifically provides that where an amendment is proposed to a Bill in Parliament the Attorney General shall communicate his opinion to the Speaker as to the constitutionality of the proposed amendment, when the Bill is ready to be presented to Parliament for its acceptance.

v). Dr. Wickremaratne and Mr. Sumanthiran submitted that there are certain provisions in the Agrarian Services Act No. 58/79(as amended), the Co-operative Society Law No. 5/1972 and the Civil Procedure Code, which provide for the imprisonment of any person

Mr. Sumanthiran who reiterated the submissions made by Dr. Wickremaratne with regard to the personal law and imprisonment for certain contractual obligations which have been dealt with above, in addition made a specific submission that there is no constitutional or statutory recognition of the right to self determination as stated in Article 1.1 of the Covenant.

The Addl. Solicitor General quite correctly submitted that the right to self determination does not require enforcement through legislative means, as established by the Human Rights Committee. This position is fortified by the Declaration of Principles of International Law contained in the United Nations General Assembly - Resolution 2625 (XV). Referring to the phrase "All people" in Article 1 of the Covenant Mr. Sumanthiran submitted that there should be statutory recognition of what he described as "internal self determination."

We have to note that in terms of Article 3 of the Constitution "in the Republic of Sri Lanka sovereignty is in the People and is inalienable". Thus sovereignty is reposed in the People as a whole and it cannot be contended that any group or part of the totality of People should have a separate right of self determination.

Whilst appreciating the erudition of Dr. Wickremaratne's endeavour of going through the gamut of Sri Lankan Law with the fine tool counts of the Covenant, we are impressed with submissions of the young Counsel representing the Legal Aid Commission (who relied on the observation of Lord Denning on the impact of the European Convention of Human Rights on the Law of England) that the correct approach should be to give effect to the covenant in the social, cultural, economic, political and legal framework of Sri Lanka.

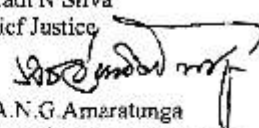
For the reasons stated above we express the opinion in terms of Article 129(i) of the Constitution that -

- i) that the legislative measures referred to in the communication of His Excellency the President dated 4.3.2008 and the provisions of the Constitution and of other law, including decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant.
- ii) that the aforesaid rights recognized in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka


We wish to place on record our deep appreciation of the valuable assistance given by the Addl. Solicitor General and other Counsel who assisted in this matter.




Sarath N Silva
Chief Justice




R.A.N.G. Amaratinga
Judge of the Supreme Court



Saleem Marsoof
Judge of the Supreme Court.



A.M. Somawansa
Judge of the Supreme Court



D.J.De S. Balapatabendi
Judge of the Supreme Court

Appendix II
Annexure to the ICCPR advisory
opinion

REFERENCE UNDER ARTICLE 129 - SC 91/2005
LEGISLATIVE COMPLIANCE WITH THE ICCPR

International Covenant on Civil and Political Rights	Legislative Compliance
<p>Article 1- Right of self Determination</p>	<p>As established by the Human Rights Committee under the ICCPR, the right to self determination does not require enforcement through legislative means. However Sri Lanka's Consistent position has been that the concept applies only in a decolonization context and cannot be applied or be interpreted in a manner prejudicial to the sovereignty and territorial integrity of an Independent State. This position is fortified by the Declaration of Principles of International Law contained in UNGA Resolution 2625(XXV)</p> <p>Articles 3 and 4 of the Constitution, vest the Sovereignty in the People</p>

<p>Article 2 & 3 - Equal protection of rights in the Covenant without distinction of any kind</p>	<p>Constitution of Sri Lanka, 1978 : Article 12(1) - Fundamental right of equality before the law and equal protection of the law Article 12(2) - Fundamental right of non discrimination based on grounds of race, religion, language, caste, sex political opinion, place of birth or any such grounds Article 12(3) - Fundamental right of freedom from subjection to disabilities, liabilities, restrictions, or conditions with regard to public places Article 27 - The directive principles of state policy provides for equal opportunity to all citizens to prevent any disability being suffered on grounds of race, religion, language, caste, sex, political opinion or occupation Article 126 - The Supreme Court of the State shall have sole and exclusive jurisdiction to determine any question relating to any alleged violation of a fundamental or language right, be it by an executive or administrative action, and it shall have the power to grant such relief or make such directions as it may deem just and equitable Supreme Court has expanded the Lucas Standi - Corporate bodies and Public Interest Litigation. Parliamentary Commissioner for Administration Act No. 17 of 1981 as amended by Act, No. 26 of 1994 : Section 10 - While the act provides for the establishment of the office of the Parliamentary Commissioner for Administration (Ombudsman) who through this section has the capability to investigate into alleged violations of fundamental rights, and if such rights are violated is capable of reporting his findings to the Public Petitions Committee for the requisite action to be taken thus providing for an added safeguard against the violation of fundamental rights</p>
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<p>Article 4</p> <p>Article 5</p>	<p>Human Rights Commission of Sri Lanka Act, No. 22 of 1996 : Section 2 – Provides for the establishment of a Human Rights Commission Section 10 – The functions of the Commission include conducting of investigations and inquires into procedural compliance of provisions in the Constitution for the protection of fundamental rights, alleged infringements of those rights; advise in the formulation of legislation and procedure and ensure compliance with international standards and to provide education and awareness of these rights Section 11 – Makes provision for a wide use of power in order to meet the above objectives Section 14 – Provision for the investigation of a leged infringements of rights even on the Commissions own motion Section 26 – Protects the Commission against suit for actions done in good faith for the above stated purposes. Thereby this legislation provides for an independent organ to strengthen the protection and safeguarding of these rights</p> <p>Grant of Citizenship to persons of Indian Origin Act, No. 35 of 2003 : Section 2 – All persons qualifying are of Indian Origin and are granted the full rights that a citizen of the State shall have, ensuring the safeguarding of rights indiscriminate of social origin</p> <p>Article 15(7) of the Constitution</p> <p>Imposes a Negative obligation</p>
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<p>Article 6 - Right to life and restrictions on capital punishment</p> <p>Article 6.1 Right to life and no one to be arbitrarily deprived of life</p>	<p>Article 125 and 126 - Supreme Court having sole and exclusive jurisdiction to interpret the Constitution has held that Article 11 read with Article 13(4) recognizes the right to life</p> <p>In the Case of <i>Sriani Silva v. Jaddamalgodu</i> [2003] 2 Sri. L.R. 63, 75-77 The Supreme Court has held that the right to life is implied in Chapter III of the Constitution.</p> <p>Court has held "Although the right to life is not expressly recognized as a fundamental right that right is impliedly recognized in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say that a person has a <i>right</i> not to be put to death because of wrongdoing on his part, except upon a court order. ...Expressed positively, that provision means that a person has right to live unless a court orders otherwise. Thus Article 13(4) by necessary implication recognises that a person has a right to life- at least in the sense of mere <i>existence as distinct from the quality of life</i> - which he can be deprived of only under a court order. If therefore without his consent or against his will a person is put to death, unlawfully and otherwise than under a court order, clearly his right under Article 13(4) has been infringed.Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be <i>inhuman</i> treatment, for life is an essential precondition for being human..... I hold that Article 11(read with Article 13(4)) recognises a right no to deprive of life-whether by way of punishment or otherwise - and, by <u>necessary implication, a right to life</u>. That right must be interpreted broadly, and the jurisdiction</p>
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<p>Article 6.2- Death Penalty for most serious crimes</p> <p>Article 6.4-Right of Convict to seek pardon or commutation</p> <p>Article 6.5- No death sentence for below 18 years.</p>	<p>conferred by the constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonable necessary for this court to protect those rights effectively.</p> <p>Quality of life improved by the Supreme Court through cases pending on the regulation of Sound pollution SC/FR/38/2007 Air pollution in SC/FR/89/2007 Salinity of Water SC/FR/31/2006</p> <p>It may be further noted that Chapter XIV of the Penal Code elaborates the offences affecting the public health and safety.</p> <p>Penal Code of 1889 as amended ;Murder</p> <p>Article 34(1) of the Constitution - President has power to grant pardon Section 312 Code of Criminal Procedure Act, No. 15 of 1979 as amended- President may commute sentence for sentences of death, rigorous imprisonment or simple imprisonment</p> <p>Penal Code as amended: Section 53 - Sentence of death not to be pronounced on persons under eighteen years of age Section 54 - Sentence of death not to be pronounced on pregnant women</p>
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<p>Article 7 - Non subjecton to torture or to cruel, inhuman and degrading treatment or punishment</p> <p>Article 8 - Non practice of slavery</p> <p>Article 9 - Right to liberty and security of person, not being subjected to arbitrary arrest, or detention</p>	<p>Constitution of Sri Lanka, 1978 : Article 11 - Fundamental right of freedom from torture or cruel, inhuman or degrading treatment or punishment</p> <p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994 : Section 2 - Any person who attempts, aids or abets, conspires or tortures any other person is guilty of an offence Section 3 - Threat or state of war, political instability, public emergency or order of a superior officer or authority would not constitute a defence for this offence creating a more stringent safeguard against torture</p> <p>Abolition of Slavery Ordinance, No 20 of 1844 Section 2 - Slavery shall no longer exist and all such persons would henceforth be free and entitled to all rights, privileges of free persons</p> <p>Constitution of Sri Lanka, 1978 : Article 13(1) - Fundamental right of freedom of arrest except according to the due procedure of law and right to information of reasons for arrest Article 13(2) - Fundamental right to be presented before the nearest competent court according to procedure established by law if being held in custody or</p>
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	<p>otherwise deprived of personal liberty and for such not to be continued except upon terms of that court according to due process of law</p> <p>Article 13(3) – Fundamental right to a fair hearing before a competent court in person or by an attorney-at-law</p> <p>Article 13(4) – Fundamental right not to be imprisoned except by order of a competent court</p> <p>Code of Criminal Procedure Act, No. 15 of 1979 as amended :</p> <p>Section 17 – This section gives provision for the payment of compensation to victims of unlawful arrest or detention</p> <p>Section 23 – Any person to be arrested must be informed of the nature of the charge or allegation upon which he is being arrested</p> <p>Section 32 - 33 – Provides for specific and limited circumstances in which arrest can be conducted without a warrant of arrest. In all other circumstances arrest can only be conducted with a warrant of arrest, ensuring freedom from arbitrary arrest</p> <p>Section 37 – Persons arrested without a warrant must be presented before a Magistrate within a reasonable time not exceeding 24 hours</p> <p>Section 53 – Provides for the substance of the warrant to be communicated to the party in question in executing an arrest under a warrant of arrest</p> <p>Section 54 – Provides for the due presentation of a person arrested under a warrant of arrest before court</p> <p>Chapter XXXIV – Makes provision for the granting of bail for certain offences</p> <p>Civil Procedure Code :</p>
<p>Article 10 – Rights of persons deprived of their liberty- shall be treated with humanity and respect</p> <p>Article 16(2) - Persons only accused but not convicted to be separated from convicted persons. Juvenile offenders to be separated.</p>	<p>Section 298 – Provides for specific and limited circumstances in which arrest can be made with the issue of a warrant which ensures that arbitrary arrest does not take place</p> <p>Bail Act, No. 30 of 1997 :</p> <p>Section 2 – Provides that the practice to be followed is that the grant of bail shall be the rule and its refusal shall be the exception</p> <p>Section 4 – 5 – Provides for the granting of bail for bailable and non-bailable offences (the latter being at the discretion of the court)</p> <p>Section 21 – Gives provision for anticipatory bail</p> <p>Constitution of Sri Lanka, 1978 :</p> <p>Article 11 – Fundamental right of freedom from torture or cruel, inhuman or degrading treatment or punishment</p> <p>Human Rights Commission of Sri Lanka Act, No. 22 of 1996 :</p> <p>Section 11(d) – Provides the Commission with the power to inspect and monitor the welfare of detained persons and to make recommendations for the necessary improvements</p> <p>Code of Criminal Procedure Act, No. 15 of 1979 as amended :</p> <p>Section 24 – 30 – These sections give provision to ensure that all persons arrested or detained are treated with dignity and in a manner befitting with the inherent human dignity</p>

<p>Article 11 - No one shall be imprisoned <i>merely</i> for inability in fulfilling contractual obligations.</p> <p>Article 12 – Right to liberty of movement, freedom to choose residence and freedom to leave and return to the state</p>	<p>Subsidiary Legislation of General Application-Volume 1- (Cap.54) General Rules Relating to Prisons -page 766-860</p> <p>Rule 177-181-Rules as to separation and Classification of Prisoners Rule 190-216-Rules relating to Unconvicted Prisoners and Civil Prisoners</p> <p>Imposes a Negative obligation Section 298 of the Civil Procedure Code</p> <p>Constitution of Sri Lanka, 1978 : Article 14(1)(h) – Fundamental right of freedom of movement and of choosing residence within the state Article 14(1)(i) – Fundamental right of freedom to return to the state</p> <p>Rodrigo Vs SI Kirulapane and others-SC/PR/ 297/97-S.C.Minutes 3-42-2007 (Bad Week Case) Somawansa and 205 others Vs AG-SC SPL 1-208/2006-4(Freedom to leave and return to the State under Immigration laws)</p>
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<p>Article 14(3) (e) - To examine witnesses against him and obtain attendance of witnesses on his behalf</p> <p>Article 14 (3) (f) - If language difficulty then assistance of interpreter</p> <p>Article 14(3) (g) - Not to be compelled to testify against himself or confess guilt.</p> <p>Article 14(4) - Procedure of juvenile persons - Rehabilitation</p>	<p>Act No. 56/ 2007 Section 4(1) (d)</p> <p>Act No. 56/ 2007 Section 4(1) (e)</p> <p>Act No. 56/ 2007 Section 4(1) (f)</p> <p>Act No. 56/ 2007 Section 5(1) and (2)</p>
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<p>Article 14(5) – Right to have conviction and sentence reviewed by a higher court.</p> <p>Article 14(6) - Compensation for malicious prosecution</p> <p>Article 14(7) - No one shall be convicted for the same offence for which he has been convicted or acquitted.</p> <p>Article 15 - Right not to be held guilty for actions which did not constitute an offence at the time of commission</p>	<p>Constitution of Sri Lanka, 1978 : Article 127 & 129 – Provision for the right to appeal against decisions of the courts of first instance and superior courts by the Supreme Court and the Court of Appeal of the State respectively</p> <p>Code of Criminal Procedure Act, No. 15 of 1979 as amended : Chapter XXVIII – Gives provision for an appeal process to have decisions reviewed by superior courts Judicature Act No. 2 of 1978- Sections 14 and 16-Right of Appeal in Criminal Cases granted</p> <p>Delictual liability under the common law (RDL) for malicious prosecution</p> <p>Principles of Double Jeopardy (Code of Criminal Procedure Chapter XXVII Sections 314 and 315)</p> <p>Constitution of Sri Lanka, 1978 : Article 13(6) – Fundamental right not to be found guilty of an offence for an action which did not constitute an offence at time of its commission</p>
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<p>Article 16 - Right to recognition as a person</p> <p>Article 17 - Right to Privacy family, secte, reputation</p> <p>Article 18(f) – Freedom of Thought Conscience and Religion</p>	<p>Act No. 56/ 2007 Section 2</p> <p>Common law Delictual rights to sue for damages and for loss of reputation. Also Sections 71 and 75 of the Post Office Ordinance No. 11/ 1908 as amended. (CAP 520) Computer Crimes Act No 24 of 2007 Section 3-Unauthorized access to a computer an offence Section 8-illegal interception of data an offence Section 10 unauthorized disclosure of information enabling access to a service an offence</p> <p>Constitution of Sri Lanka, 1978 : Article 10 – Fundamental right of freedom of Thought, Conscience and Religion including freedom to adopt a religion or belief of choice Article 14(e) – Fundamental right of freedom to manifest religion or belief in worship, observance, practice or teaching</p>
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<p>Article 18(2)- No one shall be subject to coercion which would impair his freedom to have a religion of his choice -</p> <p>Article 18 (3) - Permissible restriction on freedom to manifest one's religion or belief.</p> <p>Article 18(4) - Respect for the liberty of parents to ensure the religious and moral education of their children.</p> <p>Article 19 – Freedom of expression and right to hold an opinion</p>	<p>SC Determination 2/2001- Christian Salane Doratuwa Prayers Centre- 19/2003 New Wine Harvest Ministries incorporation- held Article 14(1)(e) and 14(1)(g) cannot be enjoyed together . " The freedom guaranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free exercised of one's thought and conscience without their been any fetter or allurement which in anyway distorts that choice.</p> <p>Constitution Article 15(7)</p> <p>Age of Majority Ordinance No.7 of 1865 as amended. Parents right to children's upbringing- religious moral upbringing - common law, law of persons</p> <p>Constitution of Sri Lanka-Article 10 and 14</p>
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<p>Article 19 (2) - Freedom of Expression and Freedom of Information.</p>	<p>Constitution, Article 14(1) (a) and Article 27 - The directive principles of state policy provide for equal opportunity to all citizens to prevent any disability being suffered on grounds of religion, language, political opinion, etc.</p> <p>Constitution of Sri Lanka, 1978 : Article 14(1)(b) – Fundamental right of freedom of peaceful assembly</p> <p>Penal Code of 1889 as amended : Sections 290 – 292 – Provides that actions of injuring, defiling, insulting or otherwise, of a religion in general or a place of worship, religious assemblies, religious feelings, etc. shall carry with it penal sanctions.</p> <p>Profane Publications Act-Prohibits publications insulting or ridicule of any observances sacred to any religion</p> <p>Environmental Foundation Ltd.Vs. UDA . SC Minutes 23.11.2005.- SC Expressed the view that the Fundamental Right relating to freedom of speech and expression including publication guaranteed by Article 14(1) (e) to be meaningful and effective should carry within its scope an implicit right of a person to seek relevant information from a public authority in respect of a matter that should be in the public domain. Court stressed that it should necessarily be so where the public interest in the matter outweigh the confidentiality that is attached to affairs of State and official communications.</p>
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Article 19(3) - Permissible Restrictions in respect of rights under Article 19.	Constitution, Articles 15(2) and 15(7)
Article 20(1) - Prohibition of propaganda for war.	Act No. 56/ 2007 Section 3
Article 20(2) - Prohibition of advocacy of national, racial, religious hatred	Act No. 56/ 2007 Section 3
Article 21 – Right to peaceful assembly	Constitution of Sri Lanka, 1978 : Article 14(1) (b) – Fundamental right of peaceful assembly.
Article 22 – Freedom of association and right to form and join trade unions	Constitution Article 14(1)(e) – Fundamental right of freedom of association Constitution Article 14(1)(d) – Fundamental right to form and join a trade union
Article 22(2) - Permissible Restrictions	Constitution of Sri Lanka , Article 15(4)

Article 23 – Protection of the family unit	Constitution of Sri Lanka, 1978 : Article 27 – The directive principles of state policy provide that the State shall recognize and protect the family as the basic family unit Prevention of Domestic Violence Act No 34 of 2005 –Protection orders can be obtained in respect of offences committed within the environment of the home Evidence Ordinance- sections 120(2),(3) and (4)-admissibility of evidence of husband and wife
Article 23 (2) & (3) - Right of Men and Women of Marriageable age to marry. No marriage without consent of spouses.	General Marriages Ordinance Penal Code
Article 23(4)- Equality of spouses in marriage	Article 12(1) of the Constitution. Maintenance Ordinance as amended.

<p>Article 24 – Rights of Children</p>	<p>Section 5 of Act 56 of 2007.</p> <p>Constitution of Sri Lanka, 1978 : Article 12(4) of the Constitution provides that subordinate law, legislation or executive action for the advancement of Children not precluded by Article 12</p> <p>Article 27 – The directive principles of state policy provides for the special care for the interests of children specifically to protect against discrimination, and to ensure their full physical, mental, moral, religious and social development</p> <p>Children and Young Persons Ordinance-Makes provision for the establishment of Juvenile Courts, Supervision of Juvenile Offenders and for the protection of children and young persons.</p> <p>National Child Protection Authority Act No 50 of 1998-Makes provision for the prevention of child abuse and the protection and treatment of children who are victims of such abuse.</p>
<p>Article 25 – Franchise and access to Public Affairs</p>	<p>Section 6(a) of Act No. 56 of 2007</p> <p>Constitution of Sri Lanka, 1978 : Article 4(e) – Sovereign Right of freedom to exercise the right of franchise at the elections of the President, Members of Parliament and Referendums, by all qualified and registered electors over the age of 18</p>

<p>Article 26 – Equality before the law and equal protection of the law, without any discrimination</p>	<p>Supreme Court Determination 12/2003 –Enhanced franchise to include Provincial Councils and Local Authorities</p> <p>Chapter XIV of the Constitution-Articles 88 and 90</p> <p>Constitution of Sri Lanka, 1978 : Article 12(1) – Fundamental right of equality before the law and equal protection of the law Article 12(2) – Fundamental right of non discrimination based on grounds of race, religion, language, caste, sex political opinion, place of birth or any such grounds Article 12(3) – Fundamental right of freedom from subjection to disabilities, liabilities, restrictions, or conditions with regard to public places</p>
<p>Article 27 – Right of minorities to exercise rights in community</p>	<p>Constitution of Sri Lanka, 1978 :</p> <p>Article 10 – Fundamental right of freedom of Thought, Conscience and Religion including freedom to adopt a religion or belief of choice</p> <p>Article 14(e) – Fundamental right of freedom to manifest religion or belief in worship, observance, practice or teaching, privately or in association</p> <p>Article 14(f) – Fundamental right of freedom to enjoy and promote culture, and use of own language, privately or by association</p>

	<p>Articles 18 – 25 – Provisions are provided for the use and practice of the Tamil and English language although such languages are used by minority communities in the State. These practices include usage in Parliamentary proceedings, educational purposes, administrative purposes, legislation and judicial proceedings</p> <p>Article 27 – The directive principles of state policy provide for steps to be taken to promote co-operation and mutual confidence among all sections of the state, specifically in the field of education, teaching and education. It also provides for equal opportunity to all citizens to prevent any disability being suffered on grounds of race, religion, language, caste, sex, political opinion or occupation. Provision is also present for the assistance and development of cultures and languages</p> <p>Official Languages Commission Act, No. 18 of 1991 :</p> <p>Section 2 – Provides for the establishment of an Official Languages Commission</p> <p>Section 6 – 7 – This Commission is charged with the task of recommending policy, conducting investigations and to take any other actions necessary for ensuring the compliance with the various rights pertaining to language as enshrined in the Constitution of the Republic as seen in Articles 18 – 25</p>
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	<p>Penal Code of 1889 as amended :</p> <p>Sections 290 – 292 – Provides that actions of injuring, defiling, insulting or otherwise, of a religion in general or a place of worship, religious assemblies, religious feelings, etc: shall carry with it penal sanctions thereby ensuring that due respect are granted even to minority religious movements.</p>
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Appendix III

The Constitution of Sri Lanka (1978)

Chapter 3- Fundamental Rights

The 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 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 sufficient knowledge of any language as a qualification for any such employment of 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 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 recognized 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, movement, &c.

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 or 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

recognized by paragraph (1) of this Article.

Restrictions on fundamental Rights

15. (1) The exercise and operation of the fundamental rights declared and recognized 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 relating to public security.

(2) The exercise and operation of the fundamental right declared and recognized 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 recognized 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 recognized 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 recognized 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 recognized 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 recognized 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 recognized 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 recognized 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 I such person is entitled under the provisions of this Chapter.

Appendix IV

International Covenant on Civil and
Political Rights (ICCPR) - Part I to III

International Covenant on Civil and Political Rights (ICCPR) - Part I to III

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

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

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

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

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

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

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 authorized 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 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.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

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

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

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

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

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

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

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

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was

committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Appendix V

European Commission decision of
14th October 2008 providing for the
initiation of an investigation
pursuant to Article 18 (2) of Council
Regulation (EC No. 980 / 2005) with
respect to the effective
implementation of certain human
rights conventions in Sri Lanka
(2008/80 3/EC)

DECISIONS

COMMISSION

COMMISSION DECISION

of 14 October 2008

providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the effective implementation of certain human rights conventions in Sri Lanka

(2008/803/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES:

Treatment or Punishment and the Convention on the Rights of the Child, is not being effectively implemented.

Having regard to the Treaty establishing the European Community,

- [2] The International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, are listed as core human rights conventions respectively in points 1, 5 and 6 of Annex III, Part A, of Regulation (EC) No 980/2005.

Having regard to Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (1), and in particular Article 18(2) thereof,

After consulting the Generalised Preferences Committee,

- [3] Article 16(2) of Regulation (EC) 980/2005 provides for the temporary withdrawal of the special incentive arrangement referred to in Section 2 of Chapter II of that Regulation, if the national legislation incorporating those conventions referred to in Annex III of the Regulation which have been ratified in fulfillment of the requirements of Article 9(1) and (2) is not effectively implemented.

Whereas

- [1] Reports, statements and information of the United Nations (UN) available to the Commission, including the report of the Special Rapporteur on Extrajudicial Executions of 27 March 2006, the statement of the Special Adviser to the Special Representative for Children and Armed Conflict of 13 November 2006 and the statement of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, of 19 October 2007, as well as other publicly available reports and information from other relevant sources, including non-governmental organisations, indicate that the national legislation of the Democratic Socialist Republic of Sri Lanka incorporating international human rights conventions, in particular the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading

- [4] The Commission has examined the information received and found that it constitutes sufficient grounds for the opening of an investigation with the objective of determining whether the legislation of Sri Lanka on the recognition and protection of fundamental human rights is effectively implemented. This would further allow to determine whether a temporary withdrawal of the special incentive arrangement is justified.

- [5] Consultations with the Generalised Preferences Committee were held on 21 September 2008.

(1) OJ L 49, 30.6.2005, p. 1.

HAS DECIDED AS FOLLOWS:

Sub Article

The Commission shall initiate an investigation in order to establish whether the national legislation of the Democratic Socialist Republic of Sri Lanka incorporating the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child is effectively implemented.

Done at Brussels, 14 October 2008.

For the Commission
Carherine ASITON
Member of the Commission
