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DECLARATION OF ORIGINALITY

I, Thamil Venthan Ananthavinayagan, do hereby declare that this work that is submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.

Signed: _________________________________  Date: 18th of February 2018

Thamil Venthan Ananthavinayagan
-A B S T R A C T-

The thesis analyses Sri Lanka’s engagement with the United Nations human rights machinery and assesses whether there has been any impact on the human rights infrastructure and situation in Sri Lanka because of this engagement. For this purpose, it will elucidate, first, the historical development of colonial and post-colonial Sri Lanka. Second, it considers Sri Lanka’s development of a domestic human rights infrastructure. Third and fourth, it provides an examination and analysis of the country’s engagement with United Nations’ treaty-based and charter-based human rights bodies. Finally, the thesis offers some conclusions concerning the impact of Sri Lanka’s human rights engagement with the United Nations.

Key words: Sri Lanka; United Nations; human rights engagement; post-colonialism; treaty-based bodies; charter-based bodies; civil society; ethnocracy; majoritarianism
For அப்பா/ appa.

My hero.
I. Introduction

Sri Lanka has had a reasonably lengthy engagement with the human rights machinery of the United Nations since becoming a party to key human rights treaties in the 1980s and through the period of the civil war which ended in 2009. This dissertation examines the impact of the engagement by Sri Lanka with the United Nations human rights machinery and seeks to answer several key questions. Did the engagement of Sri Lanka with the United Nations lead to any changes, direct or indirect, of the domestic human rights infrastructure? Did this involvement contribute to the benefit of rights-holders and other stakeholders in the country or was this engagement a pretence by successive post-colonial Sri Lankan governments before the United Nations?

The purpose of this introductory chapter is to, first, provide a short explanation and examination of the two elements of the thesis, namely the United Nations human rights machinery and the Sri Lankan human rights infrastructure. These two factors will be discussed against the background of the aforementioned research questions. Second, the introductory chapter will map out the research methodology to approach the research questions. The yardstick to measure the impact of the human rights engagement is its effect on the country’s human rights infrastructure.

The human rights infrastructure of Sri Lanka has been in a fluid state of consolidation and, as such, it needs to be interrogated to understand how the country has interacted with the human rights machinery of the United Nations. Were there any conceivable motivations or policy narratives that impeded the effective improvement of human rights on the ground? The work is mindful of the infrastructure’s evolution against the backdrop of the country’s colonial past. Further, the examination seeks to pave the way for a better understanding of this infrastructure, explain the efficacy of existing human rights institutions and scrutinise the implementation of international human rights law in the country. To this end, the work will study the impact of international human rights engagement on the island’s infrastructure, by considering the variety of tools, procedures, broad mandates, knowledge and resources available.

In the following four sections, this chapter seeks to, first, provide a short discussion on the human rights infrastructure in Sri Lanka and put this in the context of international human
rights engagement. Second, the chapter will introduce to the United Nations human rights machinery. Third, the chapter will highlight the introduction of human rights law in Sri Lanka after centuries of colonialism and, fourth, it will present the overall structure of the thesis in light of the research questions.

1. The Sri Lankan human rights infrastructure and international human rights engagement

The focus of this thesis research is on the progress of the Sri Lankan human rights infrastructure against the background of the country’s human rights engagement with the United Nations human rights machinery after its independence in 1948, a historical event that followed more than 400 years of colonial rule. Human rights law, as Anthony Anghie writes, “[p]urports the view to regulate the behaviour of a sovereign within its own territory.” Domestic human rights legislation, for this reason, falls in the national prerogative of the sovereign state. However, as Deepika Udagama writes:

[t]oday, the concept of state sovereignty has dramatically weakened, particularly with the advancement of international law in the UN era. The rapid development of international human rights law under the aegis of the UN has contributed to the acceleration of that process. It follows then that protection of human rights within a country is no longer measured only in relation to domestic standards. Today, domestic guarantees of human rights and their implementation are both scrutinized in relation to international human rights law commitments of the State.

The Chairman of the Soulbury Commission, the final colonial body which was entrusted to draft the first post-colonial constitution of the independent Sri Lanka, Lord Soulbury, lamented the absence of the entrenchment of rights protection in the Sri Lankan Constitution. He said that:

[N]evertheless - in the light of later happenings - I now think it is a pity that the Commission did not also recommend the entrenchment in the constitution of guarantees

2 Ibid p. 5.
5 Ibid.
of fundamental rights, on the lines enacted in the constitutions of India, Pakistan, Malaysia, Nigeria and elsewhere.\(^6\)

Lord Soulbury referred to the increased ethnic tensions in 1950s, a period that witnessed inter-ethnic riots in 1956 and 1958 as a reaction to several discriminatory laws\(^7\) under the administration of S.W.R.D. Bandaranaike, later prime minister of the country. Moreover, Lord Soulbury deplored one insufficient element of a human rights infrastructure, namely the presence of laws that can deliver tangible human rights benefits. However, contemporary human rights infrastructure is composed of four elements: laws, institutions, policy instruments and policy strategies.\(^8\) If these elements neither interact nor are interlinked, necessary progress will not be attained.\(^9\) Laws provide the basis for claims, establish institutions and set the framework for policy instruments and strategies. Institutions, meanwhile, seek to ensure effective implementation of laws and their enforcement. Policy instruments and strategies bring human rights objectives into new programmes, laws and allocate resources, achieving positive action.\(^10\)

Sri Lanka has initiated the development of a human rights infrastructure, encompassing the creation of human rights legislation (including the International Covenant on Civil and Political Rights Act 2007 and the Convention against Torture Act 1994), establishing institutions (including the National Human Rights Commission and National Police Commission) and producing policy instruments/strategies (including the National Action Plan for the Protection and Promotion of Human Rights). The question is if, given all the legislation and institutions in Sri Lanka, the different elements were interlinked. How did the international human rights machinery contribute to the domestication of laws and strengthening of institutions, and to what extent did the United Nations human rights machinery furnish support to the resilience of the infrastructure to the challenges posed by ethnic-religious divisions, violence, and war? By way of example, the National Human Rights Commission, in a courageous effort to highlight the human rights situation in the country and to contribute to the development of a human rights

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\(^9\) Ibid.
\(^10\) Ibid p. 13.
infrastructure, appointed a Special Rapporteur on conflict-related human rights violations in 2006.\textsuperscript{11} Consequently, this Commission issued a report, in which the Special Rapporteur asserted the detrimental effects of emergency regulations on the domestic human rights infrastructure, the ineffective human rights institutions and openly criticised the chauvinistic office-holders in charge who were entrusted to uphold and preserve good governance and human rights.\textsuperscript{12}

Meanwhile, civil society organisations, aware of the growing importance of human rights to defuse the tensions in a bilingual and multi-religious country, attempted to raise awareness of international human rights in the development of the domestic infrastructure. By way of further example, among the many human rights civil society organisations, the Human Rights Centre of the Sri Lanka Foundation, issued a commentary on the text of the Universal Declaration of Human Rights which claimed that:

\begin{quote}
[t]he social harmony which is fostered by human rights does not demand the suppression of differences; what it does demand is the acceptance and observance of certain norms, so that differences do not lead to hostility and ultimately to a social behavior which seeks to suppress differences.\textsuperscript{13}
\end{quote}

All these communications and statements grew in a time when the early history of independent Sri Lanka became intertwined with the nearly three-decade long civil war, which profoundly shaped post-colonial Sri Lanka. A large part of the conflict manifested itself in human rights violations, which might have been curbed through the application of international pressure.\textsuperscript{14} The conflict was rooted in inter-communal relations between Sinhala and Tamils that worsened in the latter years of British colonial rule. During the ethnic conflict in Sri Lanka, the primary opponents - namely the Sri Lankan government and the Liberation Tigers of Tamil Eelam - both recognised that international legitimacy was rooted in the respect for human rights.\textsuperscript{15} Human rights discourse was the point of referral in the parties' own understandings

\begin{itemize}
\item[12] Ibid pp. 16-17.
\item[15] Ibid.
\end{itemize}
of the conflict's origins and conduct. Nira Wickramasinghe writes that “[t]he post-independence years have been described as years of decline and crisis in democratic values, institutions, power-sharing mechanisms and of a near suicidal fall from prosperity and stability to civil unrest.” Among these diverse communities, all regard Sri Lanka as their home, but none of them have been integrated into one single nation. Human rights, against this background, were subject to compromises and diminished gradually in times of increasing tensions and conflict. While the literature on the protracted ethnic conflict is wealthy, not enough scholarly attention has been given to the development of the domestic human rights framework against the backdrop of international human rights engagement. This doctoral research attempts to fill this gap by identifying the progress made by the United Nations in Sri Lanka. At an event in 2015 to mark the 60th anniversary of Sri Lanka’s admission to the United Nations, the Permanent Representative of Sri Lanka to the United Nations in New York remarked that:

[w]ith the changes in the Sri Lankan political landscape, Sri Lanka has resolved to positively engage with the United Nations with a renewed vigor to further the existing relations and to resume its position as a responsible member of the international community (...) We are committed to the ideal of decency and mutual respect in dealings among nations, to the protection and promotion of human rights and preserving the dignity of all people, irrespective of race, gender, color or creed.

This comment, however, stands in stark contrast to the recent report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka in 2016, in which he states that:

[T]he current legal framework and the lack of reform within the structures of the armed forces, the police, the Office of the Attorney-General and the judiciary perpetuate the risk of torture. Sri Lanka needs urgent and comprehensive measures to ensure structural reform in these institutions to eliminate torture and ensure that all authorities comply with international standards. A piecemeal approach is incompatible with the soon-to-be-launched transitional justice process and could undermine it before it really begins.

The Sri Lankan case study provides the unique example of a country that ratified almost all

16 Ibid.
18 Sir Jeffries, supra note 1, p. 3.
20 United Nations Human Rights Council, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka, A/HRC/34/54/Add.2, para. 113.
the main human rights treaties, engaged with almost all international human rights bodies, and yet had a domestic human rights infrastructure that was affected by ethnic division, state and non-state violence in its post-colonial history. Did the prioritization of international human rights law by the United Nations harm the furtherance of human rights protection and promotion in the country? A careful examination is needed to determine the extent of human rights domestication considering the profoundly violent and politized Sri Lankan public environment. In doing so, it is necessary to examine the role of the United Nations human rights machinery. For Rosa Freedman explains that:

[T]he UN is mandated to develop, promote and protect human rights. That tripartite mandate exists across the UN but the Organisation largely utilises specialist human rights bodies to fulfil its duties. (...) The UN human rights machinery includes political bodies, independent experts, and staff from the Secretariat. The roles, functions and activities of the bodies vary but they all have one crucial factor in common – a lack of enforcement powers.²¹

The United Nations intended to strengthen and reinforce national efforts to implement human rights law standards.²² The late Cherif Bassiouni wrote, “[S]tates parties to the multilateral treaties seek to have the least amount of enforcement to ensure themselves of the widest latitude of action, and have the least exposure to collective condemnation or embarrassment.”²³ Furthermore, international human rights law standards, rules and norms can become institutionalized in the domestic political process through embodiment in the domestic law or, as Robert Keohane formulates, become “[i]nstitutionally enmeshed.”²⁴ Resolute engagement is vital to arrive at institutional enmeshment. Like the League of Nations was, the United Nations is an international organisation with a global agenda, which claims, inter alia, to speak for humanity through national governments.²⁵ The compliance with the broader human rights normative framework of the United Nations facilitates the adoption of universal

standards. To measure compliance, human rights bodies at the United Nations, treaty and charter-based bodies alike, are entrusted to scrutinise continuously, and in so doing, enhance domestic human rights infrastructures. Considering the earlier comments of Anthony Anghie and Deepika Udagama, it is opportune to consider the influence of the international human rights machinery, United Nations treaty and charter-based bodies alike on post-colonial administrations, and examine further the domestication of international human rights standards in Sri Lanka. The Sri Lankan case study is permeated with paradoxes, namely the international commitments and noble declarations on the one hand, and a troubling human rights records on the other hand, revealing a significant gap between commitment and compliance, as the country’s human rights record itself raises serious questions.

Laksiri Fernando notes that: [t]here cannot be much doubt that incorporation of human rights as fundamental rights in a national constitution emerges primarily from international obligations of countries today as members of the United Nations (...) The incorporation of fundamental rights under international influence, however, cannot succeed unless there are commensurate national processes.

Such a national process, however, was probably missing at the beginning of Sri Lanka’s statehood journey. The absence of comprehensive legal codification of domestic human rights in the immediate period after the country’s independence, as indicated by Lord Soulbury, did not benefit a commensurate national process. Moreover, considering the civil war in the country, the examination invites the question as to whether the human rights machinery was effective at exerting any influence on the behaviour of the parties to the conflict in particular, and on the infrastructure in general. Was the ongoing civil war an obstructive factor in effective human rights engagement and a political justification to counter demands by the international human rights machinery to abide by and implement international human rights standards? This dissertation seeks to address this and other related questions in the context of Sri Lanka’s engagement with the United Nations.

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26 Udagama, supra note 4, p.105.
2. The United Nations human rights machinery

With the establishment of the United Nations in 1945, the prevailing Cold War narrative at the United Nations and the developments coming after 1966, there was a considerable increase in the number of United Nations organs tasked with human rights protection and promotion. Bertrand Ramcharan writes that:

[t]he sole framework of reasoning that exists to cover everyone in the international community is that the international public order is grounded in international human rights norms and that, at the end of the day, everyone must be held accountable to this legal architecture.

A substantial body of jurisprudence from human rights treaty bodies and other authoritative sources has spelled out the human rights obligations of member states ever since. Crucial in this regard was the United Nations Human Rights Committee, a treaty body which monitors the implementation of the International Covenant on Civil and Political Rights. Bertrand Ramcharan argues further that the Human Rights Committee is “[i]n the process of humanizing sovereignty”, while he stresses that the Committee is adamant that governments are not at liberty to act as they wish, but must conform to international human rights standards. In this regard, General Comment 31/80 of the Human Rights Committee states the general obligations of State Parties to human rights treaties. Here, the Human Rights Committee spells out that:

[e]very State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the rules concerning the basic rights of the human person are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State

31 Ibid.
32 Ibid p. 51.
34 Ramcharan, supra note 30.
Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.\textsuperscript{36}

The United Nations Human Rights Council, like its predecessor the United Nations Human Rights Commission, is a political body with a values-based mandate.\textsuperscript{37} The United Nations Human Rights Commission had the “[c]ore mandate to promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind,”\textsuperscript{38} to address human rights violations, make recommendations on measures and best practices.

It also offered an appropriate forum for international cooperation, transparent dialogue, knowledge transfer and human rights capacity-building to counter domestic malpractice. It was the first human rights body within the United Nations entrusted with human rights protection and promotion, as its member states drafted numerous human rights treaties, established new mechanisms for the protection of human rights and created the Special Procedures. However, given the politicization of this human rights institution during the phase of the Cold War\textsuperscript{39}, its purpose was distorted. The United Nations Human Rights Council, which succeeded it, took over several functions of the Commission. It aimed, however, to work more closely with other components of the international human rights system and develop the role of non-governmental organisations and national human rights institutions.\textsuperscript{40} The importance of United Nations activity in the human rights field lies in the long-term socialisation process.\textsuperscript{41} Universal acceptance and application of international human rights standards need to be achieved through diligent advocacy and promulgation by a global authority, which is accepted by the nation states that are members of such an authority. Human rights standards

\textsuperscript{36} \textit{Ibid} para. 2.

\textsuperscript{37} Ramcharan, \textit{supra} note 30, p. 54.

\textsuperscript{38} \textit{Ibid} p.1.


\textsuperscript{40} \textit{Supra} note 30, Ramcharan, pp. 11-12.

must be understood as authoritative community goals, whereas the moral authority is concentrated at the United Nations, the custodian of human rights. Every individual state has the prime responsibility to be the “[g]uarantor and protector” of its human rights under its jurisdiction. However, Roluald R. Haule, rightly asserts:

[W]hen state protection metamorphoses into state abuse, the international community, through the mechanisms of guarantees it has put in place, becomes the only recourse for the protection of the universal rights of individuals failed and abandoned by the state.

It is for this reason reasonable to assert that while the state has the prime responsibility to protect and promote human rights within its jurisdiction, this duty is not its only responsibility.

3. Sri Lanka’s independence and the introduction of human rights law

Sri Lanka became an independent and sovereign country on the 4th of February 1948, marking the end of colonial rule. The new concept of sovereignty served as a tool for emerging countries to regain control over their own economic and political affairs from former colonisers. Colonies, by definition, lacked this very sovereignty. The concept of sovereignty stipulated that all states are equal and have prerogative over the territory they govern, emerged out of the Treaty of Westphalia of 1648. While non-European states lacked this sovereignty, the evolution and elaboration of international law can be seen as the penetrating force to include non-European states within this Westphalian concept of sovereignty. The concept of sovereignty by Western states, a creation “[i]n the colonial encounter for the purpose to reveal and remedy the past,” was perceived differently between non-European states and European

43 Ibid.
44 Ibid.
45 Sir Jeffries, supra note 1, p. 132.
46 Anghie, supra note 3, p. 198.
49 Ibid.
50 Anghie, supra note 3, p. 199.
states. Non-European states were not considered sovereign through the law, whereas European states - i.e., colonial powers - were not hindered in their legal actions that inflicted massive harm on their respective colonies. All this was deemed necessary to create a world order per European thinking of social order, political economy, development et al.

In Sri Lanka, British rule was facilitated by the introduction of political identities, as this construction helped to provide the basis for entitlements and rights, such as places in the administration or representation. The colonies, however, rebelled and anti-colonialism involved the quest and respect for rights. For the attainment of this goal, the realisation of human rights was seen to necessitate decolonization. Scholars debate if attaining independence and the sovereignty attached to this status, was timely or probably too early for the island. Sri Lankan sovereignty, however, was carefully guided: the Soulbury Constitution that was diligently drafted with British involvement provided only sparse human rights protection and promotion, namely in the legalized form of art. 29.2. of the Constitution, which provided a minority protection clause. One commentator is critical of the extent of the protection provided under the Constitution, stating that, “[t]he independence gained in 1948 was a step forward, but the Soulbury Constitution on which it was based clearly restricted our freedom and sovereignty.” The two republican constitutions which followed in 1972 and 1978 provided for certain fundamental rights, but these particular human rights were subject to limitation. Under the international human rights covenants, states must protect, respect and fulfil international human rights laws by implementing them in the domestic setting. With the ratification of the human rights treaties States Parties have also accepted their role as duty-

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51 Ibid p. 103.
52 Ibid p. 103.
53 Wickramasinghe, supra note 17, p. 45.
55 Sir Jeffries, supra note 1, p. 134.
bearer. Following decolonisation, States Parties acted in conflict with human rights norms, while they justified their actions on the grounds of exercising state sovereignty. Sri Lanka’s policies became increasingly insular with a greater reliance on the shield of state sovereignty, as countries consider human rights as affairs of the domestic sphere. The concept of non-interference in domestic affairs underpins, for example, one of the most important documents of the Association of Southeast Asian Nations, the Declaration on Southeast Asia as a Zone of Peace, Freedom and Neutrality. It refers to “[r]espect for the sovereignty and territorial integrity of all states, abstention from threat or use of force, peaceful settlement of international disputes, equal rights and self-determination and non-interference in affairs of States.” A national human rights infrastructure should be rooted in international human rights law, while the national protection system should be consistent with and reflect international human rights standards. To this end, attention will be devoted to the United Nations human rights agenda, and how this accompanied the national process of the inclusion of human rights.

4. Research aims and structure

4.1. Research question and aim of the thesis

The examination of human rights in Sri Lanka is academically challenging as little scholarly attention has been given to the United Nations human rights engagement with Sri Lanka. This is a gap in light of the country’s colonial history, its post-colonial development, economic decline, ethnic tensions and eruption of the civil war. This dissertation will examine whether the United Nations engagement enhanced the domestic human rights infrastructure, assisted a domestic socialisation process of internationally acknowledged human rights, and aided rights-holders and other beneficiaries. It will also consider and remain mindful of any rigid

61 Ramcharan, supra note 30, p. 90.  
determinants in governmental behaviour and the Sri Lankan zeitgeist that may have obstructed a human rights infrastructure to penetrate beyond the Sri Lankan legal code. Nira Wickramasinghe holds the view that, while Sri Lankan politicians have accepted the theoretical legitimacy of international human rights law, certain ideological alliances in the country seem to be hostile towards the concept of human rights. It is perceived as a Western brainchild with globalization as the driving force for the dissemination and infiltration of this ideology.\(^{63}\)

To this end, the role of the United Nations human rights machinery is critical, considering also the lack of a regional mechanism for the protection and promotion of human rights, but more importantly in its role to give impetus to socialisation and legalisation processes. The author will seek to substantiate the research question by considering colonial policy papers, as well as documents relating to Sri Lanka before the United Nations human rights machinery from 1946 - 2016. Furthermore, government publications, legislative enactments, Sri Lanka Law Reports, Acts of Sri Lanka, judgements of the Sri Lankan Supreme Court, reports of the Sri Lankan Human Rights Commission and reports by international and domestic non-governmental organisations as well as academic scholarship will also be relied upon. The author will examine the engagement of the international human rights machinery in addressing violations that may have created an atmosphere of denial and rejection of human rights in Sri Lanka. The author aims to achieve an understanding from this country study as to why there was such a limitation in implementation and poor domestication of a human rights regime in Sri Lanka.

4.2. Structure overview

The introductory chapter has laid out the research topic of this thesis and put forward the central research questions. It has explained the necessity of a human rights infrastructure and examined the role of the United Nations human rights machinery. The approach of this study is to, first, explore the history of Sri Lanka and its early influence on the contemporary domestic human rights infrastructure and governmental behaviour. Second, to highlight the evolution of human rights institutions and the national human rights framework. Third and most

importantly, the study will examine the role of the United Nations human rights machinery and its engagement with the country in conducting the human rights dialogue and enhancing the domestic human rights infrastructure, while assessing the effects of this engagement on Sri Lanka, both direct and indirect. The thesis will attempt to determine what the effects have been, why this has been the case and which opportunities exist for the United Nations to alter the current state. The exploration of the country’s past will help to understand the present state of human rights on the island.

For this purpose, the second chapter will provide an account of Sri Lanka’s history, beginning with an outlining of the migration of Tamils and Sinhala from India to Sri Lanka and the establishment of the kingdoms in the country. It will then focus on the arrival of the colonial powers in Sri Lanka and the introduction of legal regimes to govern the inhabitants. Three colonial commissions had a profound impact on the country. The Colebrooke-Cameron, Donoughmore and the Soulbury Commissions delineated the legal parameters, created local constitutions within which Sri Lanka would operate. Sir Charles Jeffries affirmed that while Britain was duly considering the lack of its own constitution, for practical reasons the colonial power was very much imposing powers and duties upon the subordinate administrations to control the colonial subjects.64 Further examination is required to explore the role of colonial policies on ethnicities.

Were Sinhala nationalism and Tamil separatism two inevitable consequences of colonial policy? Is, as Nira Wickramasinghe writes, colonialism responsible for the migration of “[v]ague intimations of identity and difference to pride in collective membership and finally to categorical territoriality”65 that led to violent contest of identities based on ethnicity? She asserts that the colonial institution of a race-based representative government introduced the contemporary form of political identity and conflict in the colonies.66 To this end, the chapter will examine Sri Lankan history in light of this and other questions. The third chapter will deal with the development of the Sri Lankan human rights infrastructure and examine the institutions that were, and are, designed to protect human rights. Sri Lanka has established in its post-colonial history a variety of ad hoc mechanisms with the purpose of promoting and protecting

64 Sir Jeffries, supra note 1, p. 61
65 Wickramasinghe, supra note 17, x.
66 Ibid p. 162.
human rights, including numerous Presidential Commissions for Missing Persons or the Human Rights Commission. How did these mechanisms address the gaps in human rights protection and grasp the national human rights concerns? Were there any obstacles in the attainment of specific goals? What is the role of the independent judiciary in the protection and promotion of human rights standards in the country? The third chapter will also delve into the constitutionally enshrined fundamental rights and put these in context of the ongoing emergency regulations and the executive presidency that was introduced in 1978 in the country. How did the current emergency regulations affect the development of human rights infrastructure, the laws and the institutions? Did it impact a cultivation and domestication of universally accepted human rights standards?

In the fourth chapter, the thesis will enter the examination of the United Nations human rights engagement, starting with the treaty bodies. With major international human rights treaties and treaty bodies assigned for the observation of compliance by State Parties, how and to what extent did Sri Lanka engage with the treaty bodies – have periodic reports ushered in any changes, following this human rights dialogue? Has periodic reporting been useful to initiate a socialisation process in the country? What is the role of individual complaints to achieve remedy for human rights violations? Sri Lanka has an impressive human rights treaties ratification record and this chapter will look at selected treaty bodies to elucidate and analyse the impact, if any, through this human rights engagement.

The fifth chapter will turn to the charter-based bodies, i.e., the United Nations Commission on Human Rights and the United Nations Human Rights Council. While the United Nations Commission on Human Rights was more focused on standard-setting in its first twenty years of existence, these same years of its existence were, however, dominated by politicization. The United Nations Commission on Human Rights moved to another crucial aspect of its work, namely implementation through its mechanisms. For this purpose, the work will explore the

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70 Maximilian Spohr, ‘United Nations Human Rights Council Between Institution-Building Phase and Review of
1503 and 1235 procedures of the United Nations Commission on Human Rights. Did these procedures advance the work of the United Nations Commission on Human Rights? With the Resolution A/RES/60/251, the United Nations Commission on Human Rights was replaced by the United Nations Human Rights Council, introducing new organs and mechanisms aimed at rectifying the shortcomings of the past. Theodor Rathgeber asserts:

[N]evertheless, the Council is continuously criticised for not living up to its normative nature and protecting the victims of human rights violations, even in the most dramatic situations. A major opportunity for institutionally improving its performance was the review process requested by the above mentioned UNGA resolution 60/251 after five years of existence. Unfortunately, the outcome of the HRC review was rather meagre. Nevertheless, the HRC has informally developed several specifications in its work, such as urgent debates, ad hoc fact-finding missions, inquiry commissions and new country mandates.

In this contextual environment, the chapter will draw on academic writings from the perspective of Third World Approaches to International Law and shed light on third-world states' reluctance towards international bodies and their engagement in domestic affairs of respective countries. Intrusion by international bodies is often perceived as post-colonial involvement that, according to certain scholars, leads to reluctance by such states to engage further.

The sixth and concluding chapter, will draw conclusions based on this examination, and bearing in mind the absence of a regional human rights mechanism, will seek to shed light on how the United Nations human rights machinery shifted from standard-setting to enforcement of international human rights standards in the domestic setting. The assessment from the third, fourth and fifth chapter will be valuable here to answer the research questions in the sixth and concluding chapter. It is questionable in the case of Sri Lanka if universally enshrined human rights standards can solely be achieved through the prism of domestic legal doctrine and the reliance on the independence of institutions charged with duties to observe the adherence to international human rights standards. Several states still perceive human rights as


72 Supra note 27, Rathgeber, p. 3.

a domestic affair protected by the concept of state sovereignty and the international human rights framework as a matter of neo-colonial interference.  

Political stability under state control, especially in Sri Lanka, was one of the pressing concerns for political leaders. Aggravating circumstances in the case of Sri Lanka was a persistent denial of the human rights discourse by policy-makers and a patriarchal social system that values loyalty to the state authority over individual rights, cultural relativism and an extreme emphasis on Sri Lankan values.

The hypothesis of this doctoral research is that the overarching Sinhala hegemonic narrative has transfused into national, majoritarian consciousness which leaves little room for the rights of minorities. Sinhala elitist policy-makers have, repeatedly, exploited the hegemonic narrative to obtain and entrench power. They distorted human rights language and policies to further their own interests. This has prevented the robust and sustainable development of a human rights infrastructure for the benefit of all citizens in the country.

Therefore, this research aims to enrich the existing literature by examining the contribution of the United Nations human rights machinery to the domestic human rights infrastructure of former colonies in regions without adequate human rights protection and promotion. The scholarship on the ethnic conflict and civil war in Sri Lanka, Tamil nationalism and separatism, and Sinhala Buddhist nationalism is also exhaustive. In recent literature, scholarship and

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74 Anghie, supra note 48, pp. 739-740.
practitioners have elaborated extensively on accounting for the past violations, in particular for human rights violations during the last stages of the civil war and the post-war situation.\textsuperscript{79}

Human rights in Sri Lanka, according to Desmond Tutu and Mary Robinson:

[i]s an issue that concerns all of us. Whether the Human Rights Council is able to summon the will to act on one of the most serious cases of human rights violations to have occurred since it was founded in 2006 could have ramifications for the global standing of human rights and international humanitarian law – and for the prestige and authority of the Council.\textsuperscript{80}

It is therefore necessary to investigate the human rights engagement in greater detail, identify tangible effects on the country’s infrastructure and consider the policy environment that provided the space for human rights engagement. As Sri Lanka is in the process of drafting the third republican constitution, it will be of benefit to observe and assess the impact and contribution of the treaty and charter-based bodies of the United Nations alike towards enhancing the status of human rights in the country.


\textsuperscript{80} Desmond Tutu and Mary Robinson, ‘Our duty to Sri Lanka, and human rights’, online at: <https://www.theguardian.com/commentisfree/2012/feb/26/our-duty-sri-lanka-human-rights>, last accessed 10\textsuperscript{th} of September 2017.
II. **Sri Lanka’s history: colonialism, independence and conflict**

This chapter will discuss Sri Lanka’s history since it is relevant to the overarching question of the thesis: namely, given the engagement of Sri Lanka with the United Nations on human rights, what is the impact on the country’s human rights infrastructure? This chapter will try to trace and identify the decisive historical antecedents that could have translated into the formation of law and policy in post-colonial Sri Lanka. There will be also a study on the ramifications in the societal consciousness that determined governmental interaction with the United Nations. Did the island’s history shape governmental behaviour and modify contemporary political doctrine? Is it true that the "[o]fficial history and opposition history agree on the essential terms of the argument: present conflicts can only be explained by reference to the past?"\(^{81}\)

To this end, the chapter will shed light on the migration of the Sinhala and Tamil population to Sri Lanka, the creation of domestic rule, rivalries, cultivation of cultures and the exercise of indigenous traditions and religions in the country. Consequently, the chapter will turn to the advent of European rule in Sri Lanka. Considering the colonial rule that lasted for more than 200 years, the chapter will closely discuss the impact of British rule on post-colonial Sri Lanka. Did colonial policies and governmental traditions affect the legal architecture and permeate the human rights infrastructure? This presentation of the pre-colonial and colonial history of this island will provide the background to a discussion of the developments in post-colonial and independent Sri Lanka. By presenting a historical account, and identifying certain colonial measures through examining the impact of them, this work will provide the foundation for the explanation of the state of the current human rights infrastructure in the third chapter. Furthermore, this historical appraisal will assist in a decoding of the policy narratives that drove and drives governmental behaviour before the United Nations human rights machinery.

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1. The history of the island before its independence in 1948

While there is sufficient scholarship on the history of Sri Lanka, this chapter does not intend to detail the entirety of Sri Lankan history. It is not an easy endeavor to separate historical fact from the ideological and nationalist frameworks that have complicated an objective account of the island’s history.\(^{82}\) Mahinda Deegalle expounds that a:

[m]ajority of the Sinhalese claim not only that Sri Lanka has, throughout a known history traced to the fifth century BCE, been one country, but also has historically been primarily a Sinhala Buddhist country. (…) Ideologically, among Sinhalese and Tamils, there are irreconcilable religious, ethnic, political and nationalistic positions, which have continuously fed into further misunderstandings and accusations of injustice resulting in the bloody conflict now witnessed in modern Sri Lanka.\(^{83}\)

Understanding the history of Sri Lanka is a necessary exercise to explain contemporary Sri Lanka. Only after a reflection upon the past can the objective observer know that:

[T]he range of history, like that of law, is limited only by the boundary that circumscribes the life of man. The historian deals with life as found entombed in the mute records of the past. The lawyer struggles with life governed by the passions, the prejudices, the hopes, and the fears of the present. Both alike, in reaching their conclusions, must tread upon uncertain ground and remain content with proof far short of the absolute. Law stands foremost among the practical sciences as an aid to history, and history in turn becomes the interpreter of law.\(^{84}\)

The following section will now explore the history of Sri Lanka prior to the achieving of independence in 1948.

1.1. Migration and indigenous rule of the island

Sri Lanka was described by the famous world traveler Marco Polo as the “[b]est island of its size in the world”\(^{85}\), geographically the same size as the Republic of Ireland.\(^{86}\) The renowned Sri Lankan historian K.M. de Silva explains that the island’s physical size of about 65.610 square kilometres was:

[I]arge enough to ensure that throughout much of its history, political pressure from

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\(^{86}\) Farmer, *supra* note 6, p. 1.
the Indian kingdoms could be successfully resisted, and even in regard to cultural and religious influences these could be absorbed, assimilated, adapted and, in some instances, transformed.\textsuperscript{87}

Sri Lanka was separated from the southern tip of India around seven thousand years before our present era, and only a narrow sea of just 40 km in length divide the two countries.\textsuperscript{88} The geographic vicinity and geological evolution indicate the island’s affiliation and its receptivity for the influence exerted by the Indian subcontinent.\textsuperscript{89} Kingdoms from the northern and the southern parts of India have influenced the country culturally, religiously, politically and economically.\textsuperscript{90} The island is divided in a variety of climate zones, with very characteristic rainfall in the respective regions, namely the Wet and Dry Zone.\textsuperscript{91} This distinction plays an important role in the country’s history, as the climate condition determined the peopling of the island, the creation of kingdoms and provided the basis for the economy. Moreover, climate conditions had implications for colonial conquest, and had an impact on the education of certain communities to have access to the civil service under colonial rule.\textsuperscript{92}

Howard Wriggins described the country poetically as a:

\begin{quote}
[s]mall, pear-shaped, tropical island barely twenty-five miles to the southeast of the tip of India where the waters of the Bay of Bengal meet the Arabian Sea. For centuries, her position at the juncture of important sea routes has made Ceylon a prize for whatever sea powers held or sought control of the Indian Ocean. Arabian seafarers made Ceylon an important commercial center before the Europeans found their way around the Cape of Good Hope. Successive European sea powers have each in turn used Ceylon as one of their principal bases in the vast oceanic spaces (…). But many centuries earlier, before the coming of the Europeans (…) a highly predictive and culturally rich civilization flourished in Ceylon.\textsuperscript{93}
\end{quote}

\textsuperscript{88} Ibid p. 1.
Long before Europeans settled among the communities of the island, Sri Lanka was already an accepted trading focal point with India and China, and even trade links to the Roman Empire and Greece existed. The profits from this trade and the agricultural surplus helped to finance the irrigation infrastructure and the religious buildings all over the island. To understand the history of the country, its peopling, the evolution of its communities, races, and ethnicities, it is illuminating to look into a key document in Sri Lankan history, the Mahavamsa. It is a document that is claimed to have been written by the Buddhist monk Mahanama in the fifth century BCE, who was allegedly the uncle of one of the ruling kings. This document exerted a powerful formative, but more probably normative influence on Sri Lanka.

The Mahavamsa cultivated the role of the Sinhala people in post-colonial Sri Lanka as the guardians of Buddha’s teaching, an influence enshrined in the two republican constitutions (which will be both discussed at a later stage of this thesis), and in school curricula, government speeches, history lessons etc. For the British, the Mahavamsa became central in their colonial understanding as an uncritical point of reference of the undetermined past of Sri Lanka and inevitably accepted as the authoritative history of the country. Jonathan Spencer observes that the Mahavamsa was also a vital ingredient in the polemics of early cultural nationalists. In the end, the Mahavamsa myth was an agent for ideological manipulation for both the British and the Sinhala. Nevertheless, the Mahavamsa gives the Sinhala people the roots of their identity. From this, “[i]replaceable literary source”, it is commonly understood that the Sinhala people can trace their roots to the northern part of India in the 5th

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94 Sir Charles Jeffries, supra note 1, p. 2.
96 de Silva, supra note 87, de Silva, p. 2; Bartholomeusz, supra note 92, pp. 54-61.
97 Farmer, supra note 6, p. 9; Weiss, supra note 95, p. 15.
102 Spencer, supra note 81, pp. 5-6; Neil DeVotta, Sinhala Buddhist Nationalist Ideology, (Washington: East West Centre, 2007), pp. 5-6.
103 Farmer, supra note 6, p. 6; Ibid DeVotta,pp. 5-6; Kapferer, supra note 100, p. 34.
104 de Silva, supra note 87, p. 6.
century BCE, when the island’s shores were touched by a Bengali Prince named Vijaya, grandson of a union between an Indian princess and a lion (therefore Sinhala”, the lion race).105 The myth narrates that he landed in Sri Lanka, with the protection of Buddha, who, as he entered nirvana in the northern part of India, spoke the prayer “[I]n Lanka, O Lord of gods, will my religion be established, therefore carefully protect him with his followers, and Lanka.”106 Therefore, Vijaya is the founding father of the Sinhala people, the mythical person that gave the Sinhala people their name and their national emblem.107 His followers, originally Brahmins, colonised the island after they were banished for misappropriate behaviour from the kingdom by Vijaya’s father, Sihabahu, in 500 BC along with his companions and he eventually found his exile and home in today’s Puttalam, a city on the north-west coast of Sri Lanka.108

The origins of the first Indo-Aryan immigrants to Sri Lanka can be located in the north-west of India, while another wave of migration followed from Bengal and Orissa.109 Sinhala people speak an Aryan tongue, which can be located in the family of ancient Indian languages such as Sanskrit and Pali, but also among modern languages such as Hindi, Bengali and Marathi.110 In a nutshell, the myth enhances the Sinhala consciousness, their self-perceived special origin and identity. It is this myth that gives them their special character in a homeland surrounded by alien and hostile folk, reinforced by speeches and statements by various prime ministers and presidents of Sri Lanka.111

Sinhala kings are acknowledged and praised for their allegiance to Buddhism, and are found among the stories that form the basis of the Mahavamsa myth: the landing of Vijaya, the arrival of Buddha, and the genesis of Buddhism in the country usher in an assumed trinity of divine providence for the early Buddhists.112 According to the ancient chronicles, however, Buddha has visited the island on some occasions and had promulgated that his doctrine will

107 Supra note 6, Farmer, p. 6; N. Manoharan, Counterterrorism Legislation in Sri Lanka, (Washington: East West Centre, 2006), p. 12; Kasperfer, supra note 100, p. 34.
108 Farmer, supra note 6, p. 6; Kasperfer, supra note 100, p. 34.
110 Ibid; Weiss supra note 95, p. 15.
111 Ibid Farmer, p. 7; Kasperfer, supra note 100, p. 38.
112 Ibid Farmer, p. 9; Ibid Kasperfer, p. 35; Weiss, supra note 95, p. 15.
win prominence and influence in the island. Myth-making aside, and focusing on established facts, the island was inhabited since the Stone Age by early human beings. Until today, direct descendants of the ancient inhabitants, the Veddha people, can be identified on the island. Sri Lanka was separated from the southern tip of India around 7,000 years before our present era. The assumption that Indo-Aryan migrants have laid the groundwork for Sinhala civilization came under critical scrutiny in the late 20th century. Archaeological evidence affirms that human presence before the Indo-Aryan migrations; evidence that there was synthesis between Indo-Aryan, pre-Indo-Aryan, and possibly Dravidian elements to create an early Sinhala culture of the Kingdom of Anuradhapura period from the 3rd century BCE to the 10th century CE. It would go beyond the constraints of this work to highlight the rise, decline and fall of respective kingdoms, the metamorphosis of each and the conquest of the one over the other. However, it is worth mentioning that before the arrival of the European powers in the 16th century, the history of the island was a troubled one with various conflicts, violent hostilities, and dynastic rivalries.

As the first colonisers arrived, the principal Sinhala kingdom, the Kingdom of Anuradhapura, had disintegrated, and three different kingdoms had emerged: two Sinhala kingdoms, namely the Kingdom of Kotte in the western part of the island and the Kingdom of Kandy in the central midlands. Furthermore, a Tamil kingdom called the Kingdom of Jaffna in the north of the island. Along with these kingdoms existed sub-kings and chieftaincies, and areas which were under the control of other, semi-autonomous local rulers. The history of the country records several wars, invasions and dynastic rivalries — these cannot be reproduced here, but it is necessary to highlight the important features in the pre-colonial history to explain the contemporary state of the island. Indo-Aryan settlements emerged in different parts of the

114 Sir Jeffries, supra note 1, p. 3; Weiss, supra note 95, p. 14; Moorcraft, supra note 91, p. 2.
115 de Silva, supra note 87, p. 1.
116 Sir Jeffries, supra note 1, p. 3; Weiss, supra note 95, p. 17.
117 Farmer, supra note 6, p. 5; Weiss, supra note 95, p. 14.
120 Sir Jeffries, supra note 1, p. 5; Tambiah, supra note 118, pp. 81-83.
121 de Silva, supra note 87, p. 146.
122 Sir Jeffries, supra note 1, p. 5; Weiss, supra note 95, p. 20.
island from the 5th century BCE onwards, and settlers came in numerous clans or tribes, while the Sinhala were the most powerful group, arriving through conquest or trade. The earliest settlers populated the west-central coast, and found their way to the Malwatu River in the inland and settled down there in riverbank villages. Buddhism, in the meantime, was brought to Sri Lanka by a mission which came from eastern India during the reign of the Mauryan emperor Ashoka between 273–232 BCE. Buddhism, subsequently, established itself on the island and was embraced by many areas of the island that were ruled by different chiefs. But it was the Kingdom of Anuradhapura that had contributed most to the significant expansion and flourishing culture of Buddhism on the island. In the words of Sir Charles Jeffries, this colonisation of the land was a “[r]emarkable achievement.” The first Sinhala of the country established a sophisticated irrigation system, established elaborate settlements, initiated significant public works and covered the island with a vast network of reservoirs.

The proximity of the island to southern India leads to the assumption that there must have been early Dravidian settlements in the country. Indeed, sources affirm urban and trading centres in South India, and it is likely that early international trade relations with the Mediterranean world were facilitated through ports in South India. While the power of the Sinhala kings declined, Tamil Hindus from India settled in the northern and eastern region of the island; the Tamils did not merge with the Sinhala, but kept and maintained their religion, language and culture.

K.M. de Silva understates the Tamil contribution to the island when he speaks of “[D]ravidian influence” in his influential book on the country’s history. K.M. de Silva proposes:

[B]y the third century BC, Dravidian intrusion into the affairs of Sri Lanka become more marked. (...) Thus, Sri Lanka from early in its recorded history had seen groups of persons from southern India enter the island as traders, occasionally as invaders and as mercenaries but their presence was of peripheral significance in the early demography

123 Farmer, supra note 6, p. 8.
124 Ibid.
125 Farmer, supra note 6, p. 8; Weiss, supra note 95, p. 12 and p. 17.
126 Ibid Farmer pp. 16-17; Roberts, supra note 99, p. 67.
127 Wriggins supra note 93, p. 7.
128 Ibid Wriggins, p.12; Sir Jeffries, supra note 1, p. 2.
130 Sir Jeffries, supra note 1, p. 2; supra note 118, Tambiah pp.5-9.
131 de Silva supra note 87, p. 13.
of the island.\textsuperscript{132}

The Tamils arrived from southern India where Dravidian languages were spoken. Their migration spanned a period from about the 3\textsuperscript{rd} century BCE to about 1.200 CE.\textsuperscript{133} In 177 BCE, two Dravidian conquests of the first kingdom in the country, the Kingdom of Anuradhapura (the "[c]lassical Sinhala kingdom" as K.M. de Silva calls it)\textsuperscript{134}, can be recorded: south Indian adventurers claimed power over the kingdom for 23 years, until a king named Elara gained rule over the kingdom.\textsuperscript{135} This rule was followed by the rule of Elara in 145 BC for 44 years.\textsuperscript{136} Elara was known for ruling with justice towards all and considered by history as a protector of Buddhism.\textsuperscript{137} Here, again, the Mahavamsa plays a decisive role in explaining Sinhala consciousness and constructed an animosity in light of the myth.

The Mahavamsa describes that Dutthagamani (161 – 137 BC), the Sinhala king, arrived at the gates of the ancient capital of Anuradhapura, the sacred city of Buddhism, to challenge Elara.\textsuperscript{138} At this gate both kings engaged in a heroic combat, killing many Tamils and Elara, while reclaiming the rule over Anuradhapura.\textsuperscript{139} This war is of crucial importance in the Mahavamsa myth, as it occupies 81 out of 271 pages of it. This decisive war sums up the pivotal intertwining of religion, kingship and fate of Sinhala nation. Dutthagamani is portrayed as the great warrior hero for the Sinhala, a myth that echoes and rejuvenates Sinhala fate to be the chosen ones to rule the divine providence named Lanka.\textsuperscript{140} A modern Buddhist scholar, Bhikku Rahula, uttered:

[H]is (i.e., Dutthagamani’s) war-cry was ‘not for kingdom, but for Buddhism’. The entire Sinhalese race was united under the banner of young Gamani. This battle was the beginning of nationalism among the Sinhalese. It was a new race with healthy young blood, organized under the new order of Buddhism. A non-Buddhist was not a human being. Evidently, all Sinhala without exception were Buddhists.\textsuperscript{141}

\begin{itemize}
    \item \textsuperscript{132} Ibid pp. 13-14.
    \item \textsuperscript{133} Sir Jeffries, supra note 1, p. 2.
    \item \textsuperscript{134} de Silva, supra note 87, p. 18.
    \item \textsuperscript{135} Ibid p. 13; Weiss, supra note 95, p. 15.
    \item \textsuperscript{136} Ibid de Silva, p. 13.
    \item \textsuperscript{137} Farmer, supra note 6, p. 12.
    \item \textsuperscript{138} Ibid Kapferer, supra note 100, pp. 57-65.
    \item \textsuperscript{139} Ibid Farmer, p. 10.
    \item \textsuperscript{140} Ibid Farmer, supra note 6, pp. 10-11; H.L. Seneviratne, The Work of Kings, (London: University of Chicago Press, 1999), p. 21; Kapferer, supra note 100, pp. 57-65; Weiss, supra note 95, p. 15.
\end{itemize}
1.2. A myth becoming an essential part of history and a justification for political violence

The myth of Mahavamsa is the reference point for Sinhala-Buddhist identity formation and penetrates contemporary discourse and strengthens the Sinhala narrative; it gave the Sinhala the world view of a beleaguered majority\footnote{Tambiah, supra note 118, p. 58.} and the myth mutated into the uncritical historical account of the island’s past. The brutal warfare that was portrayed in this myth absolved the Sinhala Buddhist from guilt and justified any means used against nonbelievers who were considered inhuman.\footnote{Seneviratne, supra note 140, p. 21.} It will be argued that this myth is one impeding agent in the elaboration of a human rights infrastructure and a decisive element for the governmental behaviour.

This interpretation and its constant invocation had devastating impact on contemporary Sri Lanka, providing a blueprint for the impunity for human rights violations that followed. Michel Foucault wrote once that history was exploited by the sovereign to communicate power, control and mesmerize them.\footnote{Michel Foucault, *Society Must Be Defended, Lectures at the College de France, 1975–76*, (New York: Picador, 2003), p. 68.} History revived ancestry and heroism, while trying to underscore the significance of the people’s past.\footnote{Ibid p.66.}

R.A.L.H. Gunawardana held the view that the Mahavamsa myth about Buddha’s alleged magical first visit (one out of three) to the island absolved Buddhists of any guilt and provided them with the carte blanche excuse to use violence to protect Buddhism and the unitary state.\footnote{R.A.L.H Gunawardana, ‘The Kinsmen of the Buddha: Myth as Political Charter in the Ancient and Early Medieval Kingdoms of Sri Lanka,’ *Colombo: Social Scientists’ Association*, undated (reproduced from *Sri Lanka Journal of Humanities*, 2:1, [1976], pp.53-62.)} This protectionist rhetoric was readily embraced and absorbed during a period when the eradication of Malaria in the 1930s took place in the Sinhala areas that led to a population increase among the Sinhala. As a consequence, the Sri Lankan export market shrunk and that impact translated into a stronger call for welfare allocations to those adversely affected. Finally, when the radical monks (who were imprisoned under British rule) were released in post-colonial Sri Lanka, they made sure that their demands for ethnic resources for the Sinhala were heard.\footnote{Lakshman Sabaratnam, ‘The Lion and the Tiger in the Ethnic Archipelago,’ in: *State Violence and Ethnicity*, Pierre L. van den Berghe (ed.), (Colorado: University Press of Colorado, 1990), p. 202.}

Anagarika Dharmapala, a 19th-century Sinhala-Buddhist revisionist, used this...
myth, as the thesis will illustrate, as a pretext for an anti-colonial movement based on xenophobia and exclusivism, while portraying the Tamils as the eternal enemies of Sri Lanka.\footnote{Weiss, supra note 95, pp. 24-25.}

Anagarika Dharmapala used his self-acclaimed spiritual calling and intellect to “[r]egard Buddhist practice in Ceylon as a vehicle for Sinhalese hegemony, and an inheritance for the Sinhalese alone.”\footnote{Weiss, supra note 95, pp. 24-25.}

Anagarika Dharmapala’s vision was based on two factors: an economic-pragmatic one and a political-ideological one. Both factors had crucial impact on the development of the country.\footnote{Seneviratne, supra note 140, p. 36.} “[D]harmapala marks the growing visibility of a harder-edged Sinhala-Buddhist nationalism, which sat check-by-jowl with a culture of cosmopolitan connection, and was also evident in his own biography.”\footnote{Sivasundaram, supra note 113, p. 334.} Crucial to his argument was that the Sinhala were vulnerable and encircled Aryans, threatened by Semitic influences. Anagarika Dharmapala claimed:

[T]his bright beautiful island was made into a Paradise by then Aryan Sinhalese before its destruction was brought by the barbaric vandals. Christianity and polytheism are responsible for the vulgar practices of killing animals, stealing, prostitution, licentiousness, lying and drunkenness ... The ancient historic refined people, under the diabolism of vicious paganism, introduced by the British administrators are now declining slowly away.\footnote{Seneviratne supra note 140, p. 30.}

Anagarika Dharmapala went further when he remarked:

[T]he Muhammedans, an alien people (...) by Shylockian methods became prosperous like the Jews. The Sinhalese, sons of the soil, whose ancestors for 2,358 years had shed rivers of blood to keep the country free of alien invaders (...) are in the eyes of the British only vagabonds. The Alien South Indian Muhammedan come to Ceylon, sees the neglected illiterate villagers without any experience in trade (...) and the result is that the Muhammedan thrives and the sons of the soil go to the wall.\footnote{Jonathan Spencer, ‘A nation living in different places,’ Contributions to Indian Sociology, 37:1/2, [2003], p. 10.}

The Sinhala activists surrounding Anagarika Dharmapala were upset about the declining status of the majority community under colonial rule. The overreliance on Western products, adoption of Western ways of life and the spread of Western lifestyle invoked an inferiority complex in them\footnote{Roberts, supra note 99, p. 199.} – a complex that Anagarika Dharmapala and his followers exploited for
their ends. Against the background of this highly politized climate, the country marked the centenary of the abdication of the last king of Kandy in 1915. Anagarika Dharmapala’s supporters distributed anti-Muslim leaflets in the country, ushering into the beginning of the first anti-Muslim riots in the country. Sinhala mobs attacked Muslim traders, houses were burnt down, dozens of people killed and mosques profaned and pillaged. The pogrom that unfolded was “[n]ot only a chauvinist operation, it was also a nationalist exercise in ellipsis.” Anagarika Dharmapala used the Mahavamsa myth and translated this into authentic history, setting the stage for political Sinhala-Buddhism and identity creation. Political Sinhala-Buddhism, as the thesis will demonstrate, became the receptive instrument for coming political elites to manipulate electorates and gain power, reducing the public space for human rights at large for the articulation and elaboration of a powerful unitary state. Sriskanda Rajah writes that Sri Lanka’s efforts to construct and secure a Sinhala-Buddhist ethnocratic state order include attempts to rewrite the island’s history. This happened by denying the pre-colonial existence of the Tamils and their kingdoms and principalities, and making the claims of the Mahavamsa, that the island was given to the Sinhala by Buddha for his religion (Buddhism) to be established, the so called ‘truth’.

Referring to Michel Foucault’s concept of biopower (a concept that will be helpful to explain political behaviour in Sri Lanka throughout the thesis), A. R. Sriskanda Rajah writes that “[S]ri Lanka’s biopolitics has been inextricably linked to the production of a narrative of ‘truth’ about the island’s ‘rightful’ occupants.”

1.3. The actual history

Religio-nationalism transformed to a sort of fanaticism and galvanised the whole Sinhala people. But this does not mean that Tamil and Sinhala were always in rivalry and engaged in continuous hostilities: a Tamil kingdom was firmly established in the areas of Tamil settlement in the north of the island around Jaffna. Furthermore, Tamil mercenaries were brought

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155 Weiss, supra note 95, p. 27.
156 Roberts, supra note 74, p. 208.
157 Seneviratne, supra note 140, p. 24.
159 Ibid.
161 Farmer, supra note 6, p. 11; Tambiah, supra note 118, p. 6.
from Southern India to fight for the Sinhala kingdoms from about the 5th century AD but more in particular from the 7th century AD\textsuperscript{162} and for this reason the country has seen Dravidians coming to the country either as traders, mercenaries or as “invaders.”\textsuperscript{163} There are many occasions when Tamils and Sinhala lived in the same village in peaceful coexistence.\textsuperscript{164} Sinhala kings requested support from Tamil kings in local conflicts; some kings sought refuge in the southern part of India and requested the aid of their Tamil allies while other Sinhala kings entered alliances through the matrimony with Tamil queens.\textsuperscript{165} Another very interesting detail in recorded history that underscores the interlinkages between the kingdoms is the fact that Bhuvanekabahu VII (1521–1551), one of the last kings of Kotte, signed all of his official proclamations in Tamil.\textsuperscript{166} Great historical centres of Sinhala Buddhists were heavily impregnated by Tamil speaking people, who lived and worked, for example, in the Anuradhapura kingdom, either as guards, soldiers or craftsmen.\textsuperscript{167} In a similar vein, Sinhala and Buddhist remains were recovered, indicating origins in the so-called Tamil heartland up to the 1st millennium AD. Modern scholarship has also revealed that the members of the Sinhala caste groups, namely Salagama, Durava and Karava, are descendants of immigrants from Hindus in Coromandel (native Tamil speakers) and Kerala in southern India.\textsuperscript{168}

Another important and overlooked feature in Sri Lankan history is the status and nature of the Kingdom of Kandy: although depicted as the stronghold and refuge of Sinhala culture, the kingdom was ruled in its last years by Tamil speaking kings, the Nayakkars from Madurai in south India. Under these kings, Buddhist tradition was fostered and revived\textsuperscript{169}, but a unique quality of hostility always existed.\textsuperscript{170} K.M. de Silva correctly determined that “[a]n intimate connection between land, race and (Buddhist) faith foreshadowed the intermingling of reli-

\textsuperscript{162} Ibid Farmer, p.12; de Silva, supra note 87, p. 14.


\textsuperscript{164} Farmer, supra note 6, p. 12.


\textsuperscript{166} Gananth Obeyesekere, ‘Buddhism, Ethnicity and Identity’, in: Buddhism, Conflict and Violence in Modern Sri Lanka, Mahinda Deegalle (ed.), (London: Routledge, 2006), p.157; another interesting aspect is the fact that one of the ancestors of the later prime minister Srimavo Bandaranaike, a chieftain in the Kandyan kingdom, signed the Kandyan Convention 1815 in Tamil. See also: Weiss, supra note 95, p. 20.

\textsuperscript{167} Nissan and Stirrat, supra note 82, p. 23.

\textsuperscript{168} Ibid p. 23.

\textsuperscript{169} Ibid pp. 23-24.

\textsuperscript{170} Farmer, supra note 6, p. 15.
gion and national identity, which has always had the most profound influence on the Sinhalese.”¹⁷¹ One view holds that “[B]uddha has foreseen the island’s destiny accorded to the Sinhala people, bestowing upon them the role as guardians of his teaching.”¹⁷² Moreover, “[g]iven this historical background, Sinhala argue that the practices of all Sri Lankans come from Buddhist and Sinhala traditions; they further their arguments by demanding an institutionalisation of those practices in the current political system.”¹⁷³ Thus, the Mahavamsa myth surrounding the arrival of Vijaya’s and Buddha’s arrival intertwist religion, national identity, and language of the Sinhala.¹⁷⁴

B.H. Farmer compared the Sinhala people's relation to Sri Lanka to the Jewish people's connection to Israel, as both have a particular claim towards "land" which has significant repercussions on contemporary policies and conduct of governance.¹⁷⁵ The Sinhala, like Jews and other people, understand “land” as holy land.¹⁷⁶ While it is believed that the holy land Israel was established by God for the Jewish people, it was the Buddha who created the island for the Sinhala. To this end, land is and was linked to the exclusive responsibility towards and preservation of this, a common notion and reference to land that is found in both traditions.¹⁷⁷ When European powers arrived, they ended the indigenous rule as it was known and their rule unleashed the special character of the island.¹⁷⁸

In 400 years of colonial rule, three different foreign rulers came and left, with each of them having a different approach to rule the island. But all of them shared a common characteristic, as they exploited the country through the “[t]otality of their naval powers.”¹⁷⁹ This presence of European rule was followed by three subsequent periods: the Portuguese rule from 1505-1658, the Dutch rule from 1658-1796 and the British rule from 1796 – 1948.¹⁸⁰ Colonial rule

¹⁷¹ Deegalle, supra note 83, p. 8.
¹⁷³ Ibid.
¹⁷⁵ Farmer, supra note 6, p.9.
¹⁷⁶ Bartholomeusz, supra note 92, p. 142.
¹⁷⁷ Ibid p. 142.
¹⁷⁹ Wickramasinghe, supra note 17, p. 7.
was a versatile tool of dominance and colonisers considered their rule as a frontier opening activity; they wanted to exhaust the physical limits until they met the boundaries of the globe.

1.3.1. The arrival of the Portuguese: “Coming for cinnamon, staying to rule”

Sri Lanka was, despite the local conflicts, a vibrant market place for different traders: Indian, Arabs or Chinese merchants. The Portuguese, led by Lourenço de Almeida, were bound for the Maldive Islands and by accident sailed into the Colombo harbour. A very interesting aspect of their conquest in Africa and Asia at that time was not so much territorial, but economic conquest through domination by their naval power. The Portuguese were primarily interested in the cinnamon trade and only secondly in the territory’s key strategic value – for this purpose they concluded a trade agreement in 1505 with Veera Parakramabahu VIII, the King of Kotte and built a residence in Colombo for trade purposes. The Portuguese, gradually making use of the internal rivalries, extended their influence in the country, as also the kingdom of Kandy turned to the Portuguese and accepted the status as a satellite state.

The Portuguese interest in the Tamil kingdom of Jaffna was driven by two considerations: first, by the economic value and second, the strategic value of pearl fisheries in the region. Subsequently, the Portuguese deployed missionaries all over the country, leading to aggressive resentment by the King of the Tamils, Cankiliyan. He killed the missionaries, an event that resulted in a retaliatory, first expedition by the Portuguese in 1560 when Mannar Island was captured. After some fiercely fought battles, it led to successive control by the Portuguese over Jaffna in the following decades. The Jaffna kingdom came under full and direct influence after the second retaliatory expedition in 1591, when the Tamil king, Puviraja Pandaram (son of Cankilyan) was killed and a Portuguese protégé was installed as the new king, Ethiriam.

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182 Wickramasinghe, supra note 17, p. 7.
183 Sir Jeffries, supra note 1, pp. 2 -3.
184 Farmer, supra note 6, p. 16.
185 de Silva, supra note 87, p. 147.
188 de Silva, supra note 87, p. 148.
190 Ibid.
Cinkam (son of the Puviraja Pandaram).\textsuperscript{191} Using their immense sea power, and the superior technology in moments of weakness and political division, the Portuguese were able to extend their power over the whole island by 1593 which lasted until 1658.\textsuperscript{192}

The Portuguese, however, never managed to conquer the Kingdom of Kandy. Several expeditions failed and the Kingdom only became stronger, becoming a refuge for the religiously persecuted.\textsuperscript{193} Portuguese rule heralded in an era of destruction of Hindu and Buddhist temples, with bigotry and cruelty perpetrated towards the Sri Lankan people that, “[w]ould be incredible, if there was not the testimony of their own historians.”\textsuperscript{194} Sri Lankans searched for an ally to fight and liberate themselves from the Portuguese, who was quickly found: the Dutch.

1.3.2. The arrival of the Dutch: “We gave pepper and in exchange got ginger”

The Kandyans exhausted all diplomatic means to engage other naval powers to help them in the concerted enterprise to oust the Portuguese out of power. This attempt was the point in history when the Dutch became engaged in 1638. An agreement was signed in and certain concessions given for promises to fight together against the Portuguese.\textsuperscript{195} The Dutch seized control over the precious cinnamon lands, captured and maintained control over Colombo and Jaffna. They were, however, not able to occupy as much territory as the Portuguese did (for example, the harbours of Trincomalee, Kottiayar and Batticaloa, which were controlled by the kingdom of Kandy).\textsuperscript{196} Interestingly, Kandyans considered the Dutch as their feudatories and that the land that was controlled by the Dutch was property of the Kandyan kingdom.\textsuperscript{197} But the Dutch always wanted political control as a precursor to complete real control over trade and they never had the intention to return the partial control they had to the Kandyans.

On the contrary, the Dutch were of the opinion that the country’s lowlands were retained as

\begin{footnotes}
\footnotetext[191]{de Silva, \textit{supra} note 87, pp. 148-149; p.166.}
\footnotetext[192]{de Silva \textit{Supra} note 87, p. 161; Jayawardena, \textit{supra} note 187, pp. 249-250.}
\footnotetext[193]{Wickramasinghe, \textit{supra} note 17, p. 10; Lennox Mills, \textit{Ceylon under British Rule}, (London: Oxford University Press, 1933), p. 2}
\footnotetext[195]{Wickramasinghe, \textit{supra} note 17, p. 10.}
\footnotetext[196]{\textit{Ibid} p. 10.}
\footnotetext[197]{\textit{Ibid} p. 10.}
\end{footnotes}
a security until the king of Kandy paid back the expenses of the Dutch in light of their contribution in expelling the Portuguese.\textsuperscript{198} Aggravating his financial circumstances, the king’s liability rose every day, which included the cost of the deployment of Dutch forces in the country.\textsuperscript{199} By the period 1665-1670, the Dutch consolidated their position in the country, giving them not only a greater security against other naval powers, but also a position of total dominance over trade and traffic of the island.\textsuperscript{200} The monopolization of cinnamon and any other aspect of trade, harsh and restrictive rule and laws, growing corruption, nepotism and inefficient administration paired with their religious intolerance fed native hostility towards them.\textsuperscript{201}

A Sinhala proverb goes “We gave pepper and got ginger in exchange” – the diplomatic gamblng in which the Kandyans engaged in made them eventually alienated in their own country.

The commercial decline of the Dutch coincided at a time when the British East India Company won more and more influence on the Indian subcontinent. Dutch officials were underpaid, annual expenditure of the island exceeded revenue and maintenance of the island drained the East India Company.\textsuperscript{202} In light of these deficiencies in governance, private trading was allowed, which led to maladministration.\textsuperscript{203}

In 1782 the British and French competed for the port of Trincomalee, because they regarded Sri Lanka to possess strategic value.\textsuperscript{204} In the late 18\textsuperscript{th} century, the Netherlands was forced into the growing revolutionary movement in France, and the British started to fear the French would add the oversea colonies to their colonial portfolio.\textsuperscript{205} In 1796 the British seized control over Dutch fortresses in Sri Lanka, and it was only in 1796 when the Stathouder, a refugee in London during the revolutionary wars between the French and Dutch, permitted the British annexation of the island.\textsuperscript{206} It came with no surprise that the sudden collapse of the Dutch

\textsuperscript{198} de Silva, \textit{supra} note 87, p. 184.  
\textsuperscript{199} de Silva, \textit{supra} note 87, p. 184.  
\textsuperscript{200} \textit{Ibid} de Silva, p. 189; \textit{for a detailed discussion:} Schrikker, \textit{supra} note 92, pp. 33-125; Sreemali Herath, ‘Language policy, ethnic tensions and linguistic rights in post war Sri Lanka’, Language Policy, 14:3, [2015], pp. 249-251.  
\textsuperscript{201} Wriggins, \textit{supra} note 13, p. 14.  
\textsuperscript{202} Mills, \textit{supra} note 193, p. 8.  
\textsuperscript{203} Wriggins, \textit{supra} note 13, p. 14.  
\textsuperscript{204} Sir Jeffries, \textit{supra} note 1, pp.13-15.  
\textsuperscript{205} Wriggins, \textit{supra} note 13, p. 12.  
\textsuperscript{206} \textit{Ibid} Wriggins, p. 14; Wickramasinghe, \textit{supra} note 17, p. 12; Mills, \textit{supra} note 193, p. 9.
was largely welcomed in Sri Lanka, who had never managed to win the support of the Sinhala.  

1.3.3. The arrival of the British Empire: the creation of British Ceylon

When the British took over the island from the Dutch in 1796, their interest in Sri Lanka was primarily of strategic interest. However, the commercial interest only became more prominent in the years following of British rule. The East India Company took over administrative duties, supported by the British Government, while the governor was responsible for law and order. This dual rule lasted until 1802, and with the Treaty of Amiens, Sri Lanka became a Crown Colony that was governed by British authorities from London. The Governor of Sri Lanka, Frederick North, 5th Earl of Guilford, and later his successor, General Maitland, extended the development of resources with the aim to provide sufficient basis for self-support and to enhance social services.

While the Governor hoped that the local population would show goodwill towards the British, they intended to facilitate and maintain indigenous institutions. Moreover, they wanted to root out corruption, provide rigorous control of expenditure, create a criminal and civil justice with British personnel and, finally, prohibit colonies by unlicensed Europeans. By 1815 the British managed to extend rule over the whole island, including Kandy, which fell after fierce battles. With the Kandyan Convention, the British were entrusted by the Kandyan Chiefs to preserve the laws, customs and institutions of the kingdom, but the British also received the privileges and powers of the chiefs. While trade and commerce were administered by the Portuguese and Dutch, the British introduced an independent trade sector, in particular in the coffee and tea estates. Meanwhile, the governance of plantations resembled the situation established in the coffee period, when planters foresaw strict *laissez-faire* capitalist policy and

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208 Ibid Mills, supra note 193, p. 2.
209 Nissan and Stirrat, supra note 82, p. 27; for a detailed discussion: Schrikker, supra note 92, pp. 129-195.
210 Sir Jeffries, supra note 1, pp. 15-17.
211 Wickramasinghe, supra note 17, p. 27; Mills, supra note 193, p. 41.
212 Sir Jeffries, supra note 1, p. 20; Ibid Mills, pp. 47-55.
213 Wickramasinghe, supra note 17, p. 26; Schrikker, supra note 92, pp. 177-208.
214 Ibid Wickramasinghe, p. 27; Weiss, supra note 95, p. 20.
215 Nissan and Stirrat, supra note 82, p. 27; Mills, supra note 193, pp. 251-258.
a minimum governmental interference.\textsuperscript{216} With the arrival of the British as the colonial power of the country, Sri Lanka’s colonial and post-colonial history was changed profoundly with implications on its population, laws and institutions.\textsuperscript{217} The British changed and altered the face of the country. Most importantly the British introduced liberal values to the country, for example, the introduction of ideas on the individual rights to property, and the bureaucratization and rationalisation of public space.\textsuperscript{218} British rule, therefore, differed from the rule of their predecessors in different aspects, most notably regarding the demarcation between public and private spheres.\textsuperscript{219} The British wanted to transform the society, and to lead isolated areas from tradition to modernity, they tried to overcome any economic obstacle with rapid expansion of the administrative infrastructure.\textsuperscript{220} Basic institutional arrangements of colonial law and administration, courts, bureaucracy, police, army and other technical services of government characterised the modern regime of power.\textsuperscript{221}

1.4. Preparing independence: the constitutional development of Sri Lanka

Until 1840 the British attitude towards its colonies was to allow and encourage local governments to exercise local rule with minimum interference from London. In the later years of colonial rule, the British dispatched a series of commissions, some with more significance than others.\textsuperscript{222} The most prominent commissions will be examined in the following subsections. The policy of the British towards their colonies was to ensure a minimum of local government, with a minimum of external interference in internal matters.\textsuperscript{223} Such a policy was pursued on the condition that no political scandal would emerge and no financial costs incur.\textsuperscript{224} Sri Lanka was, altogether, governed by seven constitutions between 1801 and 1947. If constitutions in the colonial context are examined, they are considered as the primary documents for the self-governments of the island. It is not possible to consider everyone, but selected and crucial

\textsuperscript{217} Wickramasinghe, supra note 17, p. 27; Schrikker, supra note 92, pp. 160-178.
\textsuperscript{219} Wickramasinghe, supra note 17, p. 27.
\textsuperscript{220} Ibid Wickramasinghe, p. 27; Mills, supra note 193, pp. 258-266.
\textsuperscript{221} Ibid Wickramasinghe, p. 28.
\textsuperscript{222} Sir Jeffries, supra note 1, p. 24; Schrikker, supra note 92, pp. 33-125.
\textsuperscript{223} Ibid Sir Jeffries, p. 24.
\textsuperscript{224} Ibid Sir Jeffries, pp. 23-24.
commissions that were dispatched by London concluded with national constitutions, which are documents that had a profound impact on identity formation, human rights infrastructure and explain, to a certain extent, contemporary governmental behaviour.

1.4.1. The Colebrooke-Cameron Commission

In 1822, London dispatched a Commission to the country to make a thorough examination of the country’s administration and finances. The Commission was headed by Major (later Sir William) Colebrooke and Charles Hay Cameron. The outcome of their report in 1832 was an important document in the history of the country. The proposals contained in the outcome document were, regarding their legal and economic aspects, significant. Of interest is the concentration on the legal aspects, particularly the reform proposals in relation to the administration of Sri Lanka.

The Colebrooke-Cameron Commission proposed a “Crown Colony” government, which meant that at the apex of the administration was the Governor, equipped with an Executive Council (replacing the Advisory Council) with senior officials. He could consult this institution, but was not compelled to do so. A Legislative Council as another unit of the public administration was established, which comprised nine officials and six unofficial members, subject to the nomination by the Governor. The six members were comprised of three British merchants, and one representative each of Sinhala, Tamil and Burgher communities. The creation of posts based on respective identity was a significant policy that would impact the further development of the island, as it fuelled the consciousness of ethnic identity and belonging. The membership in the body was set up to give governmental officials nominal lead over the businessmen and indigenous individuals, who were nominated by the Governor. The Legislative Council was modelled after an advisory body to the Executive Council. The Commission also recommended that civil service should be opened to local citizens, making these reforms unique and far more liberal than in any other legal systems of any other European colony. This Council was eventually entrusted to legislate the whole country, lifting the boundaries

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225 Sir Jeffries, supra note 1, p. 24.
226 Wickramasinghe, supra note 17, p. 29.
227 Ibid p. 29; Mills, supra note 193, pp. 65-67.
228 Ibid Wickramasinghe, p. 29.
229 Ibid p. 29.
230 Wriggins, supra note 93, p. 82.
231 Samaranayake, supra note 91, pp. 77-78.
between Kandy and coastal provinces, ushering in an uniform administrative system. This meant that the administration and judicial structure of the country moved into an unitary constitutional framework. It was the annexation of Kandy in 1815 that eventually laid the framework for the modern unitary state. Also, the Commission aimed to end administrative divisions of the country based on ethnic and cultural lines. The Commission, therefore, proposed to place the country under one uniform administration with five provinces. Commissioner Colebrooke held the opinion that separate administrative entities have contributed to a cultural and social fragmentation process and the unification of the island can only be achieved through administrative standardisation.

In the end, the modern colonial state that emerged with the Colebrooke-Cameron Commission foresaw the decentralization of executive power, reduction of autocratic powers that were vested in the Governor and the inclusion of indigenous membership to administration. Moreover, the Commission foresaw the standardisation of the curriculum and put an emphasis on the English language for metropolitan institutions, ushering in the Colebrooke-Cameron Constitution. The Colebrooke-Cameron Constitution was a crucial event that laid the groundwork for the unitary state that had severe implications for the ethnic harmony and the human rights infrastructure in the country.

1.4.2. The Donoughmore Commission

The Donoughmore Commission was the first commission after the Colebrooke-Cameron Commission that was appointed to conduct new constitutional reforms and Lord Donoughmore came to visit the country from 1927 – 1928 to examine its electoral system. The arrival of this Commission, however, led to exacerbating communal and political tensions. Individuals from different communities hoped to influence the Commission’s work in one way or the other. The commissioners observed the growing hostility between communities in Sri Lanka and concluded that the majority community, the Sinhala, were interested in eliminating...
the chief safeguards for the minority communities. The commissioners also found that communal representation was rather counterproductive to national cohesion. The Commission proposed the creation of a State Council with fused legislative and executive functions. This model was opposed to the existing Legislative Council given the absence of an effective parliamentary system modelled after the British model. Consequently, this representative system was to be based on sixty-five members elected on a territorial basis, three non-voting government officials and up to twelve nominated to represent otherwise unrepresented groups. For this reason, the commissioners asserted that it was time to introduce territorial constituencies instead of communal electorates and advocated for the increase of elected seats to sixty-five.

Twelve members, however, were nominated to speak on behalf of minorities, a move that was reduced by the Secretary of State from sixty-five to fifty-eight and from twelve to eight. Another groundbreaking recommendation was the introduction of universal franchise, as this extension of franchise would, according to the Commission, induce the country's leaders to listen more carefully to their electorate. Certain powers were supposed to be bestowed upon Sri Lankan leaders with the opportunity to acquire governmental experience towards an eventual self-government by drawing experience on the First Council. This First State Council was organized for administrative work into seven committees, each of them elected their own chairperson. The chairpersons, also ministers, created the board of representatives, established the activities of the First State Council and presented an annual budget. The three official members were vested with powers in the areas of public service, defence and foreign affairs. The powers in the areas of administration of justice, legal matters, the handling of revenue and supervision of departmental expenditures were transferred to the Executive Committees. In fact, the Cabinet was a Pan-Sinhala one from 1936 to 1942 and

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240 Ibid Wriggins, p. 85; Mills, supra note 193, p. 269; Ibid Bandarage, p. 36.
241 Ibid Wriggins, p. 86; Kumarasingham, supra note 238, p. 121.
242 Ibid Wriggins, supra note 93, p. 86.
243 Ibid Wriggins, supra note 93, p. 86.
244 Ibid p. 86; Mills, supra note 193, p. 270.
245 Ibid Wriggins, p. 87.
246 Farmer, supra note 6, p. 87; Mills, supra note 193, pp. 270-271.
Tamils strongly opposed this Constitution as it had mixed results in the distribution of communal power. Minorities had fewer representatives, although the Executive Committee System offered enough space for collaboration.\textsuperscript{246} But Sinhala justified the cabinet firstly on the ground of the Tamil antipathy towards the constitution, and secondly on the ground that pan-communal decision making was required to achieve unanimity.\textsuperscript{247} In the end, however, with its Constitution the Donoughmore Commission introduced, for the first time in an Asian country, universal suffrage regardless of income, property, literacy or sex.\textsuperscript{248} But, as Sir Charles Jeffries sums up,

\begin{quote}
[W]hatever the merits -and they were many- of the Donoughmore scheme, it suffered from one inescapable and insuperable defect. It was not founded on the wishes or the traditions of the Ceylon people, and it could not be considered as marking the natural stage in the political evolution of the country. At best, it represented an outsider’s view of what would be good for Ceylon.\textsuperscript{249}
\end{quote}

1.4.3. The Soulbury Commission

In response to widespread criticism expressed to the Donoughmore Constitution, in 1943 the British promised during the Second World War to dispatch another commission to Sri Lanka to conduct a constitutional review. Meanwhile, they urged the Sri Lankan Board of Ministers to draft a plan. If adopted by three-quarters, the British would dispatch another constitutional commission under the leadership of Lord Soulbury to Sri Lanka “[i]n light of the working of the Donoughmore Constitution and of the promise made by the British Government that Ceylon should move towards full, responsible government under the Crown”\textsuperscript{250}, representing the first post-colonial constitution of the country. Different electoral schemes were presented to the commission, among them the 50-50 plan, which foresaw the allocation of half the seats to the Sinhala and the other half to all minorities together.\textsuperscript{251} The Soulbury Constitution promoted a moderately conservative approach to a liberal democracy, drawing on examples

\begin{flushright}
\textsuperscript{247} \textit{Ibid} Wriggins, p. 89.
\textsuperscript{248} Farmer, \textit{supra} note 6, p. 86.
\textsuperscript{249} Sir Jeffries, \textit{supra} note 1, p. 66.
\textsuperscript{250} Farmer, \textit{supra} note 6, p. 56.
\textsuperscript{251} \textit{Ibid} Farmer, p. 57; Kumarasingham, \textit{supra} note 238, p. 141.
\end{flushright}
from Britain and other members of the Commonwealth. Meanwhile, traditional British constitutional principles were adopted to meet the parliamentary and cabinet systems. Furthermore, the Soulbury Commission was interested in dispersing ethnic tensions, encourage national dialogue and strengthen national consciousness. The Soulbury Commission also deemed it unnecessary to incorporate a Bill of Rights into the constitution, which arguably turned out to be fatally wrong. Sir Ivor Jennings, one eminent British legal scholar closely involved as constitutional advisor to local politicians in the drafting process of a post-colonial constitution, rejected the idea of local politicians to introduce a Bill of Rights modelled on that of Ireland at the inter-party negotiation.

Jennings believed the sole Commonwealth example of a Bill of Rights was the Irish one and no particular lessons can be drawn upon from that instance. Moreover, he believed if a Bill of Rights was introduced it would unleash a litigation industry and create the impression that liberty was protected under British rule, but not under Sri Lankan rule. Instead, it adopted other approaches, namely the main constitutional protection in art. 29 (2), which enshrined minority protection:

\[
\text{[..]} \quad (2) \quad \text{No such law shall -} \\
\quad \text{(a) prohibit or restrict the free exercise of any religion; or} \\
\quad \text{(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or} \\
\quad \text{(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions, or} \\
\quad \text{(d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body:} \\
\]

Provided, however, that the preceding provisions of this subsection shall not apply to any law making provision for, relating to, or connected with, the election of Members

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253 Ibid.


255 Ibid p. 43.
of the House of Representatives, to represent persons registered as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act.\(^\text{256}\)

To this end, this provision tried to protect minority interests by putting constitutional limitations on legislative sovereignty. The former Chief Justice of Sri Lanka, Dr. Shirani Bandaranayake, asserts that the provision was modelled after section 5 of the Government of Ireland Act of 1920.\(^\text{257}\) This section spells out:

> [I]n the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to establish or endow any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege, or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status (...) Any law made in contravention of the restrictions imposed by this subsection shall, so far as it contravenes those restrictions, be void.

Art. 29 of the Soulbury Constitution was an approach to privatisise issues around race and religion, inspired by the idea of national integration rather than communal accommodation.\(^\text{258}\) Finally, the report of the Soulbury Commission foresaw universal franchise, representation on a territorial basis, but delimitation of electorates that would help minorities to secure more seats. Moreover, the Soulbury Commission suggested a Governor-General who would have full powers relating to external affairs, a cabinet of ministers presided by the Prime Minister, ninety-five elected members and six representatives of special groups and a second chamber, a Senate, that was to be filled by fifteen members chosen by the House of Representatives.\(^\text{259}\)

The Soulbury Constitution launched a series of responsibilities for the new government, namely setting up a diplomatic service, entering trade negotiations, and making formal commitments under international conventions and agreements et al.\(^\text{260}\) Sri Lanka had begun to disentangle itself from its colonial power with this key constitutional document. In the end,

\(^{256}\) Ceylon Constitution Order in Council 1946, online at: <http://tamilnation.co/srilankalaws/46constitution.htm>, last accessed 18th of July 2016.


\(^{259}\) Wriggins, supra note 13, p. 93.

\(^{260}\) Sir Jeffries, supra note 14, pp. 128-129.
this commission as well its predecessor was committed to nation-building. The Soulbury Constitution, the first constitution of independent Sri Lanka, was adopted by an Order of Council, the Ceylon Independence Order 1947, and not as Act of Parliament with the possibility to introduce amendments by Parliamentary Counsel. The governing elite, spearheaded by D.S. Senanayake, however, was more interested in speeding up the independence process and may have, with this expediency, prevented a robust democratic framework with a stronger emphasis on human rights for all citizens.

2. Post-colonial Sri Lanka, the rise of majoritarian nationalism and the creation of the “other”

This chapter has showed so far that Sinhala nationalism and Buddhist fundamentalism were used as referral points to underscore the unique identity of Sinhala Theravada Buddhists in Southern Asia. The Sinhala-Buddhist revival that was explained in the preceding sections promoted a nationalism for the majority community, powerful enough to estrange minority communities. The nationalist cause that became rampant merged three elements: Sinhala language, Buddhism and the Indo-Aryan race.

This self-perception had won popularity towards the end of colonial rule. Meanwhile, the first years of independent rule were characterised by the formation and consolidation of racial-religious identities and differences. Sinhala nationalism heavily influenced law-making and laid the groundwork for post-colonial development of the country. In the following section, the author will explain the historical development from the early years of post-colonial rule to the establishment of a Pan-Sinhala rule that had decisive consequences on governmental policy and law in post-colonial Sri Lanka.

Sriskanda Rajah writes:

[I]n acknowledging the repressive powers of law in contemporary societies, Foucault not only reiterated his earlier claim that law always means the sword, but also implied that it remains as forceful as it was before modernity, and is thus capable of producing the effects of battle, i.e., death, injury, submission, expulsion or the appropriation of

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261 Welikale, supra note 258, p.123.
262 Ceylon Independence Order, supra note 56.
263 Kumarasingham supra note 238, pp. 118-119.
264 Ibid p. 119.
265 Tambiah, supra note 118, p. 69.
persons or property. In other words, in equating law with the sword, Foucault acknowledged its war-making function in contemporary societies. Foucault suggested a study of power beyond law so that such a study would be able to grasp the productive dynamics of power, as opposed to only its repressive dynamics represented by law. Thus, one would not be going against Foucault’s theoretical expositions of power by focusing on law if the concern of the study is the repressive actions of states that produce the effects of battle. As the discussions in this book will demonstrate, law, producing the effects of battle, has played a key role in Sri Lanka’s biopolitics of constructing and securing a Sinhala Buddhist ethnocratic state order.266

2.1. General elections 1947 - the creation of aristocratic democracy and the rise of Political Buddhism

The publication of the Soulbury Report and the end of the Second World War ushered in the recalibration of the political setting in Sri Lanka.267 There was a certain artificial prosperity given the deployment of British Royal Forces in the island, which all came to an end with the announcement of elections: social unrest grew given the constant agitation by Marxist parties and trade unions.268 Allegiances were forged between white collar workers and working class, who regarded the Soulbury Constitution as a “[c]ynical deal between the imperial power and compliant agents in Sri Lanka to preserve the old order under a guise of independence.”269 This alliance launched strikes in different segments of public life, which were eventually crushed by the military.270

In this climate, Sri Lanka held elections for the country’s first House of Representatives. It was the third election since the introduction of universal suffrage and several parties participated, but more importantly, this election prepared the ground for the involvement of Buddhist monks in politics. Their participation was a very decisive moment for Sri Lankan policy makers during the post-colonial period in Sri Lanka, which helped define the imperatives for the formulation of future governmental strategy. Essentially, the election was a political confrontation between Marxist and non-Marxist forces, resulting in the narrow victory of United National Party, a coalition of many nationalist and communal parties. D.S. Senanayake, who was elected as the first Prime Minister of Sri Lanka after the elections, paid attention to combating

266 Sriskanda Rajah, supra note 158, p.6.
267 Wickramasinghe, supra note 17, p. 212.
268 Ibid p. 212; Jupp, supra note 246, pp. 6-7.
269 de Silva, supra note 87, p. 604.
270 Wickramasinghe, supra note 17, p. 213; Jupp, supra note 246, pp. 6-7.
the left movement.\textsuperscript{271} One way of inhibiting the leftist threat was by depriving its voters the right to vote. The Citizenship Act 1948 was one of the legislative means to achieve that goal.\textsuperscript{272} This aspect will be discussed in part two of this chapter. But the following approaches became a persistent characteristic in post-colonial Sri Lanka: successive governments structurally delimited constituencies to strengthen the position of the Sinhala rural voter, but moreover, they used the mobilisation of Sinhala political force as a basis for the entrenchment of the Sinhala power elite.\textsuperscript{273} D.S. Senanayake enjoyed the confidence of the British and his commitment to Sri Lankan nationalism and alliance to the Crown impressed them.\textsuperscript{274}

It was, however, the same D.S. Senanayake who had instigated the anti-Muslim rioting in 1915 and who was jailed for this agitation with his brothers.\textsuperscript{275} He also devised the colonisation plans for the Sinhala populations in the northern and eastern part of Sri Lanka, the Tamil areas.\textsuperscript{276} He also believed that the Sinhala were the chosen people, reclaiming their lands.\textsuperscript{277} The naïve belief that the British put in Senanayake came to an end in 1952 with his sudden death. He was succeeded by his son Dudley Senanayake and he was succeeded by his cousin, John Kotelwala. The United National Party became, eventually a family party, which led the public to call the party the Uncle Nephew Party.\textsuperscript{278} Meanwhile, the Sri Lankan electorate became increasingly disenfranchised with the country’s leadership and their Pro-Americanism, while Sinhala-Buddhism revivalism grew into a steady force.\textsuperscript{279}

2.2. General elections 1956 – the rise of linguistic nationalism and identity formation

The General elections of 1956 were crucial for the post-colonial development of Sri Lanka, as it was the beginning of Sinhala-Buddhist nationalism accessing executive power.\textsuperscript{280} This elec-

\begin{itemize}
\item \textsuperscript{273} de Silva, supra note 87, p. 606.
\item \textsuperscript{274} Kumarasingham, supra note 238, p. 116.
\item \textsuperscript{275} Jayawardena, supra note 107, p. 193.
\item \textsuperscript{276} Hyndman, supra note 13, p. 67.
\item \textsuperscript{277} Weiss, supra note 95, p.33.
\item \textsuperscript{278} Kumarasingham, supra note 238, pp. 131, 149.
\item \textsuperscript{279} Jupp, supra note 246, pp. 7-9.
\item \textsuperscript{280} de Silva, supra note 87, p. 626.
\end{itemize}
tion must be seen in the context of the economic state of the country: the island's three export products, namely, tea, rubber, and coconuts performed well in the global market, as they contributed significantly to the profit from foreign trade. Despite this economic development, Sri Lanka struggled with the growing population and the free import of consumer goods that consumed the earnings from foreign trade. Moreover, prices of the country's rubber and tea fell, while the price of imported food increased and caused a serious foreign exchange problem. Moreover, the growing school system generated more educated persons who struggled to find employment.

Political and economic discontent converged after 1955 and it was in this environment that proto-communalism flourished. The proto-communal tendency revealed its first facet with the language agitation.²⁸¹ Sinhala politicians were prone to seize the language issue for their purpose and the spokesperson who captured the moment of revival was Christian-turned Buddhist S.W.R.D. Bandaranaike, who had been a member of the United National Party and left it out of disgruntlement with the party leadership.²⁸² In the 1956 elections Bandaranaike seized a triumph with his newly formed Sri Lanka Freedom Party, and garnered a landslide victory in the general elections of 1956, which instigated a period when Buddhist-Sinhala chauvinism became a mainstream position.²⁸³ Bandaranaike’s family roots stemmed from the influential Sri Lankan aristocracy that embraced Anglian Christianity during colonial rule. Bandaranaike was educated at Christ Church in Oxford, however he, “[d]iscarded Western clothes to put on the ‘native costume.’”²⁸⁴

While D.S. Senanayake tried to defuse tensions by finding the appropriate power balance and perpetuating “Sri Lankan nationalism”, Bandaranaike emphasised the special position of Sinhala and Buddhism for the history of Sri Lanka.²⁸⁵ Interestingly enough, it was the same Bandaranaike, the first major politician of his kind, who had advocated against an unitary state and in favour of federalism. He had once argued for a protection of minority rights in a speech

²⁸¹ Ollapally, supra note 272, p. 154; Bandarage, supra note 239, p. 42.
²⁸² Ibid Ollapally, p. 157; de Silva, supra note 87, p. 628; Kumarasingham, supra note 238, p. 160; Tambiah, supra note 118, p. 171.
²⁸⁴ Tambiah, supra note 118, p. 133; Winslow, supra note 271, p. 34.
that he delivered in the Tamil heartland, Jaffna, in 1926—exactly thirty years before his landslide victory based on the vehicle of Sinhala-nationalism.\textsuperscript{286} The main motivational factor for ethnic chauvinism was “majoritarian populism”; this mindset and the pure focus on elections led to a dismissive authoritarianism by the ruling Sinhala elite.\textsuperscript{287} Bandaranaike swiftly understood the signs of the times and embraced the populism and ecstatic euphoria that was prevalent within Sinhala nationalism.\textsuperscript{288}

The new government immediately set about changing the political landscape. With the Sinhala Only Bill, the Bandaranaike administration made Sinhala the exclusive official language and initiated state support for Buddhism and Sinhala culture.\textsuperscript{289} The new administration also conflated new nationalism to a form of socialism, in which the state was given the central and overarching role in economic development and the creation of economic equality. In a recent comment, the former President of Sri Lanka Chandrika Kumaratunga (who is the daughter of S.W.R.D. Bandaranaike) accounted for the events and motivations surrounding the Sinhala Only Bill,

\begin{quote}
After eight years of independence, the Sinhala people, who accounted for around 75 per cent of the population, felt that they were being discriminated against, not by the Tamil or Muslim people but by the white rulers and they felt they needed to express their identity by regaining an important place for the Sinhala people. What better way to give people an identity than to elevate the status of their language?
\end{quote}

2.3. Inter-ethnic riots 1956 and 1958

The watershed elections from 1956 ignited the first pogroms in the country, which became a distinctive feature in the contemporary history of Sri Lanka. Significantly, both major Sinhala-dominated parties from government and opposition had exploited ethno-nationalist sentiments within the Sinhala majority community for their political gain, ushering in episodes of

\textsuperscript{286} Kumarasingham, supra note 238, p. 189.
\textsuperscript{287} International Crisis Group, ‘Sri Lanka, Sinhala Nationalism and the elusive consensus, Executive Summary’, \textit{Asia Report No. 141}, 7\textsuperscript{th} of November 2007, pp. 3-7.
\textsuperscript{288} Kumarasingham, supra note 238, p. 190; Bandarage, supra note 239, p. 42.
\textsuperscript{289} de Silva, supra note 87, p. 626; Farmer, supra note 6, p. 36; International Crisis Group, supra note 287, pp. 15-18; DeVotta, supra note 218, pp. 149-150; Ollapally, supra note 272, p. 156.
\textsuperscript{290} Daily Mirror, ‘My father brought in Sinhala only Bill to give country back its identity: CBK’, online at: <http://www.dailymirror.lk/114681/My-father-brought-in-Sinhala-only-Bill-to-give-%23sthash.eZZowolD.dpuf>, last accessed 25\textsuperscript{th} of August 2016.
inter-ethnic violence. Coinciding with the elections 1956, the Buddhists celebrated the 2,500th anniversary of the passing of the Buddha. Consequently, during the elections aspirant Sinhala-Buddhists did not solely pursue cultural, and political goals, but also economic goals. The instrumentalization and exploitation of the language dynamic during the elections in 1956 were predominant reasons for the victory of Mr. Bandaranaike. He pressed ahead to appease his electorate with legislation making Sinhala the sole national language. The Bandaranaike government also introduced the Prevention of Social Disability Act, an Act that will be dealt with in the subsequent chapter. This push, inevitably, led to reactions by the Tamils who saw these pieces of legislation as an attack on their culture, language, heritage, identity and the legitimacy of their presence in Sri Lanka. It is in this context that the Tamil voters consistently returned to claims for Tamil nationhood in every general election since 1956.

Riots erupted in Colombo, as Tamil leaders observed civil disobedience following the Gandhian principle of “Sathyagraha” (Sanskrit: passive resistance). Another, disregarded element in the ethnic conflict was the so-called sons-of-soil dynamic or the Gal Oya colonisation scheme. The earlier mentioned Pan Sinhala State Council adopted the Development Ordinance of 1935, seeking the so-called acquisition of land for private gains. In the later stages, development projects were pursued. These projects foresaw the creation of agricultural settlements and the driving force behind this colonisation process was, as previously discussed, D.S. Senanayake, the then-minister of Agriculture in the state council and the first

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293 Wickramasinghe, supra note 17, p. 268.
294 Farmer, supra note 6, p. 66; Samranayake, supra note 91, p. 148; DeVotta, supra note 218, p. 148.
295 Ibid Farmer, p. 66; Bandarage, supra note 239, p. 47.
297 Farmer, supra note 6, p. 67.
Prime Minister of the country. After Sri Lanka’s independence, the newly formed government introduced and expanded the colonisation program, calling it the “Gal Oya Development Board,” a programme aiming to relocate landless farmers in the fertile region of the Eastern Provinces.\(^{301}\) One of the first agriculture projects, the Gal Oya project, launched in 1950, dammed the Gal Oya River and made up to 40.000.000 acres of arable land available to these landless peasants. The Gal Oya Development Board was assigned with the mandate to address and administer irrigation, flood control, cooperative agriculture, industrial undertakings, promotion of hydro-electric power. This institution had to direct all its activities to improve the status of economic conditions for the citizens within the area of control.\(^{302}\)

The Board, however, lacked independence, and the scheme helped to establish several Sinhala settlements in the district.\(^{303}\) The scheme pushed the boundaries towards the North, establish new Sinhala villages, creating adverse conditions for the Tamil population there. Fifty new villages with Sinhala majorities emerged by 1956 at the more productive headwaters of the Gal Oya tank. Moreover, Buddhist temples were built and Sinhala settlers were provided with police and military protection.\(^{304}\) The Tamils opposed this state-sponsored dismantlement of Tamil heritage and identity. The leader of the Tamils and the Federal Party, S.J.V. Chelvanayakam, predicted with foresight that these colonial relics of government’s resettlement policy would lead to a worsening ethnic climate.\(^{305}\) The increased tensions were result of the resettlement policy, which eventually led to an increasing number of riots in 1956. In reaction to this, the Federal Party (the main Tamil political representation), organized marches throughout the country and called for parity of status for Tamil and Sinhala communities, the end of state-sponsored colonisation schemes in traditional homelands, regional autonomy for Tamils and the restoration of citizenship and franchise rights to Indian Tamils. S.J.V. Chelvanayakam, a committed Gandhian, underscored the need for decentralisation and autonomy for the Tamils in their majority areas, but was also willing to consider careful compromises. He concluded two important agreements with the Sri Lankan prime ministers at the


\(^{302}\) Ibid.

\(^{303}\) Bandarage, supra note 239, pp. 47-48.

\(^{304}\) Ibid pp. 47-48.

time, S.W.R.D. Bandaranaike in 1957 and later with Dudley Senanayake in 1965. Both agreements foresaw decentralisation of power to the north and east, with the possibility to work together and the creation of legislation as opposed to a constitutional amendment. Moreover, the agreements were an effort to defuse inter-communal tensions, address language and land rights of the Tamils and clarify the legal status of the Indian Tamils. However, Tamils were frustrated by the slow pace of implementation and the reluctance of their Sinhala counterparts. Sensing the Sinhala opposition to the pact, the then-opposition leader, J.R. Jayawardene, led a Buddhist march to Kandy, an action that further fuelled the heated atmosphere there. Interestingly, the same J.R. Jayawardene had advocated in 1944 for making Sinhala and Tamil, both as official languages of the country. In light of this populist atmosphere, the pact with Bandaranaike, just like the pact with Senanayake in 1965, were both revoked. Both revocations occurred because of the pressure exerted within as well as outside of government. Careerist opportunism of leaders in charge was dominant, as they pursued short-term goals of ethnically outbidding each other to obtain power. Meanwhile, Tamil youth and Tamil nationalists became increasingly impatient with the non-violent and diplomatic means of Tamil leadership.

Despite the incited violence in the country that took the lives of 150 Tamils, Tamil leaders, spearheaded by S.J.V Chelvanayakam, were yet again determined to hold another satyagraha in the face of the threatening situation after the pact. In 1958 the country experienced its first ever post-independence communal violence and pogrom against Tamils by Sinhala mobs. This lasted for six days, resulting in a death toll of hundreds of people and more than 25,000 internally displaced persons. The 1958 riots were the most serious inter-communal violent outbursts in the troubled history of Sri Lanka. In retrospect, the events of 1958 were early warnings of the atrocities to follow and for the Tamils, it seemed that the state was not
only unable, but probably unwilling to protect them.\textsuperscript{315} S.W.R.D. Bandaranaike, who had seized the opportunity of rising Sinhala-Buddhism for claiming power, could not restrain the ethnic hostilities he had unleashed. Disgruntled and outraged with his mitigating efforts towards the Tamils, he was assassinated by a Buddhist monk in 1959.\textsuperscript{316} Sri Lanka, from now on, officially entered an era of political violence that shrunk the space for minorities, extended the justification of the state to exert the highest degree of force to preserve the state,\textsuperscript{317} which in turn became an “[e]thnic provocateur.”\textsuperscript{318}

2.4. The Marxist uprisings and the violent clampdown

The rise of Political Marxism in Sri Lanka was a gradual process with a strong, colourful past that, in the end, never translated into governmental responsibility. This development transpired because of the personal animosity that the respective leaders of the different Marxist parties had for each other.\textsuperscript{319} As outlined earlier, the parties of the Left could have claimed political responsibility in 1948, but failed to ally themselves, and it became apparent that disunity among the Left would become a constant malady in the Leftist movement. In the second half of the 1960s, however, the Marxist movement in the country gained momentum, as the youth was exposed to unemployment, caste oppression and poverty.\textsuperscript{320} The World Bank had advised the Sri Lankan government to reduce public spending on social and welfare significantly, as the spending consumed 35% of the state budget.\textsuperscript{321} The Janatha Vimukthi Perumana, a group of revolutionaries, attracted many disillusioned, educated Sinhala youth. The Janatha Vimukthi Perumana was intuitive enough to address their needs, exploited their disenfranchisement and channeled this frustration into political action.\textsuperscript{322} The rise of the Janatha Vimukthi Perumana was a product of class awareness, and the failed policies of the political Left.\textsuperscript{323} Their political upsurge also benefited from the support of the influential Bud-
dhist monks, the “bhikkus,” who turned to the Janatha Vimukthi Perumana to see their ideology realized, as the Janatha Vimukthi Perumana’s egalitarian ideology attracted them. The first Janatha Vimukthi Perumana insurrection in 1971 and the second uprising in 1987-1989 are one of the most overlooked chapters in the younger history of Sri Lanka. It was the first organized revolt by the youth against the government and, according to K.M. de Silva, “[t]he biggest revolt by young people in any part of the world in recorded history.” The Sri Lankan government under Srimavo Bandaranaike was confronted with various factors that fuelled public anger and disenfranchised the youth: rising prices, the lack of essential items, and the vertiginous unemployment rate. Against this background, the Janatha Vimukthi Perumana aimed to overthrow the government, but in the course of the events, 5,000 – 10,000 people lost their lives, and many remain disappeared.

The insurrection triggered drastic reforms and curtailed the criminal procedure system in Sri Lanka, it emphasised the role of the executive and, finally ushered in a strong authoritarian shift. The uprising is interpreted in different ways, but in the end, it was an insurrection of a political movement founded on an indigenous Marxist-Leninist ideology. Laksiri Fernando states:

[T]he insurrection opened the flood gates. Sri Lanka could never become the same. Recurrent cycles of violence were to follow after small interlude in almost all spheres of political life from elections to ethnic relations and political party competition.

New idioms and old expressions with new connotations won prominence in the Sinhala language, like ‘bheeshanaya’ (terror), ‘wadhakagaraya’ (torture chamber), ‘issuwa’ (kidnapped). This linguistic influence reflects the social and psychological repercussions on the people.

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324 Ibid Wickramasinghe, supra note 17, p. 235.
326 de Silva, supra note 87, p. 663; Samaranayake, supra note 91, pp. 137-138; Bandarage, supra note 239, pp. 56-57.
327 Wickramasinghe, supra note 17, p. 268; Jupp, supra note 246, pp. 319-321.
328 Ibid Wickramasinghe, supra note 17, pp. 235, 268; de Silva, supra note 87, p. 668; Sabaratnam, supra note 147, p. 213.
330 Wickramasinghe, supra note 17, p. 248.
The Janatha Vimukthi Peruma uprising led to a power imbalance in the country, rendering spouses, children, friends and relatives highly vulnerable to a high number of stresses.\footnote{Ibid p. 248; Weiss, supra note 95, pp. 45-46.} The question emerges if this chapter in Sri Lankan history contradicts the concept of biopolitics and the idea of improving the life of the dominating species that is identified by the state. To this end, Sriskanda Rajah writes:

\begin{quote}
[T]he killing of its own people by the forces of the state would appear to contradict the argument that biopolitics is about making life better for the race/ species that the state claims to represent. Foucault addresses this question in ‘Society Must Be Defended’ when he expands on the idea of ‘good’ and ‘bad’ amongst the human species. Though the idea of race is central to biopolitics, the binary division of the human species as ‘good’ and ‘bad’ is not always pinned to relations between biologically different racial groups: they go beyond the ‘traditional form of mutual contempt or hatred between races’. In other words, the ‘bad’ part of the species that the state seeks to eliminate does not always have to belong to another group ethnically/ biologically different to the ‘good’ race/ species it seeks to foster. Anyone or any group with any anomalies within the ‘good’ species can be singled out and become targets for elimination. In Ceylon’s case, the Sinhala Buddhist extremists who refused to submit to the state, when it sought to end ‘lawlessness’, fell into this category, and were killed.\footnote{Sriskanda Rajah, supra note 158, pp.35-36.}
\end{quote}

Three separate commissions were set up after 1994 to investigate the extraordinary number of disappearances, to make legal recommendations and provide legal measures to address these grave human rights violations. However, there was no genuine process in prosecuting the perpetrators because primary attention was devoted to the civil war against the Liberation Tigers of Tamil Eelam that started in 1983. Any prosecution of state security personnel would, according to state logic, endanger national security.\footnote{Wickramasinghe, supra note 17, p. 249; Weiss, supra note 95, pp. 45-46.} Gordon Weiss sums up poignantly:

\begin{quote}
[T]hese Sinhalese revolts also reveal something about the way in which those who govern Sri Lanka wield power and repress memory, revelations that encourage a broader view of the island’s ailments beyond just the ethnic paradigm.\footnote{Ibid Weiss, supra note 95, xx.}
\end{quote}

2.5. The Presidential Elections 1982

The Presidential Elections took place in 1982 and gradually contributed to the alienation of minorities. The removal of minority safeguards in the Soulbury Constitution, the lack of concern for the state of the Tamils and the newly introduced policies for university admissions,
aggravated the situation, especially for young Tamils. Moderates and the extremists of the Tamil minority envisaged the creation of their own country called “Tamil Eelam”, which became a common dominator among them. Nevertheless, this was the sole dominator. While the traditional and moderate Tamil opposition relied on non-violent disobedience, parliamentary means and parliamentary democratic politics, the radical youth movement insisted on violent means to achieve the goal of independence.

The shift from moderate to violent means to achieve a solution for the Tamils in Sri Lanka did not occur suddenly. Tamils started to show growing support for an armed solution given the fruitless parliamentary efforts, especially in a futile environment after passing the 6th Amendment to the Constitution. Young Tamils were disenchanted and frustrated by Tamil leaders and also rebelled against the traditional norms of Tamil society. By the early 1970s, much qualified Tamil youth were impeded from entering government service and university. A discriminatory state apparatus was engaged in state-sponsored marginalisation and humiliation of the young Tamils. In this social climate, the Tamil militancy mushroomed, marking the beginning of political instability in Sri Lanka. Eight years after the first Janatha Vimukthi Perumana uprising, another armed group challenged state apparatus: the Liberation Tigers of Tamil Eelam. The Liberation Tigers of Tamil Eelam was a product of Tamil nationalism, and this Tamil insurgency evolved during a twin process, namely political mobilisation and institutional decay. The Tamil population had a broad range of political opinions; this included moderate parliamentary parties, such as the Tamil United Liberation Front, but also

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335 Wickramasinghe, supra note 17, p. 278; Bandarage, supra note 239, pp. 96-97.
336 Ollapally, supra note 272, p. 160.
338 For a more detailed account of the Tamil struggle: Wickramasinghe, supra note 17, pp. 252 – 301.
340 Wickramasinghe, supra note 17, p. 279; Weiss, supra note 95, p. 49.
342 Ibid DeVotta, p.1022.
343 Wickramasinghe, supra note 17, p. 278.
other militant groups that emerged in the 1970s and 1980s. Noteworthy are the Eelam People’s Revolutionary Liberation Front, Tamil Eelam Liberation Organisation, Eelam Revolutionary Organisation of Students, and the People’s Liberation Organisation of Tamil Eelam. The Tamil United Liberation Front followed a strong non-violent line while emphasizing the right to self-determination of the Tamils and to pursuing the goal of their own country. With the Vaddukoddai Resolution from 1976 the party aimed to galvanise the youth and forge alliances with different actors for the Tamil movement. However, this very Resolution marked the genesis of Tamil radical secessionism. The variety of formations, militant as well as political, pursued the goal of an independent Tamil state. Nevertheless, the strategies in achieving an independent state differed considerably.

The Liberation Tigers of Tamil Eelam became the strongest force among these militias and by 1987 succeeded in its hegemony over other moderate and radical political movements among the Tamil youth movements. The Liberation Tigers of Tamil Eelam resented and recoiled against traditional norms and the upper-caste elite, as they believed they were out of touch with the local needs of the Tamil people. Different events between 1978 and 1983 compounded the situation, with an accumulation of riots and animosities between the two dominating communities and the gradual development of Tamil insurrection. The presidential elections in 1982 contributed to the hostile climate in country. President Jayawardene, who won the elections by a landslide, aimed to hold a referendum to prolong the mandate of the parliamentarians for another six years, which was a grave departure from democratic tradition. To illustrate the increasingly violent climate, the first incidents of provocation and

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345 Bandarage, supra note 239, p. 97.
347 Wickramasinghe, supra note 17, p. 280; Edrinsinha, supra note 36, p. 301.
348 Ollapally, supra note 272, p. 158.
349 Wickramasinghe, supra note 17, p. 288; Bandarage, supra note 239, p. 97.
350 Ibid Wickramasinghe, p. 280; Sabaratnam, supra note 147, p. 208.
351 Wickramasinghe, supra note 17, p. 285; Weiss, supra note 95, pp. 64-76.
repression broke out in July of 1982, when the Liberations Tigers of Tamil Eelam carried out attacks on the police and army.\textsuperscript{354} These attacks were retaliated against by Sinhala mobs in Trincomalee. Subsequently, railway connections between the Tamil and Sinhala areas were interrupted due to governmental sanction, with the purpose of illustrating the economic implications of further hostilities.\textsuperscript{355} In the climate of emerging liberation movements in the Third World (and in particular in Bangladesh in 1971), that context galvanised the Tamil youth to believe that a separate homeland, “Tamil Eelam”, was attainable, especially with the support of a geopolitical superpower like India.\textsuperscript{356}

In the following years, nascent secessionist groups began robbing banks to fund acquisition of weapons, to eliminate police personnel, and in particular to assassinate pro-government Tamil politicians whom they considered to be traitors.\textsuperscript{357} The Liberation Tigers of Tamil Eelam that had seized the momentum by eliminating adversaries and by doing so preserved their exclusive role as sole representative of the Tamil claim for statehood in the further course of Sri Lankan history.\textsuperscript{358}

2.6. Black July 1983 and the beginning of the civil war

In 1981 local police and paramilitary forces burnt down the Jaffna Public Library, a famous institution holding numerous precious and ancient documents of Sri Lankan history, many believe under the instruction of the administration of J.R. Jayawardene.\textsuperscript{359} 90,000 books of historical and cultural value to both, Tamils and Sinhala alike, were destroyed, and nobody was ever punished for this attack on the Public Library\textsuperscript{360}, an attack that was and is considered primarily as an attack against Tamil education and culture. It was in this context that terrorist activity began to find fertile ground. The “ignis fatalis” of the war occurred in July 1983: the Liberation Tigers of Tamil Eelam launched a deadly attack in northern Sri Lanka in a contested war zone, killing thirteen Sinhala soldiers in a jeep by a landmine. Subsequently, their remains

\textsuperscript{354} Ibid p.137-138. \\
\textsuperscript{355} Ibid p. 137-138. \\
\textsuperscript{356} DeVotta, supra note 341, p. 1022. \\
\textsuperscript{357} Ibid p. 1022. \\
\textsuperscript{358} Wickramasinghe, supra note 17, p. 289. \\
\textsuperscript{360} Ibid Salter, p. 13.
were brought to Colombo for cremation. In the following days, Sinhala mobs took revenge, killing hundreds of Tamils, regardless of age, gender and social condition. During the next ten days of the so-called ‘Black July’ a pogrom swept through the country, taking the lives and property of Tamils, while the government was either too slow or unwilling to act in the climate of violence. The government of Jayawardene then failed to take any precautionary measures, and only declared curfew after the worst incidents had already taken place. Nira Wickramasinghe writes about these dark days of Black July: “[T]he killings of innocent Tamil men and women that followed were informed by a moral framework.”

The government estimated 300 – 400 deaths, unofficial figures consider 3,000 deaths as more likely. This pogrom triggered a start of the civil war, which lasted 26 years and compelled hundreds of thousands of Tamils into exile, killing up to 150,000 people and many disappeared. Sriskanda Rajah asserts that:

[t]he use of the terror of ‘lawlessness’ in July 1983 paved the way for the state to not only assert the Mahavamsa based all-island sovereignty claim of the Sinhala Buddhist people and the power of death that they had over the Tamils, but also produced three effects of battle: the elimination of a section of the ‘enemy’ race; destruction and possession of parts of their properties; and the expulsion of a section of them from the Sinhala areas, and to an extent from the island’s shores.

Two foreign, non-United Nations interventions tried to bring the ethnic conflict to an end and prepared significant elements for the furtherance of a human rights infrastructure. The intervention of the Indian government into the conflict in Sri Lanka in 1987 mounted in the Indo-Sri Lankan Peace Accord. It was commended as “[a] milestone in domestic and international politics” which foresaw the implementation of the 13th Amendment to the Sri Lankan Constitution. It was a negotiated settlement between the Sri Lankan government and the Liberation Tigers of Tamil Eelam and other Tamil militias, with India being the guarantor. The

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363 Ibid Wickramasinghe, p. 286.
364 Ibid Wickramasinghe; Tambiah, supra note 118, p. 22.
365 Ibid Wickramasinghe; Gombrich, supra note 7, p. 23
366 Sriskanda Rajah, supra note 158, p. 64.
367 Ollapally, supra note 272, p. 169.
369 Bandarage, supra note 239, p. 132; Weiss, supra note 95, pp. 81-83.
Accord, to be specific, committed the parties to a multi-ethnic, multi-religious plural society, disarmament of all militias, devolution of powers to the Northern and Eastern Provinces, declaration of Tamil as an official language and the territorial integrity of Sri Lanka. India, meanwhile, agreed that its soil would not use for any activities of the Liberation Tigers of Tamil Eelam against the Sri Lankan government. The implementation of the Accord, however, never materialized, given the Liberation Tigers of Eelam’s resistance against the presence of Indian Peacekeeping Forces, concluding with their forced retreat.\(^\text{370}\)

The second intervention was the Norwegian-led peace effort in 1997. While the Norwegian effort was both praised and criticised, it must be stressed that the Norwegian intervention was successful at least to bring the warring parties after years of confrontation to the negotiation table and usher in a negotiated ceasefire agreement in 2002. Meanwhile, their passive approach as a third party intervenor in crucial areas such as human rights abuses was widely criticised.\(^\text{371}\) Norway referred to its intervention as a form of facilitation, intending to highlight a less intrusive form of intervention.\(^\text{372}\) Assessing the Norwegian peace efforts, it becomes evident that it was “[a] test case for the ‘responsibility to protect’ agenda, with Eastern and Western powers taking different positions”, and as “[p]art of a global story of declining Western leverage and the reassertion of state sovereignty”.\(^\text{373}\)

The ceasefire agreement between the two warring parties was a landmark achievement, with the willingness to examine again the claim for statehood and federal options.\(^\text{374}\) Norway was instrumental in efforts to create direct attention and internationalization of the engagement towards Sri Lanka.\(^\text{375}\) The peace process, however, collapsed, largely due to lack of political will and tactics on the side of Sri Lankan government, but also due to the lack of genuine commitment on the side of the Liberation Tigers of Tamil Eelam. Sinhala nationalists expressed fierce resistance against the peace process and the foreign intrusion into domestic affairs, urging the incumbent president at the time, Chandrika Kumaratunga, to bring down

\(^{370}\) Moorcraft, supra note 91, pp. 22-23.

\(^{371}\) Kristine Höglund & Isak Svensson, ‘Mediating between tigers and lions: Norwegian peace diplomacy in Sri Lanka’s civil war,’ Contemporary South Asia, 17:2, [2007], p.175.

\(^{372}\) Ibid p. 176.


\(^{374}\) Ollapally, p. 173, supra note 272; Bandarage, supra note 239, pp. 181-185.

\(^{375}\) Höglund & Isak Svensson, supra note 371, p.185.
the prime minister and his government, which was closely involved in the peace effort. Chandrika Kumaratunga argued that Prime Minister Wickramasinghe was putting national security at risk and selling out Sri Lankan sovereignty to the international community. The breakdown of a politically negotiated solution to the conflict, eventually, signified the return to military means and marked the beginning of the end of the war in 2009. There has yet to be any real and genuine reconciliation after this terrible chapter in Sri Lankan history, or any attempt to bring past wrongdoings to the public attention, or provide for reparations and bring perpetrators to justice. It was only with the election of President Kumaratunga that the “Black July” was addressed by a Head of State. In her speech commemorating the 21st anniversary of “Black July” in 2004 she said:

[O]nly very few nations seem to have had the courage or the right leadership to accept the blame for their moments of shame. Some nations have done this and have been able to put their past behind them and move forward to becoming the world’s most developed nations. Many others like us have failed to look truth in the face, they have failed for some reason which I do not comprehend (...)

Perhaps it is the responsibility of the State and the Government to engage in that exercise first and foremost, and then all of us as the Nation, every citizen in this country should collectively accept the blame and make that apology to all of you here who are the representatives or the direct victims of that violence, and through you to all the other tens of thousands who suffered by those incidents. I would like to assign to myself the necessary task on behalf of the State of Sri Lanka, the Government and on behalf of all of us; all the citizens of Sri Lanka to extend that apology. It is late but I think it is still not too late.

Instead, the changing international climate in the wake of the “war on terror” was an appreciated political and legal vehicle to conduct warfare against the Liberation Tigers of Tamil Eelam. The Bush administration’s discussion on counterterrorism measures was a welcomed frame of justification for many other states, including Sri Lanka, to restrict international human rights and international humanitarian law. Dayan Jayatilleke, the then-United Nations Permanent Representative of Sri Lanka in Geneva said in this context:

[The international pressures were too strong for the Sri Lankan state to ignore but

376 Ollapally, supra note 272, p. 175; Bandarage, supra note 239, pp. 188-189.
377 Ibid.
too weak to stop the state’s military campaign, just as the Sri Lankan state was too weak to simply ignore the mounting pressure but too strong to be cowed by them. We had to outrun the pressures by accelerating the military offensive and closing the end-game as soon as possible.\textsuperscript{380}

In his speech to the Sri Lankan parliament after the end of the civil war in 2009, the president of Sri Lanka, Mahinda Rajapakse, echoed the Dharmapala’s revisionist ideology and invoked this history to dwell on the Sinhala supremacy and the foreign and interior threat to Sinhala-Buddhist control over the country:

\[\text{W}e \text{ are a country with a long history where we saw the reign of 182 kings who rules with pride and honour for that extended more than 2,500 years. This is a country where kings such as Dutugemunu, Valagamba, Dhatuse and Vijayabahu defeated enemy invasions and ensured our freedom.}\]

\[\text{As much as Mother Lanka fought against invaders such as Datiya, Pitiya, Palayamara, Siva and Elara in the past, we have the experience of having fought the Portuguese, Dutch and British who established empires in the world. As much as the great kings such as Mayadunne, Rajasingha I and Vimaladharmasuriya, it is necessary to also recall the great heroes such as Keppettipola and Puran Appu who fought with such valour against imperialism.}\textsuperscript{381}

The next section will now examine the colonial impact, if any, on the Sri Lanka human rights infrastructure.

**3. The colonial legacy and imprint on the contemporary human rights infrastructure**

What is now left of the colonial imprint in Sri Lanka? Catholicism comprises the most significant imprint of Portuguese rule.\textsuperscript{382} Many family names (Sinhala from the Low-Country took Portuguese names (i.e. de Silva, Fernando, Fonseca etc.), place names, common words in Tamil and Sinhala, and social customs (i.e. monogamy or sanctity of marriage) are owed to the Portuguese influence.\textsuperscript{383} The Portuguese built their rule on the existing indigenous administration. Memory of the rule, however, is overshadowed by religious proselytising and authoritarian rule that left the people and land impoverished.\textsuperscript{384} Moreover, brutal destruction

\textsuperscript{380} Ibid p. 103.

\textsuperscript{381} President’s speech to Parliament on the defeat of LTTE, online at: <http://www.satp.org/satporgtp/countries/shrilanka/document/papers/president_speech_parliament_defeatofLTTE.htm>, last accessed 19\textsuperscript{th} of June 2017.

\textsuperscript{382} Wriggins, supra note 93, p. 14; Jayawardene, supra note 187, p. 232.

\textsuperscript{383} Wriggins, supra note 93, p. 14; Jayawardene, supra note 187, p.287.

\textsuperscript{384} de Silva, supra note 87, pp. 181 -183.
of existing religious sites and oppression of Buddhism, Hinduism and Islam were constant features of Portuguese rule.\textsuperscript{385}

There was, however, another interesting development with the intrusion of Portuguese in Sri Lanka: the differentiation between Kandyan and Low-Land Sinhala. Kandy was a region that was never conquered by the Portuguese. This fact is compounded by a social system that was largely unaffected (for instance, religion, caste, position of landowning aristocracy).\textsuperscript{386} The impact of the Dutch colonial regime is somehow firmer than that of the Portuguese, although not of equal impact as that of its predecessors. For instance, Dutch legal proclamations (‘Plakkaats’) had displayed certain systematic rule over the people governed, but it was only the British rule, as this will be presented later on, that attempted to create the modern colonial state where natives would be the actual subjects of colonial domination.\textsuperscript{387}

Like the Portuguese, the Dutch never managed to conquer the Kingdom of Kandy, although the Dutch managed to develop trade, commerce and urban growth. The Dutch have also contributed to the widening gap and differentiation between the Low Land and Kandyan Sinhala. And they added another group to the group of communities, the Burghers, the descendants of intermarriages between the Dutch and the indigenous population.\textsuperscript{388} To root out the Portuguese identity and Catholic imprint, the Dutch tried to convert Buddhists and Catholics to Dutch Protestantism by using administrative and governmental means.\textsuperscript{389} Another important Dutch imprint is the codification of local customary law and introduction of Roman-Dutch law whenever local law left gaps.\textsuperscript{390} The Roman-Dutch law is still applied by the legal system in Sri Lanka. Moreover, the promotion of coconut and cinnamon cultivation, commercialization of maritime provinces and the development of a canal communication in the low country marked the Dutch rule as well.\textsuperscript{391} The British contributed to the creation of an island-wide administration under the rule of law, and their judicial system brought protection from arbitrary rule and introduced a new concept of justice. The political institutions under the

\textsuperscript{385} Ibid pp. 175 – 182; Mills, supra note 193, p. 8.
\textsuperscript{386} Ibid de Silva, pp. 175 – 182.
\textsuperscript{387} Wickramasinghe, supra note 17, pp. 24-25; Thamil Venthan Ananthavinayagan, ‘Sri Lanka: Legal Research and Legal System’, online at: <http://www.nyulawglobal.org/Globalex/Sri_Lanka1.html>, last accessed 6\textsuperscript{th} of November 2016.
\textsuperscript{388} Wriggins, supra note 93, p. 14; Jayawardene, supra note 103, p. 235.
\textsuperscript{389} Ibid Wriggins, p. 14.
\textsuperscript{390} Ibid Jayawardene, supra note 103, p. 216.
\textsuperscript{391} Wriggins, supra note 93, p. 14.
British allowed for flexible growth, and economic modes of commerce and exchange developed.\textsuperscript{392} As indicated at the outset of this chapter, this section seeks to investigate the colonial impact of British administration. Sri Lankan nationalists of past and present tend to find the reasons for the trials and tribulations of their country in the policies of the colonial powers.\textsuperscript{393}

Whatever the general effects of colonialism, foreign rule had a significant impact on the distribution of people, education, employment, economy, infrastructure and formation of communities.\textsuperscript{394} The arguments that were brought forward against the British stem not in particular from its expansion in the early years of rule, but the complaints raised in concern regarding the British struggle to achieve an agreeable solution for indigenous rule before their own departure.\textsuperscript{395}

3.1. Education policy

There is the widespread perception of nationalists from both sides that the British had actively fuelled hostilities and conflict through preferred treatment of the Tamils in education, and subsequent employment in the civil service while alienating the Sinhala from the civil service. Indeed, the Tamils did receive better education and were indeed represented to a higher degree in public service.\textsuperscript{396} Manoharan writes:

\begin{quote}
\textsc{[G]iven the meager resources of the water-deficient environment of northern Sri Lanka, the Tamils were compelled to seek alternative means of livelihood. By acquiring knowledge of the English language they were able to secure a disproportionate share of public employment in the British-run administration, even in Sinhalese-dominated areas, as well as in the legal, medical, and engineering professions during colonial times. Tamils who were employed in the colonial administration had an average income higher than the rest of the population, including the majority of Tamils living in the Northern and Eastern provinces. (...) As Tamils of Sri Lankan origin and Tamils of Indian origin moved into Sinhalese areas to seek employment, it was not difficult for politicians to revive the ancient fear of a Tamil threat to the survival of the Sinhala race, its language, and culture.}\textsuperscript{397}
\end{quote}

\begin{footnotesize}
\textsuperscript{392} Ibid.
\textsuperscript{393} Farmer, supra note 6, p. 16.
\textsuperscript{394} Ibid.
\textsuperscript{397} Ibid.
\end{footnotesize}
The Colebrooke-Cameron reforms provided that elite schools were taught in English and individuals gained access to the modern economic sector. While Tamils occupied white-collar jobs, resentment among the majority Sinhala population grew against the British missionary schools. Tamils, although not conducive to religious indoctrination and conversion, were more willing to accept missionary education, as this education, contrary to the Sinhala education, was more secularised. The majority Sinhala population believed they faced barriers to gain higher education, and held a majoritarian perception that the Tamils were unduly favoured in governmental jobs. American missionaries came to the Jaffna region to teach and indeed proselytise and left the people with considerable advantage, which is proficiency in the English language.

It must be noted that Christian missionary schools were predominantly built and facilitated for the education of Tamils, leading to their professionalisation and making this one of the main characteristics of the Tamils in the Diaspora. This was not a premeditated intention of the British, but because of a requirement to fill administrative ranks with indigenous personnel, which in turn would enable a smooth transition of power. Moreover, the Tamils “[s]imply exploited one of the limited advantages they held”, in the dry and arid environment of northern Sri Lanka. As it was indicated above, the climatic zones played a significant part in the later development of the country. Education, was one of those crucial and contentious fields in the colonial and post-colonial development of the island.

3.2. Construction of identities, communal representation and unitary state

The establishment of identity and its subsequent annihilation created tensions and animosities among different religious entities. For example, converts had advantages under their colonisers in the fields of taxes, jobs, and education. With regard to the Sinhala, the Portuguese created the cultural distinction between Kandyans and Non-Kandyans, which they affirmed in legislation, land structures and other customs, and also by changing their family

399 Clarance, supra note 395, p.21; Coperehewa, supra note 218, p. 49.
400 Ibid Clarance, p. 31.
401 Weiss, supra note 95, p. 20.
402 Clarance, supra note 395, p. 32.
403 Weiss, supra note 95, p. 20; Bandarage, supra note 239, p. 31.
404 Clarance, supra note 395.
structures, as Roman Catholic moral principles helped to overcome traditional roles.\textsuperscript{405} The Dutch then again tried to eliminate the Catholic influence on the country by “[r]ewarding converts with promises of upward mobility”\textsuperscript{406}, creating a new community of Protestant Sinhala and Tamils. In this period, lower ranking Dutch military recruits accepted the incentives of the Dutch Crown and received the free land offered in Sri Lanka, and married local women.\textsuperscript{407} This, in turn, led to the creation of the Burgher community. The British introduced the census to formalise identities, making them a colonised people with bureaucratic identities, thereby orchestrating Sri Lanka society into a constant cycle of computation and reckoning.\textsuperscript{408}

Not only this, but the introduction of Donoughmore Constitution (which intended to create a broader national identity) entrenched the Sinhala position as undisputed majority power.\textsuperscript{409} The creation of Legislative and Executive Councils, eventually, sustained and maintained definitive structures, legal identification and representation.\textsuperscript{410} The communalism that was unleashed was the dominating issue in post-colonial Sri Lanka, impeding political and social progress and determined the country’s international reputation.\textsuperscript{411} The eradication of communal representation has, ironically, galvanised active communalism as opposed to unifying the national country spirit.\textsuperscript{412} The configuration of identity became a prevalent and crucial form of representation for communities. Colonial knowledge did not create new identities; rather it offered new space for political identities to grow.\textsuperscript{413} Just like the Portuguese or the Dutch, the British tried to locate and simplify the colonial project by counting, objectifying and dividing the colonial subjects into groups such as castes, races or ethnicity.\textsuperscript{414} Labeling was necessary to provide the basis for rights and entitlement.\textsuperscript{415} Sinhala Buddhist revival, in
this context, is closely intertwined with the creation of identities, with the claim for representation and triggering the forces of exclusivity of other communities. Finally, the Colebrooke-Cameron Constitution started the process of an unitary state and, later, the Soulbury Constitution fortified the centralisation of the unitary state. This process, however, promoted the growth of religious revivalism of Buddhism, Hinduism and Islam, contributed to the growing inflexibility regarding the ethnic question and human rights in general. Accommodation of institutions -in particular, human rights institutions- became a complicated endeavour, as the “[c]entralized unity tied to territorial integrity is axiomatic in the traditional Sinhala-Buddhist ontology of the state and sovereignty, and explains its resonance to contemporary nationalist hostility to any sort of political decentralization.”

3.3. Creation of dynastic democracy

Sri Lanka’s post-colonial history lies in the hands of a privileged few. The British were naïve about the level of affection and knowledge for the British culture among the Sri Lankan elite’s and among Sri Lankans involved in the governmental structure. The lack of Westminster’s political culture, however, entrenched patronage and personalised power. This situation translated into a higher level of political instability and volatile decisions while intensifying elite domination of wealthy families. Nevertheless, the creation of a powerful elite, an elitist club of families, dominated the country’s political and social events until contemporary times. Today’s “Yahapalanya” (Sinhala: good governance) government in Sri Lanka is the concentration of two of those potent elite families, i.e. the Bandaranaike family (with former president Kumaratunga at the helm) and the Jayawardene family (with Ranil Wickramasinghe as the Prime Minister). Paradoxically, the democratisation process has narrowed the electable constituency to a chosen few. Expansion of democracy has benefitted the conservative, landowning bourgeoisie of the country, who have largely profited from colonial

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416 Jayawardena, supra note 187, p. 357.
417 Ismael, supra note 235, p. 117; Fernando, supra note 28, p. 358.
418 Welikale, supra note 232, p. 47.
419 Kumarasingham, supra note 238, p. 129.
422 Weiss, supra note 95, p. 28.
423 Jayawardena, supra note 187, p. 349.
rule. Eager to secure their living and privileges, these families have influenced the Donoughmore commissioners in favour of a “[h]egemonic male, upper-class, upper-caste system”, driven by majoritarian politics framed in dynastic democracy.\footnote{Ibid p. 350.}

3.4. The Soulbury Constitution

A critical aspect for the elaboration of a human rights infrastructure in Sri Lanka needs to be detailed. There was insufficient human rights protection with the inclusion of Art. 29 (2), which largely failed to protect minorities. It was the Chairman of the Soulbury Report himself who stated:

[N]eedless to say the consequences have been a bitter disappointment to myself and my fellow Commissioners. While the Commission was in Ceylon, the speeches of certain Sinhalese politicians calling for the solidarity of the Sinhalese and threatening the suppression of the Tamils emphasized the need for constitutional safeguards on behalf of that and other minorities. As Sir Charles Jeffries has put it, Ceylon -The Path to Independence, 'The Soulbury constitution had entrenched in it all the protective provisions for minorities that the wit of man could devise'. Nevertheless, in the light of later happenings, I now think it is a pity that the Commission did not also recommend the entrenchment in the constitution of guarantees of fundamental rights, on the lines enacted in the constitutions of India, Pakistan, Malaya, Nigeria and elsewhere. Perhaps in any subsequent amendment of Ceylon’s constitution, those in authority might take note of the proclamation made by the delegates at the African conference which met in Lagos two years ago: 'Fundamental human rights, especially the right to individual liberty, should be written and entrenched in the constitutions of all countries'. Nevertheless, the reconciliation of Tamils and Sinhalese will depend not on constitutional guarantees but on the goodwill, common sense and humanity of the Government in power and the people who elect it.\footnote{Farmer, supra note 6, Foreword.}

The British fell prey to the delusion that the minority communities would adjust to the Sinhala majority.\footnote{Kumarasingham, supra note 238, p. 177.} However, there were negative consequences because, the “[i]mplantation of a cabinet-dominated British Westminster unitary, not federal, parliamentary accompanied by a single-member first-past-the-post majoritarian electoral system, paid distressingly little heed to local conditions.”\footnote{Kumarasingham, supra note 238, p. 177.} In contrast to India, Sri Lanka did not adopt a Bill of Rights to alleviate minority concerns, but only had the minority protection clause in the Soulbury Constitution, Art. 29, and an independent judiciary. The belief was that Sri Lanka would abide

\footnote{Ibid p. 350.}
\footnote{Farmer, supra note 6, Foreword.}
\footnote{Kumarasingham, supra note 238, p. 177.}
\footnote{Kumarasingham, supra note 238, p. 177.}
by the British customs and conventions through practice and common law to protect fundamental human rights.\textsuperscript{429} It was a blatant misconception and pure naivety, as neither the elite nor the British could create a human rights and democratic culture.\textsuperscript{430}

The Soulbury Constitution, with its lack of human rights protection, the promotion of an unitary approach to nation-building, and the absence of judicial review of legislation led the groundwork for ethnic bifurcation.\textsuperscript{431} Telling enough, two dominating figures of the Commission, Soulbury and Jennings, recognised that the absence of a Bill of Rights was a mistake and would have decreased the likelihood of human rights violations.\textsuperscript{432}

4. Concluding comments

The unquestioned process of democratisation in “Westminster” fashion, i.e. the electoral and political system, with a serious deficiency in human rights protection, the naïve trust of the British in the statesmanship of the country’s indigenous leaders (especially in D.S. Senanayake), Sinhala religious-nationalist revival and power gambling of the political elite for short-term political advantages - all combined provided the hostile antecedents in history, which impeded the creation of a healthy human rights infrastructure. Sri Lanka was never a liberal democracy, but an aristocratic democracy that morphed into guided democracy and, finally, slipped into autocratic ethnocracy. This process was initiated with territorial representation, coupled with universal franchise under the Donoughmore Constitution, propounded by majority politics that alienated minorities without any human rights protection, against the determination of the majority to possess and retain power.\textsuperscript{433} This very same anomaly, however, destroyed the basis for the possibility of genuine contestation in a political leadership struggle in Sri Lanka and created a power imbalance. This created deep tensions within the Sinhala society itself, as was demonstrated with the Marxist uprising.\textsuperscript{434} Almost six decades after the end of colonial rule, South Asian states are still “[f]aced with problems related

\textsuperscript{429} Ibid p. 181.
\textsuperscript{430} Ibid p. 181.
\textsuperscript{432} Parkinson, supra note 254, p. 38.
\textsuperscript{433} Tambiah, supra note 118, p. 68.
\textsuperscript{434} Tambiah, supra note 118, p. 68.
to democratic governance, social identities, development, welfare and territorial security”. As illustrated above, much of the ethnic and inter-ethnic violence that had followed decolonisation grew out of identity formation, nationalist-religious revival fuelled by politicians, and economic decline after the end of colonial rule. In its essence, the violence that followed was about an elitist power struggle. Post-colonial politicians in charge sought to strengthen their power position by jumping on the ethnic-religious bandwagon for short-term political gains. Sriskanda Rajah asserts:

[O]n another level, while asserting the authority of law, the state and its species, it was intended to demonstrate through violence, the ideology that underpinned the emerging ethnocratic state order. In other words, Ceylon’s Sinhala Buddhist leaders signalled to their people that they were entitled to use violence against the Tamils and take their lives to secure the land given to them by Buddha, as claimed in the Mahavamsa.

Former General Secretary of the Janatha Vimukthi Perumana, Lionel Bopage, who was imprisoned for his role in the Marxist uprising in the 1970s, held the view that most Tamils and Sinhala share the same destiny of being subjected to the arbitrary exercise of power by an entrenched political elite. Sinhala revolts like the uprising by the Janatha Vimukthi Perumana in the 1970s have demonstrated the way the few who are powerful govern and repress, beyond the ethnic paradigm. This corrupted and illicit profit-making elite have exacerbated the ethnic conflict for the sake of own power influence. Not only this, the quest for political power has led to a political structure of convenience and accommodation of and for the elite. This pursuit of power came at cost of public institutions: impunity, corruption, and nepotism impaired democracy, wedding politics with business. It paved the way for extra-institutional violence and restricted public space for the elaboration of a human rights infrastructure. The Mahavamsa myth and the Dharmapala tradition were irrelevant to the quest for a modern society, yet “[a]lcohol for the masses.” Nationalism was not a process
necessitated from foreign powers. On the contrary, it was rather the result of the interaction between colonisers and the colonised, with consequences that the British, for their part, did not or were too naïve to foresee.\footnote{Nissan and Stirrat, supra note 82, p. 39.} In addition to this, the early Sri Lankan elite was obsessed with the adherence to the Westminster concept of governance. Kumarasingham states that:

\begin{quote}
[T]he Westminster fixation on centralization coupled with the nascent, urban and elite-dominated parties’ failure to extend organizationally around the country disabled the ability to spread institutions and promote local knowledge of government. Manor has labeled this a serious ‘failure of political integration’ and argues that the elite/mass discontinuity, rather than the Sinhalese/Tamil discontinuity, is the principle cleavage in the polity in Sri Lanka’ of that early period.\footnote{Kumarasingham, supra note 238, p. 131.}
\end{quote}

This chapter has argued that the introduction of identity formation, the subsequent appointment of political representatives along communal lines, and the creation of a distanced western-educated elite in relation to its local electorate\footnote{Nissan and Stirrat, supra note 82, p. 34.} proved to be a toxic milieu. It led to the severely deteriorating relationship between the Sri Lankan communities. Sinhala-Theravada Buddhism was exploited for the furtherance and entrenchment of political power. As Kumari Jayawardena asserts:

\begin{quote}
[T]he differing ethnic and religious groups, composed of persons who had made their pile and were in search of ‘identity’ emerged to assert their superiority, exclusiveness and a right to a place in the sun. The most assertive was the majority Sinhala community, which developed a consciousness of beings ‘sons of the soil’, positioning itself against minorities (regarded as ‘aliens’) and more importantly, making claims to represent the ‘nation,’ while critically commenting on foreign rule. The Sinhala-Buddhist revival movement of the late 19th century was based on Sinhala capitalist successes, and Sinhala Buddhists went on to assert their claims in politics and compensate for their gross underrepresentation in the unelected legislatures of the years before 1920. The revivalism of the majority group also inspired movements among Tamils, Muslims and Burghers who asserted their own identity and exclusivity, also demanding recognition in politics. The seeds of future conflict had been sown.\footnote{Jayawardena, supra note 187, p. 357.}
\end{quote}

It is the creation of indigenous, political and especially elitist representation that laid the groundwork for institutionalised distrust and nationalism. Marasinghe holds the view that:

\begin{quote}
[T]he polarization of the two communities, as years went by, became institutionalized, both by political policies and legislative enactments, resulting in the enormity of the
\end{quote}
present communal crisis facing the island nation today."\textsuperscript{447}

This is a characteristic not too uncommon in a multi-ethnic, multi-religious, caste and class-conscious society. But, instead of searching for ways to find solutions, successive post-colonial governments took advantage of these challenges for their political gain.\textsuperscript{448} Ethnic difference was institutionalised, while the language of politics was racially charged in the post-colonial period.\textsuperscript{449} Deepika Udagama poignantly observes:

\begin{quote}
[T]hat universal sense of disquiet and disgruntlement, stemming from a sense of marginalisation based on reasons that vary (class, caste, ethnicity), reflect the inability of the political elite to engage in effective nation-building after the grant of independence in 1948.\textsuperscript{450}
\end{quote}

Looking at the constitutional developments since 1931, the claim that autochthonous constitutions are superior to alien ones is flawed. The British transplanted constitutions with the aim to establish a constitutional order to suit the context of the island and tried to overcome the flaws of the British Constitution. The introduction of the executive committee system, abolition of communal representation and the groundbreaking extension of franchise were quite courageous efforts to democratis the country at a time when other colonies were in turmoil.\textsuperscript{451} The independent democracy that was obtained in 1948 should not be confused with “ethnocracy,” the domination of the ethnic majority.\textsuperscript{452} The singular influence by one single ethnic group in government paved the way to separation and division, which found expression in the legislation of the country. It is a biopolitical transformation that was largely overlooked by the West.\textsuperscript{453} The Sinhala community, are the “[m]ajority with the minority complex,” encircled and threatened by Dravidians and Tamils around them,\textsuperscript{454} as Sinhala Buddhism was their only referral point of identity. To understand the phenomenon of the Sinhala


\textsuperscript{448} Jayawardene, \textit{supra} note 187, p. 11

\textsuperscript{449} \textit{Ibid}.


\textsuperscript{451} Edrisinha and Selvakummaran, \textit{supra} note 252, p. 96.


\textsuperscript{453} Sriskanda Rajah, \textit{supra} note 158, p.44.

\textsuperscript{454} de Silva, \textit{supra} note 87, p. 629.
majority community with the minority complex, it is noteworthy to consider Richard Gombrich’s comment in relation to the Irish situation:

[I]n Ireland we have a double dose of this problem: the Irish Catholics who form two thirds of the population of the island are afraid of the Protestant minority in Ulster whose loyalty lies with the rest of Britain, but then within Ulster the Protestants who are in a similar majority are frightened of their Catholic minority, who identify with the Catholics in the rest of the island. I regard it as no accident that the appalling violent break-up of the former Yugoslavia has shown this pattern again and again.\textsuperscript{455}

The armed conflict revealed the deepening divides along political and ethnic lines that emerged out of the historical preconditions. It was a struggle played out for the survival of the Sinhala and the Tamils.\textsuperscript{456} The political rhetoric made constant references to a historical illusion, namely that Sinhala-Buddhists had the ownership over the island, while the Tamil Hindus were the ancient enemies.\textsuperscript{457} According to the historian K. Indrapala, the entrenchment of the myth of a founding race can be attributed to two factors. First, the neglect of the systematic study of early Sri Lankan history and, second, the reliance on early British accounts of this history, conducted by British officials without any critical reflection.\textsuperscript{458} Once politicians had used Sinhala-Theravada Buddhism as a vehicle in their conquest for power. Now, however, it is the Sinhala-Theravada Buddhism that is using politicians for the advancement of their agenda. Suren Raghavan writes:

"[T]he Sinhala Sangha (assembly of Buddhist monks) are not known for their tolerance of other faiths and practices if they perceive them to be a threat of any kind. Such issues are located within broader debates within Theravada Buddhism, minority rights and human rights at large."\textsuperscript{459}

Ever since it is hard to combine the diverse elements of this narrative into a cohesive national unit.\textsuperscript{460} Similarly, the war that eventually followed was a result of the missing political and parliamentary process to introduce ethnic and social harmony.\textsuperscript{461} The Liberation Tigers of

\textsuperscript{455} Gombrich, supra note 7, p. 28.
\textsuperscript{457} Spencer, supra note 81, p. 3
\textsuperscript{460} Sir Jeffries, supra note 1, p.2.
Tamil Eelam, meanwhile, were never a liberator, but the oppressor of the Tamil people.\textsuperscript{462} The focus on Sinhala-Buddhist revivalism is not the only cause for the formation of a particular state of human rights in the country and the attitude towards the international community. While the attention to the chauvinism and counter-racism of the Liberation Tigers of Tamil Eelam was overlooked and the international attention and measures were directed at the Sinhala majority, the “[p]ermeation of this biased perspective into international policymaking has solidified Sinhala nationalist opinion against the international community.”\textsuperscript{463} Diverse communities came and inhabited Sri Lanka and claimed the island as their home; yet the “[c]ommunities were never integrated into a single nation”.\textsuperscript{464} It is not exaggerated to state that Sri Lanka successive political regimes have failed to contribute to a viable ethnic policy; negotiating ethnic concord has failed and since obtaining independence the country was never able to produce a system of national integration. All in all, the “[c]olonial legacy, the absence of institutionalized modern democratic institutions such as established parties, the lack of an activist civil society and a low level of political literacy in population, meant that in Sri Lanka power was more often personalist and delegated.”\textsuperscript{465} In the following chapter, the thesis will scrutinise Sri Lankan institutions and legislation that were and are entrusted to protect and promote human rights. To this end, this chapter will consider carefully and reflect upon historical elements that have impeded human rights legislation and institutions.

\textsuperscript{462} Bandarage, supra note 239, p.17.
\textsuperscript{463} Ibid p. 27.
\textsuperscript{464} Sir Jeffries, supra note 1, p.3.
\textsuperscript{465} Kumarasingham, supra note 238, p.137
III. Sri Lanka’s human rights infrastructure

This chapter outlines and appraises the human rights instruments and institutions that have been entrusted with the promotion and protection of human rights in Sri Lanka. To this end, the chapter will explore the development of a human rights infrastructure in post-colonial Sri Lanka, and it will build on the discussion in the second chapter. It will consider whether colonial policies have had repercussions on the growth of a human rights infrastructure and if historical narratives have either expanded or narrowed the ambit of this human rights infrastructure. The chapter begins with the consideration of those legal instruments and institutions aimed at the cultivation of human rights and domestication of international human rights standards in Sri Lanka. For this study, a human rights infrastructure can be considered as comprising those human rights instruments and institutions that have been entrusted with the promotion and protection of human rights.

The national codification of universally enshrined human rights law, adoption of human rights-inspired legislation is in the realm of every state and flows from their international human rights obligations. To this end, Hurst Hannum writes: “[N]o matter how effective international procedures may become, it is national governments that are ultimately responsible for guaranteeing human rights within their territory.”466 The adoption of human rights law is necessary to create a human rights consciousness and culture. Certain scholars define legal consciousness as a cultural practice by stipulating that legality provides the structure for social fabric, not only confined to the institutions.467 Legal consciousness, in their view, becomes a habit pronounced by everyday activities and reverberating project.468 A society must be aware of the existence and importance of the norms that empower them; otherwise, a fertile ground for human rights violations emerges.469

For this reason, the chapter scrutinises human rights legislation, but also examines the institutions created by the Sri Lankan governments that were mandated to uphold, promote, educate and disseminate human rights standards. These include the Human Rights Commission,

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468 Ibid.
the Supreme Court, and the Office of the Attorney General. After an exploration into human rights legislation and human rights institutions, the chapter will turn to the Executive Presidency incorporated in the Second Republican Constitution and the Emergency Regulations. Both facets have profoundly shaped post-colonial Sri Lanka and have implications on the human rights infrastructure. The question is whether they, in their interplay, affect the enjoyment of human rights. Constitutions with presidential regimes carry certain paradoxical contradictions: on the one hand, executive presidencies guarantee robust and stable executive branches, which are legitimised by popular vote. On the other hand, there is suspicion regarding the personalisation of power, potentially translating into the arbitrary exercise of entrusted competences, presidential nominations to independent bodies and the impairment of the judiciary.470 With regards to emergency regulations, certain effects are generally identified, namely the distribution of powers, infringement upon human rights and constraints imposed on them.471 Bearing this in mind, this chapter will reconsider the impact of the Executive Presidency and Emergency Regulations on the human rights infrastructure in Sri Lanka.

1. Legal instruments for the promotion and protection of human rights

After the Soulbury Constitution, two republican constitutions were adopted in the post-colonial history of Sri Lanka, an evolution of constitutionalism that has a troubled history.472 The First Republican Constitution was adopted in 1972. Radhika Coomaraswamy considers the First Republican Constitution a symbolic affirmation of nationalism, reflected in the political rhetoric which heralded the era of new homegrown and indigenous constitutions.473 The First Republican Constitution aggravated the human rights climate: it abolished the sparse human rights protection in art. 29.2 of the Soulbury Constitution that the country had, entrenched a majoritarian approach to nation-building and was the stepping stone for

national disintegration. The drafters of this new instrument despised the Soulbury Constitution, as they deemed it an alien and colonial remnant. This new constitution, however, was hailed as an autochthonous one. But it was, essentially, the rallying point of Sinhala nationalism. The Second Republican Constitution, meanwhile, facilitated nationalism, but most importantly amplified Executive Presidency with considerable ramifications for the human rights development of the country as will be discussed further below. A closer examination will be devoted to the two republican constitutions and the current drafting process of the Third Republican Constitution. In the following sections, the thesis will consider human rights legislation in Sri Lanka, debate the motivation for these pieces of human rights legislation and their significance for the domestic human rights infrastructure.

1.1. First Republican Constitution

The First Republican Constitution was the legal affirmation of the ideology behind the 1956 movement that was discussed in the second chapter. It was 25 years after the island’s independence, a symbolic assertion of nationalism, a reflection of Sri Lankans’ discontent with the Soulbury Constitution, which was not a product of national liberation struggles, but one with substantial foreign involvement. Srimavo Bandaranaike, the first female Prime Minister of Sri Lanka and widow of the S.W.R.D Bandaranaike, communicated to the House of Representatives in 1971:

[I]t is your unchallengeable right to set up a Constituent Assembly of our own, chosen by us and set up by us as a free, sovereign and independent people who have finally and forever shaken off the shackles of colonial subjection.

Fragments of liberal democracy remained, however, provisions clearly outlined cultural nationalism transmogrifying into a political norm. The Constitution introduced a unicameral legislature in the form of a National State Assembly, a body of elected representatives by people,

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475 *Ibid*.
476 *Ibid*.
modelled after the constitutions in Communist Eastern Europe. This body exercised legislative power, executive power was exercised by the President and the Cabinet of Ministers and judicial power was exercised through courts and other institutions. Section 5 of the 1972 Constitution stated:

[T]he National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises-

(a) the legislative power of the People;

(b) the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and

(c) the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

In the 1970s the state was considered as the supreme instrument for economic furtherance and progress in the communist ideology. Introducing a strong centralised structure and avoiding checks and balances were necessary in the eyes of the majoritarian community to strengthen this approach. In addition, abolishing minority safeguards, stipulating majoritarianism, granting Buddhism foremost prominence and enhancing the Sinhala language as the sole official language made this a populist constitution. It was a major landmark in the process of national disintegration and further limited the scope for communication between the communities. Not only did the First Republican Constitution weaken the situation of minorities, but it also weakened the role of the judiciary in the decision-making process. The framers of this First Republican Constitution reduced the powers of the judiciary, as they con-

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481 Ibid.


483 Wickramasinghe, supra note 17, p. 185.

484 Coomaraswamy, supra note 473 p. 129; Edrinsinha and Selvakumaran, supra note 252, p. 101.
sidered the judiciary as an impeding factor in a progressive economic agenda for the country.\footnote{485}{Ibid Edrisinha and Selvakumaran, p. 102.} Radhika Coomaraswamy stated that under the First Republican Constitution the judiciary became the “[c]rippled arm of the government,”\footnote{486}{Radhika Coomaraswamy, Sri Lanka, the Crisis of the Anglo-American Constitution Traditions in a Developing Society, (New Delhi: Vikas Publishing House Pvt Ltd, 1984), p. 29.} as it deprived the judiciary of its independence and self-regulation. Moreover, it extended the influence of the executive and legislative on the judiciary’s prerogative.\footnote{487}{Edrisinha and Selvakkumaran, supra note 252, p. 102.} Certain judgements of the Supreme Court on the right to property led policy-makers to the conclusion that the judiciary might block progressive legislation for a flourishing economy. Finally, the deficiency of rights consciousness hindered the emergence of the judiciary as a social motor.\footnote{488}{Coomaraswamy, supra note 434, p. 134.} With the new Constitution, the judiciary was reduced to the status of a silent bystander, unless in cases of obvious and arbitrary executive action.\footnote{489}{Interpretation Act, No. 18 1972.} Furthermore, the judiciary was deprived of its role to scrutinise the validity of laws passed by the legislature.\footnote{490}{Ibid.} And yet, the third chapter of the First Republican Constitution contained fundamental rights and freedoms, Section 18 (1). To this end, the section stipulated:

\begin{quote}
[I]n the Republic of Sri Lanka
(a) all persons are equal before the law and are entitled to equal protection of the law;
(b) no person shall be deprived of life, liberty or security of person except in accordance with the law;
(c) no citizen shall be arrested, held in custody, imprisoned or detained except in accordance with the law;
(d) every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the 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;
(e) every citizen has the right by himself or in association with others, to enjoy and promote his own culture;
(f) all citizens have the right to freedom of peaceful assembly and of association;
(g) every citizen shall have the right to freedom of speech and expression, including publication;
(h) no citizen otherwise qualified for appointment in the central government, local
government, public corporation services and the like, shall be discriminated against in respect of any such appointment on the ground of race, religion, caste or sex;

Provided that in the interests of such services, specified posts or classes of posts may be reserved for members of either sex:

(i) every citizen shall have the right to freedom of movement and of choosing his residence within Sri Lanka.

The existence of fundamental rights in this Constitution, however, had no or little impact on Sri Lankans.  

Section 18 (2) provided that the fundamental rights and freedoms shall be subject to restrictions and limitations. It read:

[The exercise and operation of the fundamental rights and freedoms provided in this Chapter shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16.]

While fundamental rights ideally protect citizens from arbitrary encroachment of the state, the rights were the only operative if the National State Assembly permitted them. Limitation on human rights provision is standard practice in human rights law. There is, however,
a particular nuance to the human rights protection in Sri Lanka. Section 18 (1) and (2) had limited relevance in light of the emergency regulations in Sri Lanka. Moreover, there was no procedure set out for the enforcement of these rights. Thusita Abeysekera asserts:

[S]ince no special system or established forum was in place to make these fundamental rights enforceable in practice, the scope for their fulfilment or enjoyment in Sri Lanka during this period was rather limited.\(^{496}\)

A certain state ideology may be identified: namely that individual rights can be denied and impeded if they contradicted with the governmental agenda.\(^{497}\) To this end, the Constitution and its 1978 successor lacked the legitimacy to be perceived as a document for the whole country.\(^{498}\) Governmental flexibility was deemed paramount, as this would fuel political promotion of socio-economic development, free from constitutional restraints.\(^{499}\) Rights, in particular, civil and political rights, were considered a bourgeois concept intending to obstruct progressive legislation.\(^{500}\) The socialist spirit of the Constitution followed the idea of social progress through Chapter V on Principles of State Policy: this chapter emphasised moral-social values and prioritized economic development.\(^{501}\)

The idea of a rights-conscious public and the realisation of those rights through the courts were considered unrealistic and unfeasible. The First Republican Constitution removed elementary safeguards in a liberal democracy, rendered the Supreme Court as the guardian of the protection human rights impotent and made the Sri Lankan citizens vulnerable to human rights violations.\(^{502}\) The Supreme Court nevertheless ruled in a case that the fundamental rights were enforceable through the District Courts, but the impact of that ruling had little impact due to the changes that followed to the Constitution in 1978.\(^{503}\)

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\(^{498}\) Ibid p. 127.

\(^{499}\) Ibid p. 130.

\(^{500}\) Ibid p. 136.

\(^{501}\) Ibid p. 136.

\(^{502}\) Ibid p. 137.

The renowned constitutional expert Dr. Neelan Thiruchelvam considered that the 1972 Constitution was the beginning of the era of “[i]nstrumental constitutions.” Radhika Coomaraswamy added to his comment that “[c]onstitutions were seen to carry the aura of a party programme and therefore often lacked the legitimacy to become the fundamental law of the land.” The quest for an unitarian state and transfusing the constitution with the state preference for the majority in the fields of religion and language ushered in the era of ethnic fragmentation. In any event, it is probably incorrect to assume that the First Republican Constitution as a purely homegrown constitution, as it was influenced by different traditions. For example, it is indeed so that the First Republican Constitution embraced ideas found in the British system, for instance, the British Cabinet system. While it is right that the First Republican Constitution formally ended Sri Lanka’s relationship with British colonial rule and made it an independent nation, it was also a harbinger for now legally enshrined division along ethnic lines through the abuse of emergency powers and exploitive use of institutions, as will be explained further below. This supreme document of the country eventually prepared the dangerous prerequisite for future partisan-driven policies and weakened any human rights consciousness that may have existed.

1.2. Second Republican Constitution 1978

The Second Republican Constitution was a result of the 1977 elections. Inspired by the US American and French Constitutions, this Constitution introduced the system of Executive Presidency and undermined the notion of parliamentary sovereignty. The incoming governing party, the United National Party, exploited the inarticulate human rights issues for their purpose, yet failed to meet the desires of the civil society. The failure had a variety of reasons. One among them was that human rights as such was a new concept to Sri Lankans. Meanwhile, the role of the parliament changed considerably and was devalued, as the new constitution compelled the members of parliament to strict party loyalty. In case of expulsion

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510 Edrinsinha and Selvakumaran, *supra* note 252, pp. 102, 105.
511 *Ibid*. 
or resignation, the respective Parliament was entitled to exclude that member, as per art. 161 d (ii) of the 1978 Constitution. This tight dominance curtailed the effectiveness of the people’s parliament and of its elected representatives, as they were subjected to scrutiny by the executive.\footnote{Ibid p. 106.} The supremacy of the executive over the legislative is also reflected in the context of the Public Security Ordinance Act. In theory, the parliament may review the existence and duration of the state of emergency; however, the oversight control by the majority party and the president made this only a constitutional formality.\footnote{Ibid.} The combination of a strong president with a devalued parliament significantly contributed towards authoritarianism.\footnote{Ibid.}

While the First Republican Constitution was a mix of Sinhala-Buddhist tradition, socialism, nationalism and had traits of a utilitarian constitutionalism, the new governing party under J.R. Jayawardene proposed two sweeping changes for the new Constitution: first, the dilution of the representative system and, second, the creation of the Executive Presidency System. Both measures had severe repercussions on the human rights situation.\footnote{Ibid.} Moreover, a proportional system was introduced, which led to weak parliaments and unstable governments.\footnote{Ibid.} This electoral system was a significant deviation from the conventional practice introduced with the Donoughmore Constitution, but the governing party under J.R. Jayawardene considered electorates as an impediment to an efficient ruling. The abolition of electorates and the introduction of the list system had considerable ramifications on the democratic system, as the representative system produced legislators who were detached from voters.\footnote{Fernando, \textit{supra} note 28 p. 341.}

J.R. Jayawardene also believed that a strong executive could unfold governmental power, free from the extensive scrutiny of a legislative. The Second Republican Constitution, however, improved the status of the judiciary, as the Constitution spells out that the judges to the Supreme Court and Court of Appeal shall be appointed and removed only by the President following misconduct or incapacity, according to Art. 107. The value of fundamental rights was


\footnote{Fernando, \textit{supra} note 28, p. 342.
also improved, as they were declared justifiable and enforceable.\footnote{518} Laksiri Fernando asserts that Art. 12 and Art. 14 were quite innovative, wide and substantiated to protect fundamental rights.\footnote{519} They spell out:

[A]ll persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds: Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any Public Corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office: Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

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

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

(…)  

14.  

(1) Every citizen is entitled to –

(a) the freedom of speech and expression including publication;

(b) the freedom of peaceful assembly;

(c) the freedom of association;

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

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

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

\footnote{518} K. Ragunadan, \textit{supra} note 516, p. 108; Hyndman, \textit{supra} note, 13, p. 67.  
\footnote{519} Fernando, \textit{supra} note 28, p. 358.
(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.\(^{520}\)

The most important aspect of the fundamental rights chapter was its justiciability component compared to the previous Constitution.\(^{521}\) The Supreme Court was entrusted with the role of interpreting the Constitution and, in particular, the protection of human rights, Art. 17 and Art. 126. The latter article sets out in section one:

\[\text{T}he\ Supreme\ Court\ shall\ have\ sole\ and\ exclusive\ jurisdiction\ to\ hear\ and\ determine\ any\ question\ relating\ to\ the\ infringement\ or\ imminent\ infringement\ by\ executive\ or\ administrative\ action\ of\ any\ fundamental\ right\ or\ language\ right\ declared\ and\ recognized\ by\ Chapter\ III\ or\ Chapter\ IV.\]

The article above allowed the same procedure for the language rights recognised in Chapter III, but the procedure was rarely invoked.\(^{522}\) Moreover, “[t]he fundamental rights implementation procedure was obviously limited to the ‘executive or administrative action’ in the public sector (private sector excluded) although extended to the ‘infringement or imminent infringement’.”\(^{523}\) The fundamental rights issues and cases were a challenge for the judiciary and the country alike. Fundamental rights were not framed in the broader context of international human rights and could not fully translate the developments through innovative judgements.\(^{524}\) This situation only changed during the evolution of later judgements. A system of individual-based fundamental rights was considered to be sufficient to address the questions of rights of all citizens’ regardless of community affiliation.\(^{525}\) Thushitha Abeyesekara asserts:

\[\text{T}he\ 1978\ Constitution\ was\ the\ first\ attempt\ at\ codification\ of\ Fundamental\ Rights.\ The\ most\ important\ feature\ of\ the\ Constitution\ in\ this\ connection\ was\ the\ provision\]


\(^{521}\) Fernando, \textit{supra} note 28, p.375.

\(^{522}\) Sri Lankan Constitution 1978, \textit{supra} note 520.

\(^{523}\) Fernando, \textit{supra} note 28, p. 350.

\(^{524}\) \textit{Ibid}.

\(^{525}\) \textit{Ibid}.

\(^{526}\) Wickramasinghe, \textit{supra} note 17, p. 185.
of an enforcement mechanism for fundamental rights through the apex court of the land - the Supreme Court. While Articles 10 to 16, speak of the substantive law of fundamental rights, remedy for the infringement of fundamental rights is provided in Articles 17 and 126 of the Constitution. These articles cater to a situation where an infringement or an imminent infringement of a fundamental right of any person occurs by 'an executive or an administrative action.' The Supreme Court of Sri Lanka has, since 1978, interpreted these articles in various ways, but has never extended their connotation to cover the judicial action.\(^{527}\)

Community rights were not considered, but Chapter III of the Second Republican Constitution was novel, as it watered down the distinction between citizens and stateless persons, as the human being as such was the beneficiary of these rights. Therefore, stateless persons gained fundamental rights.\(^{528}\) Chapter IV extended language rights; social and economic rights were covered under Directive Principles in Chapter VI. In any event, also the Second Republican Constitution bestowed upon Buddhism the foremost place in the domestic setting, in a logical constitutional continuation of the 1972 Constitution.\(^{529}\) In Chapter II of the Constitution, it states:

\[
\text{[T]he Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).}
\]

The scope of rights was limited and the most fundamental of rights, the right to life, had not been explicitly included. It was only in the decision \textit{Kottabadu Durage Sriyani Silva v. Chanaka Iddamalgoda} that the right to life was expressively recognised by the Sri Lankan Supreme Court.\(^{530}\) The reasons for the absence of the right to life are unclear and reference to the earlier discussed concept of Michel Foucault’s biopower might be useful. Michel Foucault held the view that -in biopolitics- the social body must ensure the maintenance of its survival and for this reason was entitled to kill others and wars were carried out to ensure the existence of the social body as such.\(^{531}\) In addition, Art. 126 of the Constitution imposed several limitations and restrictions for redress of violations of fundamental rights, impeding the development of human rights jurisprudence.\(^{532}\) By bestowing upon the executive the authority and

\(^{527}\) Abeysekara, \textit{supra} note 496, p. 61.

\(^{528}\) Wickramasinghe, \textit{supra} note 17, p. 186.

\(^{529}\) Fernando, \textit{supra} note 28, p. 346.


\(^{532}\) Edrinsinhe and Selvakkumaran, \textit{supra} note 252, p. 108.
discretion to hollow out the material content of the rights, human rights were reduced to shallow variables in the legal framework of Sri Lanka. Making the elaboration of human rights jurisprudence difficult, the judiciary, as will be explained in the next section, constrained itself and did not deliver innovative and progressive human rights judgements. President J.R. Jayawardene envisaged a “[r]estricted democratic system” with certain “[m]aterial comforts," in the guise of well-being through economic prosperity. While he did not wholeheartedly reject the idea of human rights, his emphasis was on a narrow set of rights that should serve for a flourishing economy.

The Second Republican Constitution, which is in operation until today, provides more human rights codification. However, the human rights record of the country suggests that it has not been actually operationalized. This situation points to the fact that some socio-political aspects must be taken into account to uphold the value of human rights and disseminate human rights consciousness. The environment for human rights became even more infertile when the Executive Presidency began to dominate the public space, control the legislative and judicial branches, while the human rights institutions could not evolve. Institutionalised norms, rules and laws were trivialized, underpinning ethnocentrism and political violence through the stipulation of arguments that find their basis in territoriality, sovereignty and security. Sri Lanka, with its 1978 Constitution, took the path of illiberalism and authoritarianism. Sriskanda Rajah writes:

[I]n Sri Lanka’s case, its elected legislature that allows it to stake a claim it is a democracy has also allowed it to exercise power in the same way that authoritarian states do. All of the discriminatory and draconian legislations that Sri Lanka has in place were enacted by its elected legislature. It is also Sri Lanka’s elected legislature that accorded the foremost place to Buddhism and the pre-eminent position to the Sinhala language and renamed the island ‘Sri Lanka’ through the two republican constitutions of 1972 and 1978, thereby giving constitutional validity to the Mahavamsa’s claim that the island is the holy land of the Sinhala Buddhists. In other words, the very institution developed by the English at the threshold of modernity to prevent the encroachment of the powers of the prince on their liberties and assert their rights has been used by Sri

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533 Edrisinhe and Selvakumaran, supra note 252, p. 108.
534 Fernando, supra note 28, p. 341.
535 Ibid.
536 Ibid p. 334.
537 Ibid p. 368.
538 Coomaraswamy, supra note 473, p. 358.
Lanka to transform into an ethnocracy and violate en masse the civil liberties and human rights of its non-Sinhala Buddhist populations and those of the Sinhala Buddhist Marxists who challenged the state.\footnote{Sriskanda Rajah, supra note 158, p. 158.}

The 1978 Constitution was subject to nineteen amendments; most prominently the 6\textsuperscript{th} and 13\textsuperscript{th} Amendment, which were discussed in the last chapter. The 17\textsuperscript{th}, 18\textsuperscript{th} and 19\textsuperscript{th} Amendment will be discussed below in the context of Executive Presidency.

1.3. Human rights legislation

While Sri Lanka has a wide range of human rights-related legislation,\footnote{Human Rights Commission of Sri Lanka, \textit{Domestic Instruments and Institutions}, online at: \url{http://hrcsl.lk/english/document-center/library/domestic/}, last accessed 2\textsuperscript{nd} of November 2016; University of Minnesota, Human Rights Library, \textit{Sri Lanka - Human Rights Statutes}, online at: \url{http://hrlibrary.umn.edu/research/srilanka/statutes.htm}, last accessed 9\textsuperscript{th} of January 2017.} a full examination of it all would go beyond the scope of this thesis. The attempt here is not to reproduce a full account of laws that have a human rights core but to highlight and illustrate important pieces of legislation, the motivations underlying their adoption and their subsequent impact on the respective target groups. By way of example, Sri Lanka has a rich history in the advancement of workers’ rights. Labour activists used the means of legislation rather than collective bargaining.\footnote{Franklyn Amerasinghe, \textit{The Current Status and Evolution of Industrial Relations in Sri Lanka}, (New Delhi: International Labour Organization, 2009), pp. 7-12.} Political leaders established and fostered ties to workers and trade unions as mobilisation bases for electoral campaigns.\footnote{\textit{Ibid}, pp. 18-21.} Against this background, the labour law system is, in many aspects meeting international human rights standards.\footnote{\textit{Ibid}.} Other pieces of legislation were passed by different administrations in the climate of growing international pressure to abide by international human rights standards or due to the increased domestic human rights advocacy to address contemporary human rights issues.

1.3.1. Prevention of Social Disabilities Act 1957

Against this background, the examination of human rights legislation begins with one of the earliest pieces of legislation in the nascent stages of statehood that had a human rights core. The Prevention of Social Disabilities Act from 1957 broke the rules of societal convention and
a prevailing traditional caste system. By way of explanation, the caste system can be understood as a social and hierarchic construct of grouping that values purity, social status, and exclusiveness. The Sri Lankan caste system is “[f]unctional, religious, ethnic, tribal and composite in origin.” Individuals who do not belong to any of the four main varnas (Brahmins, Kshatriyas, Vaishyas, and Shudras) are deemed impure, while the four castes are exclusionary to each other. The dominant notion of caste gradually lost its significance during the colonial era. However, caste discrimination survived and generated new patterns of discrimination in the plantation economy and sanitary and scavenging services, which were established by municipal and urban councils during the colonial era. Instrumental for this Act was the election of Ponnambalam Kandiah in 1956, the only elected Tamil communist to Parliament. He was the driving force for the oppressed castes of the North and played a significant role in the passage of the Prevention of Social Disabilities Act in 1957. The third provision of this Act sets out that a person from a lower caste must not be obstructed from public, religious and private services, in particular, educational institutions, restaurants, barbers' shops, laundries, etc. In case of obstruction by a third party, an imprisonment is foreseen:

[A]ny person who imposes any social disability on any other person by reason of such other person's caste shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding six months or to a fine not exceeding one hundred rupees.

The wording of the Act targeted the upper caste society present in Jaffna. In any event, the Act had limited impact, as it was never enforced in Jaffna in light of the collusion between the police and the Tamil Vellalar (i.e. the elite caste of Tamil agricultural landlords). The Act was

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548 Ibid.


551 Prevention of Social Disabilities Act, No. 21 of 1957, supra note 545.
contravening the ambitions of Tamil nationalism. The intention of the government under Bandaranaike, however, was not purely human rights driven. It was a political tactic to create a rift between the Tamils and their castes, manipulate both, pit them against each other and amass the support of the suppressed lower Tamil caste for the government. In the end, “[T]amil politicians sensed the double danger of dismantling the caste system and mainstream political parties penetrating into the Tamil community.” Tamil politicians, meanwhile, organized demonstrations and protests to express their opposition to the Act. In 1971, the Act was amended to rectify its weaknesses.

While the Act from 1957 required an aggrieved party to take the matter to court, it ignored the fact that the majority of Tamils from a lower caste were poor and could not afford to go to court. The Amendment authorised police action in case of a complaint under Art. 4.1 and 4.2 of the Act. Indeed, at the beginning some prosecutions were carried out under this Act in Sri Lanka, in particular, in the northern part. But police did not to take firm action against violations and the impact of the Act was limited. The spirit of this Act also penetrated the 1978 Constitution in the guise of art. 12.3:

[N]o person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Sri Lanka’s policies from the 1930s initiated a tradition of a welfare state with free access to education, health care et al. regardless of caste, ethnicity, religion or gender. Post-colonial governments in Sri Lanka, however, were reluctant to implement any reservation policy to favour the traditionally underprivileged caste groups in contemporary Sri Lanka and, therefore, no policies were introduced to alleviate the disadvantages of disadvantaged caste


554 Ibid.

555 Ibid.


557 Ibid.

558 Sri Lankan Constitution 1978, supra note 520.

559 Kalinga Tudor Silva, P.P. Sivapragasam, Paramsothy Thanges, supra note 549, p. 129.
groups.\textsuperscript{560} As some scholars observe:

\begin{quote}
[I]t must be noted here that problems are caused not by universal coverage policies themselves but discriminations at the point of delivery of services. It appears that the existing policy framework and legal measures are not adequate to tackle any discrimination based on work and descent at the point of delivery of services.\textsuperscript{561}
\end{quote}

1.3.2. Prevention of Domestic Violence Act 2005

Violence against women is a significant health and human rights concern.\textsuperscript{562} The dominating form of violence against women, in Sri Lanka and worldwide, is domestic violence.\textsuperscript{563} The United Nations Declaration on the Elimination of Violence against Women defines violence against women as follows in Art. 1:

\begin{quote}
[F]or the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.\textsuperscript{564}
\end{quote}

While Sri Lanka has made significant steps in the advancement of women regarding health and education, there has been a rising rate of violence against women.\textsuperscript{565} This form of violence is not confined to socio-economic levels and occurs irrespective of race, religion or social status.\textsuperscript{566} The majority of women in the country are dependent on the income of husbands, as patriarchal stereotypes subject women to household activities.\textsuperscript{567} As a result, women may have to choose between a violent breadwinner and impoverishment.\textsuperscript{568} Activists note that gender-based violence, which includes sexual abuse and torture, is drastically underreported in Sri Lanka.\textsuperscript{569} One activist expounds that in Sri Lanka, “[w]omen are still at the

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very bottom of Sri Lanka’s social hierarchy. Their status contributes to the paucity of institutional support for abused women and to prevailing stereotypes of women, which limit their social roles, impact the perception of their identities and perpetuate discrimination. Moreover, various rights organisations have pointed out that the existing culture of violence against women worsened as a result of the civil war. In a recent report, the United Nations Population Fund in 2015 stressed that gender-based violence in Sri Lanka is widespread in areas most affected by the conflict, but violence and harassment are pervasive across all socio-economic groups. In the face of this troubling situation, Sri Lankan lawmakers passed the Prevention of Domestic Violence Act No. 34 in 2005 as a result of the constant advocacy exerted by women’s non-governmental organisations. The Act was adopted without any opposition in Parliament in 2005; however, some figures from the political and public arena questioned the necessity for this Act in Sri Lanka. Several parliamentarians valued the sanctity of family and culture over the health of women. They expressed that gender equality is a Western construct which contravenes cultural values in Sri Lanka.

Before this Act, the only resort for victims of domestic violence was to lodge a police complaint. The debate on domestic violence is largely ignored in Sri Lanka, paired with the tendency to trivialize it, given the prevailing patriarchal cultural norms. The Act, however, is a meaningful vehicle to underscore the attention upon domestic violence, moving this human

571 Ibid; DFJP, supra note 567, p. 6.
576 Kodikara, supra note 574.
577 Ibid.
rights violation away from the private sphere and into the public discussion. The Act has, for the first time, recognised emotional abuse as a form of domestic violence, a major acknowledgment in a country that denied even the existence of physical battering. In section 23 the Act stipulates:

‘[d]omestic violence’ means—
(a) an act which constitutes an offence specified in Schedule I;
(b) any emotional abuse, committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person; “emotional abuse” means a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person; “shared resources” means movable or immovable property which both the aggrieved person and the respondent have habitually used or have had access to;

A recent study by the International Centre for Ethnic Studies revealed that only one percent of women would resort for protection under the Act. In addition, critics argue that the Act had little or no impact on the ground. These critics argue that, inter alia, the Act’s gender neutrality and a patriarchal society -where authorities are themselves upholding patriarchal values- hinder the protection of women.

Furthermore, the Act lacks provisions relating to monitoring of protection orders and provisions relating to institutional support services. Finally, while the Sri Lankan penal code considers violence a criminal act, the beating of one’s spouse is not regarded as a punishable offence. Instead, victims are solely protected by a Protection Order. To this end, no punishment is handed to the perpetrator, unless he violates the order, in which case he can be subjected to a one-year jail term or a small fine. Moreover, the non-recognition of marital rape and sexual abuse between spouses as a form of domestic violence in the Act is a classic example of the ineffectiveness of the concept of gender equality. While the Act aims to

578 UNDP, supra note 566.
579 Rameez, supra note 574.
581 Ibid.
582 Rameez, supra note 574
583 Kodikara, supra note 574; Kugathasan, supra note 97.
584 Rameez, supra note 574.
585 Ibid.
586 Kugathasan, supra note 562.
protect women's rights, the former president of Sri Lanka, Mahinda Rajapaksa, said before his constituency in Hambantota:

[W]e have introduced laws to bring relief to women. Sometimes I wonder whether these laws are excessive. (...) At first glance they seem very attractive. But Sri Lankan women occupy a high status based on our culture which is 2500 years old (...) and under current legal regulations, our cultural values are being weakened, while the legal bond has been strengthened.\(^{587}\)

In conclusion, the examined Act is insufficient to protect and promote women’s rights, as it does not address patriarchal values and familial ideologies. Gender equality is not underpinning judicial thinking and therefore women are at a disadvantage. Moreover, it is purported that there is a prevailing ignorance among the police with respect to the Act.\(^{588}\) A study from April 2014 conducted by Care International affirms that 40.6 % of Sri Lankan men and 58 % of Sri Lankan women agree with the statement that a woman has to accept domestic violence to maintain the unity of the family.\(^{589}\) Women’s rights advocate and academic Chulani Kodikara writes:

[D]ominant social and cultural norms in Sri Lanka which tend to privilege the family unit over a woman’s right to bodily integrity clearly discourages women from seeking legal recourse for violence. Indeed such violence is often seen as a normal part of married life or as a temporary disruption in an otherwise peaceful household.\(^{590}\)

The United Nations Development Programme ranks Sri Lanka in their Gender Inequality Index Rank 2014 at position 73 (out of 182).\(^{591}\) Despite its progressive nature, the Act fails short to achieve gender equality and does not define meaning and scope of domestic violence: these two components must be broadened, as also economic violence, marital rape and sexual abuse between spouses need to be addressed.\(^{592}\) Legal impediments to police reporting need to be removed and support services should be made available to victims.\(^{593}\) If patriarchal values and narratives persist, the prevention of domestic violence is not possible and the objective of the Act will not be attainable. Hence, a recalibrated discourse surrounding gender

\(^{587}\) Kodikara, supra note 574.

\(^{588}\) DFJP, supra note 574, p. 21.


\(^{590}\) Kodikara, supra note 574.

\(^{591}\) UNDP, Gender Development Index, online at: <http://hdr.undp.org/en/composite/GDI>, last accessed 31\(^{st}\) of January


\(^{593}\) Ibid.
equality in interaction with human rights laws may change the thinking and acting, not only in relation to domestic violence, but also in the advancement of women’s rights and gender equality. 594

1.3.3. International Convention on Civil and Political Rights Act 2007

Sri Lanka ratified the International Covenant on Civil and Political Rights on the 11th of June 1980 and accepted individual complaints under the Optional Protocol to the Covenant on the 3rd of October 1997. 595 With the domestic adoption of the International Convention on Civil and Political Rights Act No. 56, 2007 Sri Lankan lawmakers intended to give effect to certain articles that are enshrined in the Covenant. The Act spells out in its preamble:

[i]t 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 Covenant above, for which no adequate legislative recognition has yet been granted. 596

The notion of necessity enunciated in the preamble arose in the context of two factors, namely the negotiations in light of the General System of Preferences scheme of the European Union. The second factor is probably of more significance, namely the Singarasa case before the Sri Lankan Supreme Court, (which will be addressed in more detail below under the section Supreme Court). The Supreme Court stated in this case from 2006 that rights stemming from the International Covenant on Civil and Political Rights are not rights under Sri Lankan law. The Supreme Court requested enabling legislation. 597 Human rights lawyer Kishali Pinto Jayawardene explains that this judgement sparked the "[c]ulmination of a train of events" that eventually led up to the International Convention on Civil and Political Rights Act. 598 The adoption of the Act, led, in turn, to the question of whether the country could qualify itself for the Generalised Scheme of Preferences Plus (referred to as GSP+) in 2008, given that human rights protections are conditionalities for accessing the scheme of trade preferences. The

594 Kodikara, supra note 574.
595 Office of the High Commissioner for Human Rights, supra note 69.
Generalised Scheme of Preferences offered by the European Union gives developing countries the possibility to pay less or no duties on their exports to the European Union. With these Generalised Scheme of Preferences programmes, the European Union assists vulnerable countries in poverty alleviation, good governance and facilitate the process of sustainable development. The Generalised Scheme of Preferences Plus is a special component of the Generalised Scheme of Preferences scheme that gives additional trade incentives to developing countries already benefitting from Generalised Scheme of Preferences.

The motivation of the European Union at the time of the introduction of the Generalised Scheme of Preferences Plus was to provide extensive market access than under the standard Generalised Scheme of Preferences, giving beneficiary countries duty-free access to EU markets for over 7,200 products. One of the conditions to qualify for the Generalised Scheme of Preferences Plus is that a country benefitting from the Scheme is under a general obligation to ratify and fully implement the international conventions listed in Annex III of the European Council Regulation No. 980/2005 of 27th June 2005. The International Covenant on Civil and Political Rights, among other human rights instruments, is listed under Part A of Annex III of the Regulation.

The Generalised Scheme of Preferences was recommended by the United Nations Conference on Trade and Development. The United Nations Conference on Trade and Development recommended that preferential access to developed country markets would serve as to promote prosperity, poverty alleviation and increased trade opportunities for developing countries. Moreover, the United Nations Conference on Trade and Development had pronounced in the 1996 Midrand Declaration that international trade would be a tool to eradicate poverty, promote and protect human rights.
Political Rights Act, however, contained only four rights out of the twenty-two substantive rights enshrined in the International Covenant on Civil and Political Rights, and those reproduced in the Act were watered down.\textsuperscript{607} It referred to the right to recognition as a person before the law, certain procedural entitlements to an accused (benefits that already existed in criminal procedure), a provision on the rights of a child and a vaguely described right of access of every citizen to take part in the conduct of public affairs.\textsuperscript{608}

The Act also contains the prohibition of propagation of war and religious hatred.\textsuperscript{609} The sections of the Act are substantially and significantly different from the corresponding provisions of the International Convention on Civil and Political Rights.\textsuperscript{610} Section 4 of the Act, for example, corresponds to Art. 14 of the International Covenant on Civil and Political Rights but fails to reproduce Art. 14 (1), (4), and (6) of the Covenant, which includes the presumption of innocence in criminal trials and investigations.\textsuperscript{611} Sri Lankan lawmakers believed that the presumption of innocence is covered in other constitutional provisions.\textsuperscript{612} This approach is questionable, as it reveals a gap in protection standards between international and domestic law.\textsuperscript{613}

The presumption of innocence is framed as an absolute right in Art. 14 (2) in the Covenant, whereas the equivalent in Art. 13 (5) of the Sri Lankan Constitution subjects the presumption of innocence to a provision under which the accused has to prove his innocence. Furthermore, Art. 15 (1) of the Sri Lankan Constitution allows giving preference to emergency regulations in the interests of national security.\textsuperscript{614} In March of 2008, the former president of Sri Lanka, Mahinda Rajapakse, submitted the International Convention on Civil and Political Rights Act under reference to Art. 129 (1) of the Constitution before the Supreme Court, asking the Court for an Advisory Opinion on two questions of the law.\textsuperscript{615} Eventually, the Supreme Court held the opinion that the International Convention on Civil and Political Rights Act guarantees all

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  \item\textsuperscript{607} Pinto Jayawardena, supra note 598.
  \item\textsuperscript{608} Rohan Edrisinha & Asanga Welikala, supra note 597, p. 88.
  \item\textsuperscript{609} ICCPR Act, supra note 596.
  \item\textsuperscript{610} Rohan Edrisinha & Asanga Welikala, supra note 597, p. 88.
  \item\textsuperscript{611} ICCPR Act, supra note 596.
  \item\textsuperscript{612} Rohan Edrisinha & Asanga Welikala, supra note 597, p. 89.
  \item\textsuperscript{613} Ibid.
  \item\textsuperscript{615} Advisory Opinion of the Sri Lankan Supreme Court, SC. Ref.: 01/2008
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the necessary provisions mentioned in the International Convention on Civil and Political Rights and conforms with international obligations. In 2010, however, the European Union suspended the trade benefits that were granted to Sri Lanka in light of the shortcomings regarding three United Nations human rights conventions. These were the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Rights of the Child, based on the findings of a commission of investigation. This Commission established by the European Commission held that:

[T]he legal and institutional framework giving effect to the ICCPR, CAT and CRC is not sufficient to ensure effective implementation of all relevant obligations provided for by the three instruments. Some of the provisions of the Conventions have not been transposed in full, while provisions in the domestic legislation are in some cases more restrictive than the corresponding provisions of the Conventions. The domestic legislation also contains provisions which are not entirely in compliance with the Conventions. In particular, the emergency legislation overrides other current legislative provisions and imposes restrictions on human rights which are incompatible with the Conventions.

While the International Convention on Civil and Political Rights Act should have given effect to the civil and political rights, this is not the case. Two constitutional experts, Rohan Edrisinhe and Asanga Welikale, point out that:

[T]o 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.

David Daly, Ambassador of the European Union to Sri Lanka, wrote recently that only a sustained progress in on human rights might qualify Sri Lanka again for the Generalised Scheme of Preferences Plus. Meanwhile, in June of 2016, the Sri Lankan government made a new application for the scheme, and in January of 2017 Sri Lanka was included in the Generalised Scheme of Preferences Plus again. The Trade Commissioner of the European Commission,

616 Ibid.
617 Commission on the European Communities, Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka, Brussels, 19th of October 2009, prepared by Françoise Hampson, Leif Sevón and Roman Wieruszewski.
618 Ibid para. 83.
620 Ibid p. 91.
Cecilia Malmström stated on this occasion:

[G]SP+ preferences can make a significant contribution to Sri Lanka’s economic development by increasing exports to the EU market. But this also reflects the way in which we want to support Sri Lanka in implementing human rights, rule of law and good governance reforms. I am confident of seeing timely and substantial further progress in these areas and the GSP+ dialogue and monitoring features will support this reform process. This should include making Sri Lankan counter-terrorism legislation fully compatible with international human rights conventions. 621

It is pertinent that the European Union, in complementary function to the United Nations, observes the effective implementation of international human rights standards, especially the International Covenant on Civil and Political Rights. 622 Noteworthy is that, for this reason, the European Union has sent a monitoring mission to the country that has met with families of disappeared Sri Lankans. 623 The monitoring mechanism is a crucial component of the Generalised Scheme of Preferences Plus and could be of benefit in the renewed political climate to further the implementation of human rights standards. While economic benefits are at the heart of the Generalised Scheme of Preferences Plus, trade can be used as a means to further human rights implementation, while the European Union can be a resourceful agent for the United Nations in achieving this implementation.

1.3.4. Information Act 2016

Finally, the examination turns to a very recent human rights law, namely the Information Act No. 12 of 2016. 624 The Asian financial crisis of the 1990s led to the enactment of a series of laws relating to information laws and fiscal responsibility in many Asian emerging market economies with the intention to curb free market economies. 625 On the 14th of December 1946 the United Nations had acknowledged:

[F]reedom of information is a fundamental human right and is the touchstone of all

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the freedoms to which the United Nations is consecrated;

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without letters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.

Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent.\(^{626}\)

With this adoption, the United Nations accepted the right to collate and publish information anywhere without restraint. The right is recognised as a fundamental human right and as an interconnecting right to all other freedoms to which the United Nations is committed to. Art. 19 of the Universal Declaration of Human Rights postulates:

\[
\text{[E]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.}\^{627}\]

Likewise, art. 19 (2) of the International Covenant on Civil and Political asserts:

\[
\text{[E]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.}\^{628}\]

Transparency, accountability, good governance and proper functioning of the democratic system will be only ensured if the information is readily available to citizens.\(^{629}\) This is the view put forward by the Human Rights Committee in 1983 in its General Comment 10.\(^{630}\) Moreover, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stipulated in his report from 1995:

\[
\text{[T]he right to seek or have access to information is one of the most essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if}\]

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the people have no access to information.\textsuperscript{631}

A democratic government relies on the public exchange of information, as it reinforces the public debate.\textsuperscript{632} It is argued that only the existence of a right to information would sufficiently provide substance to people’s sovereignty and, moreover, facilitate the effective enjoyment of other rights, such as freedom of expression.\textsuperscript{633} Ultimately, enabling access to public information empowers citizens.\textsuperscript{634} Public awareness of driving motivations for certain decisions can strengthen the support, facilitate communication and narrow the misunderstandings between the public and the government.\textsuperscript{635}

In light of these international developments, Sri Lankan policy makers moved forward to formulate and implement such a right in Sri Lanka.\textsuperscript{636} An advisory committee on laws affecting media freedom and freedom of expression, chaired by the renowned academic R.K.W. Goonesekere recommended the enactment of an Act on the Right to Information in 1995.\textsuperscript{637} In 1996, the Sri Lankan Law Commission, headed by Justice A.R.B. Amarasinghe, prepared a draft Freedom of Information Bill. Some commentators deemed the draft as conservative and pointed out to the divergences to international best practices.\textsuperscript{638} The right to information was to be included in the context of constitutional reforms between 1995 and 2000 but never materialized in the face of a paucity of political action.\textsuperscript{639} Several other political campaigns (with participation of civil society actors) were launched, but elections and political power considerations prevented the implementation of the right.\textsuperscript{640} With the formation of the new cohabitation government, the end of the previous administration and the renewed climate from 2015 onwards, another attempt was undertaken to implement the right to information in 2016. With the Act above, the government has provided an absolute right by giving effect

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\textsuperscript{633} \textit{Ibid}.

\textsuperscript{634} \textit{Ibid}.

\textsuperscript{635} \textit{Ibid}.


\textsuperscript{637} Perera, \textit{supra} note 629.

\textsuperscript{638} Kodikara, \textit{supra} note 632, p. 274.


\textsuperscript{640} \textit{Ibid}; Perera, \textit{supra} note 629.

\textsuperscript{640} \textit{Ibid}.
\end{footnotesize}
to the constitutional right of every citizen to access information under Section 3 of the Act. Critics, however, point out to the limitations under Section 5 of the Act (for example, the restriction of the right on the basis of national security). In its preamble the Right to Information Act stipulates:

[W]hereas the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance.

The Sri Lanka Press Institute, among other institutions, issued a statement in which it praises the Bill and expresses:

[T]he passing of this long delayed Bill secures an essential right for Sri Lankan citizens. Regardless of the passing of the RTI Bill, we face a most difficult task in challenging a long entrenched culture of official secrecy in the country. It is therefore hoped that ensuring the effective implementation of RTI will be a truly national effort pursued passionately in the interests of improved governance and political accountability in Sri Lanka.

While it is too early to assess the impact of the Act, it may prove a useful legal tool to tackle the entrenched culture in an environment of official secrecy in the country. The effective implementation of the Act would be a means through which governance and political accountability in Sri Lanka can be improved. Proving the remarkable strength of this law, the Centre for Law and Democracy considers the Act as one of the most advanced in the world, ranking it at 10th position out of 59 countries assessed. The recent landslide at the Meethotamulla garbage dump in Colombo, which killed 26 people, revealed that certain branches of government, however, prefer to operate in secrecy and are still reluctant to share information.

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642 Perera, supra note 629; Ibid Right to Information Act.
643 Ibid Right to Information Act.
with the public. Media representatives filed several requests under the Act to obtain more information to the background of the event. None of the requests with the governmental entities, namely the Urban Development Authority, the Central Environment Authority, the Disaster Management Centre, the Ministry of Megapolis and Western Development and the Prime Minister’s Office proved to be successful and revealed how inoperative the Act is.

1.4. The Third Republican Constitution

In 2016 the new cohabitation government initiated the drafting process of the Third Republican Constitution, with the aim of abolishing the Executive Presidency, introducing a new electoral system, addressing national reconciliation, devolution, the role of Buddhism and the adoption of a Bill of Rights. In accordance with article 75 of the Second Republican Constitution, the Parliament was converted into a Constitutional Assembly with the mandate to draft a new constitution. A Public Representations Committee on Constitutional Reforms, comprised of twenty members, was appointed by the country’s Prime Minister with his cabinet’s consent for receiving the Sri Lankan public’s suggestions for constitutional reforms. In the meantime, this committee has concluded its public sittings, deliberations, and operations, and issued a final report. The report devotes one chapter to fundamental rights and expounds:

[B]roadening the chapter in the Constitution on human rights can be regarded as a step towards democratisation. (...) Therefore it is necessary to seek ways in the new Constitution of affirming individual rights, taking into account the multiplicity of identities in Sri Lankan society while also recognizing the need to protect the rights of special groups. The dangers of majoritarianism at different levels should be recognized and addressed.

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648 Ibid.


652 Ibid pp. 91, 93.
The urgency for a new constitution was driven by two motivations: the end of the civil war and the defects of the two republican constitutions. Numerous other attempts were undertaken in the history of Sri Lanka to adopt a third republican constitution, but all of those attempts had failed. The attempt in 2000 was promising and tried to alleviate the chapter on fundamental rights and included, *inter alia*, the right to life and a range of civil, political, economic, social and cultural rights. This Draft Constitution, written with substantial support by human rights scholars and activists, was eventually dropped due to the lack of political will.

The end of the war revealed the urgent need to restructure the existing legal framework; the focus on economic development neglected the rule of law and human rights. With this constitution-making, the public was consulted in the aftermath of the election results in January 2015 while effectuating the concept of sovereignty. Considering that previous constitutions reflected the agendas of the respective parties in charge, this new approach is positive and vital for nation-building. The new President of Sri Lanka, Maithripala Sirisena, declared in a speech before the Sri Lankan Parliament that post-colonial constitutions did not work towards unifying the different ethnic communities. In this speech, he pointed out to the resentment of the majority ethnic Sinhala community towards the idea of devolution and guaranteeing a fair power-sharing model with the minority ethnic Tamil community. While the previous government under Mahinda Rajapakse featured ethnocratic characteristics, replaced secular law with ethnic politics and envisaged monarchical traditions, the new approach of the current government is to embrace republicanism, where ultimate power emanates from the people. This approach furthers the relationship between the sovereign, i.e., the people, and governing institutions and shall effectuate state power. The new government reiterates its commitment to strengthen institutions to achieve the highest degree of accountability of the government. Current statements, however, indicate that one of the triggering points of national disintegration, the role of Buddhism, will once again be given foremost place in

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657 *Ibid* p.5.
659 *Ibid*.
the new constitution and alleged war crimes will not be prosecuted.\textsuperscript{660} This decision may be led by the motivation to defuse tensions with the country’s conservative Buddhist forces and deploy political considerations against the former president, Mahinda Rajapakse\textsuperscript{661} and further a common malaise in the previous constitution, which has perpetuated the hegemonic appropriation of other cultures. More regrettablly, this approach has negated the status of the minority communities and alienated them from nation-building and entrenched ha culture of impunity.\textsuperscript{662}

2. Institutions for the promotion and protection of human rights

This following subsection will consider and depict certain institutions that were established either as permanent or ad hoc mechanisms to foster, stimulate and safeguard human rights in Sri Lanka. To this end, this section questions whether the institutions advanced the human rights infrastructure, through their direct or indirect interaction with international human rights bodies of the United Nations.

2.1. Human Rights Commission

National human rights institutions are generally established either by a constitutional or legislative act, and can be considered official bodies that should be independent, even though funded by their respective governments.\textsuperscript{663} The Office of the High Commissioner writes: “[T]hey are at arm’s length from the Government and yet funded exclusively or primarily by the Government.”\textsuperscript{664} It was in 1993 that the Government of Sri Lanka made a pledge to the


\textsuperscript{661} Sruthisagar Yamunan, ‘Will Sri Lanka’s new constitution retain the mistakes that led to 25 years of civil war?’, online at: <http://scroll.in/bulletins/34/what-you-need-to-know-about-fighting-depression>, last accessed 10\textsuperscript{th} of November 2016.

\textsuperscript{662} Ibid.


\textsuperscript{664} Ibid.
international community\textsuperscript{665} to set up a human rights commission, a pledge that materialized itself in the Human Rights Commission Act of 1996.\textsuperscript{666} This statutory institution began its work in July 1997.\textsuperscript{667} It was only with the introduction of the 17\textsuperscript{th} Amendment to the Sri Lankan Constitution that the Human Rights Commission gained constitutional recognition.\textsuperscript{668}

Art. 10 of the Act spells out the functions of the Commission as follows:

\textit{[T]he functions of the Commission shall be-

(a) to inquire into, and investigate, complaints regarding procedures, with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights and to promoting respect for, and observance of, fundamental rights;

(b) to inquire into and investigate, complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions hereinafter provided;

(c) to advise and assists the Government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights;

(d) to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards.

(e) to make recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights; and

(f) to promote awareness of, and provide education in relation to, human rights.}\textsuperscript{669}

National human rights institutions are a crucial factor in the national human rights protection and promotion systems and facilitate the human rights engagement between international human rights bodies and the government. In a more nuanced way, national human rights institutions enable and facilitate the communication between civil society and governments. They connect responsibilities of the state to the rights of citizens, while they reinforce and


\textsuperscript{668} Section 41 B. Provision 4 an of the 17\textsuperscript{th} Amendment to the Sri Lankan Constitution, online at:<http://www.priu.gov.lk/Cons/1978Constitution/SeventeenthAmendment.html>, last accessed 16\textsuperscript{th} of November 2016.

\textsuperscript{669} Human Rights Commission Act, \textit{supra} note 666.
improve national laws by linking them to regional and international human rights systems.670 The Paris Principles from 1993 establish the standards under which national human rights institutions shall work and operate.671 It spells out in Paris Principle 3b under the section ‘competence and responsibilities’:

[T]o promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.672

Moreover, the Paris Principles urge an infrastructure that provides for its political and financial independence, but also for its pluralism through the diversity of membership to it.673 The Sri Lankan Human Rights Commission Act provides that the Commission shall consist of five members with knowledge of or experience in human rights, with one member nominated as Chairman.674 Several issues need to be raised in the context of the Commission’s composition. First, there is no clear indication what “experience in matters relating to human rights” exactly means. This unclarity presents a serious gap in determining the level of human rights experience. Second, while Sri Lanka is a multi-ethnic country, the enabling Act has a very vague determination of minority representation under Art. 3.3. This determination is not satisfactory in light of constant human rights violations especially against minorities in Sri Lanka. Third, while the Paris Principles recommend the inclusion of a range of different actors under Art. 4 to represent a pluralist reflection of the diverse voices from society, the enabling Act of Sri Lanka fails to follow that goal.675 Fourth, the Commission is only empowered to make recommendations. Fifth, the non-implementation is of more concern to the efficient fulfilment of its role. In its role with the Sri Lankan Parliament, the Commission is not making full use of the legal possibilities and venues at its hand. Informal channels between the Commission and the Government are formalised instead of institutionalising direct communication between the two bodies. Since 2005 the former President Mahina Rajapakse had made ap-

670 Office of the High Commissioner for Human Rights, supra note 663.
671 Ibid.
673 Ibid No. 5 and 6.
674 Human Rights Commission Act, supra note 666.
675 Office of the High Commissioner for Human Rights, No.4, supra note 672.
pointments to the National Human Rights Commission without a recommendation of the Constitutional Council as prescribed in the Constitution. While certain scholars offered cautious optimism when the Human Rights Commission started its work, more recent observations are daunting. One author writes:

[T]he Commission has shown itself to be increasingly willing to establish dialogue with civil society, address backlogs and complaints more effectively, amend the HRCSL Act to strengthen its mandate, and implement mechanisms which override certain limitations in mandate to effectively address human rights violations. However, the Human Rights Commission of Sri Lanka needs to amend not only its mandate but its internal policy and perspective to better understand and implement its role as prescribed by the Paris Principles which primarily emphasizes independence from the state, effectiveness, and objectivity in addressing human rights violations, and consistent relations with civil society.

The 18th Amendment to the Second Republican Constitution removed the Constitutional Council from the constitutional scene by creating a Parliamentary Council. This newly created body consisted of parliamentarians who aligned with the Rajapakse administration and, under this Amendment, the president was only required to receive observations by this body in relation to his appointments. The 18th Amendment, hence, only increased the power of the Executive Presidency and politicised any appointments.

In any case, while the Commission could have been much more effective despite the political developments in the country, the Presidential Election of 2015 was seen as the welcome event to provide impetus to reinvent this prime human rights institution of Sri Lanka. Strong and rights-conscious leadership is crucial, as it is the best facilitator between international institutions, civil society, and the government. The recent appointment of a renowned human rights academic Deepika Udagama as chair of the National Human Rights Commission may revive the institution and strengthen its functions, goals and in particular

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678 Amnesty International, supra note 676, p. 9.
680 Skanthakumar, supra note 667, p. 163.
independence.

2.2. Supreme Court

The Sri Lankan Supreme Court has, in its history, made use of international human rights law for purposes of interpretive guidance, in particular through the use of fundamental rights jurisdiction under Art. 126.1 and Art. 126.2 of the Second Republican Constitution. The aforementioned provisions spell out:

[T]he Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

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

It is beyond the scope of this thesis to look at the entire human rights case law of the Supreme Court, but it is worth noting that the country’s prime court has dealt and established landmark judgements, with regards to the relationship between the domestic human rights infrastructure and public international law, as well as international human rights law. At best, it has recognised international obligations. At worst, it misinterpreted their effective application and implementation. In one of the earliest cases that dealt with international human rights law, Leelawathie v. Minister of Defence and External Affairs, the Supreme Court decided that the Universal Declaration of Human Rights cannot develop any binding force, as it is a soft law instrument and not recognised in the Sri Lankan legal system. The Supreme Court spelled out:

[Even if the principles contained in the instrument have any relevance, it is sufficient to say that while it is of the highest moral authority, it has no binding force as it is not

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682 Udagama, supra note 4, p. 131.
a legal instrument and forms no part of the law of this country.\textsuperscript{685}

On the issue of the relationship between international treaty obligations and domestic law, one case of interest is the \textit{Ekanayake} case.\textsuperscript{686} This case saw the first judicial opinion of any court that considered hijacking as an international crime and, as such, is international customary law.\textsuperscript{687} Without going further into the background of the case, the Second Republican Constitution prescribed that there can be no ex-post facto criminal statute unless the law is based on general principles of international law recognised by the community of nations. Sri Lanka retrospectively enacted a statute by a process that recognised the crime of airplane hijacking as part of the customary international law, a landmark decision for the country, but also for the rest of the world.\textsuperscript{688} The Bill’s constitutionality was brought before the Supreme Court, as it, according to the petitioner, violated the constitutional guarantee enshrined in Art. 13.6 of the Second Republican Constitution against retrospective penal legislation. The Court, however, found that legislation was not unconstitutional as retrospective penal legislation. In this regard, the Supreme Court was of the view that air piracy was such a crime.\textsuperscript{689}

The \textit{Singarasa} case was one of the more troubling judgements rendered by the Supreme Court. The case will be given more consideration and examination in the next chapter, as it directly concerns Sri Lanka’s human rights engagement with United Nations treaty bodies. The Supreme Court held in its judgement that the rights enshrined in the International Covenant on Civil and Political Rights cannot be directly invoked under domestic law, as long as domestic law fails to incorporate an own legislation.\textsuperscript{690} The Supreme Court held that “[t]he [ICCPR] does not have internal effect and the rights under the ICCPR are not rights under the law of Sri Lanka.”\textsuperscript{691} It was of the opinion that Sri Lanka’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights, which permits individuals to submit complaints directly to the Human Rights Committee, was unconstitutional. The Supreme

\textsuperscript{685} \textit{Ibid}.


\textsuperscript{687} \textit{Ekanayake v. Attorney General} (1988), 1 Sri L R 46.

\textsuperscript{688} Averbuck, supra note 686, p. 20.

\textsuperscript{689} \textit{Ibid}.

\textsuperscript{690} \textit{Singarasa v. Attorney General}, S.C. Spl (LA), No. 182/99.

Court held further that, consequently, individuals "[c]annot seek to 'vindicate and enforce' [their] rights through the Human Rights Committee."  

In more recent judgements, the Supreme Court strived for a more progressive approach to international human rights law. In *Bulankulama v. Secretary, Ministry of Industrial Development* the Supreme Court had to judge the permission granted by the government to a private company which intended to build a giant overseas mining company. This construction would have severely curtailed the plaintiffs’ livelihood. Here, the Supreme Court held that:

[N]evertheless, as a Member of the United Nations, they (i.e., the principles under the Stockholm and Rio Declarations) could hardly be ignored by Sri Lanka. Moreover, they would (...) be binding if they have been expressly enacted or become part of the domestic law by adoption, by superior courts of record and by the Supreme Court in particular in their decisions.  

Furthering the progressive stand, the Supreme Court held in *Weerawansa* that the state authorities were obligated by the International Covenant on Civil and Political Rights to respect freedom from arbitrary arrest and detention and to respect the right of anybody arrested to challenge the legality of the detention before a court. The court pointed out to Art. 27 (15) of the Constitution, according to which:

[T]he State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order and shall endeavor to foster respect for international law and treaty obligations in dealings among nations.  

The Court underscored that the Parliament cannot disregard those safeguards and found that the Prevention of Terrorism Act (which will be discussed below) shall not hinder the full enjoyment of the International Covenant on Civil and Political Rights. Deepika Udagama considers these two judgements as containing "[r]ich judicial reasoning to sustain arguments that point to the relevance of international human rights" in the domestic setting. Finally, in *Sriyani Silva v. Iddamalgoda* and *Gerald Mervin Perera v. Suraweera*, the Supreme Court used human rights standards as interpretative guidelines in extending the focus and scope for the constitutional protection of human rights. In the former judgement, the Supreme Court

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692 Ibid.  
694 *Weerawansa v. Attorney General*, (1 Sri LR 385).  
695 Sri Lankan Constitution 1978, supra note 520.  
696 Udagama, supra note 4, p. 136.  
made use of Art. 14 of the Convention against Torture and allowed dependents of a person who died during torture to sustain the fundamental rights case and claim compensation. This judgement was a significant extension of existing domestic constitutional protection, as Art. 126 of the Second Republican Constitution solely envisages the injured party or legal representation to bring the petition forward. In the latter case, Art. 12 of the International Covenant on Economic, Social and Cultural Rights was invoked to highlight the right to health to underpin the Court’s decision to award reimbursement of medical expenses to a torture victim.

The independent judiciary, however, was severely compromised when parliamentarians supporting the then-Sri Lankan government initiated an impeachment process against the sitting Chief Justice, Dr. Shirani Bandaranaike. Observers commented that this impeachment process was triggered by judgements of the Supreme Court that did not meet the satisfaction of the previous government under former President Mahinda Rajapakse. Among other decisions in favour of victims of human rights violations, the Supreme Court blocked a law that could have established a new department in the Ministry for Economic Development that was headed by the brother of the former President. The law would have allocated a range of welfare programs under his purview, but the Supreme Court ruled that all nine provinces under the power established by the 13th Amendment need to give their approval.

The previous government launched a smear campaign against the Chief Justice. Parliamentarians voted in favour of an impeachment of the Chief Justice, establishing her guilt on three counts of misconduct. She was eventually replaced by an advisor of the former Sri Lankan President. The Centre for the Independence of Judges and Lawyers of the International

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698 Ibid Sriyani Silva v. Iddamalgoda.
701 Ibid.
703 Ibid.
704 Ibid.
Commission of Jurists strongly criticised in an open letter to the former Sri Lankan government the removal of Dr. Shirani Bandaranayake as Sri Lanka’s Chief Justice and highlighted the unconstitutionality and breach of international standards on judicial independence.\textsuperscript{706} The letter states furthermore:

[T]he irremovability of judges is a main pillar of judicial independence. Judges may be removed only in the most exceptional cases involving serious misconduct or incapacity. And in such exceptional circumstances, any removal process must comport with international standards of due process and fair trial, including the right to an independent review of the decision.\textsuperscript{707}

This unprecedented move in the nation’s history was eventually reversed after the Presidential Elections in 2015 and the appointment of a new Chief Justice from the Tamil community, while the former Chief Justice Bandaranayke was rehabilitated.\textsuperscript{708}

2.3. National Police Commission

With Art. 155 A of the 17\textsuperscript{th} Amendment\textsuperscript{709} to the current Sri Lankan Constitution the Government of Sri Lanka established the National Police Commission,\textsuperscript{710} a pivotal moment for the promotion of the rule of law and human rights in Sri Lanka.\textsuperscript{711} It is an independent body for police appointments, transfers, promotions, but also one that conducts disciplinary proceedings against police officers.\textsuperscript{712}

The provisions II and III of the establishing Art. 155 A spells out:

[T]he Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.

(3) The Commission shall provide for and determine all matters regarding police offic-
ers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.

With this, the government has ostensibly empowered citizens to launch proceedings against the police and hold them accountable for any human rights violations in which they are implicated. Human rights organisations and defenders, however, see the situation differently. The Sri Lankan Police Commission is mandated to inquire improper conduct by the national police force. Recent incidents, however, reflect a culture of impunity for violations committed by the police.\textsuperscript{713} Torture, extrajudicial killings and arbitrary arrests are common and, despite the existence of the National Police Commission, accountability for wrongdoings is absent.\textsuperscript{714} The 18\textsuperscript{th} Amendment to the Sri Lankan Constitution bestowed upon the then-President, Mahinda Rajapakse, the power to control appointments to the Commission and rendered this body incapacitated.

2.4. Presidential Commission of Inquiries

The Presidential Commission of Inquiry Act No. 17 of 1978\textsuperscript{715} is a presidential tool to launch investigations into governmental entities, in case there are claims to believe there is misconduct by a member of the public service. The Presidential Commission of Inquires was, hence, not intended to be a body to carry out investigations into human rights abuses. Given its broad wording, however, it has been exploited as a mechanism for respective Sri Lankan presidents to discuss human rights issues; presidents remained at the forefront of the process and controlled the outcome of inquiries. For this reason, critics argue that Sri Lanka has seen many decades of a “[c]ommission culture.”\textsuperscript{716} The president is free to determine the commissions’ ambit and limit, but also extend its mandate and to appoint members.\textsuperscript{717} Outcome documents

\textsuperscript{\textbullet\textsuperscript{713} Ibid.}
\textsuperscript{\textbullet\textsuperscript{714} Ibid.}
\textsuperscript{\textbullet\textsuperscript{715} The Presidential Commission of Inquiry Act No 17 of 1978, online at: <http://www.commonlii.org/lk/legis/consol_act/spcoi9504.pdf>, last accessed 16\textsuperscript{th} of November 2016.}
\textsuperscript{\textbullet\textsuperscript{716} Kishali Pinto- Jayawardena, Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977, online at: <www.humanitariansrilanka.org/newchapdf/IHR/Sri%20Lanka_final_3.pdf>, last accessed 31\textsuperscript{st} of January 2017.}
\textsuperscript{\textbullet\textsuperscript{717} Ibid.}
must not be made publically accessible and remain at presidential discretion. Numerous presidents, starting with J.R. Jayawardene, used this Act to conduct human rights inquiries. For example, retired Supreme Court Judge Justice M.C. Sansoni was appointed to examine the reasons for ethnic violence in August of 1977. This Commission suffered from political interference, while the government shielded its forces from any prosecution.\textsuperscript{718} In the end, the report scapegoated the senior political leadership of the Tamils and discarded witness testimony. Justice Sansoni, meanwhile, acknowledged the state failure to protect Tamil civilians and to prevent violence and identified a few police officers who were involved in the mass violence against Tamils. Sriskanda Rajah writes in light of the events from 1977 that:

\begin{quotation}
[t]he state would do nothing to prevent its forces assisting and guiding them. This, in effect, signalled a reformed scaffold service. The scaffold service that manifested in the mass violence of 1956, 1958 and 1961 was one in which the people showed their vengeance on the ‘enemy’ race, while the state, symbolised by armed police and military officials, stood by their side, intervening only when the violence of ‘lawlessness’ went to the extent of threatening the state order. The mass violence of 1977 signalled a shift in this state of affairs in that the state would, as well as allowing its forces to stand by the people’s side and protect them, allow them to guide the people in their mission to avenge their enemies. This was also beneficial to the state in that it held the reins of the violence of ‘lawlessness’ in its hands. The state could use the same police officers who led gangs of Sinhala Buddhist extremists to bring them under control.\textsuperscript{719}
\end{quotation}

This report, however, suggested that the Tamil victims shall be compensated for the damages, yet the identified perpetrators in the report were not prosecuted. Instead, in 1982, the Sri Lankan parliament passed the Indemnity Act No. 20 of 1982\textsuperscript{720}, which shielded police officers from any legal actions against the state forces for any act "[l]egal or otherwise, done or purported to be done with a view to restoring law and order during the period 1\textsuperscript{st} of August to 31\textsuperscript{st} of August 1977, if done in good faith.” The former President Rajapakse announced on the 4\textsuperscript{th} of September 2006 that his administration would invite an independent international commission to probe abductions, enforced disappearances and extrajudicial executions. Two days later, however, he renounced his earlier comments by saying that he would invite an International Independent Group of Eminent Persons to Sri Lanka as supervisory body to an indige-

\textsuperscript{718} Ibid.
\textsuperscript{719} Sriskanda Rajah, supra note 158, p. 59.
\textsuperscript{720} Indemnity Act (No. 20 of 1982), online at: <http://www.commonlii.org/lk/legis/num_act/ia20o1982171/>, last accessed 13\textsuperscript{th} of September 2017.
nous commission. On the 2nd of November 2006, he created, under the Presidential Commission of Inquiry Act, a commission of inquiry to investigate and inquire into fifteen cases of serious human rights abuses since 1st of August 2005, (while another, sixteenth case was added later on). The Presidential Warrant authorised the Commission of Inquiry to conduct "[i]ndependent and comprehensive investigations" and to "[e]xamin(e) the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights." In March of 2008, the International Independent Group of Eminent Persons decided to end its work and some of the members of the commission resigned. The term of the commission of inquiry came to an end in June 2009, with having seven cases concluded, five cases reports and not having started two hearings in two cases.

2.5. Office on Missing Persons

With the Office on Missing Persons the new Sri Lanka administration under President Sirisena established a standing body with a broad mandate to search for and trace missing persons, identify appropriate mechanisms for the same, and to elucidate the events that occurred before the persons went missing. As it is written elsewhere:

[T]his provides for the Office on Missing Persons to conduct investigations thoroughly and not be rushed by any deadlines. The legislation provides for a tracing unit but specifies that the OMP also has the discretion to establish other units or divisions, ensuring that the office is able to obtain the necessary expertise and technical assistance required to investigate into cases, some spanning decades.

The members are required to have, for this specific task, human rights law knowledge. It sets out in Art. 4.2 (b):

[e]nsuring that the members of the OMP shall be persons with previous experience in fact finding or investigation, human rights law, international humanitarian law, humanitarian response, or possess other qualifications relevant to the carrying out of

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722 Ibid.
the functions of the OMP.\textsuperscript{726}

While the United Nations Secretary General congratulated in a statement the creation of this Office on Missing Persons\textsuperscript{727}, it remains to be seen if this institution can successfully interact with the United Nations Committee on Enforced Disappearances.

\textbf{2.6. Lessons Learnt and Reconciliation Commission}

After the end of the civil war, Sri Lankan President Mahinda Rajapaksa established the Lessons Learnt and Reconciliation Commission. It consisted of eight members, headed by the late Attorney General, Chitta Ranjan de Silva. International observers held the view that the establishment of the Lessons Learnt and Reconciliation Commission by Sri Lanka was the result of the immense pressure by the international public, and a means of avoiding international interference in its own matters.\textsuperscript{728}

The Lessons Learnt and Reconciliation Commission began its hearing on the 11\textsuperscript{th} of August 2010 aiming to promote national unity and reconciliation. The Sri Lankan government publicly released the final report of the Lessons Learnt and Reconciliation Commission on the 16\textsuperscript{th} of December 2011. The report made significant and valuable observations and recommendations with due regard to the origins of the conflict, land reforms, restitution and other efforts to reconcile the ethnic communities of Sri Lanka.\textsuperscript{729} The mandate of the Lessons Learnt and Reconciliation Commission required it to consider facts and circumstances which led to the failure of the ceasefire agreement. This agreement came into effect on the 21\textsuperscript{st} of February 2002 and obliged the Lessons Learnt and Reconciliation Commission to inquire into the events that followed until the 19\textsuperscript{th} of May 2009, and gave it a restricted temporal mandate.\textsuperscript{730} The Sri Lankan government outlined the agenda and the mode of operation for this body. This body was requested to investigate all events that were inspired and triggered by the Liberation Tigers of Tamil Eelam, who, in different sections throughout the report, are branded as

\textsuperscript{726} Office on Missing Persons Act No.14, \textit{supra} note 724.


\textsuperscript{729} \textit{Ibid} p. 22.

\textsuperscript{730} \textit{Ibid} p. 22.
It was, however, not clear if the mandate included investigations of violations of human rights and/or humanitarian law. The President’s message to the commissioners at the beginning of their work was daunting and intimidating. His statement underlined the limits of their task, as they were obliged to work in a forward-looking manner, urging them to focus on restorative justice and reminding them not to “[e]mbarass the nation.” The mandate, however, did not satisfy international standards for an accountability mechanism. The report contained useful recommendations for the ongoing political, social, and economic process and offered an assessment of historical failures by Sinhala and Tamil political leaders, who incited the ethnic tensions and fuelled the civil war. The Commission highlighted the heavy militarisation in the northern and eastern part of Sri Lanka and urged that society must be free of military interventions in its day to day life.

The Lessons Learnt and Reconciliation Commission found that empowering local governments must ensure more participation of people at the grass roots level. They suggested that devolution of power may address and meet the needs of the people more effectively. Finally, the Lessons Learnt and Reconciliation Commission underscored that while the territorial integrity and unity of Sri Lanka should be maintained- the rich diversity of Sri Lanka should be considered. The Lessons Learnt and Reconciliation Commission did indeed make some valuable recommendations, but only its comprehensive implementation could be an initial step to achieve reconciliation. And yet, the Lessons Learnt and Reconciliation Commission suffered from a lack of independence and impartiality. It was not vested with the freedom to investigate violations committed by any party to the conflict or consider different branches of international law. The chairperson of the Lessons Learnt and Reconciliation Commission, the late Chitta Ranjan de Silva de Silva, was a friend of the Sri Lankan President and served under him as Attorney General from April 2007 until he retired in October 2008. He also served as a member of the Sri Lankan delegation to the United Nations, defending the human

732 Cot, *supra* note 728, p.22.
735 *Ibid*.
736 *Ibid*.
It is highly difficult to deny a conflict of interest of a person who had to inquire into the human rights record of a country, while he defended it on another occasion. Moreover, there was insufficient witness protection offered by the Lessons Learnt and Reconciliation Commission. The United Nations Secretary General’s Panel of Experts ascertained that there was no clear legal basis for its power and authority. International standards and best practices did not meet standards in witness protection. While the Lessons Learnt and Reconciliation Commission recognised that hospitals and other humanitarian objects were shelled, it failed to conduct a diligent investigation into the allegations that security forces deliberately targeted these objects. The report also failed to analyse or investigate the "white flag" incident critically.

According to reports, senior Liberation Tigers of Tamil Eelam leaders were shot despite promised issued by the Government of Sri Lanka that they could safely surrender. The details surrounding the white flag incident remain unclear, and the Panel of Experts concluded that the Liberation Tigers of Tamil Eelam leadership intended to surrender. This severe incident was mentioned by the Lessons Learnt and Reconciliation Commission very briefly, using testimonies that discharged the allegations. Finally, the time for hearings was very limited and insufficient to meet the needs of victims; when asked to provide written testimonials, the forms handed out were only in English and Sinhala. The hearing in the North and East of Sri Lanka did not follow a victim-centered approach and the commissioners were disrespectful and dismissive towards the victims who testified during their testimonials. The Lessons Learnt and Reconciliation Commission report has been welcomed by the United Nations Sec-

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742 Ibid.
743 Report of the UN General Secretary’s Panel of Experts, supra note 739, para. 40.
744 Ibid para. 40.
745 Ibid para. 326.
746 Ibid para. 328.
retary General’s Panel of Expert as a meaningful vehicle for the reconciliation process between the communities who suffered during the 30-year conflict. The conflict involved brutal terrorism and led to a bloody war between the Sri Lankan Armed Forces and the Liberation Tigers of Tamil Eelam. Despite comments from the governmental level on the implementation of the Lessons Learnt and Reconciliation Commission, there was no substantive official statement regarding progress made so far. Furthermore, the Lessons Learnt and Reconciliation Commission’s recommendations did not meet accountability standards to hold those accountable for violations of international humanitarian law and international human rights law during the conflict.

It has to be concluded that the Lessons Learnt and Reconciliation Commission has neither produced accountability nor reconciliation. As outlined before, the Lessons Learnt and Reconciliation Commission lacked independence, suffered from a limited mandate and lacked a witness protection capacity to serve as an accountability process for the many credible allegations of war crimes and crimes against humanity committed by both sides. More importantly, the Lessons Learnt and Reconciliation Commission has operated in a pre-independence vacuum, as Asange Welikale explains that:

[T]he LLRC has followed the lead of the Soulbury Commission insofar as the LLRC likewise embraces the conventional Westphalian model of the nation-state, wherein the nation was defined by reference to bounded territory, the state was the juridical form and repository of the sovereign rights and obligations of the nation, and solidarity and cohesion were achieved by the common enjoyment by individuals of the rights and entitlements of citizenship. The idea that language, religion, culture, or other ascriptive associations might be more important to Sri Lankans in articulating their sense of collective identity than are abstract concepts like social contract, citizenship, and civil and political rights was addressed by the Soulbury Commission only through specific constitutional mechanisms designed to prohibit legislative discrimination. Presumably, it was hoped that nation-building and political development would lead to the construction of an inclusive, modern, civic Sri Lankan national identity, and render the pre-modern linguistic, religious, and cultural communalisms redundant. The postcolonial history of mismanaged ethnic pluralism and violent conflict in Ceylon/Sri Lanka immediately demonstrates the glaring inadequacies of this model of statehood.

The correction of the flaws of the Lessons Learnt and Reconciliation Commission requires not

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only a new commission and other mechanisms, but the government must also revisit its post-war policies. The Lessons Learnt and Reconciliation Commission has, to this end, only paved the way to maintain the status quo, namely the continuation of majoritarian hegemony embedded in impunity for past human rights violations. A genuine reconciliation was not achieved with the Lessons Learnt and Reconciliation Commission. It is exemplary for the failure of transitional justice and the prioritization of the victor’s narrative, i.e. the Sinhala-Buddhist majority.

3. Institutional impediments to the development of a human rights infrastructure

The rule of law and the separation of powers are emphasised by the Sri Lankan judiciary. While the former principle aims to ensure consistency, predictability and transparency of governmental decisions, the latter principle separates power between the judiciary, executive and legislative to develop a system of checks and balances. The government must work within a prescribed framework, and all other organs must act within their prescribed framework. This is necessary to democratic governance. Sri Lanka’s current constitution, however, was moved slowly from a democratic form of checks and balances to an increasingly authoritarian state: the country has experienced more years under emergency rule than under democratic governance. The post-independence years, as described above, were characterised by a crisis of democratic values and the lack of credibility for state institutions; from "suicidal fall from prosperity to civil unrest," especially in the years 1956, 1958, 1977 and from 1983 to 2009. Inter-ethnic hostility grew, as the Republican Constitutions of 1972 and

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749 Ibid.
751 Visuvalingam v Livanage (2 SLR 311); Premachandra v Jayawickrema (2 SLR 90).
753 Ibid.
755 Nira Wickramasinghe, supra note 17, p.160.
1978 prepared the ground for Sinhala-Buddhist hegemony and failed to include minorities’ protection. The impetus for the invocation of emergency powers is owed to three historical factors: The first factor was the vibrant trade unions that emerged and grew into a considerable force between the 1940s and 1960s. The second factor was the Janatha Vimukthi Peramuna uprising as discussed in the earlier chapter in 1977. Finally, the civil war against the Liberation Tigers of Tamil Eelam from 1983 onwards.

The authoritarian state was finally established through the 1978 Constitution, which introduced the Executive Presidency. With the Second Republican Constitution, Sri Lanka ushered in the era of managed democracy, with the leading politicians at the helm who sought this control for their political expediency. Crippling the institutions and introducing tailor-made human rights laws became a common trend to please the international community for economic benefits. In the forthcoming sections the Executive Presidency, specific aspects of the state of emergency, and the threats they posed to human rights protection and promotion will be discussed.

3.1. Executive Presidency

The Executive Presidency, as it was depicted and explained throughout this chapter, was introduced with the Second Republican Constitution as a constitutional panacea for the Sri Lankan ills, such as of slow administration and economic underdevelopment. Urmila Phadnis describes that:

[T]he changeover from the Westminster model of a parliamentary system to a de Gaulist type of presidential system was justified on the ground that, for the acceleration of economic development as envisaged by the new regime, a strong and stable government was required.

The accumulation of power in the hands of the presidency is driven by the theory that only

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757 Coomaraswamy et al., supra note 754, p. 274.
this system will enable and facilitate effective governance. With the removal of checks and balances on the executive presidential power, the system has also exposed the office of the president to abuses of power, leading to inadequate oversight and dysfunctional public institutions.\textsuperscript{761} The introduction of the 18\textsuperscript{th} Amendment to the Second Republican Constitution had exacerbated the breakdown of the rule of law and had severely impeded the development of human rights in the country.

Executive Presidency has only served to amass personal power, expand ethnic majoritarianism, isolate minorities and impair human rights development. The 18\textsuperscript{th} Amendment, considered by Asange Welikale as “hyper-presidentialism” to the Sri Lankan Constitution, enacted in 2010, vastly increased the scope of presidential authority. It abolished term limits for the President, who was previously limited to two six-year terms.\textsuperscript{762} This amendment has abolished the democratic amendments, which created the Constitutional Council with under the 17\textsuperscript{th} Amendment. This Amendment was envisaged to work as a check and balance to the Executive Presidency to appoint persons to public posts. The 13\textsuperscript{th} Amendment, which foresaw devolution of power, was also diluted with the introduction of the 18\textsuperscript{th} Amendment.\textsuperscript{763}

Both amendments were made redundant, as the 18\textsuperscript{th} Amendment bestowed upon the President the power to appoint the Chairman and members of the Election Commission, Public Service Commission, National Police Commission, Human Rights Commission, Permanent Commission to Investigate Allegations of Bribery and Corruption, Finance Commission, Delimitation Commission, Chief Justice and Judges of the Supreme Court, the President and Judges of the Court of Appeal, Members of the Judicial Service Commission, Attorney General, Auditor General, Ombudsman and Secretary General of Parliament.\textsuperscript{764} The situation has been


further aggravated with the emergence of a trend of using local cultural elements to perpetuate one single individual’s power in the Sri Lankan political process.\textsuperscript{765}

Rohan Edrisinha writes:

\begin{quote}
[T]he Eighteenth Amendment repealed the Seventeenth Amendment which was introduced to restrict the vast powers of the President in relation to appointments and promote the depoliticisation of important constitutional bodies. President Rajapaksa had consistently sought to undermine the Seventeenth Amendment by non-implementation since his election to his first term in 2005. Also, the Eighteenth Amendment removed the two-term limit on the President. The brazen nature in which a President elected on a mandate to abolish the presidency, removed restraints on the office and increased its powers was one of the lowest points in the constitutional evolution of the country.\textsuperscript{766}
\end{quote}

It was only the introduction of the 19\textsuperscript{th} Amendment to the Second Republican Constitution under the current administration that reversed the autocratic traits of Sri Lankan democracy.\textsuperscript{767} Far from perfect, the 19\textsuperscript{th} Amendment limits a presidential term to two five-year terms, and refused an earlier revision that introduced unlimited six-year terms. Moreover, the president was obliged to consult the prime minister on ministerial appointments. The president’s immunity was curtailed by making him liable to fundamental rights litigation on any official act.\textsuperscript{768} Overall, the figure of Executive Presidency has led to a rise of authoritarianism, and it is evident that only a system based on effective checks and balances can provide for sustainable human rights development.\textsuperscript{769}

3.2. Public Security Ordinance Act 1947

The popular perception is that the Public Security Ordinance Act 1947 is the final act of the British before they left the country, allegedly giving the Sinhala majority a tool of legal suppression by creating and branding the ‘other.’ However, the Public Security Ordinance Act

\begin{footnotes}
\item[765] Ranjith and Somaratna, \textit{supra} note 763, p. 22.
\item[767] Sri Lankan Embassy in the United States, \textit{19\textsuperscript{th} Amendment to the Sri Lankan Constitution}, online at: \texttt{<http://slembassyusa.org/downloads/19th_Amendment_E.pdf>}, last accessed 31\textsuperscript{st} of January 2017.
\item[769] Edrisinha, \textit{supra} note 766, p. 950; Patricia Hyndman, \textit{supra} note 13, pp. 116-117.
\end{footnotes}
was rushed through the State Council and was adopted on 11th of June 1947. Marxist parties in Sri Lanka, represented in the State Council or not, firmly objected the adoption of the Public Security Ordinance Act – it is not with certain irony that it were left-leaning parties that relied heavily on the state of exception to secure their rule. The Marxists and other leftists represented in the State Council, however, regarded the Public Security Ordinance Act as a ‘reactionary’ piece of legislation calculated to crush the left parties and the labour movement. And indeed the Public Security Ordinance Act was a tool to silence the leftist threat. Deepika Udagama writes:

[T]he invocation of the Public Security Ordinance by successive governments was a common feature of political life and, indeed, an integral aspect of the political culture of the republic. Several generations of Sri Lankans have grown up and have been socialised into political and public life in an environment fashioned by states of exception replete with attendant symbols and imagery.

While some regulations did encounter threat to national security, others defused human rights protection. Radhika Coomaraswamy explains that from the government’s standpoint, “[p]ublic services such as food distribution, transportation, and communication services were essential to the nation’s survival and protecting them justified overriding civil liberties through emergency legislation.”

The Public Security Ordinance Act pronounces in Part II, Section 5 as follows:

[W]ithout prejudice to the generality of the powers conferred by the preceding subsection, emergency regulations may, so far as appears to the President to be necessary or expedient for any of the purpose mentioned in that subsection-

(a) authorize and provide for the detention of persons;
(b) authorize-
(i) the taking of possession or control, on behalf of the State, of any property or undertaking;
(ii) the acquisition on behalf of the State of any property other than land;

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772 *Ibid*.
775 Coomaraswamy et al., *supra* note 759, p. 289.
(c) authorize the entering and search of any premises;
(d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;
(e) provide for charging, in respect of the grant or issue of any license, permit, certificate or other document for the purposes of the regulations, such fee as may be prescribed by or under the regulations\textsuperscript{777}

The Public Security Ordinance Act introduced several generations in Sri Lanka to the normalcy of the state of exception\textsuperscript{778} and eventually paved the way for the Prevention of Terrorism Act 1979 which is discussed in the next section.\textsuperscript{779}

3.3. Prevention of Terrorism Act 1979

The Prevention of Terrorism Act No. 48 from 1979 provided special anti-terrorism powers to the government. With the introduction of the parliamentary system in 1978, certain fundamental rights became prey to the “interests of national security”: these rights included freedom of association, assembly, movement, expression et al. Emergency regulations, in consequence, became powerful tools of Sri Lankan presidents to impose executive will and to narrow democratic checks and balance. The Prevention of Terrorism Act was the legal basis to counter the terrorist threat in the country.\textsuperscript{780} The wide powers bestowed upon the executive had a limited oversight framework of conventional emergency powers. The anti-terrorism legislation envisaged the absence of procedural safeguards of declaration, notification, and periodic approval and oversight.\textsuperscript{781} Originally, the Prevention of Terrorism Act was enacted in 1979 as a temporary legal measure, a tool in the wider government’s political and military strategy to deal with the aggravating hostilities in the northern part of the island.\textsuperscript{782} The Prevention of Terrorism Act contains a three-paragraph preamble that outlines the underlying government policy, namely:

\begin{quote}
[p]ublic order in Sri Lanka continues to be endangered by elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka, and who have resorted to acts of murder and threats of murder of members of Parliament
\end{quote}

\textsuperscript{777} Public Security Ordinance Act from the 16\textsuperscript{th} of June 1947, online at: \texttt{http://www.refworld.org/pdfid/471712342.pdf}, last accessed 2\textsuperscript{nd} of July 2016.
\textsuperscript{778} Deepika Udagama, \textit{supra} note 771, p. 286.
\textsuperscript{779} Jayawardene, \textit{supra} 291, p. 16.
\textsuperscript{780} Welikale, \textit{supra} note 75, p. 188.
\textsuperscript{781} \textit{Ibid} p. 188.
\textsuperscript{782} \textit{Ibid} p. 188.
and of local authorities, police officers, and witnesses to such acts and other law abiding
and innocent citizens, as well as the commission of other acts of terrorism such as
armed robbery, damage to State property and other acts involving actual or threatened
coercion, intimidation and violence; 783

This law took inspirations from South Africa’s apartheid-era legislation and British anti-terror
laws in the face of Irish militancy, and became a permanent law in 1982.784 The unchecked
detention powers, special trial procedures and absence of meaningful review in the Preven-
tion of Terrorism Act facilitate arbitrary and capricious official conduct, including torture. The
Prevention of Terrorism Act severely hindered the enjoyment of fundamental rights of Sri
Lankans, while restricting human security, most notably by limiting the freedom from arbitrary
arrest, detention and torture.785 Detention and torture are weapons against vulnerable
communities and have facilitated a culture of disrespect within the police, armed forces and
even the judiciary for the security of individuals and individual liberty.786

Finally, the legal framework on which they are based undermines democracy, strengthened
the executive while severely limiting the scope and efficacy of judicial remedies. The Preven-
tion of Terrorism Act restricted freedom of speech as it impeded the role of the press in the
country and shut down the role of dissenting voices.787 In the end, the Prevention of Terrorism
Act has further eroded human rights and entrenched impunity in the country.788 For instance,
the Prevention of Terrorism Act contains immunity provisions like those found in the Public
Security Ordinance Act, namely section 26:

[N]o suit, prosecution or other proceeding, civil or criminal, shall lie against any officer
or person for any act or thing in good faith done or purported to be done in pursu-
ance or supposed pursuance of any order made or direction given under this Act.789

The temporary measure became a fixed point in Sri Lanka’s legal landscape, providing the

783 Prevention of Terrorism Act 1979, online at: <https://www.icrc.org/ihl-
nat.nsf/a24d1cf334ae99934125673ee00508142/8a597180e56d83eec125773700393abb/$FILE/Preven-
tion%20of%20Terrorism%20Act.pdf>, last accessed 7th of July 2016.
784 The Hindu, ‘Draft of new counter-terror law triggers old fears in Sri Lanka’, online at: <http://www.the-
cle9272404.ece>, last accessed 31st of January 2017.
785 Niran Anketell and Gehen Gunatilleke, ‘Emergency Regulation in the Context of Terrorism,’ South Asia for
786 Ibid.
787 Ibid.
788 Ibid.
789 Prevention of Terrorism Act, supra note 783.
ground for impunity and violence in Sri Lanka. The Prevention of Terrorism Act had severe consequences for the creation of freedoms and their protection: however, currently a new law is in discussion to replace the old Prevention of Terrorism Act.\textsuperscript{790} Giorgio Agamben explains that the state of exception is creating an imbalance between public law and political fact. He writes:

\begin{quote}
[I]n this sense, modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system.\textsuperscript{791}
\end{quote}

In the current post-war environment, the government is intending to abolish the anti-terrorism framework – only by replacing it with another one: in a co-sponsored resolution\textsuperscript{792} before the United Nations Human Rights Council, the Sri Lankan government, however, pledged to review anti-terrorism laws. Prominent human rights activists like Ruki Fernando (himself once arrested under the Act) voiced concerned over the new anti-terrorism law:

\begin{quote}
[L]ike the PTA, it can serve as a licence for enforced disappearances and torture, taking away life-saving protections when it is most needed — within the first few hours and days of a person being arrested.\textsuperscript{793}
\end{quote}

The envisaged new anti-terrorism legislation impeded access to legal counsel and allowed for the admissibility of confessions potentially obtained through torture.\textsuperscript{794} Furthermore, the draft legislation opens a vast and unclear area of offences, covering over eight pages under Section III (Offences).\textsuperscript{795} In particular, clause XVIII of section III severely restricts freedom of speech and would thwart the societal exchange of opinions\textsuperscript{796} by invoking the “[t]he threat to unity, security and sovereignty”\textsuperscript{797} of the country. Also, this draft legislation contradicts the


\textsuperscript{792} United Nations Human Rights Council, A/HRC/RES/30/1, p. 5.

\textsuperscript{793} The Hindu, supra note 784.


\textsuperscript{795} ibid pp. 3-11.


\textsuperscript{797} Policy and Legal Framework of the proposed Counter Terrorism Act in Sri Lanka, supra note 794, pp. 3-11.
above mentioned Freedom of Information Act.\textsuperscript{798} It must be noted that actors within the current government have a vested interest to introduce repressive legislation, while this contravenes international human rights commitments.\textsuperscript{799}

4. Concluding comments

Developing countries like Sri Lanka enacted legislation that defined the scope of rights, provided for increased powers of governmental authorities, and determined the procedures for redress to their citizens.\textsuperscript{800} Bertram Bastiampillai correctly notes:

[n]ational authorities that translate international obligations into domestic rules of conduct, may tailor these obligations so as to adapt them to the needs of national sovereignty. Nevertheless, it is the citizens of the state, whether it be in Sri Lanka or elsewhere, who are the beneficiaries of the salutary restraint engineered by international rules. Therefore, it is usually in their interest to ensure that national states conform to international norms. A monitoring system which can be activated by those affected by breaches of human rights can indeed be effective in fostering the welfare of citizens.\textsuperscript{801}

The Sri Lankan human rights legislation, as illustrated in this section, was driven by internal political manoeuvres and external economic incentives, as was exemplified by the Prevention of Social Disabilities Act and the International Covenant on Civil and Political Rights Act. Those above four human rights laws were selected to display a common motivation by Sri Lankan lawmakers. This motivation is to appease the international community and obtain their short-term approval by enacting human rights laws, although the laws were insufficient to grant comprehensive human rights protection and failed to meet the international human rights standards. The haphazard manner of incorporation of international human rights law into domestic law is an unhealthy precedent for effective incorporation of international human rights law.\textsuperscript{802} One commentator notes that the eventual implementation of the Information Act was driven by economic considerations, while Deepika Udagama points out that the swift

\textsuperscript{799} Gunatellike, supra note 796.
\textsuperscript{801} \textit{Ibid}.
\textsuperscript{802} Udagama, supra note 4, p. 125.
adoption of the International Covenant on Civil and Political Rights Act and the positive Advisory Opinion delivered by the Supreme Court were induced by economic pressure.\textsuperscript{803} For this purpose, she points to a comment by the former Chief Justice Sarath N. Silva who admitted that it was economic rather than doctrinal considerations that led to the positive opinion.\textsuperscript{804} Beneficiaries of the adoption of international human rights norms and increased engagement were local human rights activists that challenged and forced state authorities to implement human rights norms in the domestic infrastructure.

The Domestic Violence Act and the Information Act are, despite their flaws, paradigmatic for the enduring human rights advocacy in Sri Lanka. Influenced by global campaigns and international human rights engagement, the Acts were eventually implemented in light of domestic pressure and expanded the support space for human rights defenders.\textsuperscript{805} This chapter has illustrated that the ethno-religious Sinhala majoritarianism perpetuated in the First and then reiterated in the Second Republican Constitution “[h]as been the bane of Sri Lanka and (…) the basis for a nearly three decades long Civil War.”\textsuperscript{806} As one commentator notes, the two constitutions suffered from the following flaws:

1. They were designed to promote the political vision and ideology of the party in power;
2. They entrenched rather than countered majoritarianism; and
3. They were designed with the convenience of the executive, rather than the empowerment of the People as their primary motivation or rationale.\textsuperscript{807}

Also, while the state of exception is supposedly the temporary exception to the norm of any constitutional government, it became the daily norm in the Sri Lankan example, as the draconian measures only worsened the climate of violence and dismantled the sociopolitical framework of a democratic society.\textsuperscript{808} It was rather a method to retain power of the executive and

\begin{itemize}
\item \textsuperscript{803} Muttukrishna Sarvananthan, ‘The Right To Information Act & Its Discontents’, online at: <https://www.columbotelegraph.com/index.php/the-right-to-information-act-its-discontents/>, last accessed 1\textsuperscript{st} of July 2017.
\item \textsuperscript{804} Sarath N. Silva, ‘Why the Arrest and Detention of General Fonseka are Contrary to Law and Justice’, The Sunday Times, 14\textsuperscript{th} of March 2010.
\item \textsuperscript{805} Uduguma, supra note 4, p.127.
\item \textsuperscript{807} Rohan Edirisinhe, ‘The need for a new constitution for Sri Lanka’, online at: <http://groundviews.org/2016/01/08/the-need-for-a-new-constitution-for-sri-lanka/>, last accessed 31\textsuperscript{st} of January 2017.
\item \textsuperscript{808} Coomaraswamy et al., supra note 796, p. 295.
\end{itemize}
close the ambit of wider control. It is true that public emergency must be declared if the life of the state is at stake. However, it is questionable whether there was a constant threat to the life of the Sri Lankan nation or if the invocation of public emergency was rather a means to facilitate the rule of governments. Sriskanda Rajah holds the view that:

[However, for postcolonial Ceylon, from 1958 the PSO became an indispensible weapon in its efforts to transform from a democracy into an ethnocracy. As far as the state was concerned, the PSO was a double-edged sword. On the one hand, the legislation gave cover for the state to use draconian powers against sections of the Sinhala Buddhists who challenged its authority when it sought to bring an end to the state of ‘lawlessness’ that it had encouraged. On the other hand, it gave the state the legitimacy to use the same draconian powers to counter Tamil resistance to the discriminatory policies being implemented against them.]

It is in this context that courts and other institutions became vulnerable, as the executive gradually increased its own powers while weakening the power of independent institutions and contributed to the decline of human rights. Both post-colonial constitutions abandoned the colonial vestige of the country, but they failed to be a social contract with its citizens. Instead, the constitutions were the *sine qua non* for the effective use and exploitation of institutions in the furtherance of a particular ideology, whereas emergency powers were invoked to entrench executive power. The Sri Lankan experience, as illustrated above, has shown that courts have at times either unwilling or unable to afford human rights protection to citizens. The conduct of the judiciary’s work was also conditioned by the severe limitations imposed upon them, rendering them ineffective to protect Sri Lankan citizens from human rights violations. Post-war governance, in general, has significantly contributed to the swift erosion of independent institutions. The introduction of the 18th Amendment to the Constitution, as outlined earlier, was the impressive demonstration of enforced institutional conformity and unleashed a “pseudo democracy”, characterised by “[n]epotism, corruption, sabotaged political and bureaucratic institutions, weak rule of law, and a culture of impunity among the elites.”

DeVotta notes that Sri Lanka moved from a commendable democracy

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809 Bastiaampillai, supra note 335, p. 19.
810 Sriskanda Rajah, supra note 158, p. 36.
811 Hyndman, supra note 13, pp.116-134.
812 Bastiaampillai, supra note 800, p. 19.
813 *Ibid*.
814 Udagama, supra note 4, p. 146.
to an illiberal democracy, a so-called soft authoritarian state to an extreme example when ethnocentrism undermines liberal democracy. Trying to alter this situation is counterproductive and may only harm the minorities' position on the island.

Along with the First Republican Constitution and its severe lack of power control mechanisms, Sri Lanka ushered in institutions that delegitimised values, discredited policy-making and impeded the progressive development of integrity in a liberal democracy. In hindsight, the "divorce" between the Executive and the Legislative in the Second Republican Constitution was a pivotal moment in the democratic development of the country, just as Sri Lanka entered an era of impunity. The parliament as a forum for accountability was dismantled, while the rule of law and independent institutions suffered from constant decay, most pivotally with the destructive 18th Amendment to the current Constitution. Although the Second Republican Constitution of Sri Lanka did advance the protection of human rights, it failed to provide comprehensive and meaningful protection. Sri Lanka is “[a] complex web of overlapping identities, with multiple religious and language groups.” The country’s human rights infrastructure is, as outlined above, in a frail condition and cannot provide sufficient protection to a heterogeneous country. Edrinsinhe and Welikale write:

[I]t is clear therefore that the bill of rights in the Constitution of 1978 (...) fails 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.

It is in this environment that international support is required to enhance own institutions and develop the human rights infrastructure. To this end, the presence of domestic institutions is an alibi to fend off international intervention into Sri Lankan human rights violations. The maintenance of these institutions is therefore tolerated and required as long as

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816 Ibid p. 84.
817 Ibid p. 84.
819 Sruthisagar Yamunan, ‘Will Sri Lanka’s new constitution retain the mistakes that led to 25 years of civil war?’, online at: <http://scroll.in/article/820709/will-sri-lankas-new-constitution-retain-the-mistakes-that-led-to-25-years-of-civil-war>, last accessed 31st of January 2017.
820 Edrinsinhe and Welikale, supra note 597, p. 140.
these institutions do not dispute executive power.\textsuperscript{822} Insofar as the country’s institutions favour one particular ethnic group, and are incapable of, or unwilling to, genuinely address the grievances of all ethnic groups, then multi-ethnic coexistence is not attainable.\textsuperscript{823} Instead, Neil DeVotta presents correctly:

\begin{quote}
[I]nstitutional scholars argue that institutions can significantly influence actors' strategies and their policy preferences, and it is clear that Sri Lanka's institutions framed elites' preferences and influenced the policies they championed. Thus while Sri Lanka's elites operated instrumentally, there is no denying that their interactions with various groups as well as the opportunities and constraints the island's institutional structure facilitated influenced their decisions. The fact remains that despite being cognisant communalism could unleash intolerance and conflict, the elites cavalierly promoted rules, routines and conventions that created an ethnocracy over time.\textsuperscript{824}
\end{quote}

The Sri Lankan Supreme Court has long neglected an activist approach to the protection of human rights stands. It is a warning to those who view a Bill of Rights as a panacea for the ills of society. Encapsulating the necessity to establish a national awareness for human rights and domestic solution to rectify the poor status of human rights in Sri Lanka, the prominent Sri Lankan human rights lawyer Kishali Pinto Jayawardena writes:

\begin{quote}
[W]hat we need right now perhaps, is less attention paid to the idea of a United Nations monitoring mechanism in Sri Lanka in which there is little or no public faith and more attention devoted to rebuilding the courage and energy of Sri Lankans themselves to correct their abysmally weak national institutions.\textsuperscript{825}
\end{quote}

The domestication of international human rights cannot be successful unless there is a coherent national process underpinned by strong and democratic institutions with a cabinet system of government at the top to facilitate this process. International human rights law can serve as an instrument to induce such changes. To this end, the next chapter will focus on the human rights treaty body system, as one part of the international human rights monitoring system, and its engagement with the Sri Lankan government and its human rights infrastructure.

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\textsuperscript{822} Skanthakumar, supra note 667, p. 162; Bhavani Fonseka, ‘The Office on Missing Persons: A New Chapter or Another Empty Promise?’, online at: <http://groundviews.org/2016/08/18/the-office-on-missing-persons-a-new-chapter-or-another-empty.promise/>; last accessed 16th of November 2016. \\
\textsuperscript{823} DeVotta, supra note 218, p.146. \\
\textsuperscript{824} Ibid. \\
\end{flushright}
IV. The United Nations treaty-based bodies and their engagement with Sri Lanka

This chapter examines the impact of the engagement by the United Nations human rights treaty bodies with Sri Lanka. It can be argued that Sri Lanka's willingness to abide by international human rights standards is reflected in the ratification of eleven human rights treaties, acceptance of two individual complaints procedures and two inquiry procedures. While ratifications show a particular commitment by states' parties to treaties, effective internalisation and domestication necessitate treaty compliance. Did Sri Lanka comply with these human rights treaties? Did international examination alter the country's behaviour and translate into reforms in the Sri Lankan human rights infrastructure? Are there any behavioural patterns that can be explained through the historical and political paradigms outlined earlier and that have impeded the standardization of domestic human rights laws according to international standards? This chapter seeks to address these questions.

The chapter will discuss Sri Lanka's engagement with three specific treaty bodies, namely the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture. The selection of these three treaty bodies is not of an arbitrary nature. Three driving motivations have guided the selection. First, the selected treaty bodies have produced a wealth of concluding observations concerning Sri Lanka, underpinned by a myriad of non-governmental reports. The wealth of documents presents a welcome opportunity to elucidate the engagement exhaustively through different paradigms. Second, two of these bodies, namely the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, have maintained the longest engagement with the country, stretching over three decades. This human rights dialogue provides an important occasion to consider the long-term effects of human rights engagement on the ground. Finally, Sri Lanka has frequently submitted reports to, and appeared before these three treaty bodies. It is, therefore, a valuable chance to consider if there has been a change of political behaviour, rhetoric, and argumentation before the selected treaty bodies in the past decades of interaction.

Office of the High Commissioner for Human Rights, supra note 69.
1. The role of the United Nations human rights treaty bodies

In the following section, the development of human rights law at the United Nations, how it was implemented by policy makers and what the United Nations envisages to achieve are discussed. When the United Nations was created more than 60 years ago, it dedicated its purpose to learn from the two world wars and better protect human rights and recognise individual human dignity. The founding document of the United Nations, the Charter, sought to find an appropriate balance between state sovereignty on the one hand and the rights of the individual on the other.

With the adoption of the Universal Declaration of Human Rights in 1948, the international community undertook one of the greatest endeavors for the constant, but steady dissemination, promotion, and protection of human rights. This Declaration inspired the drafters of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, influenced numerous other human rights treaties, impacted international jurisprudence and shaped national constitutions.

Many of the rights in the Universal Declaration of Human Rights reflect customary international law. Taken together, the Universal Declaration of Human Rights and the two aforementioned Covenants, form the International Bill of Human Rights. With these documents, the international community gradually accepted that states must pursue positive common standards for a higher goal. Until the end of the Second World War, there was (except for the mechanisms established under the auspices of the International Labour Organisation)

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828 Ibid.
831 Defeis, supra note 829, p.265.
no other international mechanism to inhibit a sovereign state's action within its own territory.\textsuperscript{834} International law's first approach to the establishment of the United Nations was that the individual was solely an object of international law, with few rights (like labour rights) or responsibilities as it is established today.\textsuperscript{835} The heinous crimes perpetrated during the Second World War were a stimulant for the developments in the evolution of human rights.\textsuperscript{836} Human rights had received much attention in the drafting process of the United Nations Charter, as it specifies in Art. 1.3:

\[\text{To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion}^{837}\]

And even before, in the preamble of the Charter it is expounded:

\[\text{To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.}^{838}\]

The drafting of this specific Charter of Rights, the Universal Declaration of Human Rights, was delegated to a specific committee, the Commission on Human Rights under the leadership of Eleanor Roosevelt.\textsuperscript{839} In the following decades, the Universal Declaration of Human Rights became the founding text of global reach, an affirmation to the goals of the world community and its ideals were reinforced in the subsequent human rights treaties.\textsuperscript{840} At the adoption of the Universal Declaration of Human Rights Eleanor Roosevelt affirmed:

\[\text{We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.}^{841}\]


\textsuperscript{835} Defeis, supra note 829, p.261; Charnovitz, supra note 833, p. 149.

\textsuperscript{836} Defeis, supra note 829, p.261.


\textsuperscript{841} Eleanor Roosevelt, On the Adoption of the Universal Declaration of Human Rights, 9\textsuperscript{th} of December 1948, online at: <http://www.americanrhetoric.com/speeches/eleanorrooseveltdclarationhumanrights.htm>, last accessed 2\textsuperscript{nd} of February 2017.
Instruments such as the Universal Declaration for Human Rights, however, cannot provide sufficient legal protection and enforcement within a state, as the dissemination of human rights requires more than adopting declarations or ratifying treaties. But the Universal Declaration of Human Rights is a rallying point and moral yardstick for human rights. The United Nations has been pursuing the idea that societies must be governed on the basis of respect for human rights, amidst the backlash that the organisation has faced.

Considering the historical environment into which the United Nations was born, the founding conference in San Francisco asserted that the ill-treatment of human beings cannot be justified on the basis of state sovereignty. Differing and diverse perspectives penetrated the discussion about human rights evolution and application in an inclusive format at the United Nations. The discussion on popular demands, the claims to human dignity and the authoritative source of protection lies at the heart of the United Nations and makes it the only organisation of an universal nature that can set norms of behaviour and standards that are globally agreed upon. Global norms can provide order in a chaotic environment and in the absence of clear standards. Stephen Krasner describes norms as standards of behaviour defined regarding rights and obligations. On this subject, treaty norms are instrumental in creating universally accepted standards and, in this regard, the United Nations’ effort goes beyond the creation of treaty norms. It encompasses mechanisms and methods to influence behaviour of states, facilitate interaction, regulate relations, and monitor implementation of

843 Defeis, supra note 4, pp. 264, 266.
845 Norchi, supra note 832, p. 79; Moreover, the Atlantic Charter of August 14\textsuperscript{th} of 1941, which provided the ideological basis for the developments in San Francisco enunciated: “[S]ixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want; (...) “ online at: <http://avalon.law.yale.edu/wwii/atlantic.asp>, last accessed 11\textsuperscript{th} of April 2017.
846 Norchi, supra note 832, p. 79.
848 Ibid Sills.
universal standards. Thomas Franck asserts:

[T]reaties are the bone and sinew of the global body politic, making it possible for states to move from talk through compromise to solemn commitment. They are also moral fiber, the evidence that governments and people have pledged their ‘full faith and credit’ to one another.

Thus, against this background, the human rights treaty bodies’ role and importance need to be located in the Sri Lankan context. While every member of the United Nations is a party to at least one of the international human rights treaties, it was expected that the end of the Cold War would usher in an era of comprehensive protection of human rights. But the reality is that the protection and promotion of human rights are neglected by member states of the United Nations and States Parties to the international human rights treaties. Regional human rights protection is, moreover, not wide and detailed enough in its range, especially regarding Asia where it is still embryonic. Human rights monitoring has a long history, dating back to the beginning of the International Labour Organisation, as reporting procedures were modelled after art. 22 of the Constitution of the International Labour Organisation. Art. 22 of this Constitution sets out:

[E]ach of the members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

The United Nations Economic, Social, and Cultural Council requested states to submit reports every year with the purpose of measuring their compliance with human rights standards. Implementation of international human rights treaty provisions is among the aims of international human rights monitoring. Increased human rights monitoring leads to a clearer and thorough assessment of the human rights situation of a country in question. It considers the

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850 Sills, supra note 847, p. 48.
states’ words and actions while putting it in the larger context of human rights incorporation. The plausibility to affect the behaviour, responsiveness and motivation of states appropriating an international norm are determined by two circumstances: namely, the domestic salience of the norm and the structural context. Previous scholarship identifies two other processes for the acculturation of international norms: first, rules can infuse beliefs and values of domestic actors and, second, the international regime permeates internal processes of governing.

Thomas Risse, Stephen Ropp and Kathryn Sikkink draw out three phases of socialisation. The first is adaption and strategic planning. The second is moral consciousness-raising, argumentation and strategic bargaining. The third phase is institutionalisation and habitualization. The framework operates through a five-phase spiral model. These phases are:

1. Repression and activation
2. Denial by oppressing state
3. Tactical concessions by the oppressor
4. Prescriptive status, including the signing of treaties
5. Rule-consistent behaviour

Christopher Marsh and Daniel Payne assert that this model not only explains the respect for human rights worldwide but also provides clarification for human rights violations. Nearly every country in the world can be placed into one of these phases. But Christopher Marsh and Daniel Payne also point out to certain flaws of this model. They argue that the model is teleological, far too linear and that:

While we may be able to place all countries in the world into one of these phases, the fact is that most of the states in phase five did not get there by progressing through the earlier stages. Many countries have reached phase five through human rights movements from primarily domestic sources, which evolved over centuries. Thus, even if governments around the world engage in behavior that would place them in phase four, it is not a foregone conclusion that they will make the final quantum leap.

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858 Ibid p. 453.
861 Marsh and Payne, supra note 842, p. 668.
862 Ibid.
to phase five.\textsuperscript{863}

Despite this flaw, the model is an interpretative source for the explanation of governmental behaviour in the age of globalisation, its rules and standards, especially of those governments that do not respect human rights.\textsuperscript{864} It is acknowledged that the processes of highlighting, promoting and discussing human rights induce governments to adhere to them.\textsuperscript{865} Apart from the discussion about governments altering their legal codes based upon international commitments, Risse, Ropp and Sikkink’s work is valuable because it stresses the importance of domestic actors in this process as well. These actors are crucial, in their eyes, to change society’s attitude towards human rights and to progress the culture of human rights in any domestic infrastructure.\textsuperscript{866}

Christopher Marsh and Daniel Payne accurately sum up:

\begin{quote}
[A]lthough these agreements are significant because they allow for a nation-state to formally accept human rights as the norm, and for the citizenry to socialize the norm, the true globalization of human rights is a proliferation of the idea that human rights exist, that governments must not infringe upon the rights of their citizens, and that governments must protect these rights from other members of society. When a society accepts these norms, human rights penetrate beyond the society’s legal code and embed themselves into its culture. It is our contention that this is the only way human rights will ever be truly guaranteed. This socialization of norms has profound implications for the promotion of human rights around the world.\textsuperscript{867}
\end{quote}

While the origins of human rights ideology are an offspring of Western movements, the dissemination, globalisation and approval of human rights follow only through the force of the international community.\textsuperscript{868} Human rights treaty bodies are essential for the interpretation of treaties, clarification of the normative content, shed light on unclear passages of the treaties et al.\textsuperscript{869} To this end, the Office of the High Commissioner for Human Rights echoed: “[T]he human rights treaties form the heart of the international system for promoting and protecting

\begin{thebibliography}{99}
\bibitem{863} Ibid.
\bibitem{864} Ibid.
\bibitem{865} Ibid p. 669.
\bibitem{867} Marsh and Payne, \textit{supra} note 842, p. 666.
\bibitem{868} Ibid p. 665.
\end{thebibliography}
human rights.” Michael O’Flaherty and Claire O’Brien assert that “[W]hilst initially not expected to perform an evaluative function, the treaty bodies now contribute significantly to the promotion of States Parties’ compliance with treaty obligations.” Human rights bodies are at the centre of the international human rights system, yet these bodies are generally not empowered to establish facts or issue legally binding decisions – this nature is characteristic of the forms of knowledge established by the bodies. William Schabas illustrates the ambivalent and illogical nature of international human rights law: how can rights be rights if they cannot be enforced?

This very notion of international human rights law percolates into domestic infrastructures. William Schabas also reminds us that the reluctance to include a set of fundamental rights in the Charter of the United Nations was driven by the reluctance to create specific obligations for states, hence ushering in Art. 1.3 and the preamble. Kofi Annan suggested that the treaty bodies need to work with more efficiency in light of the growing complexity of the United Nations human rights treaties with their burdening reporting duties for states. In addition to this, Kofi Annan pointed out to the poor compliance to the recommendations in the respective systems. The outgoing Secretary General of the United Nations, Ban-Ki Moon, added that treaty bodies have already made a significant contribution to the protection and promotion of human rights, but also he underscored the need for efficiency and appropriate funding.

William Schabas refers to the intellectual and legal weight of instruments and documents that are produced by treaty bodies: pertinent are communications and general comments with authoritative weight attached to them.

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873 Schabas, supra note 830, p. 98.
874 Ibid p. 98.
876 Ibid.
878 Schabas, supra note 830, p. 105.
treaty, a State Party accepts the international obligation not only to abide by its provisions but also to pursue domestic implementation. For implementation and human rights acculturation in the domestic setting, each treaty body requires periodic reporting. It also utilizes the knowledge and input from civil society and other sources to complement the reporting process. The treaty bodies are not supplementary bodies, but are independent and have the sole responsibility of supervising State Parties’ human rights obligations under the respective treaty.879 Each treaty body has different review procedures for periodic reports, but all of them share certain common traits that will be reproduced in the following section. With the submission of a periodic report, the State Party submits its human rights record under the specific treaty, open to the scrutiny of the treaty body entrusted with monitoring its compliance. A committee member is assigned as country rapporteur supported by a small task force, helping this rapporteur in drafting the list of issues that are of common nature and importance to the treaty body with regards to the country under scrutiny.880

This list of issues is communicated to the state delegation, which is invited to provide a written submission of answers. This marks the beginning of formal discussions between the treaty body and the state delegation.881 In this formal dialogue, the state delegation presents its periodic report, answers the list of issues raised by the country rapporteur and his/her task force, while highlighting the respective country’s human rights performance.882 In the following, the committee members intervene, ask questions and comment on the report and the delegation’s replies to the list of questions. The delegation may request time to reflect upon questions and ask for the submission of responses in written form within a deadline set by the treaty body. The exchange of oral and written communications is finalised with the concluding observations that entail positive facets and highlight issues of concern. Within the concluding observations, the treaty body also incorporates recommendations for the furtherance of human rights protection in the domestic setting and determines the date for the next...

881 Ibid.
882 Ibid.
submission of the periodic state report. Andrew Byrnes comments:

[T]he examination of a state’s report under a treaty can provide an occasion for exerting international pressure on the state. If members of a supervisory body are strongly critical of a state or express the view that the state has not carried out its obligations under the treaty, this can serve to put some pressure on a government, particularly if the proceedings receive publicity internationally or nationally. However, States Parties to the different treaties seek the least pressure exerted by the treaty bodies and will often avoid such public “[n]aming and shaming.” The human rights treaty body points to the insufficient implementation of human rights provisions of respective states under examination, shaming these states into compliance by exposure. Thomas Risse, Stephen Ropp, and Kathryn Sikkink suggest that those countries most vulnerable to pressure are not the materially impoverished, but those countries concerned about the international reputation. The compliance with a broader normative framework at the international level is instrumental to fill the gaps in the national framework. While monitoring is central to the United Nations human rights treaty system, “[t]he specific nature of the monitoring process has often been taken for granted and its content seen as self-evident in the wider debates over enforceability and political reform.”

However, scholars contend that human rights treaties are inefficient and hinder the achievement of human rights goals, namely the promotion and protection of human rights: scholarship points out to the adverse effects of treaty membership, namely that human rights violations increased after the ratification, calling this phenomenon “[r]adical decoupling.” Felice Gaer, the current vice-chairwoman on the Committee Against Torture, acknowledges to this end that treaty bodies of the United Nations cannot enforce obligations in the Conventions

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883 Ibid.
885 Bassiouni, supra note 23, p. 3.
888 Udagama supra note 4, p. 105.
889 Kelly, supra note 872, p. 778.
they monitor.\textsuperscript{891} She argues that follow-up mechanisms of treaty bodies about the State Parties’ reports must be enhanced and sophisticated. But this enhanced mechanism should not be limited to monitoring and reporting, but extended to on-site verification of compliance, Felice Gaer suggests.\textsuperscript{892} Oona Hathaway contends that treaty membership is associated with a negative human rights record and, probably far worse, increases human rights violations.\textsuperscript{893} She also argues that there is not even one treaty among the international human rights documents that has reliably led to better human rights practices in a country.\textsuperscript{894} Ryan Goodman and Derek Jinks take the view that Oona Hathaway does not pay sufficient attention to the conditions under which human rights norms are incorporated into practice.\textsuperscript{895} Beth Simmons also challenges Ooana Hathaway’s findings, as she examines middle range countries and draws attention to the potential and actual benefits of treaty ratification on those countries that are neither stable autocracies nor stable democracies.\textsuperscript{896}

On the other hand, Christof Heyns and Frans Viljoen present a study on twenty different countries that scrutinises the impact of human rights treaties on the domestic level. They pointed out that treaty ratification was merely a sham exercise, while it was difficult to trace the link between treaty ratification and direct result in the domestic human rights infrastructure.\textsuperscript{897} The authors point out that the most decisive outcome from treaty ratification, however, comes from the ad hoc incorporation of international standards that are contributed to certain human rights instrumentalities rather than reporting, complaints et al. before the treaty bodies.\textsuperscript{898} The current mechanisms designed for the implementation of human rights reveal weaknesses, exploited by many state actors.\textsuperscript{899} A significant gap remains between standards of implementation and reality. Anne Bayefsky identifies certain flaws about the treaty body system:

\textsuperscript{892} \textit{Ibid} p. 108.
\textsuperscript{894} \textit{Ibid}.
\textsuperscript{895} Goodman and Jinks, \textit{supra} note 856, p. 172.
\textsuperscript{896} \textit{See also}: Beth Simmons, \textit{Mobilizing for Human Rights: International Law in Domestic Politics}, (Cambridge: Cambridge University Press, 2009).
\textsuperscript{897} \textit{See also}: Christof Heyns and Frans Viljoen (eds.): \textit{The impact of United Nations human rights treaties on the domestic level}, (Leiden: Brill Publishers, 2002).
\textsuperscript{898} \textit{Ibid}.
\textsuperscript{899} Bayefsky, \textit{supra} note 827, p. xviii.
1. Overdue state reports
2. Severely limited dialogue on human rights record
3. Poor attendance of treaty body meetings
4. Availability and reliability of timely information
5. Individual complaint procedures are not widespread
6. Inefficient follow-up procedures
7. Concluding observations lack the specificity regarding
8. Tedious and complicated procedures of the treaty bodies
9. States noncompliance under Optional Protocol to the International Covenant on Civil and Political Rights
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Moreover, international human rights law can only be incorporated in the domestic process when the state concerned is supportive and cooperative. Certain countries take a more fundamental approach regarding the internalisation of international law by codifying the international rules and norms in their domestic setting. The monist and the dualist approach to incorporate international law need to be distinguished. The late Ian Brownlie suggested that the dualist doctrine underscores the fundamental difference between international and municipal law.901 Furthermore, both regimes exist separately and do not overrule and do not interfere each other. The monist approach, however, places both orders in one hierarchical pyramid with an interaction and the possibility of norm conflict.902

By way of example: the German Constitution (Grundgesetz), which prescribes in Art. 24. 1 and Art. 25 that the Federal Republic of Germany can confer sovereign rights to intergovernmental organisations and general international law becomes part of the federal law while generating immediate rights and duties for all people on German soil.903 This is a conducive environment for international human rights law to unfold and transpire. This process may not affect the concerned state’s practice in every instance. Rather, there are variations to the domestic impact of international rules.904 The growing trend of treaty ratifications presents

900 Ibid xviii and xix.
903 German Basic Law, Art. 24 (1) and Art.25.
904 Cortell and Davis, supra note 857, p. 455.
a significant challenge to the part-time committee members, as well as the heterogeneity of human rights treaty bodies, and the lack of integrated operations.\textsuperscript{905} Also, delays in reporting, the evident failure to report at all is a common characteristic of the treaty body system and point to the absence of political will.\textsuperscript{906} As some scholars criticise the limited effect of international treaties in the domestic setting, another view postulates that treaties have no effect on states with insecure leaders.\textsuperscript{907} To this end, the thesis will discuss in the following sections the lasting impact of human rights treaty reporting to the treaty bodies in light of the flaws above of the treaty bodies.

2. Sri Lanka’s human rights treaties ratification and implementation record

With a letter dated 25\textsuperscript{th} of May 1948 the first Prime Minister of Sri Lanka, Dudley S. Senanayake, requested admission to the United Nations. Dudley S. Senanayake affirmed the country’s will to accept the obligations laid out in the United Nations Charter and considered the country to be "[p]repared to demonstrate the ability and willingness (...) to carry out these obligations."\textsuperscript{908} Reflecting this willingness, Sri Lanka, as mentioned earlier, ratified eleven human rights treaties accepted two individual complaints procedures and two inquiry procedures.\textsuperscript{909} Ratification is as the United Nations defines:

\begin{quote}
[a]n international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act and (...) grants the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.\textsuperscript{910}
\end{quote}

This presents an excellent ratification record on the international plane.\textsuperscript{911} Notably, Sri Lanka has not entered any reservation to any of the treaties it ratified,\textsuperscript{912} only submitting six respective declarations to the International Convention on the Protection of the Rights of All Migrant
Workers and Members of Their Families\textsuperscript{913}, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict\textsuperscript{914}, the International Convention for the Protection of all Persons from Enforced Disappearance\textsuperscript{915}, the International Covenant on Civil and Political Rights\textsuperscript{916}, the Optional Protocol to the International Covenant on Civil and Political Rights\textsuperscript{917}, the Optional Protocol to the Convention against Torture and

\textsuperscript{913} “The right of non-Sri Lankans to enter and remain in Sri Lanka shall be subject to existing visa regulations. Article 29: According to the citizenship Act No. 18 of 1948, citizenship rights flow from the father, and in the event, a child is born out of wedlock, from the mother. A child will be deemed to be a citizen of Sri Lanka if he and his father were born in Sri Lanka before 1.11.49 or if at the time of his birth the father was a Sri Lankan.

Article 49: Resident visas to expatriate workers are allowed in respect of identified professions where there is a dearth of qualified personnel. Existing visa regulations do not permit migrant workers either to change their professions or the institutions in which they have been authorised to work, which is the basis on which the visa is issued. Article 54: Protection against dismissal, quantum of remuneration, period of employment, etc., are governed by the terms of individual contracts entered into between the worker and the organisation which employs him. A visa issued to an expatriate worker under the visa regulations is limited to a pre-identified job assignment.”

\textsuperscript{914} “[T]he Democratic Socialist Republic of Sri Lanka [...] declares in accordance with article 3 (2) of [the Protocol] that under the laws of Sri Lanka: (a) there is no compulsory, forced or coerced recruitment into the national armed forces; (b) recruitment is solely on a voluntary basis; (c) the minimum age for voluntary recruitment into national armed forces is 18 years.”

\textsuperscript{915} “[T]he Government of Sri Lanka [...] declares as per Article 32 of the Convention that it recognizes the competence of the Committee to receive and consider communications in which a State Party claims that another State Party is not fulfilling its obligations under this Convention.”

\textsuperscript{916} “[I]n reference to previous notifications submitted by the Government of Sri Lanka under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) to the Secretary-General of the United Nations, as the Depositary of the International Covenant on Civil and Political Rights (ICCPR) made on 9th June 2010 and 30th May 2000 respectively: "The Government of Sri Lanka is pleased to notify His Excellency the Secretary General that the Emergency Regulations that have been promulgated under the Public Security Ordinance have been allowed to lapse since August 2011. The Emergency Regulations were promulgated in August 2005 using a Presidential Proclamation under Section 05 of the Public Security Ordinance. Due to the conflict situation which then prevailed in the country, the Regulations were amended from time to time and were allowed to continue in force. Given the end of the conflict in 2009 and keeping with Sri Lanka's commitments towards protection and promotion of human rights, the emergency regulations have been allowed to lapse since August 2011. The Government of Sri Lanka, therefore, wishes to notify the Secretary-General of the termination of all derogations previously notified under the ICCPR, under the lapse of the Emergency Regulations in August 2011." This communication is being made under Sri Lanka's obligations under Article 4 of the International Covenant on Civil and Political Rights. It stipulates the obligations of the State Parties to notify the derogation as well as the termination of such derogations." "The Government of the Democratic Socialist Republic of Sri Lanka declares under article 41 of the International Covenant on Civil and Political Rights that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant, from another State Party which has similarly declared under article 41 its recognition of the Committee's competence in respect to itself.”

\textsuperscript{917} “[T]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement.”
Other Cruel, Inhuman or Degrading Treatment or Punishment.918 All in all, the ratification record of Sri Lanka expresses receptiveness to the international human rights treaties, especially compared to other countries in the South Asian region and does at least as well by global standards.919 The three post-colonial constitutions of Sri Lanka have not included any provisions that set out their receptivity to international law. There is, however, an established opinion that Sri Lanka's system is dualist.920 In any event, it is important to note that few states have adopted procedures and legislation that give effect to treaty bodies' decisions on individual complaints. It is evident that rigorous follow-up and domestic implementation of the treaty bodies' findings promotes human rights cultivation. Dedicated to this aim, the Human Rights Committee echoed in General Comment 33 that:

[M]ost States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States parties does, however, provide for the payment of compensation to the victims of violations of human rights as found in international organs. In any case, States parties must use whatever means lie within their power to give effect to the views issued by the Committee.921

In the Sri Lankan example, none of the post-colonial constitutions contained a provision that regulates the relationship between international law and national law.922 Also, there is no constitutionally prescribed procedure about treaty ratification.923 There is an assumption that the ratification falls in the realm of the executive in the context of foreign relations. To this end, Art. 33 (f) of the Second Republican Constitution spells out:

[I]n addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitution, the President shall have the power (...) To do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to

918 “[T]he Government of the Democratic Socialist Republic of Sri Lanka declares, pursuant to Article 22 of the Convention against Torture, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Sri Lanka of the provisions of the Convention.”


920 Udagama, supra note 4, p. 108.


922 Udagama, supra note 4, p.108.

923 Udagama, supra note 4, p. 113.
This provision suggests that the Sri Lankan President is empowered to conduct treaty ratification and it would suggest a continuation of the British tradition where the Head of State is the authority to ratify international treaties. The current constitutional procedure hardly involves consultation of the legislative; only practice suggests that a relevant and interested ministry may manifest its interest to sign or ratify a treaty by presenting a Cabinet Paper. However, there is no legally prescribed procedure as for how a ratified treaty is implemented in the Sri Lankan domestic infrastructure; this affirms a gap and practice points out that the relevant ministry is entrusted with the implementation of a ratified treaty. In conclusion, it can be asserted that the Sri Lankan ratification status is very advanced and, especially for a country from the Asian region, of remarkable nature. Sri Lanka belongs to a small group of Asian countries leading the record on human rights treaties ratification, owing probably to the powerful role of the president in the Sri Lankan constitutional architecture. Meanwhile, the implementation of international human rights treaties lacks into the domestic legal infrastructure, as it remains a matter of political expediency.

3. Enabling an open and free society: an examination of Sri Lanka’s interaction with the United Nations Human Rights Committee

The Human Rights Committee is probably the most prominent human rights treaty body that observes the implementation of human rights in the international monitoring system. Two reasons may explain why the Committee is considered as the most innovative and active institution among all treaty bodies. Firstly, the Committee has the broadest subject-matter jurisdiction. Secondly, State Parties under the Covenant decided to not destabilise the treaty body’s work by politicising it unnecessarily. The Committee emphasises constructive dialogue to promote a flexible approach when dealing with state delegations and ensure equality

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924 1978 Constitution, supra note 520.
925 Udagama, supra note 4, p. 114.
926 Ibid p. 114.
927 Ibid p. 114.
towards states concerned. The examination of country reports is vital for human rights monitoring and the effective implementation of the Covenant. In the absence of guidance by the Covenant, the Committee established working procedures to conduct its work.929 The Human Rights Committee and the Covenant’s provisions won considerable attention from other United Nations bodies.930 Initially envisaged as a quasi-judicial treaty body, the Human Rights Committee became a careful compromise preserving national sovereignty and internationalism.931 Sri Lanka signed the Covenant on Civil and Political Rights on the 11th of June 1980, its Optional Protocol on the 3rd of October 1997 and submitted its first state report in 1983. So far, Sri Lanka has reported in five reporting cycles.932

Interestingly, Sri Lanka began with human rights reporting at the time when the civil war erupted. Ever since, the Human Rights Committee has repeatedly acknowledged that the ongoing civil war in the country affected the effective application of the rights enshrined in the Covenant, as it did in its Concluding Observation on the occasion of the Third Periodic Cycle.933 In the Second Periodic Cycle, while the expertise of the state delegation was acknowledged, the Committee had to stress the worrying development of human rights in all areas under the Covenant in light of the emergency regulations and anti-terrorism measures.934

With the Third Periodic Cycle, however, the tone had shifted, and the Committee openly criticised the flaws of the state report. It failed, inter alia, to submit detailed information on the actual domestic implementation of the treaty obligations.935 The Committee had once again deplored the poor observance of rights considering emergency regulations.936 The state delegation, however, rejected the remarks made, as it stated that the threat of terrorist attacks justified and compelled the Sri Lankan government to impose the state of emergence to maintain public order. More interestingly, the state delegation explained that:

929 Kaelin, supra note 853, pp. 20 and 71.
931 Ibid.
The emergency that was proclaimed was strictly required by the exigencies of the situation. It is not inconsistent with Sri Lanka’s obligations under international law and it does not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.937

The invocation of emergency and its underpinning justification became recurring themes in the engagement with the treaty body. Sri Lanka’s post-colonial human rights narrative was always dominated by the prolonged political crisis, which was propounded and provoked by emergency regulations.938 Introduction of more law, legal institutions and legalistic norms led to constitutionally authorised abuses of power. Thus, the authorisation of power ushered in exacerbation of human rights abuse.939 The longer the executive presidency became entrenched, the more independent human rights institutions were subjected to threat. Emergency regulations safeguarded the majoritarian narrative, unitary state and controlled democracy. The restriction of space for human rights bargaining was narrowly defined with the impeding narrative of state of emergency.940

There was, however, a more positive outcome. The Human Rights Committee had referred to the discriminatory policy of Sri Lanka towards women, which put them at a disadvantage in the fields of inheritance and marriage. The Human Rights Committee stressed both aspects in this Concluding Observation.941 In the face of the international pressure exerted by the Committee, domestic human rights activists felt encouraged to use the outcome of the state report as a vehicle for advocating legislative measures. Under this pressure, the Sri Lankan government amended the general and customary law in 1995. The government recognised the permissible age of marriage for eighteen years for both, men and women.942 During the Fourth Periodic Cycle, the state report of Sri Lanka was comprehensive in length (covering over one hundred and twenty-four pages) but lacked the analytical depth. For instance, it reproduced and explained only the functions of institutions and cites case law of the Supreme

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939 Ibid p. 145.
942 The Marriages General Ordinance No. 19 of 1907 was amended by Act. 18 of 1995 and the Marriage and Divorce Law No. 41 of 1975 was amended by Act. 19 of 1995.
Court. By way of example, the Committee pointed out to the lack of clarity and legal depth regarding the implementation of the provisions of the Covenant. It highlighted that not all substantive rights of the Covenant were covered in the Second Republic Constitution, in particular the right to life. Moreover, the Committee held the view that the rights were restricted beyond the limits allowed in Covenant, while rights enshrined in the Covenant were not granted to non-citizens. Finally, the Committee concluded that no mechanism was available in the Sri Lankan legal architecture to challenge legislation that impeded the effective enjoyment of civil and political rights. More interestingly, the civil war was repeatedly used as a justification for the difficulties in implementing the Covenant.

The state report of Sri Lanka, on the occasion of the Fifth Periodic Cycle, illustrated the relinquishment of international obligations. In the opening statement, the state delegation not only depicted the challenges that were posed by the war on terror, but stressed the human rights achievements made by the country despite those challenges. It has to be also noted that -while the delegation underscored the value of the right to life- the Sri Lankan Constitution does not enshrine the right to life in its fundamental rights chapter.

The Human Rights Committee responded to the state report of Sri Lanka in that regard that the anti-terrorism measures impeded the effective enjoyment of human rights in all areas of life. The Human Rights Committee was not at a loss for words regarding the tension between human rights culture, as it addressed prevailing cultural norms that prevented women’s rights to develop. In its last Concluding Observation, the Human Rights Committee pointed out that:

While welcoming the State party’s adoption of the Prevention of Domestic Violence Act, the Committee is concerned about the persistence of sociocultural values that condone domestic violence, resulting in such violence remaining widespread and subject to impunity. Furthermore, it is concerned about allegations of sexual abuse against women in the context of detention, resettlement and other situations that require contact with security forces (arts. 2, 3, 6 and 7).

946 United Nations Human Rights Committee, Opening Statement of the State delegation at the 5th Periodic Cycle, paras. 3-7 and 11-20.
The State party should adopt a comprehensive approach to prevent and address violence against women in all its forms and manifestations. It should enact specific legislation that explicitly prohibits domestic violence and marital rape, regardless of judicial acknowledgment of separation. It should also ensure that cases of domestic violence and marital rape, as well as allegations of sexual violence by the security forces, are thoroughly investigated, that the perpetrators are prosecuted and punished with commensurate sanctions and that the victims are adequately compensated. Furthermore, it should provide training for State officials, in particular judges, prosecutors and security forces, to ensure that they can respond effectively and appropriately to all forms of violence against women.949

Being the first state report after the end of the civil war (which was five years overdue), the participation of the non-governmental organisations was insightful. Very noteworthy is the evolution and proliferation of non-governmental organisations, international and national ones alike. They have realized and recognised that their role at the United Nations is vital to the advancement of human rights in Sri Lanka. The procedure in the context of the fifth state report of Sri Lanka is of interest: altogether twenty-four non-governmental organisations, international and national alike, had submitted their shadow reports to the state report of Sri Lanka.950 It is compelling to see that non-governmental organisations are making more and more use of the international forum, on periodic reports of states, including all its formal procedures. Two shadow reports must be pointed out.

Amnesty International encapsulated the human rights engagement with the United Nations appropriately. It pointed out that the fourth periodic report, which was seven years overdue, failed to address again the issues surrounding the repeal of the anti-terrorism laws and the persistent climate of impunity in the country which were highlighted already in 2003 before the Human Rights Committee. Moreover, Amnesty International stressed in this report the incompatibility of anti-terrorism laws with the free and effective enjoyment of human rights of, especially minorities.951 While most of the considered non-governmental reports reproduce events, witness testimonials and political developments, the non-governmental report submitted by the Centre for Policy Alternatives is of worthy consideration.952 Its report is very

949 Ibid para. 9.
950 Office of the High Commissioner for Human Rights, supra note 69.
detailed, diligently corroborated and a rights-based report, stretching over forty-five pages. Of significance are the observations considering the above discussed International Covenant for Civil and Political Rights Act, 18\textsuperscript{th} Amendment and the independence of the judiciary. The Centre for Policy Alternatives accentuated that the 18\textsuperscript{th} Amendment to the Second Republican Constitution did serious harm to the development of judicial creativity in the country. Moreover, the Centre for Policy Alternatives emphasised that different action plans and domestic human rights acts, such as the National Action Plan for the Promotion and Protection of Human Rights and the International Covenant on Civil and Political Rights Act, fell short of expectations. It pointed out that neither one rectified the human rights deficiencies in the country and failed to adhere to international human rights standards.\footnote{953}{Ibid.}

In conclusion, the Centre for Policy Alternatives held that the Government of Sri Lanka should:

\begin{itemize}
  \item [I] Implement Constitutional reform to ensure the Bill of Rights includes all rights contained in the ICCPR, Furthermore the restrictions clause in Article 15 should be amended to reflect the wording contained in the ICCPR in order to ensure the full enjoyment of Fundamental Rights.
  \item [ii)] Ensure the Independence of the Judiciary in order to facilitate the full realisation of ICCPR rights.\footnote{954}{Ibid pp. 1, 2 and 7.}
\end{itemize}

At the time of writing, two follow-up letters were sent to the government in August and in December of 2016, with responses by the government pending.\footnote{955}{United Nations Human Rights Committee, Letter to the Government of Sri Lanka, CCPR/FUL/LKA/24979 and CCPR/FUL/LKA/25999.} Finally, consideration must be given to the First Optional Protocol to the International Covenant on Civil and Political Rights. Sri Lanka ratified the Optional Protocol and thereby accepted the competence of the Human Rights Committee to examine petitions/communications from individuals and groups under the Covenant on the 3\textsuperscript{rd} of October 1997. Twenty-one individual communications were filed against Sri Lanka under this Optional Protocol so far.\footnote{956}{A full account of the communications online at: <http://ccprcentre.org/country/sri_lanka>, last accessed 19\textsuperscript{th} of April 2017.} The scope of this thesis does not warrant a far-reaching and detailed discussion of all communications. Therefore, it is limited to the examination of two selected petitions aiming to highlight the interaction between Sri Lanka and the Human Rights Committee, namely the \textit{Singarasa} petition and then the \textit{Sister Immaculate Joseph} petition. The reason for the selection is threefold. First, the two petitions
amplify two human rights issues at stake in post-colonial Sri Lanka, namely the regular practice of torture in light anti-terrorism measures and attacks against the freedom of religion in the country. Second, most petitions (eleven to be precise) concern torture and criminal procedural issues, for which the Singarasa petition serves as an exemplary material for the illustration of the other cases. Third and finally, the Singarasa petition has stirred the debate about the legal and political relationship between the United Nations human rights machinery and Sri Lanka, a discussion that is of invaluable nature to the research of this thesis.

In Nallaratnam Singarasa v. Sri Lanka, the United Nations Human Rights Committee was presented with an individual communication (petition) submitted to it by the author (petitioner) under the First Optional Protocol to the Covenant, after he had exhausted all domestic remedies.\footnote{United Nations Human Rights Committee, Singarasa vs. Sri Lanka, CCPR/C/81/D/1033/2001.} Nallaratnam Singarasa was convicted of an offence under the Prevention of Terrorism Act, based on a coerced confession and was sentenced to thirty-five years of imprisonment. It was further alleged that under the Prevention of Terrorism Act the burden was on a petitioner to prove that a confession obtained by the authorities was obtained under duress. The Committee expressed the view that Sri Lanka was indeed in violation of its legal obligations under the International Covenant on Civil and Political Rights and recommended that Nallaratnam Singarasa had to be released or retried. More specifically, the Committee called for the repeal of provisions of the Prevention of Terrorism Act that made confessions to law enforcement authorities admissible into evidence and which placed the burden of proving that the confession was not voluntary on the detainee. In so doing:

\[t\]he Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is “placed very low” and “a mere possibility of involuntariness” would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author’s allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention.\footnote{\textit{Ibid} para. 7.3.}
Nallaratnam Singarasa, having obtained international recognition for the human rights violation went again before the Supreme Court, but the Supreme Court refused to recognise the views of the Committee on the basis that the ratification of the Optional Protocol was unconstitutional.\footnote{Singarasa (Nallaratnam) v Attorney General, Application for judicial review, SC Spl (LA) No 182/99, ILDC 518 (LK 2006), 15th September 2006, Supreme Court.} What is more worrying is the fact that the Supreme Court considered the Human Rights Committee a judicial body and by ratifying the Optional Protocol, the President of Sri Lanka had violated the sovereign judicial authority of the people. To this end, the Supreme Court ruled:

\begin{quote}
[T]he resulting position is that the Petitioner cannot seek to “vindicate and enforce’ his rights through the Human Rights Committee at Geneva, which is not reposed with judicial power under our Constitution. A fortiori it is submitted that this Court being “the highest and final Superior Court of record in the Republic” in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the Petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution. (...) On the other hand, where the President enters into a treaty or accedes to a Covenant the content of which is “inconsistent with the provisions of the Constitution or written law” it would be a transgression of the limitation in Article 33(f) cited above and ultra vires. Such act of the President would not bind the Republic qua state. This conclusion is drawn not merely in reference to the dualist theory referred to above but in reference to the exercise of governmental power and the mutations thereto in the context of Sovereignty as laid down in Articles 3, 4 and of 33(f) of the Constitution. (...) Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made wider Article 1 is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.\footnote{Ibid.}
\end{quote}

Deepika Udagama correctly holds the view that this judgement is wrong in the interpretation of the law. More importantly, she asks if the concept of people’s sovereignty within a State Party can inhibit the broader protection of rights bestowed upon by international human rights law. She asks further that, if the sovereignty of the people includes the protection of fundamental rights according to art. 3 of the 1978 Constitution, should not the protection of international human rights law not enhance domestic human rights law? In any event, the impact of the judgement must be carefully observed in the context of future ratifications.\footnote{Udagama, supra note 4, p. 117.}

In an unusual move, the Bar Association of Sri Lanka has announced that it is preparing the
papers for a revision of the *Singarasa* case before the Supreme Court.\textsuperscript{962} The late Sir Nigel Rodley held that the judicial reasoning in *Singarasa* is untenable given the applicable principles of law and for this reason the judgement is arbitrary. He also claimed that the judgement is in violation of the Bangalore Principles of Judicial Conduct regarding principles of impartiality and judicial accountability.\textsuperscript{963} He wrote:

\begin{quote}
[S]uch a conception of impartiality/bias does have some resonance with respect to adjudications that summarily sentence a verbally aggressive, unapologetic, vexatious litigant to a year’s imprisonment with hard labor, followed by a refusal to change the decision after the initiation of review proceedings (Fernando v. Sri Lanka); that deny the key party to a process a possibility of incorporation without a hearing, or knowledge of one (Sister Immaculate Joseph); or fundamentally misrepresent or at least misconstrue the relevant (international) law (Sister Immaculate Joseph); or, without the issue being litigated at all, finding unconstitutional the Executive’s ratification of an international instrument (Singarasa).\textsuperscript{964}
\end{quote}

The authors of the petition in *Sister Immaculate Joseph et al. v. Sri Lanka* were members of a Catholic religious order that had been established in the country since 1900 as an unincorporated entity, and which decided to seek incorporation, requiring the passing of a statute.\textsuperscript{965} In the usual way, a private member’s Bill was introduced to achieve this object. It set out, *inter alia*, the purposes of the Order, which were apparently both typical of any such order and represented no new element in the Order’s traditional practices in Sri Lanka; it also gave authority to the corporation to acquire, hold and dispose of moveable and immovable property. The Supreme Court of Sri Lanka, however, denied the entry of their order.\textsuperscript{966}

When the matter came before the Human Rights Committee, the Committee observed that:

\begin{quote}
[f]or numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual’s manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.5 The authors have advanced, and the State party has not refuted, that incorporation of the Order would
\end{quote}


\textsuperscript{964} Ibid p. 516.


\textsuperscript{966} Ibid.
better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court’s determination of the Bill’s unconstitutionality restricted the authors’ rights to freedom of religious practice and to freedom of expression, requiring limits to be justified, under paragraph 3 of the respective articles, by law and necessary for the protection of the rights and freedoms of others or for the protection of public safety, order, health or morals. While the Court’s determination was undoubtedly a restriction imposed by law, it remains to be determined whether the restriction was necessary for one of the enumerated purposes. The Committee recalls that permissible restrictions on Covenant rights, being exceptions to the exercise of the right in question, must be interpreted narrowly and with careful scrutiny of the reasons advanced by way of justification.

After the communication, the Sri Lankan government offered only a small sum of compensation to the authors. This compensation was refused, as the compensation did not cover material and moral damages. Measures taken by the State Party to publish the Committee’s decision were not sufficient.\textsuperscript{967} The discussion in the second chapter on Sinhala-Buddhist resistance to Christian missionary schools and the Sinhala-Buddhist revivalism under Dharma
dala is helpful to explain \textit{Sister Immaculate Joseph et al. v. Sri Lanka}. It illustrates the following: the Sinhala-Buddhist ideology has fully permeated the state apparatus, resisting to expand the space for any minority, as it fears the reemergence of Christian indoctrination in Sri Lanka. Being Sri Lankan means to be Sinhala-Buddhist.

Moreover, \textit{Sister Immaculate Joseph et al. v. Sri Lanka} illustrates that the state apparatus wants to manage the minorities in within ethnocratic state-building. The other communications to the Human Rights Committee concerning Sri Lanka have mostly dealt with criminal procedural issues (eighteen to be precise), covering, \textit{inter alia}, fair trial, fair hearing, effective remedy, equality before the law. Most of the themes were covered under the discussion of the \textit{Singarasa} petition. In the end, the human rights engagement with the Human Rights Committee did not translate into substantial modifications in the human rights infrastructure and also not in human rights protection. Opening space for civil liberties in Sri Lanka was rather the result of short-termed concessions to the international community of newly elected governments and the International Covenant on Civil and Political Rights Act was enacted to give limited effect to a certain range of civil and political rights, driven by economic motivations

alone. Freedom House has recently held that Sri Lanka is partly free and the improvement in the civil and political rights regime was contributed to by the ongoing reforms of the new constitution and the fight against corruption.  

In the long assessment, however, the betterment in the field of civil and political rights stagnated. The Human Rights Committee dealt repeatedly with the effects of the ongoing civil war, while the civil war was used by different Sri Lankan governments over the years as a recurring justification vehicle for the slow implementation and alignment with international standards set out in the International Covenant on Civil and Political Rights. Meanwhile, the overarching security narrative shrunk the space for civil and political rights, but expanded the space for the emergency state to maintain the majoritarian unitary state. The Committee's legitimacy and authority were severely curtailed by the Supreme Court's Singarasa judgement considering the misappreciation of the Committee's role and wrong interpretation of international human rights law in the domestic setting. Moreover, the standing of the Committee was tarnished in the eyes of the Sri Lankan people by governmental ministers, as the Committee was accused of bias.

4. Human rights for all without racial distinction: an exploration into Sri Lanka’s reporting to the Committee on the Elimination of Racial Discrimination

Sri Lanka signed the International Convention on the Elimination of Racial Discrimination and submitted its first state report on the 16th of January 1984, only seven months after the

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972 Office of the High Commissioner for Human Rights, supra note 69.
outbreak of the civil war and major ethnic riots in the country. Adopted in 1965, the Convention was the first international human rights document that created a treaty body. It was the global spread of racist policies and the apartheid state policy in South Africa that led to the adoption of the Convention. Theodor Meron writes that the Convention is the:

[m]ost important of the general instruments (as distinguished from specialized instruments such as those pertaining to labor or education) that develop the fundamental norm of the United Nations Charter-by now accepted into the corpus of customary international law—requiring respect for and observance of human rights and fundamental freedoms for all, without distinction as to race.

In this contextual environment, it is noteworthy that States Parties made pledges to fight racial discrimination, inter alia, not to engage in any act or practice of racial discrimination against persons or institutions, not to promote any racial policies, repeal laws that lead to racial inequalities et al. Art. 8 of the Convention provided the legal foundation for the Committee to observe the compliance of State Parties to the Convention. Interestingly, Sri Lanka has a rich history in opposing racism and racial injustice on the international stage. The island was a very vehement and committed opponent to apartheid policies. By way of example, Sri Lanka requested, with several other like-minded states, the United Nations Security Council to hold an extraordinary session to discuss the political developments in South Africa, while affirming:

[O]ur respective Governments are particularly disturbed by the extreme measures, and more specifically the imposition of death sentences, which have been taken against a large number of African political leaders.

The situation in South Africa, which, in the words of the resolution of 7 August 1963 (S/5386), "is seriously disturbing international peace and security."

Moreover, underscoring its commitment to the anti-apartheid struggle, Sri Lanka announced

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975 Ibid p. 292.
976 Letter from the Representative of Afghanistan, Algeria, Burma, Burundi, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, Congo (Brazzaville), Congo (Leopoldville), Cyprus, Dahomey, Ethiopia, Gabon, Ghana, Guinea, India, Indonesia, Iran, Iraq, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malaysia, Mali, Mauretania, Mongolia, Morocco, Nepal, Niger, Nigeria, Pakistan, Philippines, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Tanganyika, Thailand, Togo, Tunisia, Turkey, Uganda, United Arab Republic, Upper Volta, Yemen and Zanzibar addressed to the President of the Security Council, UN/S/5674, 30th of April 1964.
it would not recognise Southern Rhodesia after its declaration of independence in 1965. The engagement with this treaty body, however, presents a stark contrast. Sri Lanka’s second human rights engagement in the context of the second state report from 1986 is noteworthy for this purpose. In their concluding observation to the second reporting cycle the Committee noted that the state delegation failed to produce the underlying reasons for the eruption of violence and the beginning of the armed conflict in the country.

The Committee directly addressed the problem that the state delegation singled out the Tamil community as the party solely responsible for the outbreak of the war. The Committee, in powerful wording, urged the state delegation to separate terrorist violence, communal disturbance and grievances of the Tamil minority. The communication was not confined to the aspects of the ethnic disturbances, as the Committee requested to know more about the country’s economic relationship with South Africa and to what extent this relationship contradicted the anti-apartheid struggle. The responses of the state delegation were marked by diversion and distortion. When discussing the issues of statelessness of Indian Tamils, the state delegation completely distorted the historical incident when Indian and Pakistani citizens were deprived of their citizenships due to the Citizenship Act No. 18 from 1948 (which was discussed in the second chapter). Instead, the delegation solely pointing out to the British colonial policy of bringing Indian Tamils as workers to the country's tea plantation. It is noteworthy that the delegation admitted the mistake concerning the state report, where the Tamil community was branded as responsible for the problems in the country, only by following with a disturbing legal assessment:

[I]t was a mistake to state that the report implied that the Tamil community was to blame for the current problems in Sri Lanka. Only a small number of Tamils were involved. The Government and moderate groups within the country had sought to enter into negotiations, but were prevented from doing so by extremist groups. (...) While the Sri Lankan Government conceded that there had been unfortunate incidents in which civilians had been the victims of clashes between the security forces and terror-

977 United Nations, Note Verbale dated 15th of February 1967 from the Permanent Representative of Ceylon addressed to the Secretary General, UNSC S/7770.
979 Ibid paras. 271.
980 Ibid.
981 Ibid para. 284.
982 Ibid para. 292.
ists, it must be recognized that not all the people portrayed to the international community as civilian victims were genuine civilians. Especially the wording “[g]enuine civilians” is confusing, as it is reminiscent of the rhetoric deployed towards the end of the civil war in 2009, but also confounds international human rights law and international humanitarian law. When Sri Lanka submitted its collated seventh - ninth state reports in 1995 the mechanisms had improved and the dialogue between the state delegation was constructive. This might have also been contributed to the tone set by the new administration that was voted into office. In any event, the readiness to cooperate was welcomed by the Committee.

To this end, the Committee noted that Sri Lanka’s report was of high quality and satisfied the Committee’s guidelines for the submission of reports. The Committee commented furthermore that the country’s efforts to find a negotiated settlement in the northern and eastern part of the country with the Tamils, the creation of ministry for ethnic affairs and Sri Lanka’s willingness to cooperate with the United Nations human rights machinery point to human rights progress in the country. The Committee, however, also pointed out to issues such as emergency regulations, disappearances militarisation et al. in the country. The state delegation’s response echoed a common narrative during the interaction with the human rights bodies:

[T]he representative contended that the number of disappeared persons in the country was considerably less than the number of 60,000 mentioned by a member. He described government policy concerning the future role of the armed forces and ongoing programmes of human rights education for troops. Also described were strategies to care for and bring about the return of displaced people. Other institutional initiatives to redress human rights problems included the human rights task force, the independent commission on corruption, the Centre for the Independence of Magistrates and Advocates, implementation of recommendations of the United Nations Working Committee on the Elimination of Racial Discrimination, State Report Sri Lanka, CERD/A/42/18, para. 290.


Ibid para. 135.

Group on Enforced or Involuntary Disappearances, the Presidential Commission of Inquiry on Involuntary Disappearances, the Ombudsman, etc.\textsuperscript{989}

There is an interesting aspect in the comparison between the concluding observations from 1987 and 1995: the Committee had highlighted the absence of any discussion on the effective implementation of Art. 4 of the Convention. The state delegation preferred to remain silent on the implementation of this provision.\textsuperscript{990} In light of the country's history discussed in the previous chapter, this reflects an overarching majoritarian approach, also in the international engagement with international bodies. The state delegation preferred to deflect and invoked colonial policies to justify the post-colonial legislation:

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\text{[I]t needs to be reiterated that there has never been a practice of discrimination based on race in Sri Lanka. Certain policies were pursued during the post-independence era that were intended to correct injustices caused to those belonging to the majority of the population during colonial rule. Although these were not intended to discriminate against the minority communities, they were in fact perceived as alienating the minorities and created an ethnic divide between the Sinhala and Tamil communities. A conscious effort is being made to rectify these anomalies through constitutional amendments, facilitating unprecedented devolution of political power and a robust legal regime for the promotion and protection of human rights consistent with international standards. The Government’s proposals for constitutional reform, while taking into account the country’s past experience, looks forward to a future which is more harmonious. Side by side with the process of constitutional reform, an island-wide campaign for peace and national reconciliation has been continuing to foster inter-ethnic harmony.\textsuperscript{991}}
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Sri Lanka has submitted its latest state report in 2015. The state delegation acknowledged yet again a lapse in periodic reporting of fourteen years (2001-2015).\textsuperscript{992} In their opening statement, the state delegation, led by the Permanent Representative Aryasinha, referred again to the change in government and stressed that:

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\text{[A]s you would be aware, there was a change of leadership in Sri Lanka in January 2015, following the Presidential Election and the formation of a National Unity Government in August 2015 following the Parliamentary Election. Our engagement with this Committee today is in the spirit of the priority given by Sri Lanka's leadership and its people at elections last year, to human rights, equality, freedom, democracy, and}
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\textsuperscript{989} Ibid para. 127.
\textsuperscript{991} United Nations Committee on the Elimination of Racial Discrimination, State party report of Sri Lanka, CERD/C/357/Add.3, para. 5.
\textsuperscript{992} United Nations Committee on the Elimination of Racial Discrimination, Introductory Statement, At the Presentation of Sri Lanka’s combined 10th-17th Periodic Reports, CERD/C/LKA/10-1, submitted under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), pp. 2-3.
reconciliation. There are several lacunae in the Report presented to the Committee last year. This is mainly due to the inability and lack of space to address certain issues due to the policies adopted by the previous administration. Our current approach to issues is different. Today, as you would be aware, Sri Lanka follows a policy of constructive engagement with the international community including all human rights mechanisms. We have extended a standing invitation to Special Rapporteurs and we work closely with the OHCHR.993

The opening statement also outlines the post-war development in detail, with an emphasis on the evolving engagement with different international human rights mechanisms. It sums up by declaring:

[TH]rough these practical measures, the Government has demonstrated its willingness to engage and cooperate constructively with the UN human rights mechanisms as well as other organizations, with a view to strengthening human rights for the benefit of the population as a whole without any discrimination.994

The Human Rights Committee had already noted in its Concluding Observation in 2014:

[T]he State party should ensure that all members of ethnic, religious and linguistic minorities enjoy effective protection against discrimination and are able to enjoy their own religion, language and culture, and able to participate in public affairs. Furthermore, it should take measures to prevent and stop all attacks against Christian and Muslim minorities, including on their places of worship and businesses. It should promptly and effectively investigate and prosecute all reported incidents of violence against ethnic and religious minorities.995

Echoing this statement, the Committee on the Elimination of Racial Discrimination issued an alarming recommendation in its concluding observation from 2015. It stressed that Sri Lanka must adopt legislation on hate speech that incites to racial hatred and perpetuates racial superiority. Moreover, the Committee concluded that the Sri Lankan government shall take all necessary means to create conditions for a dialogue between the ethnic groups to resolve racial tensions.996 Salient in this periodic cycle is the shadow report submitted by the International Movement Against All Forms of Discrimination and Racism.997 Regarding the poor implementation of Art.4 of the Convention, the International Movement Against All Forms of

993 Ibid.
994 Ibid pp.7-14.
995 United Nations Human Rights Committee, Concluding Observation, CCPR/C/LKA/CO/5, para. 23.
996 United Nations, Committee on the Elimination of Racial Discrimination, Concluding Observation, CERD/C/LKA/CO/10-17, para. 17.
Discrimination and Racism highlighted the dominating attitude of racial superiority especially in the highest ranks of governmental leadership, which penetrates public policy-making and creates the ground for governmental narrative.\textsuperscript{998} Furthermore, the International Movement Against All Forms of Discrimination and Racism scrupulously detailed attacks against minorities in the country and provided recommendations for the improvement of the ethnic relations.\textsuperscript{999} Interestingly, the International Movement Against All Forms of Discrimination and Racism proposes here the creation of a Minority Commission, notwithstanding the existence of a Human Rights Commission.\textsuperscript{1000}

In conclusion, while Sri Lanka’s engagement underwent a considerable evolution in their communication and presentation to the Committee, the inter-ethnic relationship has not improved. Decades of ethnosectarianism and ethnic outbidding have converted into reluctant human rights engagement and minimal improvement of the ethnic situation. It was instead a sham exercise to uphold the Sinhala-Buddhist approach to nation-making while alienating the minority communities in the country. With the last report, however, the new government was seemingly worried about its international reputation and hence presented a quite self-critical assessment, corroborated with statistics and a depiction of the post-war development. This evolution is somewhat positive, but fails to question the perception of Sri Lanka as a country based on the majoritarian narrative. The lapse in state reporting, especially between 2001-2015, points to a tactic of obstruction. The discussion on racial superiority was a dominating theme in the Sri Lanka public sphere and this discussion at the United Nations, especially towards the end of the war, was seen by the government as an unwelcoming interference into a majoritarian state of affairs. Instead of taking constant action to ease ethnic tensions and find an amicable political settlement to the ethnic conflict, the leadership of the country preferred to maintain and foster the majoritarian state-building activities.

\textsuperscript{998} Ibid.
\textsuperscript{999} United Nations Committee on the Elimination of Racial Discrimination, \textit{supra} note 997, pp.8-16.
\textsuperscript{1000} Ibid (no. 15).
5. Torture and decades of state of emergency: Sri Lanka’s engagement with the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Torture is one of the worst human rights violations with a significant position among all human rights instruments. Interestingly, the current Sri Lankan constitution enshrines in Art. 11, Chapter III that “[N]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The right not to be tortured is inevitably associated with the term human dignity; practically speaking, it is the state’s recognition that it cannot excuse or justify itself from violation. The roots of the prohibition of torture lie in the rejection to the suffering associated with it. Tobias Kelly writes that the procedure of merging monitoring and prevention creates a vision of a liberal nation-state. The eventual task for academics, human rights activists and clinicians alike is to create the situation where private perceptions of pain “[m]ove out into the realm of publicly articulated experiences of pain to create a moral community through the sharing of pain.”

The Committee against Torture takes a central role to combat that pain. Tobias Kelly, however, postulates that there is a consensus among commentators, civil society members, diplomats and United Nations employees that the Committee against Torture is weak. Criticism revolves around aspects such as the lack of expertise to grasp complicated legal issues and the limitations of formal independence. More criticism is voiced over the Committee against Torture’s overreliance on non-governmental reports that obstruct an objective and credible gathering of information. The Convention against Torture, however, was adopted in 1984 and entered force on the 26th of June 1987. Sri Lanka ratified the Convention Against Torture on the 3rd of January 1994. Since its ratification, Sri Lanka has reported to five reporting cycles, but has submitted only four state reports (the state reports for the third and

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1001 Kelly, supra note 872, pp.778-779.
1004 Kelly, supra note 872, p. 780.
1005 Ibid p. 779.
1007 Kelly, supra note 872, p. 785.
1008 Ibid p. 787.
1009 United Nations Office of the High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, online at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>, last accessed 15th of December 2016.
The last report was in November of 2016. In a surprising move, Sri Lanka submitted a declaration under art. 22 of the Convention against Torture on the 16th of August 2016, which stipulates:

> [T]he Government of the Democratic Socialist Republic of Sri Lanka declares, pursuant to Article 22 of the Convention against Torture, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individual’s subject to its jurisdiction who claim to be victims of a violation by Sri Lanka of the provisions of the Convention.\(^{1011}\)

The Committee had urged Sri Lanka to recognise the Committee’s competence of individual communications in its Concluding Observation to the first state report on the 19th of May 1998.\(^{1012}\) Sri Lanka fulfilled this demand only in 2016. This declaration must be seen in light of the change of government in 2015 and the interest of the policy makers in gaining international confidence. Moreover, Sri Lanka had deposited an unilateral declaration with the Secretary General of the United Nations, stating that it would not only abide by the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but that it would also implement “[b]y all appropriate means” the principles enunciated in the Declaration.\(^{1013}\) The Sri Lankan government submitted its first state report in 1995 and in which it outlines the legal and institutional framework and its commitment to proscribe torture.\(^{1014}\) Moreover, this report offers certain self-critical reflections as it spells out:

> [T]he Government is however aware of allegations concerning acts of torture reportedly committed by members of the security forces in the context of counterterrorist activities. Also, the police in combating crime are alleged to use excessive force in the handling of criminals. These transgressions are not the outcome of a deliberate policy but isolated acts carried out by some individuals. The Committee may be assured that

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every effort is being taken to eliminate the occurrence of such excesses. The CAT Act No. 22 of 1994 further strengthens the legal mandate of the State prosecuting authorities to take action to investigate and prosecute offenders.\textsuperscript{1015}

In this report, the state delegation highlighted legal safeguards and cited numerous case law to illustrate the country’s compliance with the Convention Against Torture.\textsuperscript{1016} Meanwhile, the Sri Lankan government enacted Act No. 22 of 1994 on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to give effect to the country’s obligations under this Convention. In this concluding observation, however, the Committee on the Convention against Torture also highlighted the subversive nature of the emergency regulation on the enjoyment of human rights and its abetting nature to torture.

Moreover, the Committee pointed out the flaws in the Convention Against Torture Act No. 22 of 1994, as the Committee held that Sri Lanka had failed to provide complete compliance with the Convention Against Torture in three respects: it neglected to define torture comprehensively; the Act did not define acts that amount to torture; and, it failed to provide compliance regarding extradition, return and expulsion.\textsuperscript{1017} Sri Lanka submitted its second state report in 2004 following a five-year delay. The Sri Lankan government aimed to abide by the recommendation issued with the first concluding observation. As the Committee asserted in its second concluding observation, the country had:

[I]nstitutional and other measures taken by the State party to implement the Committee’s conclusions and recommendations and the recommendations of the inquiry under article 20 of the Convention, including the establishment of the Permanent Inter-Ministerial Standing Committee and Working Group on Human Rights Issues, the Criminal Investigation Department, the Special Investigation Unit of the police and the Central Registry of persons in police custody.\textsuperscript{1018}

The state delegation submitted its state report and stressed that an anti-torture practice was streamlined and embedded through all institutions, making human rights the guiding imperative in their operations.\textsuperscript{1019} The exchange between the state delegation and the Committee was vibrant and marked by differences in interpretation of the law: whereas the Committee

\begin{itemize}
\item \textsuperscript{1015} \textit{Ibid} para. 38.
\item \textsuperscript{1016} \textit{Ibid} paras. 39-70.
\item \textsuperscript{1017} United Nations Committee Against Torture, Concluding Observation, A/53/44, paras.243-275.
\item \textsuperscript{1018} United Nations Committee Against Torture, Concluding Observation, CAT/C/LKA/CO/2, para 3d.
\item \textsuperscript{1019} United Nations Committee Against Torture, State Report of Sri Lanka, CAT/C/48/Add.2, paras. 7-10.
\end{itemize}
believed that the definition of torture was wrongly interpreted by the government, the government did not see any material differences.\textsuperscript{1020} The replies in this periodic reporting, however, were characterised by a certain willingness to comply and at least consideration and discussion within domestic institutions for further implementation.\textsuperscript{1021}

On the 17\textsuperscript{th} of August of 2009 Sri Lanka combined its third and fourth report and submitted them to the Committee. Once again, the state delegation of Sri Lanka referred to the civil war as the hindering reason, why the government was not in the position to implement and give effect to the rights enshrined in the Convention.\textsuperscript{1022} Nonetheless, the Sri Lankan state delegation offered following statement by Mr. Mohan Peiris, President’s Counsel, Former Attorney General, Senior Legal Advisor to the Cabinet on Legal Affairs:

\textit{[T]he consideration of the periodic report also comes at a time when the country is on an onward march to reform laws and develop and enhance domestic mechanisms of implementation. Let me assure and reiterate to all members of this Committee that Sri Lanka has assiduously followed a tradition of close and constructive co-operation with all human rights treaty bodies as well as the special procedure mechanisms of the Human Rights Council and efforts are afoot to strengthen this tradition. (...) Our desire is not merely to pay lip service to international obligations. Our sincere desire is to ensure real progress that will result in a happy and contended citizenry, empowered without discrimination but with the right to make the choices that matter to him or her, untrammeled by violence, torture or any kind of coercion. Sri Lanka remains firmly committed to uphold the obligations assumed under Convention against Torture and truly give life to the goal of ushering in a Sri Lanka that will boast of the golden ideals of no torture, no ill-treatment and no exception.}

It is again notable that the state delegation, as it has often done with previous state reports under different treaty bodies, reiterated the challenges faced with the end of the civil war. In a damning and strong-worded shadow report, the International Commission of Jurists stressed the lack of political will, absence of accountability measures, the paucity of legal clarity regarding habeas corpus and torture hindered the effective and meaningful compliance under the Convention against Torture.\textsuperscript{1023} In the concluding observation, the Committee against Torture picked up the aspect on the legal definition of torture by explaining:

\textsuperscript{1020} United Nations Committee Against Torture, \textit{Reply to the List of Follow-up}, CAT/C/LKA/CO/2/Add. 1, para. 10.
\textsuperscript{1021} \textit{Ibid} paras. 10, 11, 16,17.
The Committee reiterates its view that the definition of torture included in Section 12 of the 1994 Convention against Torture Act (hereinafter, CAT Act) does not entirely reflect the internationally agreed definition set out in the Convention. It restricts acts of torture to “any act which causes severe pain, whether physical or mental”, while the Convention definition refers to “severe pain or suffering”. It thus does not cover acts that are not violent per se, but nevertheless inflict suffering (arts. 1 and 4).1024

Hence, the Committee reiterated the recommendation made in its previous concluding observations. It stated that the State Party should amend the definition of torture included in Section twelve of the Convention Against Torture Act and to expand the definition of torture to all acts of torture, including those causing severe suffering, in accordance with Art.1 of the Convention. In this regard, the Committee drew attention to its General Comment No. 2 of 2007, which highlighted a considerable difference between the Convention's definition and the one incorporated into domestic law, creating an actual or potential loophole for impunity. And, while Sri Lanka pointed to a so-called "zero tolerance policy" in its state report from 2010, the Committee Against Torture held in the Concluding Observation that the practice of torture is not only widespread, but is matter of state policy.1025

In its recommendation under this section it states:

[T]he Committee recalls the absolute prohibition of torture contained in article 2, paragraph 2, of the Convention, stating that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”, as well as the statement by the representative of the State party reaffirming this.1026

Furthermore, the Committee Against Torture recommended to revise the laws in relation to the emergency regulations and the Prevention of Terrorism Act, and requested the establishment of mechanisms to investigate allegations of torture in the country and provide remedy to victims of torture. In its state report the Sri Lankan government maintained “[a]s a matter of State policy and practice, the Government maintains a zero-tolerance policy on torture, as is evidenced by the meaningful measures taken to curb acts of torture”.1027 The state delegation was convinced in the compliance of its laws with international laws.1028 The country’s

1024 United Nations Committee Against Torture, Concluding Observation, CAT/C/LKA/CO/5, para. 25.
1025 United Nations Committee Against Torture, Concluding Observation, CAT/C/LKA/CO/3-4, para. 6.
1026 Ibid.
1027 Ibid para. 13.
1028 Ibid paras. 36-58.
attitude was characterised by obstruction, as two follow-up letters by the Rapporteur on follow-up were left unanswered.\textsuperscript{1029} With its last state report on the fifth periodic reporting cycle, the state delegation embraced yet again the international forum. The state delegation acknowledged:

\begin{quote}
[T]he presence of the international organizations and the civil society organizations especially those from Sri Lanka who are observing this review today. We also thank the civil society organisations in Sri Lanka who provided their observations leading up to this review. In the preparation of our 5th Periodic Report, concerns expressed by different stakeholders were taken into consideration. Yet keeping with the current policy of striving to uphold higher standards of human rights, processes of this nature in Sri Lanka will have even wider consultations.\textsuperscript{1030}
\end{quote}

For the first time the state delegation extended its gratitude also to the civil society actors. Moreover, it was voiced:

\begin{quote}
[T]he Government is firm in its commitment of a zero-tolerance policy on torture. In June this year, President Maithripala Sirisena, joined by the Minister of Law and Order, joined an initiative of the National Human Rights Commission to march against Torture, sending a message at the highest level of Government regarding the Government’s commitment to zero tolerance on torture.\textsuperscript{1031}
\end{quote}

Meanwhile, the Committee against Torture showed concern regarding the government’s apparent reluctance to address broader problems. Interestingly, the non-governmental organisation Freedom from Torture presented in its shadow report that the government should launch investigations, conduct anti-torture trainings and make the zero-tolerance policy on torture actual reality and guiding principle within the ranks of police and security.\textsuperscript{1032} Even more interestingly, the revived National Human Rights Commission also issued a report, in which it assessed and evaluated the current situation in the country and examined death cases in custody. The National Human Rights Commission stressed the lack of independent investigations into the deaths of the past.\textsuperscript{1033} Against this background, it is noteworthy that

\textsuperscript{1029} United Nations Committee Against Torture, \textit{Follow-up letter sent to the State party, Reminder, 13\textsuperscript{th} of December 2012 and Follow-up letter sent to the State party, request for further information, cc//jmnf/jii/follow-up/CAT, 17\textsuperscript{th} of May 2013.}
\textsuperscript{1030} United Nations Committee Against Torture, \textit{Opening Statement at the Presentation of Sri Lanka’s 5th Periodic Report, CAT/C/LKA/5, submitted under the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, p.2.}
\textsuperscript{1031} \textit{i}bid.
\textsuperscript{1032} United Nations Committee Against Torture, \textit{Freedom From Torture, Shadow Report Sri Lanka, CAT/CSS/LKA/25498.}
\textsuperscript{1033} United Nations Committee Against Torture, \textit{Report of the National Human Rights Commission, Review of the 5\textsuperscript{th} Periodic Review of Sri Lanka, CAT/NHS/LKA/25601.}
the state report of Sri Lanka precisely laid out its commitment to give no room to torture and accentuated the government’s internal oversight mechanisms and safeguards to hold perpetrators accountable for any violation of the “zero-tolerance policy” on torture. The state delegation, moreover, emphasised the government’s commitment to streamline human rights education and engineer it into early education.\textsuperscript{1034} The state report made again reference to the domestic Convention Against Torture Act No. 22 of 1994 and reiterated that the definition of torture was in accordance with international law by citing Manfred Nowak.\textsuperscript{1035} The Committee on the Convention against Torture was not convinced and urged Sri Lanka with its concluding observation on Sri Lanka’s initial report to review this Act. The country failed to provide complete compliance with the Convention Against Torture in three respects: it neglected to define torture comprehensively; the Act did not establish acts that amount to torture; and it failed to provide compliance regarding extradition, return and expulsion.\textsuperscript{1036} The Committee urged Sri Lanka once again to provide mechanisms to put accountability measures in place and remove any emergency regulations.\textsuperscript{1037} Mindful of the gamut of communications observed and assessed, it is evident that Sri Lanka’s engagement with the Committee Against Torture did not translate into substantive changes in actual practice. The latest periodic reporting session speaks volumes.

While paying lip-service and reiterating a “zero-tolerance policy” on torture, it became evident that torture is widespread in Sri Lanka: torture, in its various forms, is seen by the State as a vital mechanism to repress dissenting voices to the political system and modus operandi. The breakdown of the rule of law, initiated by the republican constitutions from 1972 and 1978, Public Security Ordinance Act and Prevention of Terrorism Act, made torture the norm rather than the exception.\textsuperscript{1038} The Sri Lankan army and police saw themselves as above the existing human rights law, justifying the use of torture, while judges and prosecution were unwilling to try perpetrators of torture in the environment of the overarching state security narrative.\textsuperscript{1039} Sriskanda Rajah, while using Michel Foucault’s concept of biopower, explains

\textsuperscript{1035} \textit{Ibid} paras. 131-133.
\textsuperscript{1037} \textit{Ibid} paras. 13-16.
\textsuperscript{1039} \textit{Ibid}. 
that torture was used as a “policy of terror” to demonstrate the presence power in Middle Ages Europe. Using this example, Sriskanda Rajah compares to Sri Lanka, where the Sinhala-Buddhist majority demonstrated their power through application of torture, subjecting minorities under their rule and sending out the message that the lives of minorities is in the hands of the Sinhala-Buddhist sovereign.\footnote{Sriskanda Rajah, \textit{supra} note 158, p. 53.} Torture, in the end, was used by the state elite to perpetuate and entrench political violence. The dehumanisation of the Liberation Tigers of Tamil Eelam reinforced through the exaltation of cultural myths and the global narrative on terrorism created a fertile ground for the vast use of torture in the country.\footnote{Barnes, \textit{supra} note 1038, p. 352.} Meanwhile, Sri Lanka tried to display its commitment and compliance to the prohibition of torture in the international setting through continuous sham exercises. The tactic was underpinned by secrecy over torture detention sites, abdicating responsibility for torture and relinquish this responsibility to paramilitaries. During the war, moreover, access to certain sites was restricted.\footnote{Barnes, \textit{supra} note 1038, p. 351.} After the end of the war, the use of torture remained an integral part of the government’s machinery of repression. The Convention Against Torture Act did not live up to the Convention Against Torture and only a few persons were prosecuted under the Act. In the end, the engagement with the Committee Against Torture was eventually an international exercise in human rights distraction from actual reality.

6. Concluding comments

The reliability and efficiency of the treaty regime require accurate delivery of up-to-date information to the treaty bodies.\footnote{Bayefsky, \textit{supra} note 827, p. 333.} General structural issues at the heart of the treaty body system (i.e. handling of overdue and backlogged reports, poor follow-ups of the conclusions of the treaty bodies by United Nations’ political organs) coincided with specific Sri Lankan idiosyncrasies (i.e. civil war, obstructive human rights dialogue and deflection from human rights obligations to maintain ethnocratic state order). State reporting, however, must pave the way to a critical reflection of a state’s national legislation, rules, procedures and practices to a treaty. This must result in the steady inclusion of international norms into national policy
making. In relation to Sri Lanka, almost all the treaty bodies observed that the incorporation of international human rights obligations into national law was inadequate.\textsuperscript{1044} As it was examined earlier, Sri Lanka had implemented the national International Covenant on Civil and Political Rights Act and the Convention Against Torture Act, with the intention to give effect to the international obligations within the domestic realm. In different concluding observations, the examining treaty bodies urged Sri Lanka to adopt measures to incorporate necessary legislation to give effect to international standards or to clarify legal definitions.\textsuperscript{1045} The concluding observations are meant to be the careful and considered conclusion of whether the country in question has met international human rights standards.\textsuperscript{1046} Two functions are sought: first, public attention, and second, identification of mechanisms for improvement. To this end, the conclusions must be accurate regarding the human rights assessment and functional regarding the identification of needs.\textsuperscript{1047} Deepika Udagama, the current Chairwoman of the National Human Rights Commission of Sri Lanka notes:

\begin{quote}
[I]n more recent years' doctrinal issues have been compounded by the emergence of ideology within the political establishment in Sri Lanka that is deeply antagonistic toward the international human rights law regime. That doctrine is articulated regarding the necessity to privilege state sovereignty over 'international interference' into domestic affairs by western political powers.
\end{quote}

According to Surya Subedi governments adjust their conduct with the international community to win its appreciation, without necessarily believing in the validity of the norms.\textsuperscript{1048} A recurring challenge is that, while Sri Lanka is State Party to almost all the human rights treaties under the aegis of the United Nations, the country relied on three repetitive arguments to explain its lack of receptivity towards the human rights infrastructure. First, the country invoked in various communications to the treaty bodies the challenges posed by either the ongoing or the aftermath of the civil war.\textsuperscript{1049} The Sri Lankan state delegations had, on numerous occasions, pointed out that there was the overarching necessity to uphold the Prevention of Terrorism Act to counter terrorism. Second, it either refused to accept recommendations

\begin{thebibliography}{9}
\bibitem{1044} Udagama, \textit{supra} note 4, p. 123.
\bibitem{1045} For example, CERD/C/LKA/CO/10-17, paras. 8 -11; CAT/C/LKA/CO/3-4, para. 25.
\bibitem{1046} Bayefsky, \textit{supra} note 852, p. 64.
\bibitem{1047} Bayefsky, \textit{supra} note 852, p. 64.
\bibitem{1048} Surya Subedi, \textit{The Effectiveness of the UN Human Rights System}, (London: Routledge, 2017), p. 23
\bibitem{1049} Udaguma, \textit{supra} note 4, p. 119, see also: Ministry for Foreign Affairs, Democratic Socialist Republic of Sri Lanka, online at: \texttt{<http://www.mfa.gov.lk/index.php?option=com_content\&task=section\&id=29\&Itemid=148>}, last accessed 25\textsuperscript{th} of January 2017.
\end{thebibliography}
and/or remained silent on observations made by the Committee, as the committee members had repeatedly pointed out that the legislative measures were either insufficient or not existent. Third and finally, state delegations dispatched by newly elected governments hoped to establish international confidence and approval from the international community, by promising reforms and setting up ad hoc human rights mechanisms. In the end, different administrations, whether by the Sri Lankan Freedom Party or the United National Party, attempted to avert direct international intervention to uphold the majoritarian discourse. It cannot be ignored, however, that the subscription to international treaties has galvanised the human rights community within Sri Lanka: as indicated in the earlier chapter, it was the community’s continued advocacy based on the treaty ratifications to the International Covenant on Civil and Political Rights and the Convention on All forms of Discrimination against Women that led to the enactment of the Domestic Violence Act of 2005 and the Information Act 2016. Moreover, the above mentioned concluding observation by the Human Rights Committee in 1995 on the discrimination of women regarding the permissible age for marriage was the requisite for the domestic human rights activists to pressure the government to bring about swift changes in conformity with international standards.\footnote{Udaguma, supra note 4, p. 121.}

Non-governmental organisations have a vital role to play in the internal monitoring process, the dissemination of the bodies’ findings and following up on international and national level.\footnote{Philip Lynch and Ben Schokman, ‘Taking Human Rights from the Grassroots to Geneva … and Back: Strengthening the Relationship between UN Treaty Bodies and NGOs’, in: New Challenges for the UN Human Rights Machinery, William Schabas and Cherif Bassiouni (eds.), (Cambridge: Intersentia, 2011), p. 173.} The diffusion of human rights advocacy through domestic non-state channels proves to be a strategy that may enhance human rights promotion and translate into more efficient human rights protection.\footnote{Ibid p. 175.} Jaspar Krommendijk notes:

[C]oncluding observations have not solely remained “paper pushing” documents, because there have been several concluding observations which have been a contributory - and sometimes even a decisive- factor contributing to legislative and policy change. At the same time, concluding observations have not been “policy prompting” because there have hardly been any measures that would not have come about without concluding observations and which were only taken because of the concluding observations. Rather, concluding observations constitute “practical props” which can give extra strength or legitimacy to the arguments and demands of domestic actors.
when they are advocating for policy or legislative change.\textsuperscript{1053} In fact, one factor that obstructed the effective supervision by treaty bodies was the delayed submission of periodic state reports. Interestingly, however, the Ministry of Foreign Affairs of Sri Lanka has established a treaty reporting division with its organigramme to deal with the increasing obligation to report under the human rights treaties.\textsuperscript{1054} In any event, an effective follow-up is not possible, as not all treaty bodies have the same level of expertise, common rules and standardised procedures. As explained in the introduction to this chapter, delayed submissions of state reports are considered as a hindering aspect to the full realisation and effective monitoring of the human rights treaty obligation.

In the case of Sri Lanka, this structural issue hampered the communication with the country in the face of the ongoing civil war. Moreover, the inherent nature of human rights treaty bodies as soft-mechanisms that operate with carrots and sticks facilitated Sri Lanka’s internalised mechanism of dodging human rights compliance. This became manifest in the process of individual complaints under the Optional Protocol of the International Covenant on Civil and Political Rights as illustrated earlier. Another significant problem that might have obstructed efficient translation of treaty body findings into human rights development is the financial situation of the treaty body system. The human rights treaty body engaged with non-governmental organisations more efficiently, as these can serve as a platform of internal human rights dissemination, awareness-raising and development.\textsuperscript{1055} The fact that the Sri Lankan judiciary was simply ignorant regarding the nature of the Human Rights Committee in the Singarasa case is telling. To this end, the Human Rights Committee had echoed in a strategy paper in 2008:

\[\text{[M]embers appeared to agree that the work of the Committee in promoting respect for human rights is little known outside a small circle of academic and government lawyers, who specialise in human rights law, and the international human rights NGO community. The general public, and especially those in countries most affected by violations of human rights, remain largely in ignorance of the Covenant and of the work of the Committee. This ignorance extends even to the judiciary in a number of countries. (…) Direct dissemination among members of national parliaments and universities might also be employed. NGOs, and especially national NGOs, active in the}\]

\begin{footnotesize}
\textsuperscript{1054} Udagama, \textit{supra} note 4, p. 118.  \\
\textsuperscript{1055} Lynch and Schokman, \textit{supra} note 1051, p. 179.
\end{footnotesize}
field of human rights are the most obvious means by which, at a level and in a manner suited to the particular country, that knowledge may be disseminated among the general population.\textsuperscript{1056}

It is noteworthy that the Human Rights Committee lauded the role of non-governmental organisations in Sri Lanka in the concluding observation from 1995, \textit{inter alia}, in the context of so-called ‘arrest receipts’ on arrests of suspects under emergency regulations. Moreover, the Committee also acknowledged the role of non-governmental organisations in the contribution of a human rights notion in the security sector of Sri Lanka.\textsuperscript{1057} The ratification of treaties has stimulated groups on the ground and stirred up the human rights infrastructure, contributed to a process of political mobilisation and helped to be focal points to clarify and legitimise the demand for rights.\textsuperscript{1058}

As authoritative statements, the international human rights treaties are establishing the difference between acceptable and unacceptable behaviour, a legitimate reference point for the charter-based bodies to substantiate their engagement with member states of the United Nations. In the next chapter, the thesis will, therefore, interrogate the engagement of the Sri Lankan government with the charter-based bodies and elucidate how, \textit{inter alia}, legal mobilisation formed a basis for political engagement and mobilisation.


\textsuperscript{1058} Simmons, \textit{supra} note 896, p. 357.
V. The United Nations charter-based bodies and their engagement with Sri Lanka

This chapter aims to investigate the evolution of Sri Lanka’s engagement with the United Nations Commission on Human Rights and later with its successor, the United Nations Human Rights Council and the impact of such an engagement on human rights domestically. The chapter will consider the country’s participation in the formulation of international human rights law in its early post-colonial history, moving to its engagement during the period of ethnic disturbance and the examination of its human rights record during the civil war. Did this human rights engagement with the charter-based bodies alter the government’s behaviour and steer its reaction in line with its international human rights commitments? Have there been operational or even ideological deficiencies of the charter-based bodies that have complicated the human rights engagement with Sri Lanka? Did those deficiencies even contribute to the exacerbation of the conflict? Moreover, did the engagement with the human rights treaty bodies, as it was discussed in the previous chapter, provide any support to the charter-based bodies for their engagement with Sri Lanka?

Sri Lanka’s membership of the United Nations Commission on Human Rights and the United Nations Human Rights Council can be considered, just as the country’s ratification of human rights treaties, as an indication of the country’s willingness to discuss human rights matters of national and global concern in this international forum. Reflecting upon Sri Lanka’s membership more precisely, however, it might be asked whether it was employed as a technique to avoid international human rights condemnation?1059

In order to address these questions, the chapter will carefully examine Sri Lanka’s motivations for engaging with the human rights charter-based bodies. An exploration is also required to understand the antecedents of the charter-based bodies. What were the reasons for the replacement of the United Nations Commission on Human Rights by the United Nations Human Rights Council? What were and are their respective mandates, modus operandi and history of procedural, as well as substantial deficiencies and strengths? These questions will be answered before they will be applied and positioned in the case of Sri Lanka.


Human rights were, as outlined in the previous chapter, of crucial importance in the creation of United Nations.\textsuperscript{1060} The United Nations grounds its approach to human rights protection and promotion on two pillars, the treaty-based bodies, as discussed in the fourth chapter, and the charter-based bodies. The founding document of the United Nations, the Charter of the United Nations, provided the legal basis for the establishment of the Commission on Human Rights, one of the bodies carefully engineered into the original architecture of the United Nations. Initially, it was not intended to include any article in the Charter that established a body to intrude into domestic affairs.\textsuperscript{1061} Owing to the constant pressure exerted by non-governmental organisations\textsuperscript{1062} the United Nations Charter set out in Art. 68:

[T]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.\textsuperscript{1063}

As a binding international document, the United Nations Charter comprises international law.\textsuperscript{1064} It is precisely, for this reason, that it was an innovation to include and give effect to compelling moral principles and political ideas of human rights.\textsuperscript{1065} With the adoption of Resolution 5 (I) on the 16\textsuperscript{th} of February 1946, the Economic and Social Council decided to pave the way for the conception of the Commission on Human Rights, which benefited from the privilege of birth, being the only technical commission and possessing the quality of an organ with statuary character.\textsuperscript{1066} On the 21\textsuperscript{st} of May 1946, the so-called nuclear session under chair-

\begin{flushleft}
\textsuperscript{1063} United Nations Charter, Art. 68, \textit{supra} note 837.  \\
\textsuperscript{1065} \textit{Ibid} p. 36.  \\
\textsuperscript{1066} Marie, \textit{supra} note 1061, p. 355. 
\end{flushleft}
womanship of Eleanor Roosevelt embraced the idea of an expansive and progressive approach. The Commission saw its future role as one with a wide mandate to comprehensively promote human rights and formulated specific recommendations that were intended to create a basis for a body more receptive to addressing human rights violations. To this end, the majority of the members of the Preparatory Commission had envisaged, firstly, an independent membership on the Commission and, secondly, a Commission that deals with issues of threatening nature to the world.

But the Commission’s parent body, the Economic and Social Council, deemed these proposals as too far-reaching. Instead, the Council foresaw a governmental membership to the Commission. The Commission, eventually, became a politicised organ. Any actions that were undertaken by the Commission were the inevitable consequences of the political agenda of the respective members of the Commission. Moreover, following the Resolution 9 (II) of 1946, the Commission was only reduced to the role of submitting and assisting the Council to ensure respect for human rights. The Commission’s role, hence, was confined to drafting an international human rights declaration, an international human rights convention and identify implementation measures. With the resolution E/259 the Commission clipped its wings by deciding on the 10th of February 1947:

[T]he Commission recognizes that it has no power to take any action in regard to any complaints concerning human rights.

And then, in the next paragraph:

However, the Commission decided that, in the future, the Chairman or Vice-Chairman should meet shortly before each session of the Commission, with one or two co-opted members, for the purpose of receiving communications concerning human rights and bringing to the attention of the Commission such communications as might assist it in its work.

Eleanor Roosevelt, confined the work of the Commission purely to educational activities, a

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1067 Alston, supra note 29, p. 128.
1069 Alston, supra note 29, p. 128.
1070 Marie, supra note 1061, p. 357.
1073 ibid para. 23.
trend that prevailed up to 1967.\textsuperscript{1074} John Humphrey, former Director of the Human Rights Division, came to the defence of the Commission when he said:

\begin{quote}
[I]n adopting the conservative course which it did during the first two decades of its history the Commission followed the path of wisdom having regard to its terms of reference, the major constitutional authority of the Council and, above all, the great importance of the legislative work on which it was engaged.\textsuperscript{1075}
\end{quote}

The following decades saw a gradual emergence of human rights thinking at the United Nations Human Rights Commission. Four developments need to be stressed:

1. The creation of the Sub-Commission
2. The beginning of the compilation of confidential communications concerning human rights violations in 1959
3. The authorisation to examine gross human rights abuses in 1967
4. The creation of a confidential communication procedure.\textsuperscript{1076}

Jean-Bernard Marie recognises two phases that characterised the working method of the Commission, namely the period of abstention from the day of its inception up to 1967, and then the phase of interventionism from 1967 until its dissolution in 2005.\textsuperscript{1077} The phase of abstention was then again compartmentalised into two periods, namely drafting and (1947-1954) and promotion (1955-1966). The Commission was keen to establish standards by drafting numerous treaties, but politically contentious issues were referred to the General Assembly. While it was important to draft the respective Covenants, it came at the cost of the non-involvement concerning the Genocide Convention or some other human rights instruments.\textsuperscript{1078} In any event, the Commission’s proceedings were initially designed to protect state prerogatives. Governments were not interested in opening their doors to external scrutiny fearing the eroding effect on their sovereignty and domestic interference.\textsuperscript{1079} The Charter of the United Nations already echoed and integrated the concepts of sovereignty and equality of states, while giving effect to the maxim \textit{par in parem non habet imperium}.\textsuperscript{1080} And yet, the

\begin{footnotesize}
\textsuperscript{1074} Alston, supra note 29, p. 129.
\textsuperscript{1075} Ibid p.130.
\textsuperscript{1077} Marie, supra note 1061, pp. 357 – 375.
\textsuperscript{1078} Alston, supra note 29, p. 132.
\textsuperscript{1079} Gutter, supra note 1064, p. 1.
\textsuperscript{1080} United Nations Charter Art. 2.1., 2.4 and 2.7, supra note 837.
\end{footnotesize}
Commission played a vital role in the elaboration of human rights norms; it established the Sub-Commission as mentioned earlier on the Prevention of Discrimination and Protection that drafted some conventions on numerous topics including enforced disappearances.\textsuperscript{1081} In 1959 the Economic and Social Council adopted a resolution that requested the United Nations Secretary-General to collect a list of human rights abuses, the first time information was collated regarding specific human rights situations in members states.\textsuperscript{1082} While the human rights programme of the United Nations was struggling, the new composition of the Commission in the 1960s changed the narrative on state sovereignty with the rapid expansion of the United Nations with many countries from Africa and Asia into the United Nations. The new members pushed for additional powers to denounce and combat the vestiges of colonialism that lingered in Africa and the Middle East.\textsuperscript{1083} The mobilising force for human rights was coming from the global South. Stephen Jensen postulates:

[T]he global South engagement during this period has been described as essentially focused on promoting the right to self-determination. Human rights scholarship was generally speaking content with this profoundly reductionist view. It was forgotten that neither the global South nor UN human rights diplomacy was monolithic. It was always multi-tonal. The effect has been a distorted view of the global South’s role in the emergence of human rights diplomacy.\textsuperscript{1084}

In distinguishing between the treaty-based bodies and charter-based bodies, it is noteworthy that in contrast to the monitoring procedures under the human rights treaties, the Commission does not need any prior ratification or any other form of consent by member states other than being a member of the United Nations.\textsuperscript{1085} The Economic Social Council Resolution 9 (II) provided the legal groundwork for the Commission’s work. The era of interventionism as a second focal point of the Commission’s work commenced with the adoption of landmark resolutions, namely 1235 (XLII) in 1967 and 1503 in 1970 (XLVIII) had both a considerable impact and built the normative framework of the Commission.\textsuperscript{1086} Resolution 1235, for example, provided the necessary authorisation to initiate the examination of and response to human rights

\textsuperscript{1081} De la Vega and Lewis, \textit{supra} note 1076, p. 355.
\textsuperscript{1082} \textit{Ibid} p. 355.
\textsuperscript{1083} Jensen, \textit{supra} note 1071, p. 7.
\textsuperscript{1085} Gutter, \textit{supra} note 1064, p. 2.
\textsuperscript{1086} Farer and Gaer, \textit{supra} note 834, p. 274.
violations. At its height, the 1235-procedure entailed an annual debate regarding country situations, in which non-governmental organisations and governments participated, and individual cases were investigated. Resolution 1503 established a system of monitoring mechanisms, which were open to victims of human rights violations and others representing them. The 1503-procedure, as it was commonly referred to, did not provide the authority for prosecution of breaches of human rights, but it provided the means to highlight the infringements in the forum of the Commission. Moreover, violating countries needn’t to be ratifying states to the Resolution 1503 or signatory to any particular human rights treaty. The 1503-procedure is still in existence today, yet in a modified form and is confidential. The discussions were held in closed sessions and entailed a different process by several working groups for admissibility determination and the decisions on merits.

The conclusion of the sessions ushered in the publication of the country situations considered, but concrete recommendations were never disclosed. Both resolutions reflected the growing international concern for human rights issues and the Commission became the most important institution within the United Nations for the human rights discussion. The United Nations Commission on Human Rights relied on a variety of tools to meet its ideals, namely diplomacy, setting policies, quasi-judicial inquiry. But the most important contribution the United Nations Human Rights Commission made was the generation of impartial and independent information: heated discussions between non-governmental organisations and governments have nevertheless contributed to a very sophisticated and elaborated discourse based on international norms. The creation of the first special procedure under the Commission’s auspices was the Working Group on Enforced or Involuntary Disappearances in 1980. This creation amplified efforts by the Commission to investigate particular human rights violations and penetrate state sovereignty, becoming a common thread of this body to examine what Cassese called “[a] major phenomenon of human rights violations world-wide.”

1087 ECOSOC Resolution 1235 (XLII).
1088 De la Vega and Lewis, supra note 1076, p. 355.
1090 Spohr, supra note 70, p. 172.
1092 Alston, supra note 29, p. 206.
The Commission gradually expanded its monitoring capacities in the years to come, as it created some other Special Procedures, *inter alia*, with the creation of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution and Special Rapporteur on Torture. The conception of the special procedure system was summed up in the Selebi report as follows:

[D]uring the review, it was widely observed that the special procedures have been one of the Commission’s major achievements and constitute an essential cornerstone of United Nations efforts to promote and protect internationally recognized human rights and contribute to the prevention of their violation. The review process thus occasioned a strong reaffirmation of the conclusion (...) that the system of special procedures should be preserved and strengthened, that they should have the necessary human and financial resources and that States should cooperate fully with them.1094

While it is evident that a politicised organ can never deal with human rights issues impartially and independently, it is true that countries with a progressive human rights policy used that Commission as a forum to advance human rights and bring matters to international attention.1095 Eventually, the United Nations Commission on Human Rights provided the catalyst for the internationalisation of international human rights law. And yet, politicisation was, partially, defused through the introduction of the system of special procedures. Manfred Nowak, the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, recalls in his study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention from 2010:

[I]ndependent experts have played an increasingly active role within the human rights system of the United Nations since the late 1960s. On the basis of ECOSOC Res. 1235 (XLI) of 1967, the former Commission on Human Rights entrusted working groups and later individual experts to investigate the overall human rights situation in those States which were particularly criticized for gross and systematic violations of human rights (country-specific mandates).1096

The Special Procedure is, as Thomas Buergenthal explains, a serious effort from the United Nations to “[p]ierce the veil of the national sovereignty of states.”1097 Surya Subedi asserts

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that:

[T]heir appointment has frequently reflected the concern of the international community about the situation of human rights in a given country or territory and holds particular significance as a means of exerting international pressure on governments whose human rights practices are considered seriously out of line with international standards.\textsuperscript{1098}

Special rapporteurs had largely contributed to the proliferation of human rights, through monitoring and fact-finding, but also standard-setting. These experts have contributed to the elaboration, interpretation, and implementation of international human rights law and “[h]ave brought the human rights work of the United Nations to ordinary men and women around the globe.”\textsuperscript{1099} The Special Procedures provide a very flexible and more independent mechanism that aims to deliver short-term and feasible benefits for the victims of human rights violations while achieving not only international but also national attention.\textsuperscript{1100} Harsh criticism, however, was leveled against the Commission. The United Nations Secretary General’s High-level Panel on Threats, Challenges and Change presented a publication titled “A more secure world: Our shared responsibility.”\textsuperscript{1101} Here, the Panel stipulated:

[I]n recent years, the Commission’s capacity to perform these tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.\textsuperscript{1102}

Echoing this very sharp and clearly articulated desire to reform the charter-based human rights machinery of the United Nations, the former United Nations Secretary-General Kofi Annan presented a five-year progress report in 2005 with regards to the implementation of the Millennium Declaration of 2000. This report was requested by the United General Assembly. In this report, he points out:

[F]or this reason, I strongly support the proposal that country scrutiny be exercised

\textsuperscript{1098} Surya P. Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs,’ \textit{Human Rights Quarterly}, 33:1, [2011], p. 203.

\textsuperscript{1099} \textit{Ibid} p.204

\textsuperscript{1100} \textit{Ibid}.

\textsuperscript{1101} United Nations General Assembly, \textit{Follow-up to the outcome of the Millennium Summit, Note by the Secretary-General}, A/59/565.

\textsuperscript{1102} \textit{Ibid} paras. 282-283, 291.
through a system of peer review, whether in a new Human Rights Council or a reformed Commission on Human Rights. This system should be built on the principle of universal scrutiny, whereby all States submit to a review of law and practice concerning their human rights obligations. For such a system to be credible and gain the confidence of all, it will be essential that a fair and transparent method be developed to compile information upon which to base the peer review. As the Secretary-General has emphasized, a new Human Rights Council should also continue the practice of the Commission regarding access for non-governmental organizations and preserve the independent role of the special procedures.  

Surely, as outlined, the Commission had its shortcomings. But as Scannella and Splinter write:  

[O]f course it had its shortcomings and was criticised accordingly, but no one can doubt that over its 60 years it made a very important contribution to human rights standard setting, to the development of the UN institutional capacity to promote and protect human rights and, in many national situations, to significant improvements in the protection of human rights.  

The Commission had, despite all the opposition it faced, evolved from a standard setting entity to an innovative human rights mechanism designed to respond to violations effectively. Four major achievements need to be acknowledged:  

1. The creation of Advisory Services Programmes that led to the proliferation of standard-setting mechanisms  
2. Adoption of 1235 and 1503 procedures to examine effects of racism and colonialism  
3. Political emergence of Third World actors and the shift to examining economic grievances  

These results ushered in significant innovations considering the main political confrontations. The Commission provided a forum for different human rights activities, an active and adamant actor to manage, proliferate, generate and protect human rights norms. The United Nations Human Rights Council was established by the General Assembly Resolution 60/251. This groundbreaking document spells out that the General Assembly:  

[D]ecides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all  

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1105 Alston, supra note 29, p. 204.
human rights, civil, political, economic, social and cultural rights, including the right to
development.\textsuperscript{1106}

The creation of the United Nations Human Rights Council must be considered as one of the
far-reaching reforms at the United Nations in general, more specifically it was a change at the
very heart of the United Nations human rights machinery.\textsuperscript{1107} In the end, the replacement
of the Commission by the Council has to be seen as a careful compromise to the prevailing prob-
lematic dichotomy between an effective human rights monitoring system and the national
sovereignty of member states.\textsuperscript{1108}

Rosa Freedman stresses that politicisation within an international body mirrors certain trends
in the global system. The United Nations Human Rights Council, she argues, was politicised
through alliances (defined by geographic circumstances, social and cultural homogeneity,
similar attitudes, external behaviour, political interdependence et al.).\textsuperscript{1109} She argues also that
the Council’s composition contributes to this politicisation, as the majority of states repre-
sented in it come from developing states.\textsuperscript{1110} Rosa Freedman criticises further that, despite
the creation of the Human Rights Council in a reformist atmosphere, renewed politicisation
of this body obstructed the efficient execution of the mandate laid out in Resolution
60/251.\textsuperscript{1111} She substantiates her argument by pointing out to repetitive and selective discus-
sion concerning Israel, predominantly prioritised by an alliance of Arab states.\textsuperscript{1112} For the pur-
pose of this thesis, it needs to be further examined if any of the changes to the United Nations
Human Rights Council were of benefit to the Sri Lankan case study and/or any of those criti-
cisms raised by Rosa Freedman applied to Sri Lanka. In any event, the reform of the charter-
based bodies indicated a fresh start and a new focus on human rights within the United Na-
tions human rights machinery.

\textsuperscript{1106} United Nations General Assembly, \textit{Resolution adopted by the United Nations General Assembly},
A/RES/60/251, para.4.

\textsuperscript{1107} Spohr, supra note 70, p. 171.

\textsuperscript{1108} Alston, supra note 29, p. 197.

\textsuperscript{1109} Rosa Freedman, \textit{The United Nations Human Rights Council, A Critique and Early Assessment}, (Abingdon:

\textsuperscript{1110} \textit{Ibid} p. 126.

\textsuperscript{1111} Rosa Freedman, ‘The United Nations Human Rights Council: More of the same?’, in: \textit{Wisconsin Inter-

\textsuperscript{1112} Freedman, supra note 1109, pp. 128-133.

Sri Lanka expressed to the world its commitment to the international human rights values by becoming a member of the United Nations Human Rights Commission in 1957 and for three other terms, namely 1985-1990, 1992-2000, 2003-05.\footnote{See also: Office of the High Commissioner for Human Rights, United Nations Commission on Human Rights, Members from 1947 to 2006, online at: <http://www.ohchr.org/EN/HRBodies/CHR/Pages/Membership.aspx>, last accessed 28th of February 2017.} In all these years, Sri Lanka provided not only some, but substantive contribution to the development of international human rights law. Stephen Jensen asserts that Sri Lanka was prominently engaged in the drafting of the Covenant on Civil and Political Rights, in the field of freedom of thought and conscience. He points out that “[t]he outspoken defenders of adequate human rights standards in this field were, in fact, Liberia, Pakistan, Sri Lanka, Venezuela and others from the Global South.”\footnote{Jensen, supra note 1071, p. 142.}

Sri Lanka also took a prominent role in drafting and adopting resolutions that condemned racial and apartheid policies in Rhodesia and South Africa, and contributed to discussions on the situation in the Middle East, while advocating for the Palestinians.\footnote{See also, inter alia: Question of slavery and the slave trade in all their practices and manifestations, including the slavery-like practices of apartheid and colonialism: reports prepared under paragraph 6 of resolution 1982/20 of the Commission on Human Rights: note by the Secretary-General, E/CN.4/Sub.2/AC.2/1982/12, 6th of July 1982; Question of Palestine: draft resolution, A/ES-7/L.5/Add.1, 19th of August 1982; The situation in the Middle East: draft resolution, A/37/L.48, 9th of December 1982.} Moreover, Sri Lanka was actively engaged in human rights fact-finding missions (among them the first fact-finding mission ever under the auspices of the United Nations to South Vietnam).\footnote{Sri Lankan governmental representatives were appointed to different fact-finding missions, i.e South Vietnam in 1983 and to the Occupied Territories in 1968, see also: A/5630, Report Of the United Nations Fact-Finding Mission To South Viet-Nam and 2546 (XXIV), Respect for and implementation of human rights in occupied territories; furthermore: Ton J.M. Zuidwijk, Petitioning the United Nations. A Study in Human Rights, (New York: St. Martin’s Press, 1982), pp. 232, 281.} Also noteworthy is a seminar on National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region, organised by the United Nations, a seminar that was held in Sri Lanka, in 1982. The seminar resulted in a United Nations General Assembly Resolution.\footnote{United Nations General Assembly, Regional arrangements for the promotion and protection of human rights, Resolution 37/171.} Moreover, at the 41st Session of the Commission, Sri Lanka presented draft resolution S/CN.4/1985/L.65 on the regional arrangement for the protection and promotion for
human rights, which was adopted by consensus.\textsuperscript{1118} Against this background, it is also of interest to refer to the draft resolution by some co-sponsoring countries, among them Sri Lanka, before the Third Committee of the General Assembly. In this resolution, the supporting member states affirmed the indivisible nature of the civil, political, economic, social and cultural rights, moreover the need for states to bring national human rights standards in line with international human rights standards.\textsuperscript{1119} Conspicuously, Sri Lanka was an active member state within the Commission, advocating for the protection and promotion of human rights. Jayantha Dhanapala, Sri Lankan veteran diplomat, holds the view that:

[I] think it is important to know that prior to 1983 Sri Lanka was never featured in any human right forums. It was my task in 1984, when I assumed duties as Permanent Representative of Sri Lanka to the UN in Geneva, to have to face the reaction to the 1983 riots in Sri Lanka when mobs were responsible for violence which caused the deaths, suffering and burning of a number of Sri Lankan Tamils and other citizens of our country. We had to endure the criticism not only of nongovernment organizations but also of some friendly member countries including countries in our region such as India. Our approach to this task was to engage constructively with our critics and to try to show that what happened in August 1983 was an aberration from the normal practice of human rights by a democratically elected government and the breakdown of government machinery on that occasion was not an indication that that was going to be a permanent feature of Sri Lankan governance. With the co-operation of the members of the Commission on Human Rights and the Sub Commissions on Human Rights, and indeed the UN Human Rights Secretariat we were able, over a period of time, to engage in a dialogue.\textsuperscript{1120}

For this purpose, the examination will now turn to the actual human rights engagement of the Commission with Sri Lanka after the outbreak of violence in 1983, an event that is commonly referred to as “Black July” by Sri Lankans. As discussed in the second chapter, this historical event is widely seen as the starting point of the civil war that followed and lasted for 26 years.

\begin{flushleft}
\textsuperscript{1120} Jayantha Dhanapala, ‘Sri Lanka as a Member of the United Nations, Keynote Address,’ \textit{Seminar Hosted by the International Centre for Ethnic Studies (ICES – Colombo), the United Nations Country Office in Sri Lanka and the United Nations Development Programme Regional Office for Asia Colombo, 15th of November 2007}, p. 8, online at: \textless \texttt{http://www.jayanthadhanapala.com/content/UN_Address_15_November_2007.pdf} \textgreater, last accessed 1\textsuperscript{st} of March 2017.
\end{flushleft}
2.1. Sri Lanka’s interaction with the United Nations Human Rights Commission during the ethnic clashes of 1983

The United Nations Commission for Human Rights scrutinised the government’s human rights record after the events of Black July in 1983. Following Resolution 8 (XXIII), the Commission requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to discuss, report and provide information on the violations of human rights and fundamental freedoms considering the ethnic clashes in 1983. The discussion ushered in the resolution 1983/16.\footnote{1121} This resolution was very mild, as it only requested the government to provide information and subsequent discussion, without any further detailed action envisaged.\footnote{1122} In their response, the Sri Lankan state delegation, while underscoring the voluntary engagement with the Commission, reiterated its consistent policy to engage with the United Nations bodies.\footnote{1123} Throughout the note verbale, however, the Sri Lankan state delegation refuted the claims of discrimination, by declaring:

\begin{quote}
[T]he Sub-Commission considered the disturbances of July 1983 in isolation and failed to consider all the circumstances relating to the ethnic situation in Sri Lanka (...) A great majority of the Tamil people are happy with these measures. As in many countries, however, there remains a small group that is dissatisfied. This group, though small in number, has in recent years agitated for a separate state called "Eelam." It is against this background that, groups of extremists started their campaign of violence.\footnote{1124}
\end{quote}

\begin{footnotes}
\begin{quote}
[T]he Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Deeply concerned about the recent communal violence in Sri Lanka, which cost severe loss of lives and property, Recalling that Sri Lanka has ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, Recognising that the Government of Sri Lanka has sought to reduce ethnic tension and to foster national harmony, Noting with concern that despite these efforts the relationship between the ethnic communities seems to have deteriorated, 1.Requests the Secretary General to invite the Government of Sri Lanka to submit information on the recent communal violence in Sri Lanka, including its efforts to investigate the incidents and to promote national harmony, and to submit any information received from the Government of Sri Lanka to the Commission on Human Rights at its fortieth session; 2.Recommends to the Commission on Human rights that it should examine the situation in Sri Lanka in the light of all available information.”
\end{quote}
\item[1122] \textit{Ibid}.
\item[1123] \textit{Note verbale}, dated 1\textsuperscript{st} of February 1984 from the Permanent Mission of the Democratic Socialist Republic of Sri Lanka to the Secretary-General, E/CN.4/1984/10.
\item[1124] \textit{Ibid} paras. 4 (b), 13.
\end{footnotes}
The statements echoed a certain parochial approach to international human rights monitoring, underpinned by a very vague and unsubstantiated assessment of the situation of Tamil populace in the country. The rhetoric resembles which was apparent before the Committee on the Elimination of Racial Discrimination (examined in the previous chapter).\footnote{See also discussions under No. 4 of chapter IV of this doctoral thesis.} Moreover, the state delegation tried to deflect international criticism by pointing out to material safeguards, an established human rights practice in the country and revered Sri Lankan state officials of Tamil ethnicity.\footnote{Note verbale, supra note 1123, paras. 15-18.} Finally, the delegation was eager to suggest an international conspiracy against its country, shielded itself against criticism by suggesting:

[A] well-orchestrated, mischievous and devious propaganda campaign was set in motion in many countries both to justify the terrorist activities in the north of Sri Lanka and to seek international support for the state of Eelam on the same plea of discrimination.\footnote{Ibid paras. 14.}

After the delegation elaborated on the Prevention of Terrorism Act and the prison violence in Welikade, it concluded:

[The events of July 1983 were caused by a minority of lawless elements in particular circumstances. The guilty have been or are being punished and the Government has initiated a complex and sensitive political process to deal with the fundamental issues which led to the events of July 1983. In this context, the constructive approach of the international community is to resist from any action or comment on the situation in Sri Lanka.]\footnote{Ibid para. 44.}

In light of the events of July 1983, Sriskanda Rajah writes:

To sum up, the use of the terror of ‘lawlessness’ in July 1983 paved the way for the state to not only assert the Mahavamsa based all-island sovereignty claim of the Sinhala Buddhist people and the power of death that they had over the Tamils, but also produced three effects of battle: the elimination of a section of the ‘enemy’ race; destruction and possession of parts of their properties; and the expulsion of a section of them from the Sinhala areas, and to an extent from the island’s shores.\footnote{Sriskanda Rajah, supra note 158, pp. 64-65.}

The manner of dialogue between the delegations and the United Nation was supposed to become an established norm of engagement in Sri Lanka’s communication with the international community. Sri Lanka, a state that actively contributed to the formulation of human rights standards and engaged in human rights monitoring missions, morphed into the position...
of a reluctant, if not persistent human rights objector. Soon after, in 1984, the Sri Lankan human rights situation was again on the agenda of the Commission.\textsuperscript{1130} The opening statement of the Sri Lankan state delegate and permanent representative, veteran diplomat Jayantha Dhanapala indicated a reluctance for the international criticism in internal matters again:

\begin{quote}
[i]t was a strange irony that the Commission should be requested to consider the situation in Sri Lanka, particularly when a democratically elected Government had done everything within its power not only to quell the disturbances that had taken place in July 1985 but also to set in motion a delicate political process at several levels, with a view to achieving a permanent political solution acceptable to all the people of Sri Lanka.\textsuperscript{1131}
\end{quote}

After a lengthy discussion and argumentation patterns that resembled the engagement before the treaty bodies, Jayantha Dhanapala asserted:

\begin{quote}
[H]is delegation had voluntarily made available to the Commission a memorandum (E/CN.4/1984/10) on the human rights situation in Sri Lanka, with particular regard to the Tamil minority. There had been no gross violations of human rights, nor anything to suggest a consistent pattern of such violations. The situation, therefore, did not come within the Sub-Commission’s mandate under Commission resolution 8 (XXIII). It arose from political problems, which the country was trying to solve by itself, including assassinations and acts of violence against police and other public servants, carried out by terrorists in an effort to destabilize the lawfully elected Government. To plead the cause of a few terrorists in disregard of the human rights, including the right to life, of the vast majority of citizens was dangerously misleading and prompted the question whether the Commission should investigate the impact of terrorism on the protection of human rights in democratic societies.\textsuperscript{1132}
\end{quote}

The focus shifted away from malpractice in the human rights promotion and protection of the government to the human rights abuses committed by the Liberation Tigers of Tamil Eelam. From now on, Sri Lanka became a regular subject of discussion at sessions of the United Nations Commission on Human Rights. Interestingly, Sri Lanka did engage and discuss its internal matters before the international community. In 1985, the leader of the state delegation, H.W. Jayawardene enunciated:

\begin{quote}
[H]owever, in consonance with our support for the UN and in a spirit of co-operation with UN activities in the important field of human rights, we have voluntarily made available information on the situation in Sri Lanka both before the Commission on Hu-
\end{quote}

\textsuperscript{1130} United Nations Human Rights Commission, \textit{Summary record of the 46th meeting (1st part), held at the Palais des Nations, E/CN.4/1984/SR.46.}

\textsuperscript{1131} \textit{Ibid} para. 14.

\textsuperscript{1132} \textit{Ibid} para. 24.
man Rights and before the Sub Commission on Prevention of Discrimination and Protection of Minorities. This spirit of co-operation is undiminished by serious misgivings which we share with other delegations about the selectivity of approach to country situations, the overlapping of procedures within the UN bodies on human rights and the blatant political use made of these bodies by interested parties who seek to pursue their political aims in any forum and at any time.\textsuperscript{1133}

The statement revealed the consistent pattern used in future engagement with the United Nations Commission on Human Rights. The government tried to deflect attention by referring to human rights violations committed by the Liberation Tigers of Tamil Eelam:

\begin{quote}
[T]he prime cause for incidence of violence in Sri Lanka has been the acts of terrorists which the security forces of Sri Lanka are endeavouring to control in order to protect the human rights including the right to life of all citizens of Sri Lanka wherever they may live in our island home.\textsuperscript{1134}
\end{quote}

In 1987, the United Nations Commission on Human Rights adopted a resolution to address the ongoing civil war by declaring an urgent need to find a political solution to the conflict and underscored the urgency to respect human rights and fundamental freedoms.\textsuperscript{1135} The 1992 engagement with the Commission demonstrated a less ideologically charged atmosphere. Also, members of the Commission, non-member observer representatives and non-governmental organisations reported that the new members were receptive to new ideas and initiatives to enhance the effectiveness of the Commission.\textsuperscript{1136} There was also an emphasis of the Commission to take Asian human rights situations more into consideration, such as Cambodia, East Timor, Myanmar, and Sri Lanka.\textsuperscript{1137} Various human rights violations and in particular the problem of impunity were discussed at the Commission in 1992, resulting in different statements by present non-governmental organisations.\textsuperscript{1138} Facing this pressure from civil society actors and the calls for the creation of a Special Rapporteur on the human rights situation, the Sri Lankan state delegation expressed its genuine concern when confronted with

\begin{footnotes}
\textsuperscript{1134} \textit{Ibid}.
\textsuperscript{1135} United Nations Commission on Human Rights, Resolution 1987/61, 58\textsuperscript{th} Meeting, 12\textsuperscript{th} of March 1987.
\textsuperscript{1137} \textit{Ibid}.
\textsuperscript{1138} One daunting oral statement is that of non-governmental organization ARTICLE 19: “\textit{[W]hile a number of criminal cases were pending against members of the security forces, there was no evidence of any convictions for grave human rights violations committed in the course of counter insurgency operations... it is clear that these violations are only the tip of the iceberg and that various domestic procedures by which Sri Lankans may seek redress are virtually useless.\textquotedblright}, U.N. Press Release HR/3038, 20\textsuperscript{th} of February 1992.
\end{footnotes}
international attention regarding the human rights violations in its territory. Impressed by such concerns, the Commission wanted to encourage the Sri Lankan government to take steps to prevent recurrences. This resulted in an isolated statement of the chairperson of the Commission, without the possibility of a special procedure or investigator to follow-up on the situation.\footnote{Statement by Chairman of Human Rights Commission on behalf of all the member countries of the Commission, on the Human Rights Situation in Sri Lanka, 27\textsuperscript{th} of February 1992, online at: \url{http://tamilnation.co/unitednations/uncom92.htm#a1}, last accessed 14\textsuperscript{th} of March 2017.}

The 1992 session of the Commission on Human Rights would have been the strategic moment to establish a special procedure equipped with a country mandate. In hindsight, the Commission had moved away from its static engagement and solely standard-setting up to 1967, but failed to take a more decisive and probably more intrusive approach to the civil unrest that eventually morphed into the fully-fledged civil war that lasted until 2009. During a discussion on the issue of enforced disappearances, the state delegation, while acknowledging the grave human rights violation, subtly shifted the focus and the responsibility to terrorist activities.\footnote{Statement by Mr. Tilak Marapone, Leader of Sri Lanka Delegation, 23 February, 1993 under Agenda Item No. 10(C): Question of enforced or involuntary disappearances, 49\textsuperscript{th} Session, February 1993: “[M]r. Chairman, the phenomenon of disappearances did not arise from any deliberate policy of the government either through action or inaction. It was the by-product of an extraordinary situation created by terrorist violence. The implementation of the recommendations of the Working Group will undoubtedly assist us in strengthening structural, and operational deficiencies. This process however cannot be realistically reviewed in too brief a time frame. It has to be related to the exigencies of the prevailing political and security situation. (...).”}

The same method of deflection was used in a 1996 and 1998 statement by the head of the Sri Lankan state delegation.\footnote{Statement by the leader of Sri Lanka Delegation, Ambassador A.B.Goonetilleke, 17 April 1996 “[I]t is encouraging to note that the subject of terrorism has begun to engage the serious attention of the international community including the human rights fora. In this regard, the contribution made by the Sub Commission on Prevention of Discrimination and protection of Minorities is commendable. The Vienna Declaration and Programme of Action of 1993 and the Declaration on Measures to Eliminate International Terrorism contained in GA Resolution 49/60 constituted an important milestone in a debate previously hampered by political and definitional problems. In a remarkable display of unity, in the declaration made on the Special Commemorative Session of the 50th Anniversary of the United Nations, Heads of State and Government agreed to act together to defeat terrorism. (...)”; Statement by Sri Lanka Ambassador S. Palihakkara, Permanent Representative and Leader of the Delegation of Sri Lanka, Agenda Item 10 on the “Question of the violations of human rights and fundamental freedoms with particular reference to colonial and other dependent countries and territories, 15\textsuperscript{th} of April 1998.”}

Civil society played a crucial role when different non-governmental organisations raised the need for the establishment of a special rapporteur with a country
mandate again. Contrary to the statement made by the Sri Lankan government, non-governmental organisations also underscored that impunity of armed forces remained a matter of serious concern, indicating the growing self-confidence of non-governmental organisations in their statements that provided a vital mechanism to question and double-check the accounts furnished by the Sri Lankan state delegations.

2.2. Sri Lanka and the Special Procedures under the United Nations Commission on Human Rights

Sri Lanka was subject to several Special Procedures under the United Nations Commission on Human Rights. In the following section, the discussion will turn to three crucial Special Procedures established to consider the human rights situations in certain areas of concern regarding Sri Lanka: enforced disappearances, torture and arbitrary and summary execution. The reason for the choice for these three human rights violations is guided by their specific prevalence during the Marxist uprising in 1971, during and after the end of the civil war. For this reason, it is necessary to examine and identify any impact of the human rights engagement to deter and control human rights violations in these areas.

2.2.1. Working Group on Enforced or Involuntary Disappearances

Sri Lanka’s human rights record regarding enforced or involuntary disappearances is very troublesome. As outlined under the human rights engagement with treaty-based bodies, enforced disappearances became a common phenomenon in the country. Many countries with internal troubles, disturbances or war invoke national security to encounter violence in their countries. To this end, disappearances became the preferred:

[w]eapon used to suppress opposition. The term disappearance is a euphemism to disguise the use of extrajudicial detentions and killings by state-sanctioned agents. Agents arrest individuals without charge and hold them indefinitely while officials deny knowledge of their detention.

Sriskanda Rajah holds the view that:

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the tactic of “disappearance” could be said to have allowed Sri Lanka to use the power of death in more innovative ways. It no longer had to manage the lives of members of the “enemy” race in pain or kill them in public and risk being called a murderous state by the international community. It could simply arrest members of the “enemy” race, but deny having made any arrests, and then manage the lives of the detainees in the pain of torture until the ‘truth’ on the Tamil militancy had been produced, and then eliminate them. In doing so, Sri Lanka created a new official status “disappeared.”

In light of the growing number of disappearances, the United Nations established the Working Group on Enforced or Involuntary Disappearances in 1980, the first of the thematic mechanisms created by the United Nations Commission on Human Rights. It was hoped that the Commission would serve as a means of communication between victims, families, and non-governmental organisations and governments. The body was also mandated to examine questions relevant to enforced or involuntary disappearances of persons by collating information from governments, intergovernmental organisations, humanitarian organisations and other reliable sources. Finally, the body was also obliged to submit annual reports to the United Nations Commission on Human Rights.

On the 18th of March 1981, the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Commission for Human Rights issued an examination of the country situation in relation to enforced disappearances in Sri Lanka. The Sub-Commission merely examined that the legal infrastructure and material safeguards to encounter detention and disappearances in particular and on the 31st of October 1981, the Working Group expressed its wish, for the first time since its inception, to conduct a country visit and examine the reported cases of disappearances. The Sri Lankan Government’s response was swift, but they referred to ongoing domestic investigations into the matter and expressed its intention to revert to the Working Group upon conclusion of the domestic investigations. In 1986 the state delegation of the Federal Republic of Germany highlighted the issue of disappearances in countries that were unable to extend their control in certain territories.

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1145 Sriskanda Rajah, supra note 158, p. 58.
1146 Punyasena, supra note 1144, p. 125.
1147 Report by the Secretary-General prepared in accordance with resolution 18 (XXXIII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/1434/Add.4.
1149 Ibid.
state delegation called upon the Commission to act in these cases to intervene and address these human rights violations, in particular in cases where enforced disappearances were carried out by forces in opposition to the government.\footnote{Ibid.} This statement was quickly endorsed by the Sri Lankan state delegation that answered “[t]he Working Group should establish means of obtaining information on disappeared persons from insurgent groups over whose activities Governments had no control.”\footnote{United Nations Commission on Human Rights, Summary record of the 54th meeting, held at the Palais des Nations, 11th of March 1986, E/CN.4/1986/SR.54, para. 74.}

The Sri Lankan government was very adamant in this regard to quickly emphasise acts of violence committed by irregular armed groups, while deflecting from own failures to encounter disappearances perpetrated by own authorities or its proxies. By way of example, the Sri Lankan government was heavily involved in lobbying efforts to adopt measures to condemn acts committed by terrorist groups. These efforts succeeded in 1990, with the adoption of Resolution 1990/75.\footnote{UN Commission on Human Rights, Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights, 7th March 1990, E/CN.4/RES/1990/75, online at: <http://www.refworld.org/docid/3b00f01610.html>, last accessed 14th of September 2017.} And as a matter of fact, Sri Lanka maintained this line of engagement with the Commission, as they continuously referred to the human rights violations committed by the Liberation Tigers of Tamil Eelam and by doing so, they tried to divert the international attention from their violations. This argumentation is reflected in the Annual Report from 1991.\footnote{United Nations Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1991/20, para. 359.} The constant pressure exerted by the Working Group has yielded some laudable results: the common effort of the government, the Working Group, families of disappeared and civil society actors have helped to usher in the reduction and clarification of outstanding cases. More precisely, the Working Group could clarify 4,390 cases of disappearances in 2001, followed by another 1,234 cases in 2002.\footnote{United Nations Commission on Human Rights, Question of enforced or involuntary disappearances Report of the Working Group, E/CN.4/2002/79, para. 287; United Nations Commission on Human Rights, Question of enforced or involuntary disappearances Report of the Working Group, E/CN.4/2003/70, para. 252.}

By way of comparison, in 1998, 12,144 were still outstanding.\footnote{Gutter, supra note 1064, p. 239, Table: Clarification rates of nine states with the highest numbers of reported cases of disappearances in 1998.} This was the result of the sophistication, self-assurance and international legitimacy of the Working Group that had deepened and intensified its engagement with the Sri Lankan government. When the Working
Group visited the country in 1991 and 1992, the special procedure had moved away from formulaic to more precise and reprimanding recommendations. Exemplary is the Working Group’s recommendation regarding outstanding clarification of cases and civil defence:

[The] Government should pursue the clarification of disappearances even more vigorously. The setting up of various bodies has been an important step in this direction, but is not sufficient (see recommendations (j) and (k)). Human rights groups should be brought more closely into the search for missing persons, specifically as regards the identification of bodies discovered. In such identification, assistance might also be requested from an international team of forensic experts under United Nations auspices. (...) Civil defence units should only be formed on a purely voluntary basis, under the control of civil authorities. They should come under stricter control in terms of command structure, operations and supply of arms and ammunition. Care should be taken that only properly trained personnel in uniform are allowed to carry officially issued arms and use official vehicles in carrying out operations. This may prevent the present practice of civilian defence units in plain clothes arresting people at will, a practice about which the Working Group has received many complaints as having led to abuse.\footnote{1157 United Nations Commission for Human Rights, \textit{Report of the Working Group on Enforced or Involuntary Disappearances}, E/CN.4/1992/18/Add.1, paras. 204 c) and m).

Moreover, the engagement was of a vital nature: thanks to the Commission’s heavy lobbying efforts and pressure exerted upon Sri Lanka, the Working Group was able to make another on-site visit in 1992.\footnote{1158 Gutter, \textit{supra} note 1064, p. 281.} Also, in the larger context of this human rights engagement, it needs to be taken into account that Sri Lanka had voted in a new president in 1988, Ranasingha Premadasa.\footnote{1159 Barbara Crossette, ‘Ranasinghe Premadasa; Sri Lankan At the Top’, online at: <http://www.nytimes.com/1988/12/21/world/man-in-the-news-ranasinghe-premadasa-sri-lankan-at-the-top.html>, last accessed 14\textsuperscript{th} of March 2017.} When confronted with the possibility to adopt a country-specific resolution, the Sri Lankan government felt compelled to allow another on-site visit, as a resolution was considered to be more politically harmful to the country’s reputation than a visit by this special procedure.\footnote{1160 Gutter, \textit{supra} note 1064, p. 281.} Given this continuous interaction with the government of Sri Lanka and its active engagement with the Commission and this procedure, Sri Lanka’s attitude towards the Commission changed. By engaging openly with the Working Group and human rights reassurances submitted (with regards to the creation of a task force to monitor detainees, presidential commissions et al.), the Commission decided to adopt a consensus statement in 1992 after the conclusion of the special procedure.\footnote{1161 United Nations, Press release HR/3048, 27\textsuperscript{th} of February 1992.} The statement appeared in the record of the
proceedings, but disappeared in the descriptive and procedural sections of the Commission’s Annual Report.

This particular statement encouraged the Sri Lankan government to continue to implement human rights reforms and the recommendations of the Working Group. This decision did not find the support of members of the community of non-governmental organisations, as they had urged for the appointment of a Special Rapporteur, and viewed this outcome as a failure.\textsuperscript{1162} Despite this setback, non-governmental organisations continued their lobbying efforts at the Commission for the establishment of a Special Rapporteur, resulting in 1998 in a joint statement by numerous non-governmental organisations.\textsuperscript{1163} In the larger context, it can be concluded that the Working Group on Disappearances has managed to establish a working relationship with the Sri Lankan government, maintaining, however, its modest stance on its contribution to the clarification of disappearances.\textsuperscript{1164}

2.2.2. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

The late Sir Nigel Rodley reported on torture in Sri Lanka based largely on communications he received from individuals. He expressed the view that the emergency regulations aggravated and facilitated the wide practice of torture in the country.\textsuperscript{1165} He detailed the components that provide a fertile ground for the torture practices to strike roots, \textit{inter alia}, admission of confessions which were obtained under torture, the maintenance of dark sites. Meanwhile, the Sri Lankan government had, under pressure from the international human rights machinery, enacted the Convention against Torture Act in 1994, which was discussed in the third chapter. In his report, Sir Nigel Rodley held that “[i]t remains evident that more prosecutions and convictions will be required in order significantly to affect the problem of impunity.”\textsuperscript{1166} Substantiating this observation, Eric Sottas, the Director of the World Organisation Against

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\textsuperscript{1163} United Nations Commission on Human Rights, Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories, E/CN.4/1998/NGO/120.
\textsuperscript{1164} Gutter, supra note 1064, p.351.
\end{flushright}
Torture argued that:

[M]any resolutions and recommendations expressed by both conventional and constitutional mechanisms remain widely ignored and are of little practical use. At the national level, the recognised universal judicial competence to sanction torture, is seldom used. (...) Nevertheless, in the course of the past year, cases of torture, violation, summary executions and forced disappearances have continued to be denounced by the human rights organisations. Some months ago, we planned to have one of the many victims present a testimony of the atrocities before this body. The fear, unfortunately justified, of reprisals against their family has meant that his submission cannot be made. This lack of confidence that the people that we are supposed to be defending have in the single most important international body with responsibility for the protection and promotion of human rights, speaks volumes.\textsuperscript{1167}

In response to a report by the South Asian Human Rights Recording Centre, the Sri Lankan government submitted in 2004 a note verbale in which it refuted the claims made of widespread application of torture.\textsuperscript{1168} Sri Lanka maintained its official position that torture was not used in the country, while the Special Rapporteur and the United Nations Commission on Human Rights insisted that torture was a standard practice, but different governments in charge neither changed the policy nor official rhetoric. Torture was a necessary means to demonstrate the presence of ethnocratic state power to the people it governed. Prosecutions against perpetrators would have undermined the legitimacy of power.

2.2.3. Special Rapporteur on extrajudicial, summary or arbitrary executions

In light of communications received, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted a report on Sri Lanka in 1994.\textsuperscript{1169} The cases of more than hundred people who were killed were communicated to the Sri Lankan government.\textsuperscript{1170} By way of example, the Special Rapporteur pointed out to the case of Tharmalingam Selvakumar\textsuperscript{1171}, a person who filed a fundamental human rights case in the Supreme Court not only against the police, but also the Attorney General and the leader of the Eelam People’s Democratic Party, Douglas Devananda. Selvakumar claimed he was abducted

\textsuperscript{1167} United Nations Commission on Human Rights, \textit{Statement World Organisation Against Torture, Agenda Item on Question of human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment}, 26\textsuperscript{th} of March 1997.


\textsuperscript{1170} ibid para. 552.

\textsuperscript{1171} ibid paras. 551, 554.
and tortured by the latter in collusion with the country’s police and claimed to fear for his life. The heightened attention and increased visibility contributed to the international exposure through the mechanisms such as the special procedure and secured the life of Tharamalingam Selvakumar.\textsuperscript{1172} In this report, the Special Rapporteur also expressed his wish for an on-site visit. This request was realized in 1997, which led to the 1998 country report. In this report, the Special Rapporteur stressed the complicating nature of anti-terrorism legislation on the full enjoyment of human rights in the country.\textsuperscript{1173} The report, overall, described the severity of the situation, along with the blatant and widespread human rights violations. He pointed to the prevailing culture of impunity in the country, a recurring theme in the Sri Lankan context as was illustrated.\textsuperscript{1174} The conclusion in the report was a clear and frank prediction on the future of Sri Lanka:

[I]mpunity enjoyed by human rights violators in Sri Lanka is very pervasive. (...) it has proved itself equally effective in guaranteeing impunity for violations of the ordinary criminal law in respect of acts (murder, torture, kidnapping) committed in the line of duty. Thus, Sri Lanka fails to its obligations under international law to carry out exhaustive and impartial investigations with a view to identifying those responsible, bringing them to justice and punishing them. (...) This strongly suggests the lack of institutional willingness to hold the authors of human rights violations responsible. (...) Neither the Sri Lankan population, the main victims, nor the international community, a powerless witness to the frequent killings and disappearances, seem capable of halting the violence. The failure by the Sri Lankan authorities to take concrete measures which would have immediate effect and put an end to this violence and further prevent its degeneration into a civil war has also contributed to shaping the present situation.\textsuperscript{1175}

In response to his visit to Sri Lanka, the state delegation of Sri Lanka took certain observation


\textsuperscript{1173} Report of the Special Rapporteur, \textit{supra} note 1169, paras. 74-90.


“[I]mpunity enjoyed by human rights violators in Sri Lanka is very pervasive. The judiciary is competent to deal with cases involving security forces personnel accused of human rights violations. The justice system can be tough and effective in prosecuting and punishing disciplinary offences involving manifest disobedience of orders. However, it has proved itself equally effective in guaranteeing impunity for violations of the ordinary criminal law in respect of acts (murder, torture, kidnapping) committed in the line of duty. Thus, Sri Lanka fails to fulfil its obligations under international law to carry out exhaustive and impartial investigations with a view to identifying those responsible, bringing them to justice and punishing them. (...)”

\textsuperscript{1175} \textit{Ibid} paras.159-161.
into account, but refuted certain comments made:

[W]hile acknowledging some of the forthright comments the Special Rapporteur had made in his presentation of the report, we find certain generalisations and sweeping statements made in his report as not reflecting the fullest appreciation of the complex issues involved, particularly the implications such simplified comments will have for the principles of the United Nations Charter such as the territorial integrity of States. The Government will undertake a careful study of the report and will continue the dialogue with the Rapporteur.\textsuperscript{1176}

The successor of Mr. Bacre Waly Ndiaye, Mr. Phillip Alston, visited the country, as part of one of the last country visits mandated by the Commission, between the 28\textsuperscript{th} of November and 6\textsuperscript{th} of December 2005. He arrived in the country during the resurgence of the conflict, as the foreign minister of the country, Lakshman Kadirgamar, was assassinated by the Liberation Tigers of Tamil Eelam.\textsuperscript{1177} Despite a carefully brokered ceasefire in 2002 by the Norwegian government, both, Sri Lankan government as well as the Liberation Tigers of Tamil Eelam, had repeatedly violated this cease-fire agreement.\textsuperscript{1178} In this very hostile environment, the Special Rapporteur wrote his Report from his mission to Sri Lanka.\textsuperscript{1179} He noted:

\textbf{[T]he last days of my visit witnessed what were then the deadliest attacks on Government forces since the ceasefire and even more deadly attacks have followed. As the Sri Lanka Monitoring Mission (SLMM), established to monitor the ceasefire, has warned, the ceasefire is "in jeopardy" and "war may not be far away."} I deplore this turn of events, and reiterate that peace is necessary to fully ensure the right to life in Sri Lanka. I would emphasize, however, that the findings below remain relevant despite these developments: extrajudicial killings were not halted by the ceasefire and appear set to continue regardless of how the conflict develops.\textsuperscript{1180}

Moreover, he asserted:

\textbf{[D]uring my visit to the east, I received complaints of Tamil youths being picked up by white vans (allegedly with involvement by the security forces), and of two Tamil men from the east abducted from a trishaw shortly after being released by the police in


\textsuperscript{1178} The Guardian, ‘Violence kills of Sri Lanka ceasefire’, online at: <https://www.theguardian.com/world/2008/jan/03/1>, last accessed 10\textsuperscript{th} of February 2017.


\textsuperscript{1180} \textit{Ibid} para. 6.
Colombo and later turning up dead. During the month of December, the Human Rights Commission of Sri Lanka received 16 complaints of disappearances from the north of the country. I am seeking further information on these cases and will pursue them with the relevant authorities, but I flag them here as an alarming warning that the escalating security situation could trigger a reversion to abusive practices of the past. I urge the Government to respond to these cases promptly and effectively and ensure that all the necessary safeguards with respect to detention are fully observed.\footnote{Ibid para. 68.}

His report undoubtedly served as an early-warning mechanism to draw the attention of the international community to the slow peace process in the country. Commentators aligned with the government and alleged him of lobbying for an external intervention by the United Nations, while scorning him as one of the “[m]ore passionate human rights campaigners for external intervention against human rights violations in Sri Lanka.”\footnote{Peiris, supra note 840, p. 258.} Nonetheless, Phillip Alston’s report not only scrutinised the actions by the government, but also held activities of the Liberation Tigers of Tamil Eelam rebels to account, as well as of a fraction of Liberation Tigers of Tamil Tigers defectors. Phillip Alston’s report is a strong document providing robust legal and political analysis. His report highlights in one instance that “[A]s a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.”\footnote{United Nations Commission on Human Rights, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53/Add.5, paras. 22, 25-27.} This report provided a comprehensive and impartial guideline to encounter the erupting violence and deter the threat of the outbreak of civil war.\footnote{Ibid pp.2-3.}

Given the events that followed, however, the report failed to be a basis for collective and preventive action. On the one hand, the engagement with the Special Rapporteur on extrajudicial, summary or arbitrary executions helped to create awareness in the international forum for the deteriorating situation in the country. It helped, for example, to save the life of an individual’s life, namely that of Tharamalingam Selvakumar. The special procedure amplified that human rights violations cannot remain invisible and isolated, but become a matter of world attention. On the other hand, this special procedure failed to trigger any follow-up mechanism or credible action by the United Nations Commission on Human Rights to prevent...
the outbreak of the conflict. The Commission was more engaged with its own existential crisis rather than with the engagement with Sri Lanka. Altogether, the engagement of Sri Lanka with the United Nations Commission on Human Rights had a modest impact. The engagement was an evolution, owing to the deficiencies in the legal birth of the United Nations Commission on Human Rights. It was, as outlined earlier, too engaged in finding its own role and voice up to 1967 in the United Nations. Resolution E/259 severely limited its own action scope.

As it was outlined in second and third chapter, Sri Lankan governments and policy-makers took legal actions and political decisions with far-reaching impact on the Sri Lankan human rights infrastructure in the early years of independence. This happened in a phase when the United Nations Human Rights Commission remained in a reluctant and cautious status. It was, as outlined earlier in this chapter, only after 1967 when the United Nations Commission on Human Rights shifted to a more vibrant and intervening human rights engagement, with the 1235 and 1503 procedures. But, by this time, several policies in Sri Lanka had already harmed the Sri Lankan human rights infrastructure and the United Nations Commission on Human Rights was nothing more than a ponderous admonisher. More precisely, the impact of the engagement was too little, too late.


In the relatively short history of the Human Rights Council, it seems that the body prefers to adopt country-specific resolutions by consensus rather than by a recorded vote. The value of conciliatory and consensus-based decision making over non-consensual cannot be appreciated enough. The approach to consensus facilitates an egalitarian procedure which, once applied, assures in multilateral negotiations real geopolitical power of the countries that are participating. This trend seemed to continue in the years between 2006 and 2015 when resolutions were adopted by consensus, indicating that member states tend to prefer less controversial resolutions. The overall number of resolutions adopted by a vote has grown, an

indicator that member states are moving to consider more controversial cases. Sri Lanka’s internal human rights situation, coming along with the lack of accountability and impunity, is such a case. In 2006, Finland, on behalf of the European Union, submitted a draft resolution with regards to the Sri Lankan human rights situation. This resolution underscored the international concern regarding the deteriorating human rights situation, while demanding for a field presence of the Office of the High Commissioner in the country. In the same year, the former president of the country, Mahinda Rajapakse, addressed the General Assembly at the sixty-first session with following words:

> [G]iven my personal commitment to the promotion of human rights at both local and international level, the establishment of the Human Rights Council with enhanced status and capacity to promote and protect human rights worldwide, is a cause for delight. I am happy that Sri Lanka was elected to the Council in May this year. In honouring a pledge made at the Presidential election last year, we have already started work on crafting a Human Rights Charter in Sri Lanka. Consistent with our goal of safeguarding human rights, my government will establish an international panel to observe investigations into certain alleged human rights violations which my Government has already condemned.

The human rights charter, was never fulfilled, like many other pledges. Meanwhile, Sri Lanka became a member of the Human Rights Council in 2008. As Sri Lanka sought election to the Human Rights Council, the state delegation of Sri Lanka submitted a voluntary pledge. Here the state delegation enunciated:

> [S]ri Lanka has opened itself to scrutiny of multiple international mechanisms on the belief that openness and accountability, through international means, can strengthen national efforts at promoting and protecting all human rights. (…) Sri Lanka is a firm supporter of the United Nations human rights system, and has been active in deliberations on human rights in international fora including the negotiations that led to the establishment of the Human Rights Council as well as the adoption of the institution building package of the Council.

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While this is a notable affirmation to the international human rights machinery, it needs to be investigated if the words met with action in the forum of the Human Rights Council. In the next subsection, the examination will closely examine the charter body's engagement with Sri Lanka in light of its efforts to highlight the war crimes allegations after the end of the war in 2009.


Towards the end of the war in Sri Lanka, the question of alleged war crimes came before the Human Rights Council. At the eighth session of the Human Rights Council, the intensifying conflict in Sri Lanka became the subject of discussion. Two non-governmental organisations raised the issue of Sri Lanka in this context, namely the Norwegian Refugee Council and Forum-Asia. The Norwegian Refugee Council, for instance, mentioned the concern with regards to internally displaced persons in the country.\(^\text{1192}\) Forum-Asia stressed, \emph{inter alia}, the vulnerable situation of internally displaced persons, the lack of humanitarian access and prevailing impunity in the country.\(^\text{1193}\) The concluding section of the note verbale of the Sri Lankan state delegation to the statements is very telling.\(^\text{1194}\) This was an early indication of the tone that would follow in future discussions with the Human Rights Council, reflecting the growing recalcitrance and intransigence of the government’s engagement with the Human Rights Council:

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\text{[S]}\text{ri Lanka is tired of these misrepresentations. Sri Lanka is tired of claims that we are ‘unwilling to accept international advice and assistance offered to address deficient prosecution and compensation processes’ when in the words of Alfred Doolittle we are begging for it. We have asked for technical assistance, but if we are slapped in the face when we do so and told that either we accept a monitoring mission or nothing, we are not going to submit to such blackmail. We appreciate the assistance of those officials in the UN system who are willing to help with the problems we have, but we will not be stampeded by forces providing excuses for terror into measures that will}
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\(^{\text{1192}}\) United Nations Human Rights Council, \emph{Written statement by the Norwegian Refugee Council (NRC), a non-governmental organization in special consultative status}, A/HRC/8/NGO/29.


prevent us from putting a stop to terror, and its ghastly consequences for all our citizens and our Tamil brethren in particular.

In the following sections, the discussion will examine the engagement of Sri Lanka with the Human Rights Council on alleged war crimes and the closer examination of the resolutions that resulted from this engagement. Six resolutions will be considered, while the tone in the engagement, behaviour and change of behaviour will be accentuated.


As it was shown earlier, Sri Lanka has not been subject to a formalised procedure by the Commission for Human Rights. The first formal referral and discussion on the country’s human rights situation was on occasion on the eleventh special session of the United Nations Human Rights Council, held on the 26th and 27th of May 2009, requested by the European Union and tabled by the German state delegation. This group of states presented a draft resolution which demanded the cooperation of Sri Lanka with the human rights machinery and highlighted the loss of civilian life, suppression of civil liberties, the state of internally displaced persons and urged the need for an accountability mechanism. Before this session, the Sri Lankan government issued a joint communiqué with the United Nations Secretary-General, which underscored the country’s commitment to the promotion and protection of human rights, its commitment to abide by international human rights standards and willingness to engage on the international plane. The United Nations Secretary-General expressed the need for an accountability process and the government committed to taking measures to address those grievances.

With this joint statement and a strong alliance in the Human Rights Council, the state delegation of Sri Lanka entered the Special Session for the discussion of a resolution. The state delegation not only managed to secure the passage of a deeply flawed resolution on the situation

1195 United Nations Human Rights Council, Assistance to Sri Lanka in the promotion and protection of human rights, A/HRC/S-11/1, supported by: Argentina, Bosnia and Herzegovina, Canada, Chile, France, Italy, Mexico, Mauritius, Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, the United Kingdom and Uruguay.
1198 ibid.
in its country. It also ignored the demand for an international investigation into alleged war crimes during the last stages of the war. It also failed to express its concern for the hundreds of thousands of people facing indefinite detention in government camps. More regrettably, the state delegation managed to introduce its own narrative on the war, underpinning its position and, unlike other resolutions of this nature, “[d]id not mention any follow up and even denied the Human Rights Council the right to comment on human rights issues as allegedly interference with the internal affairs of a sovereign country.”1199 The resolution was adopted by vote1200 and, according to observers, the European Union’s attempt to address the country situation was a colossal failure and a victory for those advocating the principle of non-interference.1201 This resolution also had short-term implications for the Human Rights Council on other country situations, as the fear grew in light of the Sri Lankan experience that another resolution on another country situation may lead to another defeat in the Council. Human Rights Watch held the view that:

[I]t is deeply disappointing that a majority of the Human Rights Council decided to focus on praising a government whose forces have been responsible for the repeated indiscriminate shelling of civilians. These states blocked a message to the government that it needs to hear, to ensure access to displaced civilians and uphold human rights standards. They undermined the very purpose of the council.1202

The discussion, resolution and handling on Sri Lanka were considered by many observers as the “[d]arkest moment” in the young history of the Human Rights Council.1203 And yet, this very deplorable session turned out to be the springboard for collective international action in the years to come at the United Nations. The United Nations Secretary-General became subject to growing criticism for his handling of the Sri Lankan situation. In reaction to the criticism, he appointed the Panel of Experts on Accountability in Sri Lanka.1204 The panel, which was not

1199 Rathgeber, supra note 27, p.13.
1200 The vote was supported by Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia.
1203 Ibid.
allowed to visit the country, received information from international organisations, governments, non-governmental organisations and individuals. Communication between the Panel and the Sri Lankan government were marked by suspicion and hostility.

Credible allegations were found that both, the Sri Lankan Army Forces and Liberation Tigers of Tamil Eelam, violated international humanitarian and human rights law. Allegations against the Sri Lankan army included, *inter alia*, killing of civilians through widespread shelling and the denial of humanitarian assistance. Allegations against the Tamil Tigers included, *inter alia*, the use of civilians as a human buffer and the killing of civilians attempting to flee control of the Liberation Tigers of Tamil Eelam. The panel requested the government to investigate the war crimes allegations and bring justice to victims. On the 12th of September 2011, the United Nations Secretary-General Ban Ki-moon sent the report of his Panel of Experts to the United Nations Human Rights High Commissioner for Human Rights and the United Nations Human Rights Council. The Panel held in this report, which turned out to be a significant vehicle for the Council’s revived action, the following poignant wording:

> [t]he Government has used its military success to create a discourse of triumphalism, which celebrates its claim to having developed the means and will to defeat "terrorism." It is a discourse couched regarding Sinhala majoritarianism that presents the defeat of the LTTE as the defeat of all Tamil legitimate political aspirations.

Moreover:

> [P]olitical, social and economic exclusion based on ethnicity, perceived or real, lies at the heart of the Sri Lanka conflict. Reconciliation in Sri Lanka requires recognition and acknowledgment of the rights of all communities, including Tamils and Muslims, as full citizens. Future policies must be inclusive to prevent the potential re-emergence of violence as a form for expressing grievances.

Finally, in addition to its conclusions on the need for Sri Lankan accountability for violations during the war, the Panel of Experts also recommended that there was a need for the United Nations to review its handling of affairs. This recommendation resulted in the Secretary-

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1205 *Ibid* paras. 16-17.
1207 *Ibid* p.ii.
1208 *Ibid* para. 401.
1209 *Ibid* para. 401.
1210 *Ibid* Recommendation 4.B.
General’s Internal Review Panel, headed by senior British diplomat Charles Petrie.\textsuperscript{1211} It would go beyond the scope of the thesis to fully appreciate every aspect of the valuable assessment of the general apparatus of the United Nations. The concluding statement of the Internal Review Panel is, however, noteworthy:

\text{[C]oming at the beginning of his second term, the Secretary-General’s decision to commission an internal review is a courageous step. The Panel believes that the report’s findings and recommendations provide an urgent and compelling platform for action. The UN’s failure to adequately respond to events like those that occurred in Sri Lanka should not happen again. When confronted by similar situations, the UN must be able to meet a much higher standard in fulfilling its protection and humanitarian responsibilities.}\textsuperscript{1212}

Meanwhile, the Sri Lankan government was rather infuriated and embarked upon an antagonistic discussion with the respective United Nations bodies. Most importantly, the Secretary-General was heavily criticised, while the former High Commissioner for Human Rights, Navi Pillay, was also attacked for her alleged personal bias towards Sri Lanka, given her Tamil heritage.\textsuperscript{1213} A member of the Rajapakse administration, Mahinda Samarasinghe, stated: "[T]oday it may be Sri Lanka, but tomorrow it could be any other member state faced with this predicament."\textsuperscript{1214}

3.1.2. A/HRC/19/L.2: Promoting reconciliation and accountability in Sri Lanka

In a significant evolution from the 2009 resolution, the Human Rights Council took a different approach to the Sri Lankan human rights situation. In the months before the March 2012 Human Rights Council session, political support began to build up for a resolution on Sri Lanka. By January 2012, the environment in the Human Rights Council was significantly different from the early summer of 2009. The membership of the Human Rights Council had changed, and events had heavily influenced the Human Rights Council during the Arab Spring, including


\textsuperscript{1212} \textit{Ibid} para. 88.


\textsuperscript{1214} IRIN, ‘Pressure mounts on accountability process’, online at: \textless https://www.irinnews.org/fr/node/251031 \textgreater , last accessed 14\textsuperscript{th} of March 2017.
international human rights and humanitarian law violations committed against civilians by State and non-State actors. More reports were available and a Channel Four documentary, ‘Killing Fields’, was screened at a side-event, leaving a substantial impression on the memory of the participants who had attended the screening.\textsuperscript{1215} Acknowledging the importance of this session, the Government of Sri Lanka sent a large delegation (reportedly over seventy persons) from Colombo to Geneva. The resolution that was adopted did not contain any provisions for the external support in the domestic affairs of Sri Lanka, but provided requirements to assist the government in the fulfilment of international obligations.\textsuperscript{1216} Moreover, the resolution provided for the support of the Council, other member states of the United Nations and other actors who can provide technical assistance to fully implement the Lessons Learnt and Reconciliation Commission’s findings. Politicians from other coalition parties within the Government took the position that those who supported the resolution were “[t]raitors.”\textsuperscript{1217}


Once again, the United States of America led efforts to hold Sri Lanka accountable in the international arena in 2012. The resolution that the United States had tabled expressed its concern with regards to the Lessons Learnt and Reconciliation Commission. The national plan of action which had not provided sufficient response to the serious allegations of violations of international human rights law and international humanitarian law, as it was also outlined in the third chapter.\textsuperscript{1218}

Moreover, the resolution commented on several ongoing human rights cases of abuse in the country and mildly rebuked the country’s progress in post-war developments. It reiterated recommendations made two years ago by the Lessons Learnt and Reconciliation Commission. To this end it underscored to investigate widespread allegations of extra-judicial killings and

\textsuperscript{1215} Internal Review Panel, supra note 1211, para. 70.
\textsuperscript{1217} Ibid.
enforced disappearances, protect freedom of expression, strengthen independent institutions, implement the rule of law reforms and demilitarize the North of Sri Lanka. The resolution called upon the High Commissioner for the establishment of an independent and credible international investigation, asked him to provide a comprehensive report on these issues at the March 2014 session of the Human Rights Council. The resolution was yet again another significant shift from the infamous special session from 2009, moving towards a rigorous scrutiny of the human rights record of the island.


At the twenty-fifth session of the Human Rights Council, the Council had requested the Office of the High Commissioner for Human Rights to undertake a comprehensive investigation into alleged violations and abuses of human rights by both parties in Sri Lanka during the final months of the conflict. The resolution also urged the Government of Sri Lanka to launch investigations into the reported attacks on journalists, human rights defenders, religious minority groups and other members of civil society. Finally, the resolution encouraged the government to continue cooperating with Special Procedures mandate holders. Interestingly, countries that had initially supported Sri Lanka at the infamous eleventh Special Session from 2009 moved away from their initial support and transferred to the support this resolution. Countries that shifted their votes included Brazil, South Africa, Indonesia and, notably the close ally, India. The Sri Lankan government, however, represented by its former Foreign Minister G.L. Peiris, voiced aggressive resistance to the resolution and the envisaged report. He stated:

[T]he stark reality is that the continuation and proliferation of the practice of the selective adoption of country-specific resolutions in the Council is a tool that exploits human rights for political purposes. Regrettably, a similar pattern is evident in the case of continued action on Sri Lanka in this Council. We reiterate that such politicized ac-

1219 Ibid.
tion is contrary to the high purposes and principles of the Council and must be arrested.\textsuperscript{1222}

Furthermore, he pointed out to the domestic measures taken to tackle impunity, namely the Lessons Learnt and Reconciliation Commission and numerous ad hoc inquiries, discussion of human rights legislation and continued cooperation with the human rights machinery of the international system. He amplified the country’s stand towards the United Nations with this very bellicose statement in his address:

[M]r. President, the Government of Sri Lanka categorically rejects the High Commissioner’s Report (A/HRC/25/23) (...) the recommendations contained in the Report are arbitrary, intrusive and of a political nature, and are not placed within the ambit of the LLRC, as demonstrated by the call to establish an international inquiry mechanism. (...) The Government of Sri Lanka, therefore, reiterates its rejection of resolution 22/1, as well as the High Commissioner’s Report in its entirety which is fundamentally flawed. These initiatives disregard the substantial progress made by the Government during the five years which have elapsed since the end of the thirty-year war against terrorism. They also pay scant regard to the complexities and local nuances of a sensitive reconciliation process, while eroding confidence of the people of Sri Lanka by the constant changing of unjustifiable demands. Moreover, they persist in an attitude which is clearly disproportionate to the circumstances and inconsistent with the treatment of comparable situations. It is much to be regretted that the High Commissioner’s Report and those who exalt its virtues only seek to inflict harm on the reconciliation process by bringing about a polarisation of the Sri Lankan society.\textsuperscript{1223}

The report, which was scheduled to be presented in March 2015, was eventually presented in September 2015, after nimble interventions of the new Sri Lankan government. The government requested for more time to pursue its own investigations and enact laws to set the framework for accountability, salient human rights infrastructure and the restoration of the rule of law in a letter to the High Commissioner for Human Rights.\textsuperscript{1224} Furthermore, the opening sentence of this letter is striking. The foreign minister states in the letter that “[S]ri Lanka is renewing its partnership with the world community including international organisations.”\textsuperscript{1225} Acknowledging the process of catharsis, the High Commissioner for Human Rights requested the deferral of the presentation of the report, then scheduled for September

\textsuperscript{1223} Ibid.
\textsuperscript{1225} Ibid.
He stated:

[I]n addition, I have received clear commitments from the new Government of Sri Lanka indicating it is prepared to cooperate with my Office on a whole range of important human rights issues – which the previous Government had absolutely refused to do – and I need to engage with them to ensure those commitments translate into reality.

This decision must be seen in the context of the Sri Lanka state delegate’s statement at the 26th session, where he unequivocally stated:

[W]e reiterate the categorical rejection of this Resolution, and our non-cooperation with the OHCHR-driven “comprehensive investigation”. The Government of Sri Lanka remains firm in its conviction that the Human Rights Council’s efforts should contribute to a State’s own efforts in the promotion and protection of human rights, and that any external assistance and initiatives to protect human rights in a country should be in consultation with, and with the consent of, the country concerned, as stipulated in Council Resolution 5/1. As we have placed on record previously, operative paragraphs 2 and 10 of Resolution A/HRC/Res/25/1 are also mutually contradictory. The latter violates a basic principle of international law that national remedies need to be exhausted before resorting to international mechanisms. Ironically, the Resolution calls on the Government of Sri Lanka and the OHCHR to conduct parallel investigations.


In September 2015, the United Nations published its major report on grave violations of human rights in Sri Lanka between 2002 and 2011. The document was “[c]lear in its view that many of those violations would amount to war crimes and crimes against humanity if established in a court of law.” The report, considered by key stakeholders as a “[m]ilestone in the quest for justice and accountability” and significant mechanism to provide ownership

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over the justice process\textsuperscript{1230}, made several recommendations as to how Sri Lanka might begin to address these, and other abuses, to start laying the foundations for a sustainable peace. The report includes, \textit{inter alia}, following points:

1. Numerous unlawful killings between 2002 and 2011
2. Enforced disappearances affecting tens of thousands over decades
3. The "brutal use of torture" by security forces, in particular during the immediate aftermath of the conflict
4. Extensive sexual violence against detainees by the security forces
5. Forced recruitment of adults and children by the rebels, particularly towards the end of the conflict
6. Extrajudicial executions of identified Liberation Tigers of Tamil Eelam cadres and unidentified individuals
7. Arbitrary arrest and detention by government security forces and abductions by paramilitary organisations
8. Repeated shelling by government troops in densely populated ‘No Fire Zones,’ and the Liberation Tigers of Tamil Eelam forcing civilians to remain within these areas and using them as human shields.
9. 300,000 internally displaced persons were being deprived of their liberties in camps for periods beyond what is permissible under international law.\textsuperscript{1231}

Concerning the engagement with the old and new government, it was ascertained in the report:

[W]hen the Human Rights Council adopted resolution 25/1, the Government of Sri Lanka “categorically and unreservedly rejected” it and refused to engage “in any related process”. Former government ministers and officials repeatedly criticized and indeed vilified the OHCHR investigation in public and, more seriously, resorted to an unrelenting campaign of intimidation and harassment against victims, witnesses and representatives of civil society who might seek to provide information to OHCHR.

8. Since January 2015, the tenor of the Government’s engagement with OHCHR has


changed markedly. Although the new Government did not change its stance on cooperation with the investigation, nor admit the investigation team to the country, it engaged more constructively with the High Commissioner and OHCHR on possible options for an accountability and reconciliation process.\textsuperscript{1232}

The report also recommended the creation of a hybrid special court with international judges, prosecutors and investigators.\textsuperscript{1233} In this context, the International Commission of Jurists welcomed the report’s recommendation for a hybrid court and prosecutor’s office, envisaging the inclusion of international judges, prosecutors, lawyers and investigators to it.\textsuperscript{1234} The new Sri Lankan government was more receptive and seemed to be more open to pursuing accountability than the previous government, while seeking the standpoint that direct international involvement in war crimes prosecutions was not desired.\textsuperscript{1235} The Sri Lankan government, however, was criticized, especially from the majoritarian Sinhala population, that this resolution and the indication of a hybrid court might open a venue for international interventions that would infringe upon Sri Lanka’s sovereignty.\textsuperscript{1236} Sri Lanka’s prime minister, Ranil Wickremesinghe declared the position of the government on the matter: “[S]ri Lanka’s sovereignty is guaranteed by formulating a domestic mechanism to find out the truth about the war, within the provisions of the Constitution” thus ruling out the possibility of establishing such a judicial mechanism.”\textsuperscript{1237}

3.1.6. A/HRC/RES/30/1: Promoting reconciliation, accountability and human rights in Sri Lanka

Considering the revived political impetus after the presidential elections and general parliamentary elections in 2015, the government of national unity in Colombo decided to cooperate more actively with international human rights mechanisms and even co-sponsor resolution

\textsuperscript{1235} Ibid.
\textsuperscript{1236} Ayesha Kalpani Wijayalath, ‘UNHRC Resolution and Sri Lanka’s ‘Domestic Mechanism: Accountability for Human Rights Violations’, ISAS Insights No. 302, 22\textsuperscript{nd} December 2015, p. 7.
30/1 on the thirtieth session of the Human Rights Council. In its note verbale, the state delegation voiced its commitment to engage with domestic stakeholders as well as with the international human rights machinery, while highlighting that it:

[T]akes note also of the Report of the OHCHR Investigation on Sri Lanka (OISL), recognises fully that the Report represents a human rights investigation and not a criminal investigation, and will ensure that its content, as well as recommendations, receive due attention of the relevant authorities including the new mechanisms that are envisaged to be set up.  

Amnesty International noted that Sri Lanka’s decision to co-sponsor United Nations Human Rights Council Resolution 30/1 indicated an important opportunity to break with the past and usher in an era of justice and accountability. Human Rights Watch submitted a qualified support for the resolution. John Fisher, Advocacy Director at Human Rights Watch observed:

[T]his resolution makes it clear the time has come for the Sri Lankan government to act. The resolution’s endorsement of a judicial mechanism with international participation is an important recognition of the need for an international role to ensure justice for victims.

Finally, also the largest Tamil party, the Tamil National Alliance, was also quick to hail the co-sponsorship of the resolution. The resolution was indeed a product of diligent Sri Lankan diplomacy at the Human Rights Council. An early assessment by a non-governmental organisation on the promises revealed, however, that Sri Lanka had largely failed to deliver on those promises.


With the oral update A/HRC/32/CRP.4 following the Resolution A/HRC/RES/30/1 the High

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1243 Ibid.
Commissioner for Human Rights stressed the positive and full cooperation of the government with the international human rights machinery, especially its engagement with the Special Procedures. Moreover, he highlighted several positive steps undertaken by the new government to reframe the post-conflict narrative, such as the introduction of the 19th Amendment to the Constitution that helped to re-establish the independence of several human rights institutions, and the drafting of a new constitution.

Despite all these positive developments in the country, the High Commissioner noted with concern that the security narrative built upon the Prevention of Terrorism Act still impeded the important development and penetration of international human rights standards into the country’s infrastructure. He stressed that the security narrative and the culture of impunity must be dismantled and a transitional justice system must be built up by the corroboration of a vital victims and witnesses protection regime. Finally, he concluded with the following recommendation:

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\text{[I]}\text{nevitably, the transformative process on which Sri Lanka is embarked will take time. Dealing with the multiple tracks of constitutional reform, transitional justice, economic recovery and security sector reform would tax the capacity of any government. Nevertheless, the High Commissioner urges the Government to take concrete steps to address the impatience, anxiety and reservations towards the process that stem from various quarters and reiterates the importance for all Sri Lankans to rally behind the process. The encouragement and support of the Human Rights Council have been crucial in underpinning this process and giving assurance and confidence to all stakeholders, particularly the victim community. The High Commissioner, therefore, hopes the Human Rights Council will sustain its close engagement and he looks forward to reporting on further progress at its thirty-fourth session.}\]

The impact of this engagement is encouraging. With its inception in 2006, the United Nations Human Rights Council faced its first huge challenge with Sri Lanka and failed. This engagement, however, triggered a range of developments within the United Nations system, as for example the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, the 'Human Rights Up Front' Initiative and the Secretary-General's Internal Review Panel. The engagement with Sri Lanka created an environment where the United Nations underwent a transformation of its approach to handle crises. But, more importantly, the engagement of

\footnotesize{1245 \textit{Ibid} paras. 18 and 20.}
\footnotesize{1246 \textit{Ibid} para.38.}
Sri Lanka with the United Nations transformed and galvanised the United Nations Human Rights Council to pierce the veil of impunity in Sri Lanka, resulting in changes in the human rights infrastructure. The constant pressure exerted in the United Nations Human Rights Council led to the final enactment of the Right to Information Act, the creation of the Office of Office of Missing Persons and the drafting process of the Third Republican Constitution are surely the result of the constant and thriving engagement of Sri Lanka with the United Nations Human Rights Council. It is an evolutionary process and the United Nations Human Rights Council must keep the attention and pressure high to yield more results in the Sri Lankan context.

3.2. Sri Lanka and the Special Procedures under the United Nations Human Rights Council

3.2.1. Working Group on Enforced Disappearances

In its first communication on Sri Lanka with the government of Sri Lanka, under the mandate of the Human Rights Council in 2007, the Working Group pointed to the positive cooperation with the government, but stressed the failure of the Human Rights Commission to lift the veil of impunity regarding enforced disappearances.\textsuperscript{1247} In particular, the Working Group noted:

\begin{quote}
[t]hat the Prevention of Terrorism Act and the Emergency Regulations had not been abolished or harmonized with internationally accepted standards of human rights and recommended that the prohibition of enforced disappearance be included as a fundamental right in the Constitution of Sri Lanka.\textsuperscript{1248}
\end{quote}

The existence of emergency regulations and anti-terrorism legislation is directly linked, as it was illustrated earlier, with this human rights violation and became a recurring theme throughout the engagement with the United Nations, yet the governments of Sri Lanka were either unwilling or unable to make changes hereto. Moreover, the dissolution of the United Nations Commission on Human Rights, highlighted by the Working Group as a severe impediment to effective human rights protection, was an early warning for the lack of human rights oversight towards the outbreak of the civil war. The Asian Legal Resource Centre echoed the same concerns as it urged a field presence of the Office of the High Commissioner for Human

\begin{footnotes}
\item \textsuperscript{1248} \textit{Ibid} para. 393.
\end{footnotes}
Rights and indicated that the breakdown of the rule of law contributed to widespread disappearances.\textsuperscript{1249} The Asian Legal Resource Centre also warned that the reignited violence and the chaotic internal state of the country might lead to an outbreak of the conflict.\textsuperscript{1250} Intensifying its calls upon the Human Rights Council, the Asian Legal Resource Centre urged the Human Rights Council only six months later of the increasing number of disappearances and the unwillingness of the state authorities to deter the violation or prosecute the perpetrators.\textsuperscript{1251} In its report from 2009, the Working Group’s numbers indicated a sharp increase of reported disappearances compared to 2006. Furthermore, an increasingly non-cooperative attitude of the government became evident, as Sri Lanka failed to reply to the request for an on-site visit.\textsuperscript{1252} Also, probably underscoring its assertive attitude, the implementation of the recommendations made in 1991, 1992 and 1999 were not clarified.\textsuperscript{1253}

It was this climate that prevailed and resulted in the 2014 non-governmental report from Asian Forum for Human Rights and Development, which stated that the government and its authorities are complicit in enforced disappearances.\textsuperscript{1254} Noteworthy is, however, that the constant pressure exerted by the Human Rights Council led the Sri Lankan government to the creation of the Office of Missing Persons to meet the demands of a meaningful transitional justice agenda.\textsuperscript{1255} As it was already described in the chapter three, the creation of this institution might be of a major leap forward to achieve accountability. Notwithstanding, commentators have identified flaws with this institution.\textsuperscript{1256} Among many other issues, the creation

\textsuperscript{1250} Ibid para. 3
\textsuperscript{1253} Ibid para. 524.
\textsuperscript{1256} Kusal Perera, ‘OMP – When labels take precedence over content’, online at: <http://groundviews.org/2016/08/14/omp-when-labels-take-precedence-over-content/>, last accessed 14\textsuperscript{th} of March 2017.
of this institution took place behind closed doors without proper public consultation and, regarding content, it did not envisage any prosecution of state officials. Moreover, as one non-governmental organisation had pointed out in a submission to the Human Rights Council, the lack of international involvement in this institution undermines its credibility in light of Sri Lanka’s prevailing cultural impunity for human rights violations. Finally, prominent Sri Lankan human rights advocate Ruki Fernando asserted:

[D]espite serious reservations about government’s intentions, I and several activists and families of disappeared persons had made written and oral submissions, highlighting serious concerns about the OMP and with practical and specific suggestions. We have no idea how much of it had been taken on board during the last few weeks before cabinet approval. Now that cabinet approval has been given, it’s likely that a draft bill will be finalized by the legal draftsman, gazetted, tabled in parliament and passed. Technically, there’s still space for families and others to give input during these phases, but it’s extremely unlikely input at this stage can influence the OMP.

Against this background and in the spirit of cooperation under the new government, the Working Group on Enforced Disappearances visited Sri Lanka in 2016 for the fourth time since its inception. In its concluding report, it highlighted again the causes for the disappearances, the insufficient laws to address disappearances and the security narrative that facilitates this particular human rights violation. The Working Group dissected the history of national ad hoc commissions on disappearances and highlighted the shortcomings, *inter alia*, the bias towards women, lack of witness protection and inefficient consideration of cases in light of their magnitude. The Working Group made again beneficial recommendations, which were largely identical to previous proposals, such as those from 1999. The Working Group stressed that the government should, *inter alia*, repeal the Prevention of Terrorism Act, provide reparations, integrate a gender-sensitivity, address impunity and create independent judicial mechanisms. While it is positive to note that the Sri Lankan government allowed the Working Group to visit the country after sixteen years, it is significant that recommendations

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1258 Dibbert, *supra* note 1255.
made by previous Working Groups seem not to have been heeded.

3.2.2 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Mandated by the Human Rights Council, the successor of Sir Nigel Rodley, Manfred Nowak, communicated cases of torture to the government as the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In the communication exchanged with the government, Manfred Nowak highlighted a number of individual cases.\textsuperscript{1263} The government’s response was somewhat static to the cases communicated as it stated: “[O]nce the investigations are completed the matter will be referred to the Attorney-General for consideration of criminal charges against the perpetrators.”\textsuperscript{1264} A number of cases, where the alleged victims had submitted affidavits and charges against the alleged perpetrators were subsequently dropped or a settlement was reached before the Mediation Board. It is likely that, as it was mentioned in the mission report from 2008, police intimidation had triggered victims to refrain from filing complaints.\textsuperscript{1265} In the communication from 2010, the government’s response to the highlighted cases by the Special Rapporteur was sparse at best.\textsuperscript{1266} One year after the end of the war, the form of communication was embedded in the generally hostile atmosphere. Three years earlier, Manfred Nowak eventually visited the country in 2007 against the background of a highly-intensified atmosphere. He gave Sri Lanka credit for the enactment of the Convention Against Torture Act No. 22 of 1994 and the Corporal Punishment Act No. 23 of 2005 and, indirectly, commented on the effectiveness and vital importance of the Supreme Court of Sri Lanka to adjudicate on torture cases.\textsuperscript{1267} Meanwhile, Manfred Nowak took the opportunity to explain the detrimental effects of emergency regulations on the prohibition of torture.\textsuperscript{1268} The density of cases adjudicated before the Supreme Court seemed to suggest that torture was a common practice in Sri Lanka.\textsuperscript{1269} Moreover, the

\textsuperscript{1264} \textit{Ibid}.
\textsuperscript{1265} United Nations Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Sri Lanka, A/HRC/7/3/Add.6, para. 73.
\textsuperscript{1267} A/HRC/7/3/Add.6, supra note 1265, paras. 90-91.
\textsuperscript{1268} \textit{Ibid} para. 78.
\textsuperscript{1269} \textit{Ibid} para.91.
Special Rapporteur addressed, similar to the Working Group on Enforced Disappearances in previous communications, the lack of a vital witness and victims protection regime.\textsuperscript{1270} He also stressed the number of issues arising due to the existence of emergency regulations.\textsuperscript{1271}

This visit was ridiculed and belittled by scholars siding with the government. G.H. Peiris, for example, noted after the visit of Manfred Nowak:

\begin{quote}
[N]ovak, as a promoter of human rights, already had a reputation for taking controversial stands against anti-terrorist action by governments, according greater priority to the rights of those accused of engaging in terrorism than to the rights of their victims (as he believed his UN job demands) and basking in the publicity so received, especially for his mildly hilarious confrontations with the giants of the world community. (…) extravagant and barely credible claim regarding the scope and thoroughness of his investigations, however, was not substantiated by him with specific information. (…) He had no compunction whatever in declaring that ‘torture is widely practiced in Sri Lanka and is prone to become routine in the context of counter-terrorism operations.’ Given the charlatanism which Novak has been previously displayed, it is not surprising that no reference has been made in his report to the stark reality that it is in the operations of the terrorists that there have always been the most barbaric forms of torture; the remnants left behind by the LTTE at their eviction from the east would have borne ample testimony for Novak to see if only he had cared to look.\textsuperscript{1272}
\end{quote}

Juan Mendez succeeded Manfred Nowak in the position and carried out a country visit in 2016.\textsuperscript{1273} Juan Mendez commended the engagement of the government with the United Nations, but pointed out to the power imbalance and the prevailing security narrative that eroded human rights.\textsuperscript{1274} To this end, he noted:

\begin{quote}
[W]hile the practice of torture is less prevalent today than during the conflict and the methods used are at times less severe, the Special Rapporteur concludes that a “culture of torture” persists; physical and mental coercion is used against suspects being interviewed, by both the Criminal Investigations Department in regular criminal investigations and by the Terrorism Investigation Division in investigations under the Prevention of Terrorism Act. In the latter case, a causal link seems to exist between the level of real or perceived threat to national security and the severity of the physical suffering inflicted by agents of the Division during detention and interrogation.\textsuperscript{1275}
\end{quote}

It became a repeated mantra that the Special Procedures were compelled to underscore the

\begin{footnotes}
\item \textsuperscript{1270} Ibid para. 94 l.
\item \textsuperscript{1271} Ibid paras. 94 c, f, l k n.
\item \textsuperscript{1272} Peiris, supra note 840, pp.257-258.
\item \textsuperscript{1273} United Nations Human Rights Council, Addendum - Mission to Sri Lanka, A/HRC/34/54/Add.2.
\item \textsuperscript{1274} Ibid paras. 9, 28-37; 111, 113; 119a), b).
\item \textsuperscript{1275} United Nations Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka, A/HRC/34/54/Add.2, para. 22.
\end{footnotes}
urgency to repeal the Prevention of Terrorism Act, demilitarise the country and rectify shortcomings in the Criminal Penal Code and Criminal Procedures Act, moreover stressed the need for effective and committed prosecution of perpetrators, in particular of sexual violence in detention.1276 These flaws and shortcomings were and are alarming as they reflect the country’s continued inability and unwillingness to implement the international recommendations. The Special Rapporteur attached a vital importance to the National Human Rights Commission of the country to deter torture.1277 After more than twenty years of examination of this human rights violation by both, charter-based and treaty-based bodies alike, the Special Rapporteur on Torture offered the following damning summary of the absence of sufficient positive impact on the human rights infrastructure:

[T]he issue of torture and other cruel, inhuman or degrading treatment or punishment is part of the legacy of the country’s armed conflict, and one of the reasons why the citizens of Sri Lanka continue to live without minimal guarantees of protection against the power of the State, in particular its security forces.1278

3.2.3 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

Philip Alston, carrying the mandate from the Commission on Human Rights over to the Human Rights Council, exchanged communications with the Sri Lankan government about four cases referred to him.1279 He received one broadly satisfactory answer, while the remaining cases were not addressed.1280 Regarding the first answer he received, however, the government was prompt to complain about the supporters of the Liberation Tigers of Tamil Forces who impeded effective investigations of the incidents outlined.1281 Regarding the prominent case of the Trinco Five, the government preferred not to respond.1282 In this particular case, five ethnic Tamil students were killed in the city of Trincomalee in Sri Lanka, while two others were severely wounded. The Sri Lankan authorities claimed the victims were members of the

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1276 Ibid paras.35; 42, 70-71. 110.
1277 Ibid paras. 118 c) and m), 119 d).
1281 Ibid pp. 295-296:
“[F]urther inquiries are being conducted to identify and apprehend the culprits, in spite of the lack of public cooperation and the midst of campaigns and interferences by various fronts acting at the behest of the LTTE.”
1282 Ibid p.299
“[T]he Special Rapporteur regrets that the Government of Sri Lanka has failed to cooperate with the mandate that he has been given by the General Assembly and the Commission on Human Rights.”
Liberation Tigers of Tamil Eelam and were carrying out a grenade attack, without providing any evidence. The father of one of the victims, Dr. Kasipillai Manoghar, had to flee the country given constant death threats, along with the entire family. The Special Rapporteur noted:

[H]is sons are no longer able to attend school, as members of the security forces have intimidated them by calling them the brothers of the “late kottiya” (Tiger). These threats have compelled him and his family to sleep away from home at different locations. However, since pictures of him and his sons were published in a local newspaper, it appears that even moving to another part of the country would not ensure their safety.

His follow-up report on Sri Lanka in 2008 was quite critical and encapsulated the general attitude that was prevailing at that time:

[B]y way of overview, the recommendations made in the Special Rapporteur’s report on Sri Lanka have not been implemented. Recommendations directed to the Government have been all but completely disregarded, and in most areas there has been significant backward movement. The same is true of recommendations directed to the Liberation Tigers of Tamil Eelam (LTTE).

While he held in his initial and follow-up report that the oversight mechanisms, such as National Police Commission had potential to effect reforms, he also held that his recommendations made in the initial report were disregarded. More worryingly, he noted that there was a sharp increase in extrajudicial killings in the country against the background of the re-ignited civil war. After elaborating on human rights violations committed by both sides of the conflict, he offered a bleak and compelling appeal to the parties involved and the international community:

[T]his would appear to explain why the recommendations of the Special Rapporteur to the Government and the LTTE have been almost entirely disregarded. It does not, however, explain why there have been no meaningful responses by the Human Rights Council or the General Assembly. Even when the Special Rapporteur stated unambiguously that "[t]oday the alarm is sounding for Sri Lanka" and that "[i]t is on the brink of a crisis of major proportions" and provided recommendations as to how the General Assembly could take steps to avert this crisis, no action was taken. This follow-up

1287 *Ibid* paras. 6, 9.
The Special Rapporteur highlighted the vital nature of the ceasefire agreement and the monitoring mission to prevent arbitrary killings. By doing so, and contrary to the narrative of the government that the United Nations was favouring the Liberation Tigers of Tamil Eelam, the Special Rapporteur signalled that the Tamil Tigers had deliberately jeopardised the institutional safeguards. He asserted that:

[U]nfortunately, within six months of making these reforms, the SLMM was severely weakened by the decision of LTTE to insist on the withdrawal of monitors who were nationals of EU member States. The SLMM ended its work when the CFA was formally terminated on 16 January 2008 following a declaration by the Government.

While the government allowed the senior human rights advisor of the United Nations to expand his technical advice capacity to governmental institutions, he noted that the government had vehemently opposed any initiative for the creation of a human rights field presence of the United Nations. Instead, he offered another blunt assessment when he noted that the government had failed to disarm paramilitary groups and limit the regular police forces’ mandate that was expanded under the emergency regulations, contravening the recommendations made in the initial report. Phillip Alston’s reports and as well as the United Nations

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1289 Ibid para. 35.
1290 Ibid para. 35.
1291 Ibid paras. 45-47.
1292 Ibid paras. 52; 54-59.
working methods, however, where met with criticism and reservation by Sri Lankan academics and governmental members. The successor of Phillip Alston, Christof Heyns, communicated four cases in 2012. However, he noted:

[T]he Special Rapporteur is concerned by the number and varying nature of communications sent to the Government. He regrets that the Government of Sri Lanka has to date not provided a response to the communications dated 23 August 2011 and 1 March 2012, and calls on the Government to provide a response to the latter communications.

In a submission from to the Human Rights Council, the Asian Legal Resource Centre expounded the prevailing phenomenon of extrajudicial killings in the country:

[T]he Asian Legal Resource Centre respectfully submits that one of the major causes of enforced disappearances, as well as extrajudicial killings, is the virtual collapse of the public justice system within Sri Lanka, due to politicization of the police, prosecutorial branch, and the judiciary, which, in turn, is a result of the authoritarian form of government that has developed due to the 1978 Constitution and reinforced by the 18th Constitutional Amendment. We further submit that until this constitutional framework favouring authoritarianism is dismantled, enforced disappearances and extrajudicial killings will likely continue with impunity.

Frankly, most of the observations in the reports of all Special Procedures were echoing previous assessments and were unsuccessful in providing a positive impact on the ground, during the end of the civil war. Sri Lanka remained uncooperative and hostile. All in all though, the Special Procedures under the United National Human Rights Council became more sophisticated, especially after the end of the civil war. While the United Nations failed to follow with actions on Philip Alston’s report, it cannot be denied that the Special Procedures have triggered a range of actions in transitional justice in Sri Lanka. The creation of the Office on Missing Persons is a result also of constant engagement with the Working Group on Enforced Disappearances and the contribution of the Special Rapporteur to Sri Lanka’s accession to the Optional Protocol to the Convention against Torture can also not be disregarded. The Special Procedures are in a process of sophistication and their contribution in the phase of transitional justice in Sri Lanka will be crucial.

1293 Peiris, supra note 840, pp. 258-259.

The Universal Periodic Review was established as a mechanism under the purview of the Human Rights Council to make the human rights record of each country subject to international peer-review. It can, without doubt, be considered as the most innovative development of the human rights machinery of the United Nations.\(^\text{1296}\) Objectivity and non-selectivity became the guiding principles of the Universal Periodic Review.\(^\text{1297}\) The Universal Periodic Review appreciates the human rights situation on the ground, embedded in an interactive and constructive dialogue led by the states within the Human Rights Council.\(^\text{1298}\) Being a review system led by states, it presents a difference to the treaty body review system led by independent experts, whose work the Universal Periodic Review is designed to complement and not duplicate.\(^\text{1299}\) There is certainly a resemblance to the aforementioned 1235-procedure, but the Universal Periodic Review is more comprehensive and operates in a depoliticised environment in light of its peer-to-peer review process.\(^\text{1300}\) While sceptics argue that this mechanism is another feeble instrument to enforce human rights obligations organized by human rights violators, more positive commentators argue that this mechanism helps to validate international human rights norms, while adding to the strategic value in the domestic infrastructure of member states.\(^\text{1301}\) The Universal Periodic Review creates space for the engagement for the widest range of stakeholders, namely governments, individuals, non-governmental organisations and helps to stimulate the proliferation of human rights through good practice, support for cooperation and also by exposing gaps in the fulfilment of human rights obligations under international law.\(^\text{1302}\) All in all, the Universal Periodic Review invites all participants involved in a non-selective, non-confrontational, non-politicised, constructive, transparent and objective dialogue.\(^\text{1303}\) The Hu-

\(^{1296}\) Spohr, supra note 70, p. 178.
\(^{1297}\) De la Vega and Lewis, supra note 1076, p. 357.
\(^{1298}\) De la Vega and Lewis, supra note 1076, p. 358; Spohr, supra note 70, p. 178.
\(^{1299}\) Spohr, supra note 70, p.179; A/RES/60/251, paras. 5-9e).
\(^{1300}\) Ibid p. 179.
\(^{1301}\) Ramcharan, supra note 30, p.150.
\(^{1302}\) Ibid p. 150.
\(^{1303}\) Ibid Ramcharan, p. 151.
man Rights Council later adopted Resolution 5/1, outlining objectives, standards and modalities of the Universal Periodic Review. Based on this resolution, the review becomes indeed universal, as it covers not only examination under treaty obligations, but also the United Nations Charter, Universal Declaration of Human Rights, voluntary pledges stipulated before entering the Human Rights Council and humanitarian law. This means that the scope of the review covers not only hard and soft law, but also binding and non-binding instruments. This peer-to-peer human rights mechanism examined Sri Lanka twice, during the first cycle at the second session of the Human Rights Council in 2008, and then during the second cycle at the fourteenth session of the Human Rights Council in 2012. In its national report from 2008, while it was in the middle of the reignited civil war, the state delegation submitted its national report on the human rights situation. Meanwhile, the various stakeholders had submitted their reports on the human rights situation in Sri Lanka. Noteworthy is the statement provided by the Joint Civil Society Report as it:

[i]ndicated that the standard response of the Government in the face of criticism of human rights abuses has been the creation of a multiplicity of ad hoc institutions, committees and commissions of inquiry, which have been ineffective in bringing perpetrators to account, and have done nothing to deter violations. SLDF noted that the most prominent commission of inquiry is the Presidential Commission of Inquiry (Col) into grave human rights violations and the associated International Independent Group of Eminent Persons (IIGEP). While SLDF believed that the Col and IIGEP had some potential to address impunity, it pointed out that neither should be viewed as a substitute for international human rights monitoring or the criminal justice system. SLDF stated that the Col failed to complete even one case in its first year of existence, and noted that the Col and IIGEP have not served as effective deterrents against ongoing abuses, and have failed to bring justice to the families of the victims.

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1304 As regards its objectives, the Resolution 5/1 speaks of:

(a) The improvement of the human rights situation on the ground;
(b) The fulfillment of the State’s human rights obligations and commitments and assessment of positive developments and challenges faced by the State;
(c) The enhancement of the State’s capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;
(d) The sharing of best practice among States and other stakeholders;
(e) Support for cooperation in the promotion and protection of human rights;


1308 ibid para.5.
Furthermore, the Universal Periodic Review proved to be a critical screening mechanism to review the impact of legislation as again the Joint Civil Society Report asserted:

[J]CSR reported that acts of violence against women are growing. ACHR added that women had been specific targets during the war because of their gender. In 2005, Sri Lankan Parliament passed the Prevention of Domestic Violence Act, yet, domestic remedies are insufficient. WMC explained that there are often delays of between five and twelve years before cases of sexual violations are concluded. Regarding domestic violence, the majority of police complaints are resolved through police mediation or referral to Mediation Boards and there is very limited use of the Domestic Violence Act.1309

In this regard, UPR Info assessed and held that Sri Lanka received eighty-five recommendations, from which it accepted fifty-two recommendations and refused twenty-five, while the remaining eight recommendations were commented, but no clear position was provided.1310 The dialogue between the Sri Lankan state delegation and member states reflected most of the broad human rights concerns in the country.1311 Among those recommendations made, Sri Lanka refused all recommendations that related to any international field presence of the United Nations, in particular, the Office of the High Commissioner for Human Rights. The state delegations from, inter alia, Sweden, Portugal, Ireland, Italy and the United States made an explicit recommendation with the intention that Sri Lanka would allow such a human rights field presence established by the United Nations.1312 Interestingly, all the recommendations that were rejected came from Western states. This engagement within this mechanism of the United Nations Human Rights Council shaped the language of engagement and reflected the hostile atmosphere that prevailed up to 2015. The Universal Periodic Review from 2012 provided a platform to frame a certain, insular rhetoric in the international engagement. In the opening paragraph of its national report to this Universal Periodic Review the state delegation stated:

[S]ri Lanka is pleased to submit its national report for the 14th Session of the Working Group. As consistently maintained Sri Lanka considers the UPR to be the most appropriate forum at which human rights related matters pertaining to a country should be discussed, together with voluntary engagements under the human rights treaties and

1309 ibid para. 20.
1311 Internal Review Panel, supra note 1211, para.19.
interactions with special procedures mechanisms. This is despite two unhelpful attempts to needlessly draw attention to the situation in Sri Lanka in the Council in 2009 and again this year. These ill-conceived, unwarranted, unnecessary and intrusive attempts did not result in any tangible benefits for the Sri Lankan people over and above what the Government of Sri Lanka (GoSL) set out to do and has been able to achieve for them. Sri Lanka regularly briefs the Council on gains made, challenges faced and future plans vis-à-vis the human rights situation in the country. Participation in the new interactive, collaborative and inclusive mechanism, the UPR, must be viewed as part of that ongoing effort.\footnote{United Nations Human Rights Council, \textit{National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 - Sri Lanka}, A/HRC/WG.6/14/LKA/1, para. 1.}

Moreover, the Sri Lankan government used this Universal Periodic Review to indulge in the discussion around its National Human Rights Action Plan.\footnote{\textit{Ibid} paras. 13-25} Important to underscore is the contribution of the civil society stakeholders, yet again, in the setting of the Universal Periodic Review. The stakeholders expressed with regards to the National Human Rights Action Plan that:

\begin{quote}
Whilst noting Sri Lanka’s voluntary commitment to strengthening national human rights mechanisms and procedures by initiating a national plan of action on human rights during the previous UPR, AI stated that progress on this commitment had been extremely slow. AI specified that the Cabinet approved the proposed Action Plan in September in 2011 and appointed a sub-committee to oversee its implementation in February 2012, but there has been little progress on implementation. AI expressed the view that this National Plan of Action on Human Rights (NHRAP) must not become another vehicle to evade international scrutiny and delay necessary reform. JS expressed a similar concern. Joint Submission 15 (JS15) stated that the adoption of the Action Plan had fallen short of full and proper engagement of civil society groups.\footnote{United Nations Human Rights Council, \textit{Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21}, A/HRC/WG.6/14/LKA/3, para. 10.}\footnote{\textit{Ibid} paras. 19, 28 and 37.}
\end{quote}

Moreover, contrary to the statements of the Sri Lankan government, the stakeholders expressed their different views on the slow prosecution of perpetrators of freedom of the press and enforced disappearances as well as the lack of will to prosecute anybody for alleged war crimes.\footnote{\textit{Ibid} paras. 19, 28 and 37.} More importantly, one paragraph of this Universal Periodic Report is conspicuous and blunt. This remark by the government must be inevitably seen in the larger hostile environment at the United Nations Human Rights Council. In this comment, Sri Lanka raised its heavy doubts over the purported numbers of civilian casualties towards end of the civil war in 2009: “[I]t is expected that by the resulting statistics the unfounded allegations of tens of
thousands of civilian deaths having occurred in the first 5 months of 2009 will be conclusively refuted.” Interestingly, Sri Lanka rejected ninety-one recommendations made by state delegations from different regions of the world, sixty-one more than in the previous review. Sri Lanka’s attitude seemed to reflect a growing disdainful and disparaging nature on the international plane, with a heavy reliance on the domestic sovereignty, prevailing alliances in the Human Rights Council, self-assured by their victory from 2009. The recommendations concerned mostly the quest for accountability and the suggestion to ratify the Rome Statute. This attitude, three years after the end of the war, reflected a reluctant, if not hostile and obstructive stand towards any international interference in domestic affairs and the human rights machinery in general.

5. Concluding comments

It is interesting to observe that a country like Sri Lanka, actively involved in the constant advocacy for international human rights law in the phase of decolonisation and embedded in the United Nations human rights machinery, followed a two-fold tactic before the treaty- and charter-based bodies. When Sri Lanka was subject to scrutiny, it was following alternating, non-conceding and conceding tactics. Under the non-conceding tactic, the Sri Lankan government invoked national sovereignty. The government stressed the salience of domestic human rights norms over international human rights norms, emphasised the narrative of the impediments posed by the conflict and post-conflict country situation and, inextricably linked, the shaming of the Liberation Tigers of Tamil Eelam for human rights violations, while deflecting from its human rights abuses. The Sri Lankan government used a “[s]tratagem of UN intimidation” to pervade any intrusion in domestic affairs. Interestingly the conceding tactic resembled the tactics already observed before the treaty-based bodies. The first component of this tactic is the quest for periodic validation and constant redemption sought by newly

1319 Internal Review Panel, supra note 1211, para. 13.
elected governments from the international community. The validation flows from the country’s reputation: pledges, commitments, interaction and engagement in the international human rights fora. Validation, in the end, indicates a desire to break from the past and a certain sense of catharsis.

The second component to the tactic is the announcement of the creation of ad hoc human rights mechanisms, adoption of action plans et al., in an attempt to avoid direct international interference. Sri Lanka was always keen to protect its name from being tarnished by human rights abuses and violations. State delegations, again and again, resorted to the human rights forum to explain that the country was serious about the protection of human rights, as it, supposedly, transparently investigated abuses.\textsuperscript{1320} The Commission for Human Rights’ willingness to target various serious offenders is noteworthy, as the body forced an increasing number of repressive regimes to defend their records in private and in public.\textsuperscript{1321} Moreover, reputation within the international community was “[a] critical determinant of commission behaviour.”\textsuperscript{1322} This does apply to Sri Lanka while considering the enhanced international scrutiny in the 1990s. Reputation in the human rights community was a critical determinant for the island. The gradual activation of the United Nations Commission on Human Rights to human rights violations, however, neither sufficiently nor efficiently responded to the growing human rights concerns and the procedures established under its purview, namely the 1235 and 1503 procedures, were probably not forceful enough to scrutinise Sri Lanka’s human rights record. The Sri Lankan government has adopted measures to meet the demands set by the international community, such as the Office of Missing Persons Act, the Witness Protection Act and the ratification of the International Convention on Enforced Disappearances or the accession to the Optional Protocol to the Convention against Torture. These, however, are laws without substance, not sufficient to pass the international litmus test. These measures aimed to fend off international intrusion in domestic affairs and yet, they provided a meaningful vehicle for domestic stakeholders to demand more changes in the domestic setting. In the Human Rights Council, Sri Lanka’s engagement was characterised by a growing


\textsuperscript{1322} Ibid.
hostile dialogue, while making use of the organisational leverage against international intervention. Sri Lanka managed to forge a major alliance of states to shield itself from foreign intrusion with the creation of a homegrown mechanism, the flawed Lessons Learnt and Reconciliation Commission. Part of early failure from 2009 must be attributed to one of the flaws it carried from the Commission to the Council, namely the regionalisation through alliances. Moreover, as the Petri Report points out:

[A] similar dynamic occurred in Geneva within the Human Rights Council; some actors suggested that OHCHR could have done more to provide Council members with information on the situation that would have helped them reach consensus much earlier.\footnote{Internal Review Panel, supra note 1211, para.71.}

The resolutions after 2009 signalled a significant development of the United Nations Human Rights Council and the United Nations as such. Sri Lanka’s main stand before the United Nations Human Rights Council and the international community was that it had made tremendous progress, but it needed more time to fully implement the recommendations made by the Lessons Learnt and Reconciliation Commission.\footnote{Human Rights Watch, ‘OHCHR report on Sri Lanka, Statement Delivered Under Item 2, HRC 25’, online at: <https://www.hrw.org/news/2014/03/26/un-human-rights-council-ohchr-report-sri-lanka>, last accessed 13th of March 2017.} This argument, however, is cynical and repetitive, designed to deflect from resolutions. Meanwhile, Sri Lanka continued to harass and intimidate human rights advocates who submitted their comments on Sri Lanka.\footnote{Ibid.} The state media for example, publicly named and showed images of rights advocates with the intention to put them in peril.\footnote{Daya Gamage, supra note 1320.} To implement resolutions, the government required political support: from those who are critical of international involvement and from those who have been critical of the government’s alleged abuses. The institutionalisation of impunity for human rights violations directly contributed to the ability of the government to violate so willfully international humanitarian law in 2009 and to avert measures to report these violations. It also contributed to the impunity with which the Liberation Tigers of Tamil Eelam could
abuse its captive population of Tamils in the north, after years of violating the rights of individuals from all communities throughout the country. The suspicious attitude in the country, where any international support and criticism is perceived as an imperialist aggression, is mirrored in a recent incident in Sri Lanka: posters had appeared in Colombo, praising incumbent President Sirisena for defeating imperialist forces - a concern long raised by nationalists from the country’s ethnic Sinhala majority. Gehan Gunatilleke, Research Director at Colombo-based Verité Research, expressed that the Human Rights Council can do little but to allow more time to implement the needed reforms within its human rights infrastructure to meet international human rights standards. Gehan Gunatilleke explained, though, that “[i]t is vital that the substance of the co-sponsored resolution at the UNHRC is retained and that the Council remains seized of the situation in Sri Lanka.”

Meanwhile, a more critical voice, Kumaravadivel Guruparan from the Adayalam Centre for Policy Research, offered a different view in the slow progress of human rights progress in Sri Lanka in light of international scrutiny:

[W]e have learnt that the main factor that animates the Government to deliver reforms relating to human rights and transitional justice is international pressure. There is no alternative to maintaining pressure while granting the Government more time.

By way of example, the Report of the Review Panel indicated that the Universal Periodic Review was used as a vehicle to refute and even falsify claims of alleged human rights violations. To this end, the tool of the Universal Periodic Review in 2008, in the midst of the

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1329 Ibid.

1330 Ibid.

1331 Ibid.


1333 Ibid.

1334 Internal Review Panel, supra note 1211.
reignited civil war (one year before it ended) had failed. Moreover, the actual impact of Special Procedures was limited, as Sri Lanka managed to dodge “[i]nternational scrutiny by procrastinating until the individual who raises the question finishes the term of their mandate.” Nonetheless, the longer the mechanism evolved, the more sophisticated it became. Member States with poor human rights records should not be allowed to undermine this useful and flexible mechanism that promotes and protects human rights at a time when more needs to be achieved in this area. As this institution is more robust and effective than are many other human rights mechanisms, it is natural that it comes under greater scrutiny as well as stronger concerted attacks. Unfortunately, the Sri Lankan government failed to engage in the latest resolution on Sri Lanka from 2015. Colombo-based journalist Kusal Perera holds the view that:

[T]hey have only been shuffling around with no serious attempt in doing anything worthy. [E]ven the consultative taskforce for designing a reconciliation process appointed by Foreign Minister [Mangala] Samaraweera lacks credibility and competence, showing the government is not serious.

Meanwhile, the current government seems to fear the old avantgarde around the previous president, Mahinda Rajapakse. It fears the exploitation of unfounded criticism and the continuous use of slogans by Sinhala supremacists against governmental action. All such campaigns “[w]ould allow state security forces to continue with their interpretations of national security from a Sinhala ideological standpoint and push President Sirisena to further compromise on demands for undeclared immunity for war heroes.” Ultimately, the current administration finds itself caught in a dichotomy. On the one hand, it attempts to appeal to the international community and revalidate itself on the international plane. On the other hand, it is entrenched in the prescriptive parameters of majoritarian policy, pandering the Sinhala-Buddhist nationalists. And yet, the High Commissioner for Human Rights stated after the

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1335 Subedi, *supra* note 1098, p. 228.
1337 Perera, *supra* note 1256.
1338 *Ibid*.
end of his country visit to Sri Lanka in February 2016:

[T]here are many myths and misconceptions about the resolution, and what it means for Sri Lanka. It is not a gratuitous attempt to interfere with or undermine the country’s sovereignty or independence. It is not some quasi-colonial act by some nebulous foreign power. The acceptance of the resolution was a moment of strength, not weakness, by Sri Lanka. It was the country’s commitment to both itself and to the world to confront the past honestly and, by doing that, take out comprehensive insurance against any future devastating outbreak of inter communal tensions and conflict. (…) Let me make it as plain as I can: the international community wants to welcome Sri Lanka back into its fold without any lingering reservations.\textsuperscript{1340}

In the end, Sri Lanka’s engagement with the Commission for Human Rights and the Human Rights Council was characterised, after the outbreak of hostilities in 1983 up to 2006, by deflection and stalling techniques. These techniques were mirrored in the deployment of ad hoc commissions, insufficient human rights laws that served as paper laws. The actions of the state authorities may have been malicious, but the result was a poor state of human rights in the country. The engagement, meanwhile, served as a means for the government to periodically validate its legitimacy on the international plane. More importantly, the international human engagement from 2006 up to 2015 must be seen in the context of the majoritarian approach to nation-building. The engagement was overshadowed by hostile obstruction to avert international intervention to give effect to the Sinhala-Buddhist narrative of Sri Lanka.

Nevertheless, the renewed willingness of the countries to cooperate with the new Human Rights Council, the proliferation of information available as it was indicated by the Internal Review Panel, the creation of the Panel of Experts of the Secretary General and the diversification of non-governmental organisations had all contributed to the revived engagement of the Human Rights Council with Sri Lanka. Coinciding with these components, Sri Lanka’s new president and the newly formed unity government were keen to signal a break with the previous government and communicate a new era of engagement with the United Nations human rights machinery. While this renewed momentum contains some positive elements, negative notions are still recognisable. These negative notions are underpinned by repetitive engagement patterns of the past, such as the invocation of the violent past that allegedly impede the swift implementation of human rights laws that meet the international standards or

the enactment of specific institutions and laws that are not sufficiently meeting international standards. Meanwhile, given the increased scrutiny and focus at the United Nations, civil society’s space has modestly expanded its range of action, and certain institutions regained independence due to the 19th Amendment of the current, Second Republican Constitution, most notably the National Human Rights Commission of Sri Lanka.
VI. Conclusion

In this final chapter, the thesis will draw its conclusion based upon the previous examination of Sri Lanka’s engagement with the international human rights machinery. To this end, this chapter seeks to answer the research questions: did the engagement of Sri Lanka with the United Nations lead to any changes, direct or indirect, of the domestic human rights infrastructure? Did this commitment contribute to the benefit of rights-holders and other stakeholders in the country or was this engagement a pretence by post-colonial governments before the United Nations? The answers will be provided in the following sections in light of the contemporary history of human rights engagement. The impact of human rights engagement will be assessed, and reasons for the effect elucidated – not only for what the consequences of human rights engagement was, but also why Sri Lanka often sought this international human rights engagement. Concluding this work, the chapter will give an outlook for challenges and possibilities of a continued human rights engagement with the United Nations.

1. Reasons for the contemporary state of human rights in Sri Lanka

1.1. Majoritarian insularity dominating public discourse

Sri Lanka is a functioning democracy with continuous and periodic elections ever since its independence in 1948. The two dominating parties in the post-colonial era, the United National Party and the Sri Lankan Freedom Party, were led by two dominating Sinhala elitist families, the Jayawardenas and the Bandaranaikes. The discussion in the second chapter showed that their quest for power turned Sri Lanka from a parliamentary democracy to an elitist democracy and eventually morphed into an autocratic ethnocracy embedded in a security narrative. Both parties exploited the growing majoritarian consciousness in post-colonial Sri Lanka for obtaining power in the country and both sides were, to this end, always inclined to serve the needs and aspirations of the Sinhala ethnic majority. The power aspiration left little room for human rights discourse for all communities in Sri Lanka, as the majority community enlarged and expanded the public space. The small clique of prominent families dominated Sri Lankan state-building, and, as demonstrated in the second chapter,

both parties contributed to the ethnic polarisation that deepened the racial divide between
the majority Sinhala community and the minority Tamils.\textsuperscript{1342} The gradual and steady adoption
of majoritarian democracy after independence marginalised and alienated the Tamils from
executive power and within the Sri Lankan post-colonial res publica. Ironically, as Darini Ra-
jasingham Senanayake points out, it was the process of democraticisation that paved the way
for the “[t]yranny of the majority.”\textsuperscript{1343} She goes further to state:

[t]he institution of democracy in the absence of adequate checks and balances has
legitimised the rise of Sinhala Buddhist majoritarianism and the concomitant margin-
alisation of ethno-religious "others" in the postcolonial nation state in Sri Lanka.\textsuperscript{1344}
The requests for devolution and recognition of language rights were refused as the post-co-
lonial framers of Sri Lanka were, as Neil DeVotta formulates, engaged in “[e]thnic outbidding”
each other.\textsuperscript{1345} Minorities, specifically Tamils, were excluded and yet included. According to
Giorgio Agamben:

[T]he fundamental categorial pair (...) is not that of friend/ enemy but that of bare
life/political existence, zoe/ bios, exclusion/ inclusion. There is politics because man is
the living being who, in language, separates and opposes himself to his own bare life
and, at the same time, maintains himself in relation to that bare life in an inclusive
exclusion.\textsuperscript{1346}

Sri Lankan majoritarian democracy, a democratic form based on majority rule, entails the trait
of a “[p]opulist-patriotic drift,” carrying the likelihood to degenerate and atomise itself into
self-induced destruction. As outlined in the second chapter, this was an evolving process and
reality, beginning with the Donoughmore epoch that established “[f]orcefully the reality of
Sinhalese majoritarian rule and monopoly over governance.”\textsuperscript{1347} And before legal entrench-
ment of differences, as it was demonstrated in the second chapter, the categorisation of eth-
nicities during the colonial rule established a bipolar imagination, which produced and con-
solidated ethnicisation of politics and politicisation of individuals and groups.\textsuperscript{1348} The Sinhala-

\textsuperscript{1342} Ibid.
\textsuperscript{1343} Darini Rajasingham Senanayake, ‘Buddhism and the Legitimation of Power: Democracy, Public Religion and
\textsuperscript{1344} Ibid p. 4.
\textsuperscript{1346} Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life, (Stanford: Stanford University Press, 1995),
p. 8.
\textsuperscript{1347} Kumaravadivel Guruparan, ‘Flawed Expectations: The Executive Presidency, Resolving the National Ques-
tion and Tamils’, in: Reforming Sri Lankan Presidentialism – Provenance, Problems and Prospects, Asange Wel-
\textsuperscript{1348} Rajasingham Senanayake, supra note 1343, p. 8.
Buddhist nationalist perspective permeated the virtual reality and underpinned the post-colonial era.\(^{1349}\) The manipulated nationalist historiography, bestowing upon the Sinhala population the role of the sole protectors of Theravada Buddhism, was reinforced in post-colonial state-building as a process to reclaim pre-colonial status.\(^{1350}\) The Mahavamsa myth discussed in the second chapter was perceived as an accurate history. According to Neil DeVotta, it is impossible to fathom the driving force and dedication with which Sinhala Buddhists relate to Sri Lanka and the impetus for political Buddhism on the island that determined the rhetoric for governmental engagement in relation to Sri Lanka.\(^{1351}\) This myth is the reference point to justify claims to governance and provide a basis for majority rights to exercise.\(^{1352}\) Ayesha Zuhair notes:

[S]inhala-Buddhist nationalism can be described as a form of nationalism that is ethno-religious in character and draws on the Sinhala language as well as Buddhism. It is a nationalism which considers the territory of Sri Lanka to be belonging, predominantly, to the Sinhala-Buddhists, and its primary aim is to protect the sovereignty and territorial integrity of the country. While there are several strands of Sinhala-Buddhist nationalism, Sinhala-Buddhist nationalists, in general, see no distinction between the Sinhala-Buddhist identity and the Sri Lankan identity. For them, other groups can exist in the country and expect to be treated with respect as long as they acknowledge the supremacy of Buddhism and the primacy of the Sinhala language and culture.\(^{1353}\)

To this end, the unitary state is the genesis of a centralised government, equipped with the task “[t]o defend the Sinhala-Buddhist patrimony (...) against the ‘other’.”\(^{1354}\) The perceived threat to identity was a source of the political violence, threats that multiplied and intensified. Bearing in mind the discussion in the third chapter, this specific self-perception necessitated the constitutional enshrinement of Sinhala-Buddhist prerogative and the preservation of this status under any circumstances.\(^{1355}\) This status provided legitimacy and justification to govern and wage war, stabilised and safeguarded by two pillars: executive presidentialism and emergency regulations. Ethnocracy is the inevitable result of this post-colonial process, where the

\(^{1349}\) Welikale, supra note 296, p. 326.  
\(^{1350}\) Ibid p. 326.  
\(^{1351}\) DeVotta, supra note 102, p. 6.  
\(^{1352}\) Ibid.  
\(^{1354}\) Welikale, supra note 296, p. 326.  
\(^{1355}\) Welikale, supra note 296, p. 327.
appropriation of state institutions and the exploitation of its legal, economic and military resources advanced the territorial, cultural, economic and political interests – under the varying degrees oppression of freedoms. Moreover, one scholar notes that two components, majoritarianism and globalisation, made the process of democratisation precarious and vulnerable. To this end, the nation-state has been an instrument of persistent policies of cultural homogenisation. One commentator notes: “[R]acism has now been rooted out amongst a fair number of Sinhala Buddhists, who fear dominance of the minority community.”

Neil de Votta asserts:

[m]uch of the political decay that has taken place in Sri Lanka since the mid-1950s is directly related to the insidious Sinhala Only Act, which besides marginalizing and humiliating Tamils also inadvertently laid the groundwork for the mediocrity, nepotism, favoritism, and anomic that followed. The so-called ‘ape anduwa’ (our government) mentality that pervaded Sri Lankan politics following the Sinhala Only Act made being Sinhalese Buddhist the most important criterion. Eventually, majoritarian democracy is equaled or associated with an unchecked majority (i.e., a populist regime), coinciding with the breakdown of the rule of law. The former president of Sri Lanka, Mahinda Rajapakse, conferred upon Sri Lanka this unitary, ethnically dominant narrative in his landmark speech on the Sri Lankan Army’s victory over the Liberation Tigers of Tamil Eelam, underpinned by an anti-imperialist sentiment and ethnic exclusivity.

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1358 Ibid.
1361 Ceremonial opening of Parliament on May 19, 2009, President’s Address to the Sri Lankan Parliament: “[W]e are a country with a long history where we saw the reign of 182 kings who rules with pride and honour for that extended more than 2,500 years. This is a country where kings such as Dutugemunu, Valagamba, Dhatusena and Vijayabahu defeated enemy invasions and ensured our freedom. As much as Mother Lanka fought against invaders such as Datiya, Pitiya, Palayamara, Siva and Elara in the past, we have the experience of having fought the Portuguese, Dutch and British who established empires in the world. As much as the great kings such as Mayadunne, Rajasingha I and Vimaladharasuriya, it is necessary to also recall the great heroes such as Keppettipola and Puran Appu who fought with such valour against imperialism. In looking at this unconquerable history there is a common factor we can see. It is the inability of any external enemy to subdue this country as long as those to whom this is the motherland stand united. That is the truth. Another common factor we can see is the inability to establish any savage or dictatorial regime on this land. In the history of my motherland, the people have always risen undefeated against any arbitrary, savage or brutal rule.”, online at: <http://www.satp.org/satporgtp/countries/shrilanka/document/papers/president_speech_parliament_defeatofLTTE.htm>, last accessed 20th of July 2017.
was he conferred with an honourary Buddhist title by the chief monk of Sri Lanka. Moreover, this title foresaw him in the tradition of Sinhala kings that fought and won against the invasion of the "foreign invader." Fitting this narrative, Carl Schmitt had argued democracy has not to serve the conflicting interests but to achieve the ethnic exclusivity. In the larger setting, the environment of post-war Sri Lanka was characterised by triumphalism, an eruption of nationalist sentiment after the war victory, while distracting from the causes of the protracted armed conflict. Rather, support for Sinhala-Buddhist ethnonationalism surged and was relied upon as a deliberate political scheme to consolidate the majority vote-base, a standard plan that was devised by political leaders in Sri Lanka’s post-colonial history. A vital part of the larger strategy of successive governments was to vilify minority communities, depreciate and deprive them of their rights while propounding the majoritarian narrative.

Sriskanda Rajah writes:

[a] democracy, in its contemporary sense, is not simply a state that only upholds the will of the majority. Nor does a state qualify to be called a democracy simply because it holds periodic elections, upholds its laws and adheres to open market economic policies or because it maintains close ties with Western-liberal states. Instead, democracy is a state that is also capable of guaranteeing the civil liberties and human rights of all of its citizens, not simply that of the majority ethnic community that holds political monopoly. Sri Lanka has held periodic elections, and upheld the will of its majority community – the Sinhala Buddhists. Many of its actions, including the mass atrocities it perpetrated on the Tamils and other sections of its populations, were largely in accordance with the laws enacted by its legislature, or carried out for the purpose of upholding the state, the sovereign and laws enacted in its favour, though these were in contravention of international human rights and humanitarian law.

The recent emergence of the BoduBalaSena (Buddhist Power Force) in 2012, underscores the emergence of a stronger sense of Buddhist-nationalist insularity in the country. International interventions and engagement for minority communities was not only seen as an intrusion or violation of state sovereignty, but especially as a threat to Sinhala Buddhist identity. The following statement of the BoduBalaSena’s chief ideologist clearly enunciates the emerging sentiment:

1364 Zuhair, supra note 1353, p. 20.
1365 Ibid.
1366 Sriskanda Rajah, supra note 158, p. 160.
Although Sinhalese are the majority of this country, and although Buddhism is given some recognition in the constitution, this is not happening in practice. We thought we have a duty to protect the Sinhalese and Buddhism, and the BBS was created for this purpose. Sinhalese can be considered as the majority, but with globalisation, it is a global minority. If something happens to the Muslims and Tamils all the embassies will raise their voices. But if something happens to the Sinhalese, no one is there to protect. 1367

The third chapter described how the post-war period ushered in an era of authoritarianism and heavy militarisation, a continuous point of critique by the United Nations human rights machinery as it was outlined in the fourth and fifth chapter. This indicated the:

[i]nvisible formation of a deep state, on ethnocratic ideological foundations, on the need to control the state as a requirement of immunity and impunity especially against international investigations or criminal proceedings, and on the need to preserve more mundane privileges and vested interests that military-bureaucracies inevitably acquire in contexts such as ours post-war. 1368

1.2. Perpetuating majoritarianism through the Executive Presidency and the state of exception: the marginalisation of human rights

Sri Lanka’s post-colonial history is framed within the Sinhala-Buddhist narrative and, to this end, the military victory of the Sri Lankan government in 2009 was defined by two characteristics: unitarian state-making and cultural homogeneity. 1369 Ethnicity, religion, territory and unitary polity were fused to one element and inseparable vision that was reestablished with the military victory in 2009. 1370 As discussed in the third chapter, the majoritarian policy-making and state-crafting was safeguarded by two components, namely executive presidency and emergency/anti-terrorism legislations. By upholding and elaborating on these two instruments, governments of Sri Lanka undermined the independence of human rights institutions, alienated minority communities, increased inter-ethnic hostilities and weakened the domestic human rights regime. Emergency regulations have been a vital instrument for the post-colonial governance, reinforced and advanced the majoritarian power. Meanwhile, address-

1367 Cited in Zuhair, supra note 1353.
1369 Fernando, supra note 1362, p. 29.
1370 Fernando, supra note 1362, p. 29.
ing violence perpetuated by the majority and protecting the minority using emergency regulations was slow at its best.\textsuperscript{1371} Constitutional provisions that paved the way for emergencies (and the regulations as such) have refracted social dynamics, deformed inter-ethnic relations and ushered in the normalisation of political life.\textsuperscript{1372} This new reality set the stage and tamed the environment for repressive laws to persecute and prosecute opposing voices, including minority representatives, unionists and other actors.\textsuperscript{1373} As it was demonstrated in the fourth and fifth chapter, international human rights bodies had repeatedly underscored that powers granted to national security forces and police enforcement were too broad, far-reaching and inappropriate in relation to the actual emergency situation.\textsuperscript{1374} Invocation of public and national security was used as a smoke screen for the infringement of both, constitutionally entrenched fundamental rights and international standards of human rights.\textsuperscript{1375}

Numerous Special Procedures of the charter-based bodies and treaty bodies, as outlined in the fourth and fifth chapters, asserted that the instrument of emergency regulations perpetuated public terror, laid the groundwork for torture, arbitrary executions and enforced disappearances. Besides, they implanted the utter disregard for the rule of law, embedding a permeating culture which could not be reverted by regulatory human rights safeguards or monitoring bodies meant to act as review mechanisms.\textsuperscript{1376} Against this background, the recent submission of the National Human Rights Commission on the occasion of the fifth periodic review of Sri Lanka's state report before the Committee against Torture speaks volumes.\textsuperscript{1377} Here the National Human Rights Commission ascertained that torture was routinely used by the state officials in all parts of the country.\textsuperscript{1378} Echoing this very concern, the United Nations High Commissioner for Human Rights, remarked during the United Nations Human Rights Council at its thirty-fourth session:

[I]t is important for the country's future to send the signal that impunity is no longer

\textsuperscript{1372} \textit{Ibid}.
\textsuperscript{1373} \textit{Ibid} p. 137.
\textsuperscript{1374} Coomaraswamy and Charmaine de los Reyes, \textit{supra} note 754, pp. 282, 294.
\textsuperscript{1375} \textit{Ibid}.
\textsuperscript{1376} \textit{Ibid}.
\textsuperscript{1378} \textit{Ibid} para. 13.
tolerated. I am particularly troubled by the lack of progress in some emblematic cases. The consistent failure to adequately investigate, prosecute and punish serious crimes appears to reflect a broader reluctance or fear to take action against members of the security forces.  

The state of exception establishes, as Giorgio Agamben formulates, a scheme for authoritarian rulers that fear the loss of control and power. The existence of the state of exception reinforces the legitimacy of their power. The maintenance of a state of generalised fear, the depoliticisation of citizens and the renunciation of all certainty of the law, are three characteristics of the security state. The security state, which promised the absence of concern, in effect maintained fear and terror. With the gradual depoliticisation of the citizen who turned into a potential terrorist, the security state, like in Sri Lanka, moved towards an uncertain zone where the public and the private are confused, unable to define borders. As it was discussed in the third chapter, the state of exception is not a safeguard for the protection of democracy, the rule of law and human rights, but the very threat to them.

The enduring political and military crisis normalised emergencies, as the notion of permanent war enforced the belief that the enduring crisis can only be met by emergency measures. The scope of emergency powers mandated the executive to act with impunity, limited the space for democracy, silenced dissent and crippled the human rights infrastructure. The executive presidency was introduced, inter alia, with the intention to find a solution to the ethnic problem, an institution to put an end to the ethnic outbidding. Moreover, the institution was created with the intention to ensure the proper functioning of independent, public authorities. But Sri Lanka’s recent history has shown that executive presidents failed to ensure the

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1381 Ibid.

1382 Ibid.


1384 Nesiah, supra note 938, pp. 124-127.
smooth functioning of public authorities. Instead, it became the actual enemies of them.\textsuperscript{1385} As was discussed in the third chapter, the Second Republican Constitution has given the executive president arbitrary powers that led to an ideological crisis, loss of citizen’s hope in independent human rights institutions, growing frustration by the citizenry due to the biased and dysfunctional functioning of the same.\textsuperscript{1386} The idea of the executive presidency, however, is the “[i]nstitutional safe haven of Sinhala-Buddhist chauvinism and militarised authoritari-anism.”\textsuperscript{1387} The original argument was, as illustrated earlier, that executive presidency would not only provide stable governments, but also protect the minorities.\textsuperscript{1388}

The opposite is true, though: in 2005 and 2010, Mahinda Rajapakse embarked upon his path to the perpetuation of power by eliminating minority vote and by a strong support of the Sinhala majority.\textsuperscript{1389} More importantly, the former president’s agenda was majority-driven, overlooking and depreciating minorities.\textsuperscript{1390} And, at the beginning of the conflict, the first person who filled the role as executive president, J.R. Jayawardene, said in light of the Black July pogroms:

[I] am not worried about the opinion of the Jaffna (Tamil) people... now we cannot think of them, not about their lives or their opinion... the more you put pressure in the north, the happier the Sinhala people will be here... Really, if I starve the Tamils out, the Sinhala people will be happy.\textsuperscript{1391}

The growing resistance against the envisaged new constitution by the Sinhala majority must be seen in against background. Their sentiment is encapsulated with the words of the Dayan Jayatelile:

[T]hus the new Constitution is an effort to sabotage and destabilize the State, Sri Lanka as a country and the Sinhalese as a community. It is an attempt to neutralize the numerical strength that the Sinhalese have, which gives the community a leading role on

\textsuperscript{1386} Ibid.
\textsuperscript{1387} Welikale, supra note 1368.
\textsuperscript{1389} Ibid.
\textsuperscript{1390} Ibid.
the island. The project for a new Constitution is the project for an anti-Sinhala Constitution!1392

With this comment, Dayan Jayatilleke, former Permanent Representative of Sri Lanka to the United Nations in Geneva, echoed the concerns of the majority, which thinks that the planned new constitution will rather aid and help the minority communities and undermine the position of the majority. Federalizing the country’s structure will, in their view, divide Sri Lanka and jeopardise and dismantle Sinhala national consciousness and empower the minority consciousness, specifically the Tamil minority’s one. The Consultation Task Force on Reconciliation Mechanism received several submissions that concerned the issues surrounding the exclusion of the majoritarian narrative into the current constitution-drafting.1393 In the end, emergency regulations and the executive presidency served as instruments for the fortification of majoritarian nationalism, with far-reaching consequences for the human rights infrastructure. Both instruments became super-majoritarian escalators, creating a new normalcy, where suppression of dissent was authorised and “[m]arginalized and delimited counter-hegemonic social forces.”1394


2.1. The United Nations and international law as a Trojan horse of post-colonialism

The current international human rights system emerged and developed during the period of decolonisation. Sympathies were expressed for the suffering that newly independent states had endured during colonial rule, but that sympathy, probably, left gaps in human rights application and enforcement by the international community.1395 The argument against the United Nations goes through that the United Nations is (at best) a legitimating organ for great power interest.1396

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1394 Nesiah, supra note 938, p. 136.
1396 Mazower, supra note 25, p. 10.
One conservative Sri Lankan academic shares the view that:

[It] is the weaker countries that have the highest propensity of falling prey to the human rights vigilantes. In the case of the latter category of states, the relative ease of access (including the safety factor and the availability of a sycophantic or pliant officialdom in the host country) also appears to be a principal covariant of the intensity of intervention. (...) In short, it is the economically weak, dependent, conflict-ridden countries with a tradition of subservience to the West that bear the brunt of the challenge to sovereignty from supposedly ‘humanitarian’ external intervention.\footnote{Peiris, supra note 840, p. 252.}

Anthony Anghie argues that sovereignty was defined by colonial confrontation and often represents the lingering issue of state inequality.\footnote{Anthony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, Harvard International Law Journal, 40:1, [1999], p. 71.} Sovereignty is, per Anghie, in a fluid state of aggregation, exposed to the civilising mission that is embedded in human rights narrative.\footnote{Ibid.} This statement resonates very much in the larger context of the Advisory Opinion by the Permanent Court of International Justice in \textit{Nationality Decrees in Tunis and Morocco}, where the Court opined:

[The] question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the court, in principle in this reserved domaine.\footnote{PCIJ, Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 7\textsuperscript{th} of February 1923, Publication Series B, No. 4, 24.}

Anthony Anghie does agree, however, that the emergence of sovereign states of Africa and Asia transformed international law into a truly universal concept, where these states could finally engage as equal and sovereign states.\footnote{Ibid note 3, p. 197.} His broader argument is that sovereignty and the desire for equality never translated into real power. More importantly, he argues that the innovations and reforms of and at the United Nations reproduced the antique inequalities, recreated power imbalance and reinforced formal colonialism.\footnote{Ibid, 199.} Colonialism, in other words, has metamorphosed through the use of different techniques and has redefined the foundations of international law that is confined to strict parameters, such as civilisation and development, which international law, including human rights law, wishes to define, maintain and use through flexible techniques.\footnote{Ibid p. 244.} Eric Posner wrote in a widely noticed article that...
every president of the United States succeeding Jimmy Carter has used and exploited the human rights vocabulary not out of idealistic reasons, but they have "[u]sed the language of rights to express their idealistic goals (or to conceal their strategic goals)." The aspect of legitimacy, if palpable, is connected with the issue of obedience. Is international law legitimate? Is there a moral duty to obey international law? Such a duty is of central concern for citizens who are governed by a national constitution. Mattias Kumm articulates:

[International law may generally be addressed to the states, but in constitutional democracies the state is merely the institutional framework through which citizens govern themselves. This makes it possible to refocus the discussion of the legitimacy of international law by asking the following questions: To what extent should citizens regard themselves as morally constrained by international law in the collective exercise of constitutional.]

And yet, the appearance and interaction of respective governments on the international plane is the depiction of periodic validation of its respective legitimacy issued by the international community. Even if Anthony Anghie would disagree with the thesis that the international system has institutions with certain legitimate authority, he will find it difficult to explain why the international social system should be incapable of developing structures and forms that hold such a prominent place in domestic social spheres systems. International law is surely not the only instrument to rectify the ills of the world. But international law contains norms that are source of inspiration for domestic stakeholders, often underutilized and undervalued. In the end, the scope of international law is comprehensive enough to generate compliance, a basic standard that is fundamental to the state system. It cannot be proved by reference to some antecedent norm. It is an article of faith, yet one that underpins the verifiable reality of a world in which sovereign states interact in a structured system of rules and an expectation of compliance.

2.2. The impact of international scrutiny on the ground of human rights violators

Building on the examination of the fourth and fifth chapter, the thesis has shown that the impact on human rights infrastructure by the international human rights machinery has

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1406 Ibid.
1407 Simmons, *supra* note 896, p. 351.
achieved some modest changes in Sri Lanka and on the international plane. To be more precise: the Sri Lankan human rights engagement has changed the United Nations more that it has changed Sri Lanka itself.1408 The Internal Review Panel and the Human Rights Up Front Initiative are the direct products of the failure in the Sri Lankan human rights engagement. Lessons from this failure have been applied to other situations, but especially regarding Sri Lanka. Nationally, the Sri Lanka’s engagement with the United Nations human rights machinery has activated and expanded the radius of activity of civil society, as was highlighted in the third, fourth and fifth chapter. The sheer volume of reports submitted to the United Nations indicates the increasing human rights awareness in the country and impetus provided and boosted by the United Nations for changes in the domestic setting. Internationally, the accession to the Optional Protocol to the Convention against Torture, and the ratification of the Convention against Enforced Disappearances are noteworthy.

Moreover, the introduction of the nineteenth amendment to the current constitution (resulting in the re-establishment of independent oversight bodies), the constitutional drafting process - with the participation of civil society - towards the Third Republican Constitution, the adoption of the Right to Information Act, the Witness Protection Act, the Prevention of Domestic Violence Act and the establishment of the Office on Missing Persons indicate that the international human rights engagement does show penetrating influence on the domestic infrastructure and empowers the civil society to expand their role in mobilising and lobbying for human rights. The domestic civil society finds its motivation stimulated by the United Nations. The popular and critical argument, however, goes that the engagement is sham, deflection and merely window-dressing. It is argued, for example by Surya Subedi, that human rights treaty ratification by a government is a method to gain legitimacy (in case it is autocratic) or to boost its popularity or to signal to the world that a country is welcoming investments, without really believing in the validity of the norms.1409 One critic argues: “[I] think what this government has done most effectively is perfect the art of sophistication. What the Rajapaksa government did overtly and crudely, this Government does covertly and subtly.”1410 But why,


1409 Subedi, supra note 1098.

however, did Sri Lanka engage with the United Nations? The reasons are at hand. As it was elucidated in the second chapter, the post-colonial state-building of Sri Lanka was led by elite families at helm who had and have exploited majoritarian superiority sentiment for own power purposes. This view occupied much of the public space in society, penetrated public consciousness and transfused into governmental doctrine and left little space for human rights discourse, but defending the majoritarian Sinhala-Theravada claim over ownership of the country.

The third chapter has highlighted that Sri Lanka metamorphosed from a parliamentary democracy into an autocratic ethnocracy, deeply entrenched in a militant state, becoming increasingly hostile to intervention of foreign forces that threaten the unique identity of the majority with the minority complex. Appearing before the United human rights machinery - submitting reports, engaging in human rights discourses in Geneva, New York and in Colombo- was, on the one hand, an exercise to renew governmental legitimacy through the valuable human rights language and to gain trust by the international human rights community. On the other hand, it was a precondition for the country’s economic development and the attraction of global investment in the country. Religion and ethnicity were the agencies for governance by the elite, arbitrarily exploited for power purposes and control the state machinery, while militant majoritarianism has developed a life of its own.

3. Final remarks and lessons from Sri Lanka

3.1. International human rights law as the law of open states

The world and the international community is facing a constant rise of nationalist powers, propounding the widespread view that international penetration eviscerates state sovereignty. The retreat to the antique notion of their nationhood translates into the negation of international cooperation. One commentator notes:

[N]ationalists dislike the balkanisation of their countries into identity groups, particularly when those groups are defined as virtuous only to the extent that they disagree
with the nation’s previously dominant history. In the context of Sri Lanka, it was pointed out that the Sinhala Theravada Buddhism is conceived as an emotional selling proposition which must be defended and protected. This position is influenced and reinforced by the above mentioned Mahavamsa myth, recurring validation of power mandate over the country. The engagement on the international plane, however, has changed and affected the exertion of executive powers over the national soil. The traditional concept of an integrally closed territorial entity is penetrated not only by the transparent process of human rights monitoring. When and if territory is the circumscribed area of legal and legitimate exercise of governmental power, it has become permeable to international human rights law-making in light of its universal protection regime.

Jost Dellbrueck addresses the idea of global constitutionalism considering the changing structure of the international legal system due to effects of globalisation. He argues that it is the United Nations, the forum of the clear majority of the states, that is the only organisation that can provide the platform for international discourse on issues of public interest, such as global environmental protection and human rights protection. Multilateralism is at the core of the United Nations. The term refers to collective, and cooperative action by states, and it requires the close collaboration with civil society actors, engaging in a joint effort to manage issues collaboratively at the international level. On the one hand, human rights are relying on the supranational standardisation of human rights norms into the realm of nation states, penetrating the territorial sovereignty as well as the status of the individual before the nation state. On the other hand, it is the double-role of the nation state as law-making entity as well as addressee of obligations that cause deficits in the rudimental realisation of

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1412 Stephan Hobe, Der offene Verfassungsstaat zwischen Souveraenitaet und Interdependenz, (Berlin: Duncker and Humblot, 1998), p. 221.
1413 Ibid.
1414 Ibid, p. 221.
1416 Ibid.
the enforceability of the rights.\textsuperscript{1418} The international characterisation of national constitutions, therefore, ushers in an era of openness of nation states.\textsuperscript{1419} In Sri Lanka, a new constitutional status must be achieved, where a:

\begin{quote}
[s]tatus de novo, which provides for the constitutional changes the Tamil minority demands to feel assured they are integrated as political equals in a single island policy may achieve a new equilibrium which could re-establish near normalcy. For this to happen, a change in attitudes of the elites of the ethnic majority is necessary.\textsuperscript{1420}
\end{quote}

3.2. The necessity of international human rights engagement in situations of poor or non-existing domestic and regional human rights infrastructures

The interaction with the United Nations human rights machinery by Sri Lanka has considerable relevance given the absence of a regional human rights mechanisms or, as already outlined, poor human rights infrastructure in the country. As seen in the fourth and fifth chapter, the status as a State Party to international human rights treaties and the reporting procedure is even more relevant and important as this fills the gap of regional scrutiny and exerts continuous pressure to align domestic infrastructure with international standards. Eric Posner, however, intervenes:

\begin{quote}
[W]ith the benefit of hindsight, we can see that the human rights treaties were not so much an act of idealism as an act of hubris, with more than a passing resemblance to the civilising efforts undertaken by western governments and missionary groups in the 19th century, which did little good for native populations while entangling European powers in the affairs of countries they did not understand. A humbler approach is long overdue.\textsuperscript{1421}
\end{quote}

Posner goes further when he explains that human rights law shall be replaced by development assistance, a somewhat puzzling statement:

\begin{quote}
[I] have been struck by a recent erosion of consensus upholding many of the international institutions and laws which help to maintain social cohesion within States, and peaceful, constructive relations between them. The international institutions set up by States are imperfect, but they are a bulwark against worse chaos. To erode their legitimacy and impede their action threatens vital forces for moderation and progress – at a time of heightened risk. Global instability, which is fed by inequalities, oppression, deprivation and exploitation, affects all your people, rich and poor alike. Your
\end{quote}

\begin{footnotes}
\textsuperscript{1418} Hobe, supra note 1412.
\textsuperscript{1419} \textit{ibid} p. 424.
\textsuperscript{1421} Posner, supra note 1404.
\end{footnotes}
States have established international institutions because these threats cannot possibly be resolved by any one State alone.\textsuperscript{1422}

Devotta asserts that political culture is the root problem in the Sri Lankan context. While Sri Lanka has the suggested appearance of a democratic institution, liberal constitutional thought was perverted in an environment of ethnic hatred.\textsuperscript{1423} Sri Lanka’s allegedly independent institutions had rendered themselves impotent considering executive’s influence and contributed to the corrosion of fundamental rights.\textsuperscript{1424} Undoubtedly, Sri Lanka’s communalism, as discussed in the second chapter, exploited by the elite politicians is the paramount issue before the international human rights bodies that paralysed political and social progress and determined the country’s international image.\textsuperscript{1425} Against the background of the failing infrastructure, international human rights bodies are obliged to fill in gaps and strengthen fading institutions.

3.3. International legitimacy through human rights engagement

Recognition by the international community is a source of legitimacy, not only in foreign affairs, but also in internal affairs.\textsuperscript{1426} It is apt to understand what legitimacy means and signifies. Thomas Franck explains:

[T]o summarize: coherence, and thus legitimacy, must be understood in part as defined by factors derived from a notion of community. Rules become coherent when they are applied to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system. The resultant skein of underlying principles is an aspect of community, which, in turn, confirms the status of the states that constitute the community. Validated membership in the community accords equal capacity for rights and obligations derived from its legitimate rule system.\textsuperscript{1427}

\textsuperscript{1423} DeVotta, supra note 1345, p. 84.
\textsuperscript{1425} Kumarasingham, supra note 238, pp 171-172.
International organisations have an important role in determining legitimacy within accepted international rules. International human rights norms are a source of international legitimacy, out of two reasons: first, human rights became increasingly operational after the end of the Cold War being the mobilisation basis for state sovereignty. Second, international human rights norms are a source of domestic legitimacy, being the moral raison d’être for the state. The norms, ideally, must establish a link between the state and its citizenry. A state, though, that violates human rights norms exhibits disdain for the human rights of its subjects. Such a disrespect undermines a government’s good faith and its legitimacy. Legitimacy is the “[n]ormative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s perception of the institution.”

The actor’s appreciation of the substance of a rule, from the procedure or source by which it was constituted, affects the behaviour of the state because this behaviour is internalised by the state and helps the state in its self-perception. The internalisation is initiated by external factors, through standards, laws, rules, and norms created and present in the (international) community. A rule, which becomes legitimate to the state can also become and behaviourally significant, if and when “[t]he individual internalizes its content and reconceives his or her interests according to the rule. Compliance then becomes habitual, and it is non-compliance that requires of the individual special consideration and psychic costs.” John Gerard Ruggie expresses the view that ”[p]olitical authority represents a fusion of power with legitimate social purpose.” When and where the actor integrates a rule because he deems it legitimate, that rule gains a particular legitimacy quality over the actor and becomes hierarchically superior to him. The rule may also influence the actor’s behaviour, whereas the

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1428 OECD, supra note 1426.
1429 Franck, supra note 1427.
1431 Ibid.
1432 Ian Hurd, ‘Legitimacy and Authority in International Politics’, International Organization, 53:2, [1999], p. 381.
1433 Ibid.
1434 OECD, supra note 1426.
1435 Ibid.
1437 OECD, supra note 1426.
organisation entrusted with the observation of that rule is perceived by an actor as a legitimate rule generator with authority over the actor. \[1438\] “[T]hus the character power changes when it is exercised within a structure of legitimate relations, and the two concepts of power and legitimacy come together in the idea of ’authority’.\[1439\] Recent human rights engagement of Sri Lanka is criticised by academics and human rights activists as Sri Lanka’s tactics are meant to ”obfuscate, confuse, undermine and buy time.”\[1440\] Meanwhile, there is a recurring statement of Sri Lanka’s state delegations in its long history of engagement. The statement is repeatedly exploited before the human rights bodies of the United Nations, an argumentation enunciated in various forms: “[B]y all means, push us and if we are not doing enough, you are free to say so (...) Help us to do things faster, be constructive, that is my plea to you.”\[1441\]

Followed by this, the Sri Lankan state delegations deplored the international community’s disregard for the country’s human rights improvements in the Sri Lankan infrastructure despite the decades of civil war. It was always a far too common pattern and formula, yet Sri Lankan delegations appeared before the human rights bodies: they engaged, they acknowledged flaws and they tried to distract, while arguing for their human rights record. Beth Simmons writes that “[s]ocial camouflage is a rational response to perceived social pressures in a normatively charged situation. (...) it is because moving with the crowd reduces the increment of criticism that can be directed at any particular country.”\[1442\] The overarching authority of the United Nations human rights machinery as a legitimacy-validating machinery and is pivotal for Sri Lankan governments to enhance and bolster their legitimacy – and gain economic benefits by submitting human rights commitments.

3.4. Human rights engagement as a mobilizing basis for civil society actors and development of human rights infrastructure

Once social and political movements forge alliances, they create valuable political, legal and social changes and increase the chance of success. International human rights treaties, for

\[1438\] Ibid.
\[1439\] Ibid.
\[1441\] Ibid.
\[1442\] Simmons, supra note 896, p. 89.
example, provide an important vehicle to this end.\textsuperscript{1443} It is the legal mobilisation that unfolds, outside of the litigation process, a form of political mobilisation leading up to claim-making. If this so happens, then human rights treaties under the auspices of the United Nations are a very resourceful reference point for the mobilisation process, as they provide leverage against governments that have signed and ratified these treaties.\textsuperscript{1444} A transition in Sri Lanka is due, and victims and civil society play a decisive role. Justice has to prevail, and the country cannot slide towards impunity.\textsuperscript{1445}

Indirectly acknowledging and aware of the vital non-governmental organisation’s power for human rights, the Sri Lanka president Sirisena noted: “[I] am not going to allow non-governmental organisations to dictate how to run my government. I will not listen to their calls to prosecute my troops.”\textsuperscript{1446} Not only this, during the Rajapakse era non-governmental organisations were put under tight control, supervised by the Sri Lankan Defence Ministry.\textsuperscript{1447} Under the current government, non-governmental organisations are supervised by the National Secretariat for Non-Governmental Organisation, organized under the Ministry of National Co-existence, Dialogue and Official Languages.\textsuperscript{1448} This supervision reflects the degree of importance and fear that the government attaches to the vibrant civil society in Sri Lanka. This measure, however, is no more in place, and civil society actors must play a critical role in shaping the human rights reform agenda.\textsuperscript{1449} Members of the civil society are "[w]atchdogs of the state."\textsuperscript{1450} That being said, it is important not to oversee that ratification, overall, does lead to improvements among countries in which enforcement is likely.\textsuperscript{1451} As it was seen in

\textsuperscript{1443} Ibid p. 138.
\textsuperscript{1444} Ibid p. 139.
\textsuperscript{1447} SriLankaBrief, ‘No more Defence Ministry Supervision for NGOs’, online at: \url{http://srilankabrief.org/2015/06/no-more-defence-ministry-supervision-for-ngos-deputy-minister/}, last accessed 4th of August 2017.
\textsuperscript{1449} Fonseka, supra note 1445.
\textsuperscript{1450} Wickramatunge, supra note 1410.
the fourth chapter, the status of human rights treaty ratification of Sri Lanka suggests some degree of readiness to abide by international law. If human rights are supposed to become a key component in cultures of the developing world, then these societies must be at high levels of social and economic development, as this will pave the way for enculturation of international human rights norms. As it was examined and highlighted in the fourth and fifth chapter, different Sri Lanka administrations invoked the civil war in the country as an impediment to effectively implement the human rights treaties. Both sides to the conflict, however, have used the language of human rights to accuse each other. Meanwhile, the global “war on terror” was a welcome prerequisite for the Sri Lankan Government to conduct their warfare against the Liberation Tigers of Tamil Eelam and use the language of human rights protection for Sinhala and Tamils alike to liberate the country. As Gerrit Kurtz and Madhan Mohan Jaganathan assert:

[T]he case of Sri Lanka underlines the observation that critical studies have made about the effect of a counterterrorism discourse on the protection of human rights and international humanitarian law: it helps states ‘to carve out a great deal of impunity for abuse’. The global war on terror advocated by the United States was only the latest global framework in this context. Aligning with this effort ‘has often encouraged additional demonization of rebels and additional resources for counter-insurgency’.

International human rights language was subsequently hijacked to justify a war by all means against the Liberation Tigers of Tamil Eelam. Nonetheless, the signature and the ratification of the human rights treaties established a prescriptive status and served as a rallying point for domestic popular mobilisation. Different legislative measures taken by the respective administrations were triggered by domestic human rights activists and the treaty body findings have greatly exerted influence upon domestic actors. In any event, as Deepika Udagama writes:

[B]ut it could be safely argued that at the root of that political stance is the entrenchment of majoritarianism which views the international human rights law regime as being sympathetic towards for minority rights.

1453 Marsh and Payne, supra note 842, p. 684.
1455 Kurtz and Jaganathan, supra note 379, p. 110.
1456 Udagama, supra note 4, p. 144.
There was no systematic approach to incorporating international human rights laws into the domestic infrastructure. Instead, the approach was incorporation by amendments, propounded by the paucity of judges and lawyers with sufficient international human rights knowledge. The Singarasa case elucidated the severe lack of doctrinal knowledge, while the popular insular ideology by Sri Lankan lawmakers made matters worse. It also revealed the weak character of international human rights institutions. And yet, the communication with non-state actors seems promising to bring about change in the domestic setting. Those, who are subjected to constant human rights violations have the utmost interest in the cooperation within the international human rights system, as their genuine interests are in danger. As it was accentuated in the fourth and fifth chapter, civil society gradually grew, nourished and revived itself through the constant interaction at Geneva. It is noteworthy that with the sophistication of the United Nations treaty body systems civil society participation became more active, while not allowing domestic issues to slip from international attention and scrutiny. The wealth of non-governmental reports submitted before the treaty bodies are rich and resourceful, mirroring a vivid human rights community. Camilla Orjuela notes:

[M]ost nongovernmental organizations concerned with peace, human rights, and democratic reform were formed in the 1970s in response to ethnic riots and government repression. After the 1983 anti-Tamil violence, international attention generated an influx of foreign-relief funds, much of which was handled by NGOs. Although civil-society actors have been working for peace for decades, a peace movement gained momentum first in 1994–95. In connection with International Human Rights Day in December 1994, thousands of peace and human-rights activists, representatives of more than 40 NGOs and other groups, organized a peace rally in Colombo. A procession was accompanied by street drama, music, and speeches on the peace and human-rights theme, and appeals were adopted and sent to the government and the LTTE.

Nonetheless, Sinhala nationalist politicians consider precisely these non-governmental organisations as a threat to their carefully established hegemony. The non-governmental organisations are considered as lackeys of neocolonialism, who, with the help of the United Nations, are attempting to undermine the integrity of Sri Lanka. The presence of non-governmental

1459 DeVotta, supra note 102, p. 33.
organisations, however, has been increasingly growing within the United Nations, in fields such as standard setting and normative development.\textsuperscript{1460} This should be evaluated as an improvement of the human rights machinery. While the human rights treaty bodies are the authoritative interpreters of international human rights treaties, human rights non-governmental organisations speak on behalf of the people whose rights were violated.\textsuperscript{1461} They make the human rights violations visible and keep the international focus on the violators, while trying to achieving awareness and reinvigorating pressure through the international human rights machinery.\textsuperscript{1462} Albeit a non-United Nations entity, the non-governmental organisations do carry out work for the United Nations: they are in the vanguard with their diligent and meticulous follow-up on concluding observations.\textsuperscript{1463} Andrew Clapham sees their role also as disseminators at the national level, “[p]roviding an alternative perception of the state’s compliance with its obligations under the treaties.”\textsuperscript{1464}

Paradigmatic is the grassroot action on the occasion of the fifth periodic cycle of Sri Lanka to the Human Rights Committee or the volume and analysis recorded at the fifth periodic cycle of Sri Lanka to the Committee against Torture. Sri Lanka’s ratification of human rights treaties has been resourceful and provided an opportunity for mobilisation, while it is salient to state that the human rights treaty ratification did not correspond to the immediate change in policies and behaviour of the Sri Lankan governments. This is reflected by the overdue reports which Sri Lanka had submitted: states are usually reluctant to spend resources on human rights enforcement.\textsuperscript{1465} It should also not lead to the erroneous belief that human rights treaties, despite their role as vehicle for civic action, trigger uniform beneficial effects.\textsuperscript{1466} Yet, the efficacy of human rights bodies in the context of Sri Lanka, considering the examination, cannot be denied and, as Beth Simmons has correctly expounded, the effects of international

\begin{footnotesize}
\begin{enumerate}
\item[1460] Lynch and Schokman, \textit{supra} note 1051, p.173.
\item[1461] \textit{Ibid} p. 192.
\item[1465] Dai, \textit{supra} note 1457, p. 94.
\item[1466] \textit{Ibid} p. 102.
\end{enumerate}
\end{footnotesize}
human rights institutions lie at the changes coming at the domestic level.\textsuperscript{1467} Sustainable developments in domestic human rights policy largely depend on the combination of top-to-bottom and bottom-to-top pressure. More specifically, it is the advocacy for domestic human rights changes by invoking international human rights standards. As outlined under the third and fourth chapter, this is exemplified, \textit{inter alia}, by the discussion on the change to the Marriage Act. The existence of domestic stakeholders, the existence of the international human rights fora through the elite-initiated agenda setting, human rights litigation before treaty bodies and the mobilisation initiated with concluding observations by the treaty bodies is providing fuel for the effects on the domestic human rights norms.\textsuperscript{1468} Concluding observations and outcomes of international human rights litigation, in general, provide the fertile ground for further engagement and arguments about facts and ongoing accountability. Authoritative principles are imperative to identify gaps and empower individuals to address the gaps, while the international community must be helpful to the rights holders to articulate and mobilise.\textsuperscript{1469} The same argument can be applied to the United Nations Human Rights Council.

The fifth chapter discussed how the increased space for non-governmental organisations has allowed for a more transparent dialogue, it had empowered individuals and increased their leverage against arbitrary execution of power. This was not always the case. It was one of the crucial deficiencies of the United Nations Commission on Human Rights that it was inactive until 1967, in the phase of abstention, when the most pressing human rights issues erupted, the early seeds for ethnic hostility were sown and when human rights intervention would have been of utmost importance. Allowing civil society to take a prominent part was a slow and long process, coming along with more human rights intervention. Compliance gaps will obviously remain and any observer should not be naïve about closing compliance gaps anytime soon. The Sri Lankan case study has underscored this. Despite more than thirty years of reporting, significant gaps remain. As Xinxuai Dai argues, however, compliance gaps are not reliable indicators of the behaviour of states or the effects of human rights institutions. Rather, he furthers, the compliance gap reflects a “[s]ubjective benchmark by which behaviour

\textsuperscript{1467} Simmons, \textit{supra} note 896, p. 126.  
\textsuperscript{1468} Simmons, \textit{supra} note 896, p. 126.  
\textsuperscript{1469} \textit{Ibid}. 
ought to be evaluated." To this end, international human rights law cannot be replaced by other rights-based action, but must be a set of norms that is helpful to assist in human rights intervention in its myriad ways. It will be the existence of international human rights law identifying the gaps that will close the ambit of majoritarian discourse and empowers the local human rights community through inclusion, dialogue and promotion of each individual’s rights.

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1470 Dai, supra note 1457, p. 100.
1471 Simmons, supra note 896, p. 351.
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