Paper 19

Fundamental Rights of Tamils *by Ms. Barbara Jackman*

Since the Second World War, the international community has increasingly recognized that individuals have human rights and that states are obligated to protect them from human rights abuses. Through international and regional conventions and declarations, fundamental human rights have been articulated and standards developed for ensuring that these rights are protected and respected by states.

The current international human rights system is not perfect. However, for citizens of the industrialized nations it can and often does provide effective remedies from human rights breaches. However, the system cannot be characterized as meaningful or effective for peoples in many other parts of the world. The litmus test of respect for human rights is their protection in situations of crisis. Recent conflicts highlight the extreme frailty of the international protection mechanisms. One only has to think of Rwanda, Bosnia, Kosovo, Sri Lanka, Turkey, the Israeli Occupied Territories, and the Sudan.

The situation for the Tamils of Sri Lanka is a case in point: matching international human rights norms against the practices in Sri Lanka, can lead only to the conclusion that human rights are routinely breached by the Sri Lankan state. In spite of the many human rights conventions now in place and in spite of the customary nature of some human rights, such as the right to be free from torture and the protection of civilians in times of armed conflict, fundamental human rights are not respected, nor are there effective mechanisms in place to ensure their protection. Sadly, as is the case with other peoples who are the victims of severe state repression and who have engaged in a struggle against this, human rights abuses are being perpetrated not just by the Sri Lankan state, but by other states where Tamils have sought refuge. This is not to say that states who have obligated themselves to provide protection to refugees are involved in extra-judicial executions or torture, however, it is a human rights breach to return a person to a country where there is a substantial risk of torture. European states, Canada and the United States routinely engage in such practices. Also troubling in recent times is the practice of detaining and forcibly subjecting refugees to *refoulement* for exercising their rights to freedom of expression and association.

It is not possible in a presentation of this nature, to review state practices in respect of all of the human rights now recognized internationally as customary norms or under international and regional human rights conventions. Rather, the focus of this presentation is narrow, covering only several of the human rights which are meant

to be respected by states, but which are routinely being breached, not just by Sri Lanka but by states such as Canada in relation to Tamils. Given my knowledge of Canadian practices, as a lawyer in Canada, Canada is used as the primary example of 'complimentary' human rights violations against Tamils.

The international community has recognized some human rights norms as being operative in all circumstances. The United Nations Human Rights Committee, for example, has indicated that while states may register reservations to an international treaty, the *Vienna Convention on the Law of Treaties, CTS 1980/37* permits reservations only to the extent that they are not incompatible with the object or purpose of the treaty. The Vienna Convention is reflective of general international law, as was affirmed by the International Court of Justice in *The Reservations to the Genocide Convention Case* of 1951. Reservations that offend preemptory norms are not compatible with the object and purpose of the *International Covenant on Civil and Political Rights.* In its General Comment 24, the United Nations Human Rights Committee has identified as preemptory norms those provisions of the ICCPR which reflect customary international law and as such may not be the subject of reservation:

> Accordingly, a state may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit advocacy of national, racial or religious hatred, to deny persons of marriageable age the right to marry, or to deny minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right of a fair trial would not be. (p. 3, para. 6, 8)

19.1 Self Determination

There are many international indicators that there is a right of a people to self determination. The right is recognized in the *United Nations Charter*, C.T.S. 1945, No. 7. It is recognized in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Oct. 24, 1970*, (referred to hereafter as the *Declaration on Friendly Relations*). This Declaration elaborates principles established in the *United Nations Charter* and is generally recognized as reflective of customary international law, binding on all states. The customary nature of the Declaration was recognized by the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.) [1986] I.C.J. 14.* The right of self determination is recognized in Common Article 1 of the International Bill of Rights – the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 and the *International Covenant on Social, Economic and Cultural Rights*, 993 U.N.T.S. 3. It is important to understand that the international community, by placing the right of self determination in article 1 of both conventions, has clearly rec-

ognized that this right is a human right, and one which is fundamental to the protection of other human rights.

In Canada, the right of a people to self determination has recently been confirmed by the Supreme Court of Canada in the *Reference Re Secession of Quebec, [1998] 2 S.C.R. 217*:

> While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the 'rights' of entities other than nation states – such as the right of a people to self determination.
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> The existence of the right of a people to self determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law. (para. 113.)

Recognition of the right of a particular people to self determination need not be recognized by international community of states or any number thereof, because the test of determining if a people are a people with a right to self determination is an objective one. While recognition is essential to establishing a norm of customary international law, such as establishing the right to self determination, once the norm is established, the question of its application to a particular case becomes a matter of objectively assessing the evidence to determine if the norm applies.

Any objective assessment of the facts concerning the Tamil people supports the conclusion that they are a people and as such have a right to self determination. The indicators of 'peoplehood' are met. The Tamils have historic homelands in the north and the east of Sri Lanka in which they have been settled for well over two thousand years. They have a language and religion distinct from that of the other principal people on the island, the Sinhalese. They have a distinct culture, and perhaps most importantly, the Tamils self identify as a people – a consciousness of identity which has crystallized through their repression by the Sinhalese dominated state.

Exercising a right of self determination need not mean that a people have a right to secede from an existing state. The general rule in international law is that the exercise of the right of self determination does not mandate a right of secession. As the Supreme Court of Canada indicated in *Reference Re Secession of Quebec*:

> The recognized sources of international law establish that the right to self determination of a people is normally fulfilled through *internal* self determination – a people's pursuit of its political, social and cultural development within the framework of an existing state. A right to external self determination . . . arises only in the most extreme of cases, and even then, under carefully defined circumstances. *External* self determination can be defined as in the following statement from the Declaration on Friendly Relations as
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> [t]he establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self determination by that people. (*supra.*, para. 126)

The Supreme Court of Canada summarized

the existing state of customary international law, which recognizes a right of secession in limited circumstances, which include:

- where a people is subject to colonial rule, based on the assumption that such people are inherently distinct from the colonial or occupying power and the territorial integrity of such people ought to be restored;
- where a people is subject to alien subjugation, domination or exploitation, based on the same concerns as occurs with colonization, and
- likely as well, where a people is blocked internally from the meaningful exercise of the right of self determination. (para. 131–135)

The right of the Tamils to external self determination arises under the second and the third instance referred to by the Supreme Court of Canada. Clearly there is a right to external self determination in instances of alien subjugation, domination and exploitation, which includes racial repression, as is apparent in the Sri Lankan state dominating and subjugating the Tamils. As well, in respect of the third instance, the Sri Lankan state has consistently denied Tamils the meaningful exercise of the right of self determination. While various persons in the Sri Lankan leadership, over the years, have promised implementation of measures which would provide Tamils with internal self determination, these agreements and legislative initiatives have with never been carried out or watered down to such an extent that the they cannot be said to be effective.

The crystallization of the right of external secession as a norm of customary international law is self evident in the *Declaration on Friendly Relations*, the principles of which have been reaffirmed in the *Vienna Declaration and Programme of Action*, A/Conf.157/24, June 25, 1993. Both the *Declaration on Friendly Relations* and the *Vienna Declaration* impose on states an obligation to respect the equal rights of peoples and their right of self determination. The territorial integrity of a state is explicitly protected where a state is conducting itself "in compliance with the principle of equal rights and self determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind." The counter to this, of course, is that the territorial integrity of a state is not protected where it does not respect the equal rights and self determination of peoples within its borders. In Sri Lanka, not only have Tamils been denied the meaningful exercise of their self determination right within the existing state structure, the post independence history of Sri Lanka includes a series of legislative and administrative measures meant to disadvantage Tamils. The Sinhala only language laws, the constitutional entrenchment of Sinhalese and Buddhism, but not Tamil or Hinduism, anti-Tamil quotas for admission to higher education, the colonization of historic Tamil homelands by Sinhalese settlers, particularly in the east, the deconstitutionalizing of minority protections, and the disenfranchisement of the hill country Tamils are some examples of these measures. In addition to these measures, state repression increased in response to Tamil efforts to peacefully push for equality within the state of Sri Lanka. With disappearances and extra-judicial killings of Tamils, arbitrary detentions of Tamils, including politicians, and the de facto institutionalization of torture, it is clear that Tamils have been denied self determination and equal rights.

The right to use force is distinct from the right of external or internal self determination. A self determination right could be exercised to ensure respect for equal rights and self determination within an existing state, as well to ensure such rights by means of the establishment of an independent state. In either case, the right to use force to ensure respect for self determination is being recognized as a matter of customary international law, akin to the right of self defense, i.e. the right of a state to defend itself from aggression. The *Declaration on Friendly Relations* explicitly references the right of a people to receive outside assistance in their actions against and resistance to forcible action in pursuit of the exercise of their right to self determination. Further, the *Declaration* prohibits states from using forcible action to oppress the right to self determination. This is the only instance where states are obliged to support one side to the conflict – the people with the right to self determination.

Even though there are instances where the use of force is justifiable under general principles of international law, the preference always is to find means of accommodating differing interests through negotiations and other peaceful means of resolution. Armed struggle, however, where a people are denied self determination and equal rights, is clearly justifiable where it is in response to armed repression by a state. Further there must be a margin of deference to the people themselves, who are subjected to repression, because they are the ones who have had to conclude that other means of resolving the denial of equal rights and self determination had been exhausted or realistically do not exist. In other words, if the conditions of severe racial repression exist, it is not the place of others in the international community to determine that a people do not have a right to use force to effect respect for equal rights and internal or external self determination.

In the context of the Tamils, it is clear that neither Sri Lanka, nor other states, respect the right of self determination of the Tamils, and therefore their right to insist on the fair application of international law norms. Sri Lanka engages in severe repression of Tamils. Other states, like Canada, Switzerland, and the United States detain, deport, fine and otherwise penalize Tamils for assisting the Tamils in Sri Lanka through peaceful and lawful activities. The *Declaration on Friendly Relations* specifically permits a people to receive outside assistance their resistance to a denial of self determination, equal rights, and state repression. This effective negation of Tamil self determination is particularly unsettling given the active assistance provided by NATO to the Albanians in Kosovo, whose situation differs little from that of the Tamils. Western leaders, extolling lofty human rights principles in support of intervention in Kosovo, appear at best to be hypocritical when one considers the plight of the Tamils of Sri Lanka, the Palestinians, and the Kurds of Turkey, for example. These peoples, subjected to equally severe repression over the years by state authorities, have not only not been assisted in the name of human rights protection, but have themselves been labeled as 'terrorists' by western states and detained, deported and otherwise penalized.

19.2 Freedom of Expression and Association

The right of individuals to freely express their views and to engage in associations which further their self fulfillment is universally recognized as fundamental to free societies and is enumerated in all of the general international and regional human rights conventions. Mr. Justice McIntyre

of the Supreme Court of Canada in *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at p. 393, recognized that freedom of association was but another form of the exercise of freedom of expression. He states:

> Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association. (p. 393)

The reports on human rights conditions in Sri Lanka published by international monitoring agencies, such as Human Rights Watch and Amnesty International, indicate that Tamils are detained, subjected to torture, disappearance, and extra-judicial killing, often solely on the basis of a suspicion of association with the Liberation Tigers of Tamil Eelam. However, states like Canada and the United States have also proscribed peaceful activities in support of and association with the LTTE. In the United States criminal penalties may be imposed for such support and association, while in Canada it is only non-citizens who are targeted for exercising their freedoms of expression and association. In Canada, non-citizens supporting the LTTE in any manner face indefinite detention without bail or access to habeas corpus, a customary norm of international law, considered non-derogable even in times of emergency. Non-citizens face deportation and direct *refoulement* to Sri Lanka.

19.3 Arbitrary Detention

The rights of persons detained by state authorities are strictly protected by the principal international and regional human rights tribunals charged with ensuring state compliance with international and regional human rights norms. These include the *International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, UN Res. 217 A (III).* Article 9(1) of the ICCPR states that everyone has the right to liberty and security of the person and that no one shall be subjected to arbitrary arrest or detention. Any detained person is entitled to take proceedings before a court in order that that court may determine without delay the lawfulness of the detention and order release if the detention is not lawful. In General Comment 8, the United Nations Human Rights Committee has indicated that even in instances of 'preventive detention' for reasons of public security, the due process norms applying to any detention continue to apply and the detention cannot be arbitrary. An arbitrary detention is not and can never be lawful. Further, the *Universal Declaration of Human Rights (UDHR)*, considered to be expressive of customary international human rights norms, recognizes in Article 3 that no one shall be subjected to arbitrary arrest, detention or exile.

There have been varying interpretations of the

meaning of 'arbitrary.' The Subcommittee of the United Nations Commission on Human Rights in *The Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile, United Nations, Department of Economic and Social Affairs*, New York, 1964, notes that the two views are whether the detention is in accordance with law or whether, even if in accordance with law, the detention is arbitrary as being unjust or incompatible with the inherent dignity of the person or incompatible with the respect for the right to liberty and security of the person. The concluded for the purposes of its study that:

> ... arbitrary is not synonymous with 'illegal' and that the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary. The committee, therefore, ... has adopted the following definition: an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of the person. (p. 6–7)

The United Nations Working Group on Arbitrary Detentions (UNWGAD), which receives complaints from individuals alleging a detention to be arbitrary in relation to the rights accorded to persons in the UDHR and the ICCPR, considers that a detention is arbitrary if it falls within any one of three categories:

1. cases in which the deprivation of freedom is arbitrary as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of sentence or despite an amnesty act, etc.); or

2. cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concerns the exercise of rights and freedoms protected by Articles 7 (equality), 13 (freedom of movement within state jurisdiction), 14 (right to seek asylum), 18 (freedom of thought), 19 (freedom of expression), 20 (freedom of peaceful assembly and association) and 21 (citizen participation and access to government) of the *Universal Declaration of Human Rights* and Articles 12 (liberty of movement within state jurisdiction), 18 (freedom of thought), 19 (freedom of expression), 21 (freedom of peaceful assembly), 22 (freedom of association), 25 (citizen participation and access to government), 26 (equality) and 27 (minority rights) of the International Covenant on Civil and Political Rights; or

3. Cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.[1]

The UNWGAD in its reasons for determining a detention to be arbitrary considers that a detention which is in accordance with the laws of a state is still an arbitrary detention where either the laws do not provide for due process

[1]Decisions Adopted by the Working Group on Arbitrary Detention, UNWGAD, E/CN.4/1995/ 31/Add.1, Oct. 5, 1994, Decision No. 43/1993 (PRC), p. 3, para. 3.

safeguards or sanction conduct which is not violent but constitutes an exercise of the freedom of expression and association.[2]

The United Nations Human Rights Committee has defined 'arbitrary' consistent with the broader view of the term as set out above. The Committee has held that a detention is arbitrary when it stated that "... remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".[3]

The reports of international human rights monitoring agencies indicate that Sri Lanka routinely violates the rights of Tamils to be free from arbitrary detention. Tamils are detained because they are Tamils, because they exercise their freedoms of expression and association, and often merely because they have exercised their freedom of movement within Sri Lanka by traveling from the north of the country to Colombo, the capital. Other countries are now engaging in similar practices. Canada detains or attempts to detain Tamils because they have exercised their freedoms of expression and association in Canada. Due process norms are not applied because Canadian law does not provide for a review of the need to detain within a reasonable time, nor is habeas corpus available to challenge the lawfulness of the detention. Unfortunately, the non-availability of habeas corpus for non-citizens detained under the *Immigration Act* comes, not from domestic constitutional norms, but from the Canadian courts, up to the Supreme Court of Canada. Canadian Courts routinely deny fundamental protections to non-citizens because they are non citizens. This is justified by the Courts on the basis of a 'contextual' analysis: non-citizens traditionally have no rights in Canada, so it is justified to deny them human rights protections because of this.

[2]See for e.g. UNWGAD, Decisions No. 62/1993 (Myanmar), at p. 30, para. 7–8; No. 1/1994 (Syrian Arab Republic), at p. 52–53, para. 5–6; No. 3/1994 (Morocco), at p. 56, para. 5–13; No. 4/1994 (Zaire), at p. 59, para. 5–8; No. 5/1994 (Guinea-Bissau), at p. 61, para. 5–7; No. 7/1994 (Viet Nam), at p. 64, para. 5–9.

[3]Hughes and Tootell-Bell, Art. 9 of the ICCPR, Art. 37 of the Convention on the Rights of the Child and Other Relevant UN Instruments, Working Documents, European Seminar on the Detention of Asylum Seekers, ECRE, Nov. 1995, at p. 5-6; UNHRC, Communication No. 305/1988

19.4 Torture

The *Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment*, UNGA Res. 39/46, Dec. 1984, CTS/91 defines torture as "... any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person ... for any reason based on discrimination of any kind, when such pain or suffering is inflicted by acquiescence of a public official or other person acting in an official capacity".

Article 2.2 of the *Convention* recognizes the right as non-derogable in declaring that "No exceptional circumstances whatsoever, whether war or threat of war, internal political instability or any other public emergency, may be involved as a justification of torture." While prohibition against removal to place where there is a likelihood of torture occurring is generally considered to be inherent in the general human rights treaties, the *Convention* explicitly extends this protection to instances where the person could face such treatment if removed from a signatory state to another state. Article 3 states:

1. No state shall expel, return ("*refouler*"), or extradite a person to another state where

there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The right to be free from torture is also contained in other international and regional human rights conventions. The United Nations Human Rights Committee, which monitors compliance with the *International Covenant on Civil and Political Rights*, states in General Comment 20:

> para. 3: ...even in situations of public emergency, ...no derogation from the provisions of Article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.
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> para. 9: In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[4]

The views of the UNHRC are the same as those of the European Commission and Court of Human Rights. In *Chahal v U.K., E.Ct.H.R., File: 70/1995/576/662*, Nov. 15, 1996, the European Commission and more recently the Court of Human Rights affirmed the absolute nature of the prohibition against placing a person at risk of being subjected to torture. Article 3 of the European Human Rights Convention is similar in scope and purpose to Article 7 of the ICCPR in prohibiting torture or other inhuman or degrading treatment or punishment. In *Chahal*, the British government argued that Article 3 of the Convention had implied limitations entitling the State to expel a person for reasons of national security, notwithstanding the existence of a real risk that the person concerned would be subjected to torture or to inhuman or degrading treatment in the receiving State. The Commission and the Court disagreed. The Court stated:

> para. 79: Article 3 en-shrines one of the most fundamental values of democratic society .... The Court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these modern circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. ...no derogation from it is permissible under Article 15, even in a state of public emergency threatening the life of a nation ....
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> para. 80: The prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk

[4] CCPR/C/21/Rev.1/Add.3, April, 1993, para. 3.

> of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion .... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 *Convention on the Status of Refugees.*
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> para. 81: ...It should not be inferred from the Court's remarks [in *Soering*] concerning the risk of undermining the foundations of extradition, ...that there is any room for balancing the risk of ill-treatment against reasons for expulsion in determining whether a state's responsibility under Article 3 is engaged. (at p. 23)

The human rights reports concerning Sri Lanka indicate that in spite of the Sri Lankan government's commitment to eliminate torture, it is routinely practiced by state forces, who for the most part act with impunity. Countries, such as Canada and many of the European states routinely remove Tamils who face a risk of torture in Sri Lanka, in spite of pleas by non-governmental human rights agencies to end the practice. Canada recently affirmed before the United Nations Human Rights Committee, when its human rights practice was assessed under the ICCPR, that it will return individuals to a country where there is a substantial risk of the person being subjected to torture.

19.5 Right to an Effective Remedy

In the international human rights context, the availability of an effective remedy is considered an inalienable or non-derogable right. Article 10 of the *Universal Declaration of Human Rights (UDHR)* recognizes the right to a fair and public hearing in the determination of rights and obligations. Article 8 recognizes the right to an effective remedy by competent tribunals for acts violating the fundamental rights granted by constitution or by law. Where a state does not provide an effective remedy under domestic law, this is considered to itself be an independent breach under the *International Covenant on Civil and Political Rights.*

The United Nations Human Rights Committee has recognized a general right to a remedy from a breach of the ICCPR under Article 2(3)(a) of the ICCPR. The absence of an effective domestic remedy relieves a complainant from the obligation to exhaust domestic remedies before bringing a complaint to the Human Rights Committee. The United Nations Subcommission on Prevention of Discrimination and Protection of Minorities in its *Report on the Right to a Fair Trial*, E/CN.4/1995/2; Sub. 2/1994/56, Oct. 28, 1994, Res. 1994/35 recognizes the right to claim effective remedies against a breach of the ICCPR as "inherent in the Covenant as a whole and should accordingly be considered non-derogable, particularly because they are necessary to protect other non-derogable rights" (p. 84).

The Inter-American Court has similarly recognized that the failure to provide for a remedy is a separate violation of the IAD. In *Velasquez Rodriguez v Honduras, Judgment on Preliminary Objections, June 27, 1987 (IACHR)*, a decision which focused on admissibility of the petition,

the Court concluded:

> Thus, where certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies *or the lack of due process of law*, not only is it contended that the victim is under no obligation to pursue such remedies, but indirectly, the state in question is also charged with a new violation of the obligations assumed under the Convention.

Like the UN Human Rights Committee, the Inter-American Court and Commission have concluded that 'essential *judicial* guarantees' which are not subject to derogation include habeas corpus and any other effective remedy before judges or competent tribunals, which is designed to guarantee the respect of the rights and freedoms whose suspension [i.e. in states of emergency] is not authorized by the Convention.[5]

The reports of international human rights monitoring agencies indicate that human rights of Tamils are routinely abused in Sri Lanka. While there are 'remedies' available through the Sri Lankan courts, they cannot be characterized as truly effective or meaningful. The Sri Lankan government fails to take effective steps to punish state forces who engage in human rights abuses. While, in recent years, there have been several high profile prosecutions of Sri Lankan enforcement officials who have committed egregious human rights violations, by far the vast majority of state officials continue to abuse the human rights of Tamils with impunity. As long as a state fails to take effective and comprehensive action against its own officials who engage in human rights abuses, remedies will remain ineffective for the victims of those abuses. More often than not, remedies are available only after a human rights abuse has occurred. It is difficult to consider court ordered compensation for wrongful death to be an 'effective' remedy in respect of the right to life.

It is unfortunate that other states, such as Canada, fail to provide effective remedies to some Tamils. Canada, generally limits access to the Courts to non-citizens and denies effective remedies to Tamils and others for reasons of national security, related in the case of Tamils to their support of the Tamil cause of self determination in Sri Lanka. Non-citizens wishing to challenge the lawfulness of their removal from Canada do not have direct access to a court, but rather, in all instances, are required to obtain the approval of a judge to proceed with a challenge. Approval may be withheld without the judge having to set out reasons and merely on the basis that the Court already has too many cases before it. Appeals to a higher court are subject to the discretion of the judge who has refused the application, on the showing that there is a serious issue of general importance which transcends the facts of the individual case. So for example, if a person asserts a substantial risk of torture, including loss of life, a judge may decide that this is only a matter of concern to the one individual, and so is not a serious question of general importance. Non-citizens subject to security certificates, are precluded from having their cases reviewed by a higher court on any grounds, and as noted above, *habeas corpus* is not available to non-citizens detained under Canadian immigration laws.

This past century has seen an increasing

[5] Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, October 6, 1987.

awareness of human rights among people and by states, as it has seen increasing resort to violence and the abuse of those rights. At the same time that the human rights of individuals are being violated throughout the world, mechanisms are being developed to address violations domestically within states and internationally by means of conventions and declarations. Most remedies remain ineffectual as a means of preventing human rights violations. Probably, the most significant impact of the entrenchment of human rights protection as a branch of international law, is merely that states must answer to international human rights agencies for their human rights violations. This unfortunately does little to prevent the violations from continuing to occur. States such as Canada are generally more sophisticated in their efforts to present the image of a respecter of human rights.

The treatment of Tamils both in Sri Lanka and by states of refuge, however, points to the weaknesses of human rights mechanisms. While the abuses are more direct and immediate in Sri Lanka, states like Canada are not above inflicting their own kind of repression against Tamils. If one root reason for this can be identified, it is because of the failure of Canada and other countries to recognize and respect the right of the Tamil people in Sri Lanka to self determination. The characterization of those who support the Tamil cause of self determination as terrorists and the use of this labeling as a justification for the denial of fundamental human rights protections, merely underscores the frailty of human rights protections. The willingness of states to respect the human rights of Tamils is not, in reality, rooted in an objective assessment of these rights and their application to the Tamils, but rather is formed by political considerations unrelated to human rights.