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'AMMA I WILL NOT BE COMING BACK HOME' - REFLECTIONS OF A PUBLIC HEARING ON DISAPPEARANCES IN VAVUNIYA



Image : Vikalpa/ CPA

On an uncharacteristically busy Monday morning in the Division Secretariat's Office of Chettikulam in Vavuniya, a small gathering of people mostly women stood outside the DS office clutching an invitation letter. This letter for many was a source of hope. As family members of those disappeared, they were to give their testimonies and statements to the Presidential Commission on Disappearances which was established on the 15th of August 2014. The Commission was appointed by the President of Sri Lanka with the mandate to inquire into and report on any abductions or disappearances between the period from the 1st of January 1983 to the 19th of May 2009, their potential whereabouts, the potential perpetrators, recommend legal action which could be taken against the perpetrators, measures which could be taken to prevent recurrence in the future and any compensation or relief which can be granted to the families of the victim.

Since its inception the Commission has received more than 20,000 complaints. These complaints ranged from persons who have gone missing during Welikada Prison Killings in 1983 to persons who have gone missing in the year 2010.

The nine concluded public hearings of disappearances were filled with stories of pain, suffering and the continuous search by families to find their loved ones. The Vavuniya sittings highlighted patterns of abduction by the Armed Forces, the LTTE, Para militant groups,

white van abductions and abductions by unidentified men. *Subramaniam Ranjithkumar* was only 17 years of age when he was taken away by the military. According to his mother on the 3rd of June 2008, he had just returned from temple and was sleeping at home. An Army buffel arrived at his house, dragged the boy out of the house, pushed him into the buffel and took him away. She stated that on the same day her brother was also taken away in a buffel. Both brothers were taken to the Joseph Army camp. The next day her brother was released. When he had asked about his nephew, one Military Officer had pushed his face in to a bucket of water and said that they will not be releasing the boy. Her brother came back, narrated the story and soon left to India. Similar stories were narrated by many where buffels have been used by the Military to abduct people.

A lady who came to testify before the Commission narrated stories of how her three brothers went missing during different stages of the ethnic conflict.

Her first brother went missing in 1980, when he had gone to the Market as usual for his daily routine.

The second brother went missing when the family was displaced in Vavuniya in the 1980s. One month after he went missing they traced his whereabouts to Welikada prison. On 23rd of July 1983 they received a letter from their brother asking for soap and basic toiletries. Three days later his death was announced on the radio. It said that he had been killed during the prison riots in 1983 which claimed the lives of 52 Tamil Prison inmates. The family was never allowed to collect the remains of their brother.

The third brother was taken away by the Sri Lankan Army during a curfew in 1990. When she was informed that her brother's body can be identified in the Madukantha camp she had sent her husband to find him. However, her husband was beaten by the army and dumped in a bunker there. The injuries were severe and they took him to India for treatment. She said that he died there as a consequence of his injuries.

Another young boy *Sathasivam Logeswaran* was only 19 when he was taken away by the LTTE. His mother was able to meet him until February 2008 and then he went missing. His mother's hopes were renewed again when two men who identified themselves as LTTE officers visited her house, and showed her a file containing her son's photograph, in which he was dressed in the Tiger Uniform. His mother testified and stated that, she has never given a photo to anyone with her son in Tiger Uniform and that it must have been a photo taken later. She said she strongly believes her son is alive somewhere. Many abductions by the LTTE were reported between the periods of 2002 to 2007.

There were also incidents reported where persons were abducted in white van. Most white van incidents reported took place outside the victim's house or work place. Almost all testifiers wanted to know the whereabouts of their missing relatives. Many women burst in to tears when the Commissioners asked them whether they received compensation. One lady said "I don't want anything. I just want my son back"

As per the Commission's website, after a period of one year the Commission had completed hearing 1440 cases out of the 20,000 applications they have received. This figure is telling of the immense volume of work before the Commission and calls into question whether it is possible for a three member Commission to attend every public hearing and process the 20,000 cases with equal priority.

Each testifier is given an average time of eight to fifteen minutes to record testimonies. Is this time sufficient to record a comprehensive statement which could be used for an investigation to trace the missing? The Commission's mandate was further expanded in July 2014 through a Gazette notification, to inquire in to alleged civilian deaths and violations of humanitarian law during the final stages of the war. Given the Commission's already overwhelming workload, what credible outcome will such an expansion of its mandate create?

The second pressing question is whether any leads are being pursued from all the information from witness testimonies listened to and recorded so far. Have any suspects been identified thus far? And if they have been identified, when will they be called to testify publicly

before the Commission? These are just some of the questions the Commission will have to address when it releases its first report due in February 2015.

With the change of Government, it was hoped that the Commission's mandate will be evaluated, and that its working methodology will be revised. However the Commission continues with its mandate given by the former President. This has serious consequences as seen during the Trincomalee Commission sittings which took place at the beginning of March 2015. Less than half the people invited came to testify before the Commission. There is an urgent need to address the shortcomings of this Commission before it too becomes known as yet another failed mechanism of the Sri Lankan Government.

Kanapathy Thayalakanthan was 27, when he was abducted by unknown men on his way to Vavuniya from Colombo. On the date of this incident, he was constantly updating his mother about his journey. In Madavachchi she received the last call from her son. She said he was sobbing on the phone and someone was threatening him from behind. "That's the last time I heard his voice she said crying. Her son had said, "Amma I will not be coming back home"

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CHUNNAKAM CRISIS: WATER AS A HUMAN RIGHT



Image : Vikalpa/CPA

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Cataclysmic events in Weliveriya, the consequent protests in Rathupuswala and the thousands of farmers perishing in the face of Chronic Kidney Disease of Unknown Etiology (CKDu) has forced the discourse on socio-economic rights to the front pages.

The latest among a series of calamitous developments is the water crisis concerning the Chunnakam Power Plant. The Northern Power Plant operating inside the Ceylon Electricity Board (CEB) premises in Chunnakam, allegedly releases waste oil contaminating the underground water springs in the region.² This is said to have affected over ten thousand families in the area.³ The residents of the area have been advised against using water for their basic daily activities such as washing, bathing, and cooking.⁴ Furthermore, in an area where most families' primary form of livelihood is farming, they are unable to use water for the purposes of cultivation given that the water not only has adverse health effects on humans but has also had an impact on crops and plants.⁵

The Northern Power Co (Pvt) Ltd Jaffna has consistently denied the validity of allegations made against them, claiming that the waste oil from the plant is in fact collected in overhead tanks, that nothing is discharged to the ground and that the environmental licenses and approvals have been properly issued on an annual basis with quarterly checks.⁶ While a court case is underway to deal with the issue, the power station continues to function.⁷ The protestors against the functioning of the power plant demand that a permanent solution be provided to the problem of contaminated water.⁸ This essay is a survey of the international human rights jurisprudence on the Right to Water and an analysis as to what extent the Sri Lankan legal system can give effect to such a right.

Right to Water and State Obligation under International Law

The recognition of the Right to Water in the international human rights jurisprudence exemplifies

² Northern power plant's waste oil contaminates region's water supply, Sunday Times, January 18, 2015.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Jaffna Power Plant Rejects Claims, Colombo Gazette, January 20, 2015.

⁷ Jaffna school kids protest against Chunnakam power plant oil spillage, Tamil Guardian, January 21, 2015.

⁸ *Ibid.*

the interrelatedness and interdependence of human rights. General Comment 15, which gave expression to the Right to Water, regards it as indispensable for leading a life of human dignity and as a prerequisite for the realization of other human rights.⁹ Accordingly, the Right to Water was read into Article 11 of the International Covenant on Economic, Social and Cultural Rights as an integral component necessary for an adequate standard of living.¹⁰ The Right to Water therefore is interconnected with the right of everyone to the enjoyment of the highest attainable standard of physical health.¹¹ In order to achieve the full realization of this right, the state must take steps to improve all aspects of environmental and industrial hygiene as well as take measures to prevent, treat and control occupational and other diseases.¹² Moreover, the recognition of the right to just and favourable conditions of work, which includes the right to safe and healthy working conditions, implies access to clean water.¹³

Not only does this right create an entitlement on the part of individuals to be free from the contamination of water,¹⁴ but it also imposes positive obligations on States to monitor the quality of water supply in order to ensure that the water required for personal or domestic use is safe.¹⁵ i.e. free from micro-organisms, chemical substances and radiological hazards that threaten a person's health. Furthermore, even in the case of such an emergency, the State has an obligation to ensure at least the bare minimum core of that right by providing physical access to water facilities or services that provide sufficient, safe and regular water, including an adequate number of water outlets to avoid prohibitive waiting times, that are located at a reasonable distance from the household.¹⁶

⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, at Para 1.

¹⁰ *Ibid.*, at Para 3.

¹¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 12; *Ibid.*, at Para 8.

¹² *Ibid.*

¹³ *Supra* 10, Article 7.

¹⁴ *Supra* 8 at Para 10.

¹⁵ *Supra* 8, para 12.

¹⁶ *Ibid.*, para 37.

The obligation to protect the Right to Water further requires the State to prevent third parties including corporations from polluting water resources.¹⁷ As per the UN Guiding Principles on Business and Human Rights, corporate entities have obligations within their respective spheres, to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights violations. Such corporate responsibility to respect human rights exists wherever they operate. It is also independent of the states' abilities and willingness to fulfill their own human rights obligations.

Thus, they have a positive obligation to inform themselves of the human rights impact of their activities. Due diligence requirements include an obligation on the part of the corporation to conduct a process of internal impact risk assessment of their own activities or their business relationships. Such a risk assessment should draw on internal or external human rights expertise and involve meaningful consultation with potentially affected groups and stakeholders. The demand for such consultative processes stands in stark contrast to the adversarial methods that have been used by the relevant parties in the Chunnakkam water crisis.

Domestic enforcement of human rights norms

Unlike the South African Constitution, which has enshrined right to water as a justiciable constitutional right,¹⁸ the Sri Lankan constitution¹⁹ does not recognize social cultural and economic rights as enforceable. Thus human rights advocates are constantly required to look into creative processes through which they can appeal to existing judicial practice and explore avenues most palatable to the courts.



Image : Nestle

One such approach has been to incorporate socio-economic rights into the existing fundamental rights framework. The Indian constitution has utilized this rationale to overcome the lack of social cultural and economic rights in its constitution, accepting in one instance that water is one of the bare necessities of life.²⁰ Unlike the Indian Constitution, Sri Lankan constitution does not recognize the right to life. However, the courts in a case dealing with unlawful detention interpreted the right not to be deprived of life and, by necessary implication, to mean the recognition of a right to life.²¹ The Court of Appeal commenting on public nuisance in *Singalanka Standard Chemicals v Thalagama*, a case on the environmental effects of an aluminum factory, furthered this negative obligation of the state to a positive right. Therefore, it was accepted that the right to life would include within its ambit the right to a decent environment. This was under the rationale that rights must be interpreted broadly, and the purpose of protecting fundamental rights must be deemed to have conferred all that is reasonably necessary for the Court to protect those rights effectively. Therefore, the Sri Lankan judiciary seems open to extending this same principle in order to recognize a right to water, as a component of a decent environment.

In terms of limiting corporate actions that have an adverse impact on rights, in addition to the multiple regulatory mechanisms that the state has legally enacted, Sri Lankan courts have indicated that corporate rights are also curtailed whenever they interfere with the health of the general public.

When The Ceylon Tobacco Company challenged a

¹⁷ *Ibid*, para 23.

¹⁸ Article 27, *Constitution of the Republic of South Africa*, 10 December 1996; *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009).

¹⁹ Constitution of the Democratic Socialist Republic of Sri Lanka of 1978.

²⁰ *Air India Statutory Corporation v United Labour Union* AIR 1997 SC 645

²¹ *Sriyani Silva v Iddamaloda, S.C. (FR) No. 471/2000, S.C.M 8/8/2003*

regulation requiring pictorial warnings on cigarette packets, the Court of Appeal denied the tobacco company's request to delay implementation of the regulation.

This denial was based on the claim that the right to employment and freedom of expression of the company cannot override the right to health of the general public that is recognized by the international obligations undertaken by Sri Lanka.²²

This judgment is important not solely for the fact that it held that the internationally recognized right to health is applicable in the domestic legal regime but also in that it accepts that the rights of corporate entities are subordinate to the fundamental interests of the public.

From a humanitarian perspective, one hopes that the plight of those affected by the Chunnakam water crisis would come to an end sooner than later. However, from the point of view of a human rights advocate, there is also the anticipation that such a plight of the many may perhaps be the impetus that the judiciary needs in order to entrench the right to water in the Sri Lankan fundamental rights jurisprudence.

Vishakha Wijenayake²³

GLIMPSE OF HOPE FOR TAMILS?



Image : Vikalpa/ CPA

It has been almost two months since the ruling coalition has come to power. However the government has hardly addressed any of the core issues of the Tamils in the North and East. Tamils from the North and East voted for the new government unconditionally, hoping that their rights would be realized and genuine efforts towards reconciliation will be made. Several concerned parties including civil society, religious leaders and Tamil political leaders have expressed their disappointment over the delay in addressing the issues listed below.

1. *Land issues* –

Although the government mentioned that a committee will be appointed on a directive of the President in order to commence a programme to release lands in the North back to civilians, no concrete steps have been taken so far to this effect. The State Minister of Defense had mentioned that the lands in the Northern and Eastern provinces will be released back to civilians in a just and fair manner and it would not be necessary to remove army camps in the North in order to release lands required by civilians²⁴. Although government has confirmed cabinet's approval to release land from High Security Zones, [many residents complain that it is only a mere fraction of land, and that they would like to resettle in their traditional villages.](#)

2. *Political prisoners and abolishing the Prevention of Terrorism Act* ó

Out of the 554 inmates released under the presidential pardon on the 67th Independence Day, not a single Tamil political prisoner was included, which was a considerable letdown to the Tamil Community who had expectations in Mr. Sirisena's promises towards reconciliation. The release of political prisoners with a general pardon would have paved way for reconciliation. Disclosing the number of LTTE cadres detained in secret detention camps and allowing civil society, international inspectors to visit those rehabilitation camps and providing unrestricted access to lawyers would express government's willingness and commitment towards reconciliation. [The Commission for Justice and Peace of the Catholic Diocese of Jaffna had urged](#) the President to release all

²² Ceylon Tobacco Co v. Minister of Health, C.A. 336/2012, Court of Appeal (2014).

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²⁴http://www.defence.lk/new.asp?fname=Govt_to_appoint_committee_to_inquire_land_issue_in_North_20150209_04

Tamil political prisoners and to resettle the Internally Displaced Persons (IDPs) on their original lands²⁵.

3. *Enforced disappearances* –

The presidential commission, the sole mechanism for addressing war time violations of international human rights and humanitarian law among others, appointed to probe into complaints regarding missing persons has received 20,000 complaints to date. However, there is still no indication of any investigations presently underway. [The latest critique](#)²⁶ by the Center for Policy Alternatives (CPA) captures key issues and trends that undermine the credibility of the Commission. It goes on to say that the flaws in the process confirms the inability of a domestic process to address grievances in a post war context and strengthens calls for international investigations.

4. *Militarization* –

The State Minister of Defense mentioned on various occasions that the army would not be withdrawn from the North. On his visit to Jaffna the Minister remarked that the strength of the troops wouldn't be reduced and the prevailing number of military bases would function without dismantling.²⁷ [The prelate of Asgiriya Chapter had apparently expressed to the Minister](#) that the people in the North are living in peace due to the presence of the security forces and that therefore, it is not advisable to withdraw security forces from any part of the country.²⁸ Even the then Presidential Candidate Mr. Sirisena made it very clear during his election campaign that the military would not be removed from the North. The dominant role played by the Army in civilian affairs has been a threat to peace and reconciliation as the military continues to exercise a high degree of control over all aspects of people's lives in the North and East.

5. *Ambiguity on finding a political solution to the ethnic conflict*

No political solution to the ethnic conflict was

proposed and the Sirisena government continues to be vague about any political solution to the ethnic problem. The election manifesto itself was ambiguous about possible solutions and the government still remains so. Critics argue that this could be due to the need to win over the Sinhalese majority vote, which the Rajapakse campaign tried to secure by stating that Mr. Sirisena was going to divide the country. Sinhalese majority vote again looms over the heads of the present administration with general elections to be announced in April, 2015.

6. *Implementation of LLRC*

Although Mr. Sirisena promised to launch an investigation into allegations of war crimes committed during the final phase of the war and to act according to the recommendations of the Lessons Learned and Reconciliation Commission, (which as it is, has been deemed a flawed mechanism by various international human rights organisations and the United Nations) he has not taken any substantial measures to implement the recommendations of the LLRC.

Resettling Internally Displaced Persons (IDPs)

The current government had promised to take necessary steps to resettle IDPs in their places of origin and to provide infrastructure facilities to the resettled areas²⁹, but has not taken any concrete action to address this issue in reality.

Addressing these pressing issues while working on a political solution for the ethnic conflict will usher in a favorable beginning for positive cooperation between the Tamil National Alliance (TNA) and new government. This will further strengthen the relationship between Tamils and Sinhalese. Thus, the new President and Prime Minister should take Tamils' aspirations into consideration and act accordingly, if they are really committed to make a change and bring a lasting peace which had been denied to Sri Lankans for decades.

Aingkarán Kugathasan³⁰

²⁵ <http://www.ceylontoday.lk/51-83376-news-detail-jaffna-diocese-calls-for-the-release-of-tamil-political-prisoners.html>

²⁶ The Presidential Commission to investigate into complaints regarding missing persons, Trends, practices and implications, A critique, Centre for Policy Alternatives, December 2014

²⁷ <http://www.dailymirror.lk/63055/no-troops-reduction-in-north-minister-ruwansthshash.FVvMuMJE.dpuf>

²⁸ <http://www.lotuscomm.net/news/news-updates/1135-sri-lanka-buddhist-prelate-asks-not-to-withdraw-military-from-any-part-of-the-country>

²⁹ <http://www.dailynews.lk/?q=local/resettlement-remaining-idps-be-expedited-minister>

³⁰ Attorney at Law

THE COLOMBO PORT PROJECT : ENVIRONMENTALLY CHALLENGED



Image : Dominic Sansoni/ World Bank

The Colombo Port Project, valued at \$1.4 billion, has always been a political saga bathed in accusations of corruption and geo-political intrigue. Recently, opponents restarted their protests over the Environmental Impact Analysis (EIA) of the project. Unfortunately, the politicisation of the EIA impresses a false dichotomy between development and environmental sustainability. It also demonstrates the various misunderstandings of the EIA itself.

Why we need EIAs

The traditional understanding of development and its impact on the environment assumes a robotic response to environmental degradation as income increases. One understanding of this relationship is through resource allocation. For example, Paul Kuznets argues that environmental degradation increases at the early stages of development because of inefficiency and wastage, leading to excessive pollution. Sociological understandings are also noteworthy. Robert Nash, for instance, argues that developing societies see the environment as a resource ripe for exploitation; thus, leading to serious environmental degradation in the early stages of development. In both cases, increasing development leads to declining pollution because either industries become more efficient or attitudes towards the environment change positively.

The traditional understanding, however, is no longer sufficient to guide our approach to the environment and development. Society has begun to understand that our natural habitat is vulnerable and finite. Unrestrained growth is no longer an option for countries like Sri Lanka. The alternative to this "standard" development model is sustainable development, whereby society uses its natural resources only as far as it improves their living standards but not so much as they will deprive future generations of an opportunity to improve their own lives. It is in this context, that EIAs play such an important role.

What EIAs do

EIAs have become a staple of environmental treaties and trade treaties and passed into customary international law. The 17th Principle of the Rio Declaration on Environment and Development, the Espoo Convention and Article 7 of the ILC draft articles on transboundary harm, Article 5 of the Sanitary and Phytosanitary Agreement, are just a few of the examples that outline the basic principles of an EIA.

One way to understand the purpose of an EIA is to liken it to a warning on a pack of cigarettes. The information in the warning merely informs consumers of the consequences of their purchase; but they are still free make the purchase. Similarly, an EIA is to inform decision-makers and the public about the likely environmental effects when deciding whether to authorise a proposed activity and what controls or protocols should be placed on it.

EIAs are not, however, tools to determine whether a project should proceed or how it should be regulated. Moreover, it is clear that an EIA deemed 'satisfactory' does not have to show that there will be no risk of environmental harm. Instead, all it must provide is the necessary information about the project's likely impact and follow the proper processes. Admittedly, even international agreements are vague on what exactly constitutes a 'proper' EIA.

EIAs in Sri Lanka

Sri Lanka's guidelines on EIAs are mostly found in the National Environmental (Amendment) Act No.56 of

1988, which requires EIAs for large-scale development projects likely to have "significant impacts on the environment." The degree of severity determines the action itself. Insignificant projects only require an Initial Environmental Examination (IEE), which is a shorter and simpler process. Significant projects require the more comprehensive EIA. Moreover, an EIA should be open to public comment for 30 working days (IEE is exempted).

The politicisation of EIAs in Sri Lanka leads to a grave misunderstanding of its value. Instead of understanding that an EIA is a source of information designed to help decision makers and the public, it is now understood as a bureaucratic check box determining the authorisation of a project. This undermines the EIA itself and further removes the public from the decision-making process.

How to make EIAs work better

A feasible, albeit imperfect, method of improving EIAs is through extensive public consultations. Established practices elsewhere can help guide Sri Lanka. Ideally, the proponent of the project, the competent government authority or some other entity should take up the responsibility of initiating and funding a comprehensive public consultation, especially in the affected areas.

There are many ways to disseminate information to the public. Simply, authorities could inform the public via the radio, television and newspapers, requesting a public response on EIAs.

Other more comprehensive methods could include public hearings or meetings on EIAs or establishing a point of contact with the public in and around the site of proposed activity. Email addresses and websites dedicated to publishing EIAs and soliciting feedback could be useful. Whichever the method, the content of these meetings require attention. A public consultation should describe the project and its effects on the environment. Thus, apart from a basic understanding of the project and its purpose, the EIA should also describe the potential environmental impacts, possible mitigation measures, gaps in knowledge and the mechanisms set for monitoring and managing the project. EIAs should enlighten and inform the public; not be used to confuse and divide them.

EIAs are vital to sustainable development but it is important to understand why and how they work. EIAs should not be bureaucratic check boxes to soothe nervous donors nor should they be the final hurdle in the way of a development project. EIAs should inform and educate decision-makers, empower them to make sensible choices that further sustainable development. Whether they actually do make sensible choices, however, is beyond the purview of any EIA.

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