

International Law and the Global South
Perspectives from the Rest of the World

Thamil Venthana Ananthavinayagan

Sri Lanka, Human Rights and the United Nations

A Scrutiny into the International Human
Rights Engagement with a Third World
State

 Springer

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*For அப்பா and அம்மா
My heroes.*

Foreword

Thamil Venthan Ananthavinayagan has written an excellent and elegant book on the constitutional evolution of Sri Lanka's human rights experiences. The long and cruel ethnic war of 30 years has provided the context. Though it is about the experience of Sri Lanka, the lessons to be drawn from his work have a wider impact as these events are repeated in the postcolonial Africa and Asia with the same insidious pattern. The rise of ethnic and religious chauvinism as an easy path to power, the creation of authoritarian leaders to maintain such power through the generation of further divisions on racial and religious grounds, the constitutional entrenchment of these divisions and the creation of institutional devices to entrench majoritarian power through democratic means have been factors afflicting Sri Lanka but are features common to other postcolonial states. This is the reason why the deep study of the constitutional problems relating to human rights in the context of ethnic strife that Thamil presents in this book will have lasting significance not only in the understanding of underlying issues both in Sri Lanka and other states but also for shaping solutions to the malaise that has set in these different political communities.

The colonial beginnings of these problems are clearly identifiable in the case of Ceylon (Sri Lanka), an island in which three separate kingdoms had existed, divided largely on the basis of race and religion. The British unified them for their own administrative convenience pursuing the well-known policy of divide and rule. When they left, they left establishing deceitfully lofty ideals of democracy that eventually privileged the majority Sinhalese-Buddhist community. At that time, the future trends were clearly discernible but sufficient safeguards to protect the minority communities were not created. The account of these events is succinctly presented in this book so that the reader is able to form an idea of the historical context in which later events unfolded.

There is originality in the manner in which the work explains the rise of ethnic chauvinism along with the profession of fidelity to human rights through the ratification of almost every human rights treaty that is made. It is a story of unmatched state deception and duplicity that while much killing, often government inspired with the miscreants never tried and punished, takes place, the international

community is given the impression of a state that is law abiding and has subscribed dutifully to every international human rights instrument that comes to be made. All the while, megalomaniac leaders are bolstering up power through the institution of a presidential system that effectively ensures the concentration of executive power in a single individual and downgrades the legislature and the judiciary. The legitimate question is raised whether human rights can function in a state in which the rise of authoritarian figures truncates the powers of the legislature and the judiciary.

State duplicity in deceiving the international community's compliance measures for ensuring conformity of conduct with human rights standards is becoming a hallmark of Sri Lankan policy. The extent to which these compliance mechanisms have been applied by various UN bodies and the manner in which Sri Lanka has deflected their objectives is the focus of one chapter of the work. Sri Lanka, as a state, bears responsibility for successive pogroms in which Tamils were killed only because they were Tamils. Such responsibility flows not only from omission to protect Tamil lives but also due to direct complicity in acts committed through its agents, namely the police and the armed forces of the state. There is a credible case for genocide to be made out. Clearly, the mass destruction of civilians during wars amounts to crimes against humanity. There is accountability to be established against the actual perpetrators. There is command responsibility in the military leaders as well as their political masters. There are gory pictures of the perpetrators of killings over the years. No one has been punished despite the presence of clear evidence. The President maintains that no war crime liability exists despite the fact that he was the Minister for Defence at the time of the last war with the Tigers in which some 40,000 Tamils were decimated. The extent to which a small country like Sri Lanka can dupe the United Nations and the international community that it has set in process machinery to ensure respect for human rights does not augur well for the progress of international human rights law. Tamil cogently explains the way in which the United Nations agencies have been thwarted by various devious means by the Sri Lankan Government.

This is a timely book that deserves to be read by a wide audience, not international lawyers alone, but political scientists, historians of colonialism, constitutional lawyers and other professionals concerned with minority issue. It is a pathbreaking book that will guide studies of similar ethnic issues around the world. Tamil, a young scholar, is to be congratulated for writing this work. We look forward to his further work in the field of human rights.

Singapore

Prof. Muthucumaraswamy Sornarajah
National University of Singapore

Acknowledgements

Sri Lanka, formerly Ceylon, has had a reasonably lengthy engagement with human rights machinery of the United Nations since becoming a party to key human rights treaties in the 1980s and through the period of severe violence in the forms of two inter-ethnic conflicts, two intra-ethnic conflicts and one civil war. This book examines the impact of engagement by Sri Lanka with the United Nations human rights machinery and seeks to answer several key questions. Did engagement of Sri Lanka with the United Nations lead to any changes, direct or indirect, in 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 showcasing exercise to create a conducive environment for trade and investment, stipulated by successive postcolonial Sri Lankan governments before the United Nations? Three different colonizers influenced the country, and each of them left their legal, political, social and psychological impact on the country and its people.

Colonization left a mark on the Global South, and continued to affect the region even after independence. As one commentator writes, “[I]t seems that the symbiotic relationship between colonizers and colonies in the past was somewhat of a parasitic relationship, where, only one party really benefited”. The resources, natural and human, were exploited to benefit the Global North, and the Global South was to a large extent left without any benefit from this relationship. Colonization is the reverberating marker and point of distinction between Global North and Global South. Colonization as a temporal construct is over, but its legacy continues to have repeating effects on the domestic and international policies of the formerly colonial nations. As Anthony Anghie writes, “[T]he United Nations responded by creating a number of institutional mechanisms for the furtherance of decolonisation, and (...) significantly changed the composition of the international community, as they became a majority in the UN system. Most significantly, this enabled the sovereign Third World states to use international law and sovereignty doctrines to further their own interests and to articulate their own views of international law”.

To this end, international law takes a crucial role in, on the one hand, the constitution and regulation of behaviour of states and, on the other hand, the relationship between states. It should enable empowerment of formerly colonized states. It should become the law of majority serving global justice. The reality is, however, that international law is propounded by its colonial origins and contaminated by a neo-colonial power structure that curtails global justice. With view to human rights, however, the argument by Jose-Manuel Barreto is: “[F]or a geopolitical analysis of knowledge, the cultural colonization of world civilizations, rationalities and intellectual disciplines ended in the crucial assumption according to which the origin of legitimate thinking is confined to a certain geopolitical location—Europe—excluding the existence of other sites of knowledge generation”.

The human rights infrastructure of Sri Lanka has been in a fluid state of consolidation and elaboration, and, as such, it needs to be interrogated 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? This 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 scrutinize the implementation of international human rights law in a country from the Global South.

In an article written by Bruce Gilley, titled “The Case for Colonialism”, in the *Third World Quarterly*, he argues that Western colonialism was, both, “[o]bjectively beneficial and subjectively legitimate” in most places where it existed. Bruce Gilley explains that the solution to poverty and economic underdevelopment in parts of the Global South is to reclaim “[c]olonial modes of governance; by recolonizing some areas; and by creating new Western colonies from scratch”.

To this end, the work will study the impact of international human rights engagement with an exemplary country from the Global South, by considering the variety of tools, procedures, broad mandates, knowledge and resources available at the international level. In this vein, what is the role of the United Nations? An introduction to postcolonial mode of good governance, while exploiting the human rights language to further geopolitical goals of Western countries?

On this note, let me refer to the Tamil poet and philosopher Thiruvalluvar who once said that: “நன்ற பொழுதிற் பெரிதுவக்கும் தன்மகனைச் சான்றோன் எனக்கேட்ட தாய்” which translates to: *Even more than the time when she gave birth, a mother feels her greatest joy when she hears others refer to her son as a wise learned one.* அம்மா and அப்பா. My parents are courageous, fearless and audacious. They gave birth to me; above all, they protected, sheltered and educated me. They were and are the driving force of my life, and my greatest teachers—morally, ethically, spiritually and intellectually. More than anybody else, they helped me become a passionate advocate for justice.

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About the Author

Dr. Thamil Venthana Ananthavinayagan is currently teaching international law at Griffith College Dublin, Ireland. He studied law in Bonn and Marburg, and following several years in the policy and research sector (e.g. for the German Labour Party, Friedrich-Ebert Foundation), he went on to work as a junior lawyer for the German Tenants' Association. Subsequently, he resumed his law studies, which were supported by the German Tenant's Association and the Scholarship "Deutschlandstiftung Integration", and completed his postgraduate degree at the Maastricht University, the Netherlands, in 2013. He went on to pursue a doctoral degree from the Irish Centre for Human Rights, National University of Ireland, Galway, funded by the Centre. His research interests include third world approaches to international law, international humanitarian law, international human rights law, comparative constitutional law, critical legal theory, and sociopolitical approaches to international law.

Chapter 1

Introduction



The introductory chapter will give an overview over the topics that will be covered in the course of the book and outline the structure of the work. As such, the chapter will introduce to the Sri Lankan human rights infrastructure and international human rights engagement, United Nations human rights machinery, post-colonial development of Sri Lanka and early stages of international engagement. Finally, the introductory chapter will illustrate the structure of the next chapters and amplify the underpinning question/s.

1.1 The Sri Lankan Human Rights Infrastructure and International Human Rights Engagement

The focus of this book 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 1948,¹ a historical event that followed more than 400 years of colonial rule.² Human rights law, as Anthony Anghie writes, “[p]urports the view to regulate the behaviour of a sovereign within its own territory”.³ Domestic human rights legislation, for this reason, falls in the national prerogative of the sovereign state.⁴ 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 mea-

¹Jeffries (1962), p. 128.

²*Ibid* p. 5.

³Anghie (2005), p. 254.

⁴Udagama (2015), pp. 104–105.

sured 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.⁵

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 of fundamental rights, on the lines enacted in the constitutions of India, Pakistan, Malaya, 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 laws⁷ 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,

⁵*Ibid.*

⁶Lord Soulbury, 'Foreword', in: *Ceylon, A Divided Nation*, B.H. Farmer, (London: Oxford University Press, 1963).

⁷Gombrich (2006), p. 26.

⁸Equality and Rights Alliance, 'A Roadmap to A Strengthened Equality and Human Rights Infrastructure in Ireland', authored by Niall Crowley, Paper 3 of series: Setting Standards for the Irish Equality and Human Rights Infrastructure, March 2015, p. 4.

⁹*Ibid.*

¹⁰*Ibid* p. 13.

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 infrastructure, appointed a Special Rapporteur on conflict-related human rights violations in 2006.¹¹ 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.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:

[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.¹³

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.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.¹⁵ Human rights discourse was the point of referral in the parties' own understandings of the conflict's origins and conduct.¹⁶ 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”.¹⁷ Among these diverse communities, all regard

¹¹National Human Rights Commission of Sri Lanka, 2006 Report by SLHRC Special Rapporteur on Conflict-Related HR Violations, by T. Suntheralingam, 31st of March 2006, online at: <<http://sangam.org/wp-content/uploads/2013/12/Sri-Lanka-HRC-report.pdf>>, last accessed 7th of September 2017.

¹²*Ibid* pp. 16–17.

¹³Hyndman (1988), p. 114.

¹⁴Alston and Abresch (2007), p. 31.

¹⁵*Ibid*.

¹⁶*Ibid*.

¹⁷Wickramasinghe (1988), p. 160.

Sri Lanka as their home, but none of them have been integrated into one single nation.¹⁸ 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 work 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.¹⁹

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.²⁰

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

¹⁸Jeffries (1962), p. 3.

¹⁹Office of the Sri Lankan President, 'Sri Lanka committed for positive engagement with UN—Ambassador Rohan Perera, Presidential Secretariat', online at: <<http://www.presidentsoffice.gov.lk/?p=1687>>, last accessed 23rd of June 2017.

²⁰United 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.

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.²⁶ 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.²⁷ Laksiri Fernando notes that:

²¹Rosa Freedman, ‘Human Rights Protection: Ought the United Nations To Have an Increasing or Diminishing Role?’, *Cicero Foundation Great Debate*, Paper No. 14/06, p. 4.

²²United Nations General Assembly, 2005 World Summit Outcome, A/RES/60/1, paras. 123–124.

²³Bassiouni (2011), p. 1.

²⁴Robert Keohane, ‘Contested Commitments and Commitment Pathways: The United States Foreign Policy, 1783—1989’, Paper presented at Annual meeting of *International Studies Association*, 21st–25th of February 1989, Chicago.

²⁵Mazower (2009), p. 194.

²⁶Udagama (2015), p. 105.

²⁷Theodor Rathgeber, ‘Performances and Challenges of the UN Human Rights Council,’ Friedrich Ebert-Stiftung, February 2013, online at: <<http://library.fes.de/pdf-files/iez/global/09680.pdf>>, last accessed 29th of January 2016; Amnesty International, ‘Annual Report’, pp. 339–342, online at: <<https://www.amnesty.org/en/countries/asia-and-the-pacific/sri-lanka/report-sri-lanka/>>, last accessed 25th of April 2016; Human Rights Watch, ‘World Report 2015: Sri Lanka’, online at: <<https://www.hrw.org/world-report/2015/country-chapters/sri-lanka>>, last accessed 25th of April 2016.

[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.²⁸

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 work seeks to address this and other related questions in the context of Sri Lanka's engagement with the United Nations.

1.2 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.²⁹ 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.³⁰

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.³¹ Crucial in this regard was the United Nations Human Rights Committee,³² a treaty body which monitors the implementation of the International Covenant on Civil and Political Rights.³³ 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,

²⁸Fernando (2015), p. 344.

²⁹Alston (1995), p. 2.

³⁰Ramcharan (2015), p. 54.

³¹*Ibid.*

³²*Ibid* p. 51.

³³Office of the High Commissioner for Human Rights, *Human Rights Committee*, online at: <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>, last accessed 3rd of April 2016.

but must conform to international human rights standards.³⁴ In this regard, General Comment 31/80 of the Human Rights Committee states the general obligations of State Parties to human rights treaties.³⁵ 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 Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.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.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”,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,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.⁴⁰ The importance of United Nations activity in the human rights field lies in the long-term socialisation process.⁴¹ Universal acceptance and application of international human

³⁴Ramcharan, *supra* note 30.

³⁵United Nations Human Rights Committee, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26th of May 2004, CCPR/C/21/Rev.1/Add. 13, online at: <<http://www.refworld.org/docid/478b26ae2.html>>, last accessed 3rd of April 2016.

³⁶*Ibid* para. 2.

³⁷Ramcharan (2015), p. 54.

³⁸*Ibid* p.1.

³⁹Boyle 2009, p. 2.

⁴⁰Ramcharan (2015), pp. 11–12.

⁴¹See for this purpose: Ryan Goodman & Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, [2004], 54 *Duke Law Journal*, pp. 621–703; Harold Hongju Koh, ‘Internalization Through Socialization’, [2005], Faculty Scholarship Series. Paper 1786; Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights—International Norms and Domestic Change*, (Cambridge: Cambridge University Press, 1999); Ryan Goodman

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 must be understood as authoritative community goals, whereas the moral authority is concentrated at the United Nations, the custodian of human rights.⁴² Every individual state has the prime responsibility to be the “[g]uarantor and protector”⁴³ 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.⁴⁴

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.

1.3 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.⁴⁵ The new concept of sovereignty served as a tool for emerging countries to regain control over own economic and political affairs from former colonisers.⁴⁶ Colonies, by definition, lacked this very sovereignty.⁴⁷ 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 1648.⁴⁸ 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.⁴⁹ The concept of sovereignty by Western states, a creation “[i]n the colonial encounter for the purpose to reveal and remedy the past”,⁵⁰ was perceived differently between non-European states and European states. Non-European states were not considered sovereign through the law, whereas European states—i.e., colonial powers—were not hindered in their

and Derek Jinks: *Socializing States Promoting Human Rights through International Law*, (Oxford: Oxford University Press, 2013).

⁴²Haule (2006), p. 387.

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵Jeffries (1962), p. 132.

⁴⁶Anghie (2005), p. 198.

⁴⁷Anghie (2001–2002), p. 513.

⁴⁸Anghie (2006), pp. 739–740.

⁴⁹*Ibid.*

⁵⁰Anghie (2005), p. 199.

legal actions that inflicted massive harm on their respective colonies.⁵¹ All this was deemed necessary to create a world order per European thinking of social order, political economy, development et al.⁵²

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.⁵³ 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.⁵⁴ Scholars debate if attaining independence and the sovereignty attached to this status, was timely or probably too early for the island.⁵⁵ 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.⁵⁶ 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”.⁵⁷ 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.⁵⁸ With the ratification of the human rights treaties States Parties have also accepted their role as duty-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.⁵⁹ The concept of non-interference in domestic affairs underpins, for example, one of the most impor-

⁵¹*Ibid* p. 103.

⁵²*Ibid* p. 103.

⁵³Wickramasinghe (1988), p. 45.

⁵⁴Burke (2010), p. 35.

⁵⁵Jeffries (1962), p. 134.

⁵⁶Ceylon Constitution Order in Council 1946, online at: <<http://tamilnation.co/srilankalaws/46constitution.htm>>, last accessed 29th of January 2016.

⁵⁷Tissa Vitarana, ‘The Republic of Sri Lanka: Forty Years of Complete Independence’, online at: <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=52286>, last accessed 25th of January 2016.

⁵⁸United Nations Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004). See also Art. 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23rd of May 1969, 1155 UNTS 331 (entry into force 27th of January 1980) (“VCLT”), which provides that a state party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

⁵⁹Udagama (2015), p.107; Jina Kim, ‘Development of Regional Human Rights Regime: Prospects for and Implications to Asia’, online at: <www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p57-1022.pdf>, last accessed 29th of January 2016.

tant 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”.⁶⁰ A national human rights infrastructure should be rooted in international human rights law,⁶¹ while the national protection system should be consistent with and reflect international human rights standards.⁶² 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.

1.4 Aims and Overview

1.4.1 *Overarching Question and Aim of the Book*

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 book will discuss 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 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 globalisation 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 question by considering colonial policy papers, as well as documents relating to Sri Lanka before the United Nations human rights machinery from 1946 to 2016. Furthermore, government publications, legislative enactments, Sri Lanka Law Reports, Acts of Sri Lanka,

⁶⁰1971 Zone of Peace, Freedom and Neutrality Declaration, online at: <<http://www.icnl.org/research/library/files/Transnational/zone.pdf>>, last accessed 28th of January 2016.

⁶¹Ramcharan (2015), p. 90.

⁶²*Ibid* p. 118.

⁶³Wickramasinghe (1997), p. 39.

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.

1.4.2 Overview

The introductory chapter has laid out the topic of this book and put forward the central questions. It has explained the necessity of a human rights infrastructure and examined the role of the United Nations human rights machinery. The approach 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 book will discuss 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 book 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

⁶⁴Jeffries (1962), p. 61