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Date. } 20 May 2024

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**இலங்கை மனித உரிமைகள் ஆணைக்குழு**  
**Human Rights Commission of Sri Lanka**

Mr. Deshabandu Tennakoon,  
Inspector General of Police,  
Sri Lanka Police Headquarters,  
Colombo 01.

Dear Mr Tennakoon,

**Misapplication of Section 3 of the ICCPR Act in relation to Commemoration Event in Trincomalee**

The Human Rights Commission of Sri Lanka (HRCSL) writes to you with reference to the recent arrest of persons in Trincomalee, Eastern Province in relation to acts of commemoration.

At the outset, we wish to recall the Commission's mandate under section 10(d) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. The said provision empowers the Commission 'to make recommendations to the government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards'.

We have reviewed the B Report dated 13 May 2024 in Case No. AR 211/2024 filed by the Officer in Charge (OIC) of the Sampur Police Station in the Muttur Magistrate's Court. We note that the Learned Magistrate had issued a temporary order in terms of section 106(1) of the Code of Criminal Procedure (Chapter 26) to prevent certain persons, and the public at large, from engaging in the commemoration of Tamil deceased who perished in Mullivaikkal in 2009. The said temporary order was issued on 12 May 2024 on the application of the OIC of the Sampur Police Station. The HRCSL is reliably informed that the said order was later rescinded on 16 May 2024.

On 13 May 2024, the HRCSL launched a *suo motu* investigation with respect to the alleged arbitrary arrest and detention of four persons on 12 May 2024 in Trincomalee. These persons were arrested for allegedly violating the above-mentioned temporary order of the Learned Magistrate by holding a commemoration event at the Bhuvanewari Amman Temple in Chenaiyoor, Muttur at which *kanji* was served to the public, and for allegedly assaulting a police officer. We note that the abovementioned B Report states that the said persons were arrested for alleged offences committed under section 32 read with sections 344, 315, 316, 185 and 486 of the Penal Code (Chapter 19). The HRCSL is reliably informed that the said persons have been granted bail by the Learned Magistrate on 17 May 2024.

**We are disturbed to observe in the said B Report the fact that Sri Lanka Police was also investigating the possible commission of an offence under section 3 of the International Covenant on Civil and Political Rights Act No. 56 of 2007 (ICCPR Act).** This fact was also confirmed by the Sampur Police Station when the HRCSL's Trincomalee Regional Office inquired into the matter. The HRCSL learnt that, subsequently, the OIC of the Sampur Police Station filed a second B Report on 17 May 2024 admitting that section 3 of the ICCPR Act was not relevant to the case, as no offence had been committed under the Act. We note that the Learned Magistrate was able to grant the above-mentioned four persons bail only because section 3 of the ICCPR Act was removed from the scope of the proceedings. If not, only the High Court is empowered to grant bail to a suspect in terms of section 3(4) of the Act.



The ICCPR Act incorporates the provisions of the International Covenant on Civil and Political Rights into domestic law (ICCPR). The ICCPR recognises certain human rights and freedoms, including the rights to freedom of expression, peaceful assembly, and association, all of which are relevant to acts of commemorating past events and remembrance of deceased persons. Moreover, Articles 14(1)(a), 14(1)(b) and 14(1)(c) of the Sri Lankan Constitution respectively recognise these rights, and Article 15(7) provides that any restriction of these rights must be lawful, necessary, and proportionate to advancing legitimate public interests, such as protecting public health.

Section 3(1) of the ICCPR Act criminalises **the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence**. This complex offence has several elements and has come to be routinely misapplied in practice. In August 2019, in view of its observation that section 3 of the Act was not being applied in a ‘consistent and even-handed manner’, the HRCSL issued **general guidelines on the scope of section 3 of the ICCPR Act** (attached herewith as **Annex A**). It also wrote to the then Attorney-General and then Inspector General of Police recommending full compliance with the said guidelines. More recently, in October 2023, in its observations and recommendations on the Online Safety Bill, the HRCSL once again pointed to the misapplication of section 3 of the ICCPR Act. It observed that ‘the strengthening of institutional capacity of law enforcement authorities to interpret and apply the existing criminal law in good faith should precede any proposals to introduce new legislation...’

We recall the recent judgment of the Supreme Court of Sri Lanka, in *SC (F.R.) Application No. 135/2020* in which His Lordship Justice Yasantha Kodagoda, P.C. endorsed the HRCSL’s guidelines on section 3 of the ICCPR Act. The Supreme Court held that, for any form of expression to constitute an offence under section 3 of the ICCPR Act, several factors must be considered by law enforcement authorities. The most crucial of these factors is whether the impugned expression amounts to ‘**incitement**’ to discrimination, hostility, or violence. This feature of the offence requires law enforcement authorities to consider whether there is an ‘imminent danger’ that the impugned expression would cause actual harm. **The HRCSL in its guidelines on section 3 of the ICCPR Act states that, for there to be ‘incitement’, there must be a ‘reasonable probability’ that the expression would cause imminent harm.**

The HRCSL is of the view that peaceful acts of commemoration, and the distribution of food items, (not dissimilar to the distribution of food and drink at a *dansala* (alms stall) during Buddhist festivals) cannot be considered forms of incitement to discrimination, hostility, or violence. The use of section 3 of the ICCPR Act in such instances amounts to a gross misapplication of the section and could result in the harassment of suspects including the unreasonable denial of bail.

The HRCSL also recalls that, pursuant to the HRCSL’s recommendation, in May 2022, the then Inspector General of Police issued **Circular No. RTM 541** with respect to investigations concerning section 3 of the ICCPR Act. The said Circular directs all OICs to conduct investigations under the said provision only on the advice of the Director/Legal Division of Sri Lanka Police. It also states that any police officer who misuses the provisions of the Act would be subject to disciplinary procedure.

The HRCSL observes that the motivation behind the application by the OIC of the Sampur Police Station to obtain a magisterial order prohibiting acts of commemoration remains unclear. Such temporary orders are usually obtained for the purpose of preventing an imminent public nuisance or serious harm to public health. Acts of peaceful commemoration do not constitute such nuisance or harm, particularly in a context where there was no evidence of any complaint of a public nuisance by any person or report by a public health official with respect to an epidemic or the spread of a dangerous disease in the area.

The HRCSL recalls its **recommendation to HE the President in 2017** recognising the right to commemoration (attached herewith as **Annex B**), particularly in a context where post-war accountability and reconciliation remain major national priorities. The HRCSL emphasised that all communities should ‘**have the space and ability to mourn the loss of their loved ones and remember them...irrespective of their status or political beliefs**’.

**Moreover, acts of commemoration form part of ‘collective reparations’, and the Sri Lankan state has a statutory duty to respect and protect the right to collective reparations.** The HRCSL observes that the Office for Reparations Act, No. 34 of 2018 defines ‘collective reparations’ to mean, ‘such measures as are intended to recognise the right to an effective remedy and benefits to the communities or groups of aggrieved persons and shall include – (a) means of remembrance of deceased persons...’ (emphasis added). **Therefore, aggrieved persons within the Tamil community are entitled to the respect and protection of their right to collective reparations through means of remembrance of deceased persons.**

In this overarching context, the HRCSL recommends the following:

1. **Re-circulate, in all three languages, among all divisions of Sri Lanka Police, copies of the HRCSL’s guidelines on the scope of section 3 of the ICCPR Act. Include the said guidelines and Circular No. RTM 541 as part of a compulsory training and awareness programme for all police officers.**
2. **Issue clear guidance, in all three languages, to all divisions of Sri Lanka Police, that peaceful acts of commemoration (i.e., remembrance of deceased persons), are recognised in the law as a part of what aggrieved persons within the Tamil community are entitled to as collective reparations. Furthermore, emphasise that acts that do not amount to advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence, (i.e., where there is no ‘reasonable probability’ that the act would cause imminent harm) should be respected and protected. The said guidance should also direct OICs in relevant administrative divisions to refrain from seeking magisterial orders preventing any peaceful acts of commemoration.**

The Commission is prepared to assist and advise Sri Lanka Police in fulfilling the above recommendations and anticipates your fullest cooperation in this regard.



Justice L.T.B. Dehideniya,  
Chairman.

Human Rights Commission of Sri Lanka.

Justice L.T.B. Dehideniya  
Judge of the Supreme Court (Retired)  
Chairman  
Human Rights Commission of Sri Lanka

Cc: H.E. Ranil Wickremesinghe  
President of the Republic of Sri Lanka,  
Minister of Defence,  
Presidential Secretariat,  
Colombo 01.

The Hon. Attorney-General  
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