

POLICY BRIEF

POLITICS, POLICIES AND PRACTICES WITH LAND ACQUISITIONS AND RELATED ISSUES IN THE NORTH AND EAST OF SRI LANKA

NOVEMBER 2013

CENTRE FOR POLICY ALTERNATIVES

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Bhavani Fonseka & Dharsha Jegatheeswaran



CENTRE FOR POLICY ALTERNATIVES

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Centre for Policy Alternatives

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organization that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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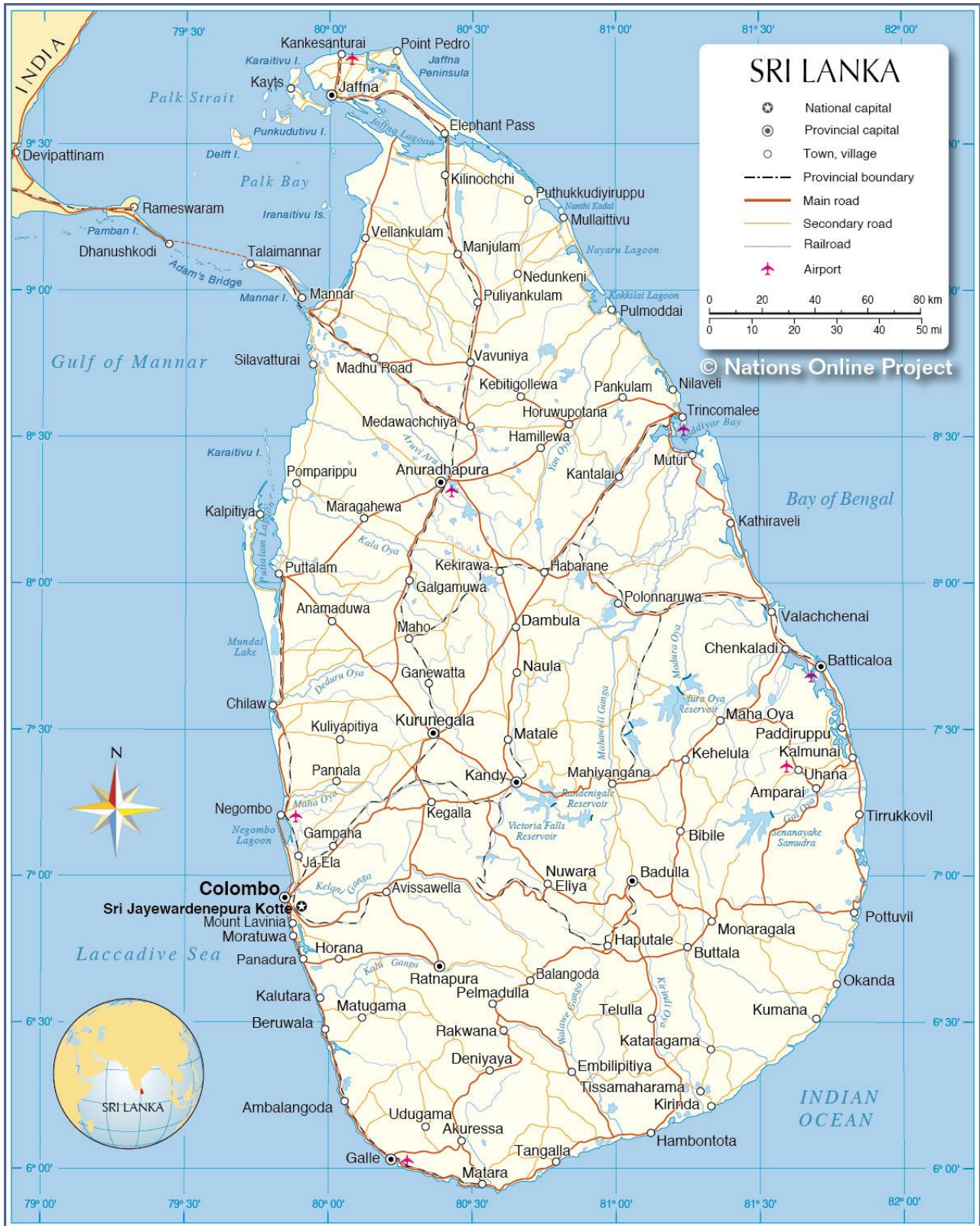


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Acronyms

CPA	Centre for Policy Alternatives
DS	Divisional Secretary
EPC	Eastern Provincial Council
GA	Government Agent
GS	Grama Sevaka
HSZ	High Security Zone
IDP	Internally Displaced Person
I/NGO	International or National Non-Governmental Organisation
LDO	Land Development Ordinance
LLRC	Lessons Learnt and Reconciliation Commission
LTTE	Liberation Tigers of Tamil Eelam
NIRP	National Involuntary Resettlement Policy
NLC	National Land Commission
NPC	Northern Provincial Council
NPLC	Northern Provincial Land Commissioner
PTF	Presidential Task Force RDS Rural Development Society
TNA	Tamil National Alliance
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

Executive Summary

Land has been and continues to be a contentious issue in Sri Lanka. It forms an important basis of individual and community identity and provides livelihood support and security for many families. Since the end of the war, instead of using land policies to further reconciliation, the Government has abused provisions within the Land Acquisition Act among other pieces of legislation, and taken large swathes of land in a manner that predominantly affects minority communities and facilitates entrenched militarisation in the North and East. In many ways, the land acquisitions themselves are administered by and give further control to military actors. The Government through land acquisitions has also shown clear disregard for the law, often acting outside the parameters of the Land Acquisition Act and avoiding the inherent responsibilities of the Act itself, which requires that land only be taken where it is for a “public purpose”. This process of abusive land acquisitions is not confined solely to the North and East, but is part of a larger systemic problem throughout Sri Lanka and indicative of the breakdown of the rule of law.

This policy brief examines the legal and policy framework and current ground realities pertaining to land acquisitions and related issues in the North and East of Sri Lanka. The three cases discussed in this brief highlight the problems related to acquisitions and how the present practices raises concerns of ‘land grabs’ in the area.

Legal Framework

The main piece of legislation governing land acquisitions of private land is the Land Acquisition Act, No. 5 of 1950. The Act allows for the Government to take land for a ‘public purpose’ which has been defined in the case law to mean “public utility and benefit of the community as a whole.” Another important limitation on land acquisitions is the ‘Public Trust Doctrine’ which serves to prevent the abuse of discretionary power and in its essence dictates that government power can only be used to further the interests of the public and that the judiciary has a role in ensuring that the public interest is upheld. Section 38 of the Land Acquisition Act allows the government to acquire land in situations of urgency, but sets a very high threshold for the government to meet in proving that the need for the land is truly urgent. Critically missing from the Land Acquisition Act are provisions outlining mandatory impact assessment checks and explicit criterion for the judiciary to consider social, cultural and economic factors when determining the validity of a land acquisition.

An important provision in the Constitution in the context of land is the Thirteenth Amendment, which devolves some land powers to the Provincial Councils. In the recent judgment of SC Appeal No. 21/13, the Supreme Court of Sri Lanka severely limited the powers of the Provincial Councils over land. The court essentially stated that the Provincial Councils would only have power over lands which were given to them by the central government. This centralisation is problematic both because it raises questions as

to whether there will be any real devolution of powers under the Thirteenth Amendment, but also because it reduces the possibility of the involvement of local actors when dealing with land in the area. It is crucial that the central Government devolve powers provided in the Constitution and work with the Eastern Provincial Council (EPC) and the newly elected Northern Provincial Council (NPC) on issues of land.

Other relevant pieces of legislation related to land acquisitions examined in further detail in this brief include: the Board of Investment Act, the Urban Development Authority Law, the Town and Country Planning Ordinance, the (now lapsed) Emergency Regulations, and the Requisitioning of Land Act. All of the aforementioned pieces of legislation contribute to a legal framework that provides the central government with expansive powers over land, but nonetheless lay the foundation for certain limitations on the government's actions. Important to note is the recognition in the existing legal framework that acquisitions of private land need to be in accordance with the law. As is evident in the case studies examined by the brief, the constitutional and legal framework is continuously disregarded by the central government and its agents.

Policy Dimensions

A disturbing trend with respect to land highlighted in this brief is the dominant role of the central government and military actors in the administration of land. Four years after the war, the military continues to play a major role in the acquisition and alienation of land in the North and East. As is demonstrated by the case studies in this brief, the large-scale acquisitions happening in the North and East appear to be directed by the central government and the military with limited information available to local officials and affected populations.

With respect to policy, the government has yet to take a firm position regarding land acquisitions, with different government officials making contradictory statements. Further, recent policies put forward by the government have been woefully inadequate in addressing land issues. For example, the Land Circular issued in 2013 while an improvement on the one from 2011, still fails to address any issues concerning private land and is far too expansive in defining what it calls 'lost lands', which the government can acquire at will. Nonetheless, the government has failed to even adhere to the minimal standards set out in its own policies concerning land. Recommendations by the Lessons Learnt and Reconciliation Commission (LLRC) and the National Action Plan for the Protection and Promotion of Human Rights have been either disregarded or blatantly ignored. For example, despite the LLRC having addressed the issue of High-Security Zones (HSZs), the government and military continue to control land formerly demarcated as HSZs, as seen in the Jaffna and Sampur case studies.

The failure of the government to follow its own policies contributes to the lack of clarity concerning land issues and leads to confusion. This also greatly impedes any meaningful progress towards reconciliation and rebuilding.

Ground Realities and Trends

The case studies in this brief were chosen to reflect three distinct ways in which illegal land acquisitions and arbitrary land alienations occurring in the North and East amount to 'land grabs'. In Jaffna, the Government is attempting to acquire 6380 acres of largely private land to build a purported military cantonment. It is abundantly clear that the stated purpose of a 'military cantonment' is a guise for other commercial enterprises, and in any event, there is absolutely no justification for requiring such a large amount of land for a military cantonment purported to hold 13, 200 personnel, a figure provided by the Government. In Sampur, the Government is taking land with no regard for due process under the guise of development. The area in question has had a contentious history shifting from a Special Economic Zone to a High-Security Zone and finally in May 2012, to a 'Special Zone for Heavy Industries'. Families displaced from the area have received mixed messages from local officials and have yet to see any formal acquisition procedures, with the exception of a small area of land allocated to a Coal Power Plant. And finally, the brief examines the Government's land alienation processes in Weli Oya. Information available publicly indicates that this scheme has provided lands to Sinhalese settlers, with questions raised as to whether these are people who were previously in the area or new settlers from other areas. Reports also indicate that minorities who earlier resided and cultivated land in the area are unable to return to the area. Further compounding issues is the problem regarding the status of the land in the area, questions being raised as to whether the land being given is state or private land. All these issues contribute to questions over whether schemes introduced by the Government result in 'land grabs' with significant implications regarding changes to ethnic demographics in the areas.

Conclusion

This brief focuses on land acquisitions and related issues because they serve as an important reflection of government policy and attitudes towards meaningful reconciliation. As the Government continues to blatantly disregard legal standards and pursue initiatives that can constitute 'land grabs', they further alienate minority communities and contribute to perceptions that the Government only caters to the majority community. The questions raised in the policy brief have far-reaching implications for devolution and governance in the North and East. They raise serious concerns of whether trends of further centralisation and militarisation regarding land issues are signs of things to come and accordingly, key impediments to reconciliation and unity. Although the present policy brief is narrow in its focus on different trends in land acquisitions and related issues, the implications are significant and cannot be ignored. It is time to take stock of ground realities and initiate reform.

Introduction

In Sri Lanka, the use, control and ownership of land have historically been contentious issues. Governance and power sharing structures relating to land and the discrimination faced by the minorities in terms of alienation, control and ownership of land were some of the reasons for the three-decade long

ethnic conflict in Sri Lanka. Four years after the end of the war many of these grievances remain unresolved.

Since the end of the war, instead of using land policies to further reconciliation and re-development, the Government has abused its power and position. Some of the legislation introduced post-war such as the Divineguma Act and policy decisions such as the Land Circular of 2011/04, confirmed preconceived fears regarding government positions on the critical issues of a political solution, devolution and reconciliation. Adding to these fears, the centralisation and militarisation evident on the ground were given legitimacy by way of new legal and policy reforms, further undermining the rights of minorities and any prospects for meaningful devolution.

A key issue relating to land is that of alienation and acquisition of land and how it impacts on an individual's ability to own and control land. An important aspect of this issue is the distinction between state and private lands. A recurring problem in Sri Lanka is the confusion when attempting to distinguish between what is state and what is private land. This has been compounded by the destruction of land documents, confusion regarding the history of the land and fraudulent documents produced by various actors, which result in competing claims of ownership.

The Centre for Policy Alternatives (CPA) has documented and critiqued land issues in Sri Lanka for over a decade during the war, post-tsunami and post-war.¹ In recent times, a key issue with significant repercussions is the different forms by which the state and its agents have attempted to control people's land, depriving them of use and access and in some instances engaging in full-fledged dispossession. The existence of purported High Security Zones (HSZs), military and police occupation and secondary occupation are just a few examples of ways in which control is exerted over individuals' lands resulting in dispossession and displacement, evident during the war and continuing to the present.

The acquisition of private lands, most recently the initiative to acquire thousands of private lands in the North and East has raised questions as to whether attempts are underway to control a significant area of land belonging to minorities by way of a legal process. This demonstrates disturbing trends of how the state and its agents use the legal framework to legitimise practices such as land grabs. Critically examining such motivations is especially important in a context where numerous pledges have been made by senior government ministers, officials and the military to release lands to legal owners. This is an issue highlighted by the government's own Lesson's Learnt and Reconciliation Commission (LLRC).

This policy brief is written to question recent practices in the North and East of Sri Lanka, which have significant implications for control and ownership of land in the area. While this brief is focused on the North and East, it does not imply that important issues relating to the government's practices

¹ Visit www.cpalanka.org for more information on research, advocacy and public interest litigation initiated and supported by CPA on land and related issues.

concerning land are not present elsewhere in Sri Lanka. This brief merely highlights some disturbing trends and issues in the area most directly affected by the war and an area that is hailed as a success story by the government with its massive rehabilitation and developments projects post war.

This policy brief critiques the legal and policy framework existing in Sri Lanka with respect to land acquisitions and related issues. It highlights the mechanism by which the present framework is used to manipulate situations to take over land with complete disregard for due process. The case studies demonstrate that the government is often acting outside the parameters of the Land Acquisition Act and avoiding the inherent responsibilities of the Act itself, which requires that land only be taken where it is for a “public purpose”. This process of abusive land acquisitions is not confined solely to the North and East, but is part of a larger systemic problem throughout Sri Lanka and indicative of the breakdown of the rule of law. Land acquisitions also have to be considered in the context of the current judiciary and its inability to serve as a valid check on government actions due to its politicisation and partiality.

This brief also examines another issue that is connected to ownership and control of land -that of alienation of state land. Alienation of state land by the government is meant to provide land for specific purposes identified by the legal framework. Despite its potential for good, it has also been used by some governments to establish new settlements resulting in ethno-demographic change. The general confusion over what is state land and what is private land has also contributed to fears of whether alienation by the government of what they identify as state land may also include private lands. This in turn raises the question of whether the process to alienate land is in fact done to exploit the confusion regarding the real status of land in certain areas. The Weli Oya case highlights the numerous questions revolving around alienation of land including whether the legal process is being used to legitimise land grabs.

At the outset it must be noted that the case studies examined in this policy brief in no way encompass all dimensions of land acquisitions and alienations occurring across Sri Lanka, but focus on ones that are ongoing and representative of government actions in the North and East. The case studies discussed in this policy brief are chosen to reflect three distinct ways in which the government’s actions on land including acquisitions and alienation can amount to “land grabs”. In Jaffna, the government is in the process of acquiring 6380 acres of largely private land to build a purported military cantonment in an area occupied by the military since the 1990s. In Sampur, the government is in the process of taking over land under the guise of development. And finally, the brief examines a case that while not strictly land acquisition, examines the government’s land alienation processes in Weli Oya and its implications for land ownership and ethnic demographics in the area.

Land will undoubtedly be the first major issue the newly elected Northern Provincial Council (NPC) will have to address this year. It remains to be seen whether the powers provided under the Thirteenth Amendment to the Constitution will be devolved to the NPC. The track record with other Provincial Councils is disappointing and early signs regarding devolution and governance in the North do not hold

promise for a change in practice. The issues of land acquisitions and related practices and its implications for land ownership in the area have wide implications for minority rights, governance, a political solution and reconciliation. It is therefore timely to acknowledge ground realities and introduce reform.

Chapter 1: Legal Analysis of Land Acquisition Processes

This chapter briefly discusses the current legal framework in Sri Lanka relevant for land acquisition and highlights some of the problems with its application in the current postwar context. While this chapter is not comprehensive or an extensive analysis, it draws attention to key aspects in legislation that require further attention and reform.

Relevant Constitutional and Legal Provisions

Land Acquisition Act

The legal basis for acquisition of private land is in the *Land Acquisition Act*, No. 5 of 1950. The Act states that land can be taken by the Government for a 'public purpose', provided that procedures set out in the Act are followed.

Section 2 of the Act provides for notices of land acquisitions to be publicly available, i.e. displayed in 'conspicuous' places and also that the notice be displayed in the three official languages:

(1) Where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that land in the area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose.

Section 4 of the Act importantly sets out that notice must be given to owner(s) of land to be acquired AND in places "on or nearby that land".

(1) Where the Minister considers that a particular land is suitable for a public purpose, or that a particular servitude over a particular land should be acquired for a public purpose, he shall direct the acquiring officer of the district in which that land is situated to cause a notice in accordance with subsection (3) to be given to the owner or owners of that land and to be exhibited in some conspicuous places on or near that land:

(2) The Minister may issue a direction under the preceding provisions of this section notwithstanding that no notice has been exhibited as provided by section 2, and, where he issues such a direction to any acquiring officer, the provisions of subsection (3) of section 2 shall apply in regard to the land to which that direction relates in like manner as those provisions would have applied if that acquiring officer

had caused a notice under section 2 to be exhibited in the area in which that land is situated.

(3) The notice referred to in subsection (1) shall-

(a) be in the Sinhala, Tamil and English languages;

(b) contain a description of the land or servitude which is intended to be acquired;

(c) state that the Government intends to acquire that land or servitude for a public purpose, and that written objections to the intended acquisition may be made to the Secretary to such Ministry as shall be specified in the notice (hereafter in this section referred to as the " appropriate Secretary "); and

(d) specify a period within which such objections must be made, such period being not less than fourteen days from the date on which such notice is given.

Sections 38 and 38A of the Act set out procedures of acquiring land "urgently":

Section 38 (a) where it becomes necessary to take immediate possession of any land on the ground of any urgency, at any time after a notice under section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under section 4 is exhibited for the first time on or near that land, and

Section 38A.

(1) Where any land is being acquired for the purposes of a local authority and the preliminary valuation of that land made by the Chief Valuer of the Government does not exceed the specified sum, the immediate possession of such land on the ground of urgency, within the meaning of the proviso to section 38, shall be deemed to have become necessary, and accordingly the Minister may make an Order of possession under section 38 of this Act.

Ambiguities in the Land Acquisition Act

The following sections outline how the court has interpreted sections of the Land Acquisition Act and how their interpretation play a role in the current land acquisitions, especially those taking place in the North and East.

Meaning of 'Public Purpose' and Requirements for Section 2 Notice

'Public Purpose' while undefined in the Act, has been defined through Supreme Court jurisprudence in the 'Water's Edge' case². This case sets out explicitly that "public purpose" should not be read broadly to mean any purpose, and instead is a requirement imposed by law on the government when trying to

² *Mendis et al. v. Perera et al.* [Supreme Court] S.C. (FR) No. 352/2007

acquire land, to show that the purpose of acquiring such land has “as the primary object, public utility and benefit of the community as a whole.”³ The court further clarifies that the ‘community’ to be directly benefited must include the local community to be affected, not just the community as a whole: “Apart from the creation of a handful of low-level jobs, what is notably lacking from this list, and from any of the statements submitted in evidence by the UDA in this regard, however, is any significant benefit of a sufficiently direct nature to the community of People of the Battaramulla area.”⁴ Here the court makes it abundantly clear that the “public purpose” must benefit the local community directly in some way. Consequently, following this judgment, it is not sufficient for the government to merely show that the purpose of the land acquisition benefits the country as a whole; they must also show direct benefit to the local community.

The idea of a truthful public purpose was entrenched in the jurisprudence by Manel Fernando v D.M.Jayaratne, Minister of Agriculture and Lands and others⁵. The judgment clearly set out that a Section 2 notice must state the public purpose for which the land is being acquired.⁶ Horana Plantations Ltd. V Minister of Agriculture and others⁷ further clarified this point by deciding that where there is a proven collateral purpose, the requirement set out in Manel Fernando is not met.

What remains to be seen is whether the interpretation of ‘public purpose’ as in the Water’s Edge Case, Manel Fernando and Horana Plantations will be followed by the current Supreme Court. This is in a context where the independence of the judiciary is increasingly questioned with fears of unprecedented levels of politicisation of the judiciary. While this chapter merely examines the legal dimensions of land acquisitions in Sri Lanka, one cannot ignore the larger political context and its implications for the peoples right to own land. Therefore, the interpretation of ‘public purpose’ by the current judiciary is of considerable concern. It is of utmost importance that the judiciary uses this opportunity to reinforce the principles established by previous case law, ensuring legal protection is provided for people to fully enjoy their land and if acquisition is to take place, that it is done in adherence to the law and in a transparent manner.

Public Trust Doctrine and Public Purpose

The Public Trust Doctrine is a concept that has been incorporated into Sri Lankan jurisprudence primarily to prevent the abuse of discretionary power. In *De Silva v Atukorale* where the first reference in Sri Lankan jurisprudence to the Public Trust Doctrine is found, Fernando J. cited the following passage from H.W. Wade: “Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when

³ *Ibid.*

⁴ *Ibid.*

⁵ *Manel Fernando v D.M.Jayaratne, Minister of Agriculture and Lands and others*, 2000 (1) S.L.R. 112

⁶ *Manel Fernando supra* note 2

⁷ *Horana Plantations Ltd. V Minister of Agriculture and others*, SC Appeal No. 06/2009

conferring it is presumed to have intended.”⁸Fernando J. speaking about the powers conferred on the government by the Land Acquisition Act went on to say: “It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.”⁹ In *Bulankulama*, Amarasinghe J. appears to find a basis for the Public Trust Doctrine in Article 3 of the Constitution. Dinesha Samararatne in her paper, Public Trust Doctrine: The Sri Lankan Version summarizes this connection well: “Amarasinghe J., holds that Article 3 is an expression of democratic values, in that it affirms that the People are the ultimate sovereigns and that holders of powers of government are only temporary bearers of those powers. The logical conclusion therefore is that such powers can only be exercised to further the interests of the People.”¹⁰ The Supreme Court has also promoted the idea that the Public Trust Doctrine exists to promote the Rule of Law. In the case of *Mundy and Others v Central Environmental Authority and Others* Fernando J. affirms the above approaches to the Public Trust Doctrine saying:

“...this Court itself has long recognized and applied the ‘public trust’ doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes...Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law...”¹¹

Mundy also states that the Public Trust Doctrine is a valid basis for a separate ground of review: “Administrative acts and decisions contrary to the ‘public trust’ doctrine and violative of fundamental rights would be excess or abuse of power and therefore void or voidable.”¹² This concept is reaffirmed in the *Water’s Edge* judgment, where Thilakawardene J. “holds that the Court can review any exercise of public power, even if an express provision of the law grants immunity to the exercise of that power.”¹³

The concept of Public Trust Doctrine is extremely important as a tool that ensures on one hand that the Government’s legislative actions are genuinely in the public interest, and on the other hand, allows Courts to check that they are. Where the Government does not act in the public interest, the Public Trust Doctrine as articulated by the Supreme Court gives courts the jurisdiction to void those actions. As will be seen in the three case studies highlighted in this policy brief, the Public Trust Doctrine appears not to have been considered by government actors in recent land acquisitions. However, it is essential that

⁸ *De silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*, SC Appeal NO. 76/92, para 296.

⁹ *Ibid* at para 297.

¹⁰ Dinesha, Damaratne, Public Trust Doctrine: The Sri Lankan Version, International Centre for Ethnic Studies (2010)

¹¹ *Mundy vs. Central Environmental Authority and others*, SC Appeal 58/2003

¹² *Ibid*.

¹³ *Mendis et al. v. Perera et al.* SC FR No. 352/2007

Courts uphold the Public Trust Doctrine in relation to land acquisitions, specifically applying it when considering the genuineness of purported 'public purposes'.

What does 'Urgency' under Section 38 mean?

Section 38 in the Land Acquisition Act provides the government with a process of acquiring land immediately when urgency demands it. However, the burden of proving whether there is urgency lies with the government as per *Marie Indira Fernandopulle and Another v E.L.Senanayake, Minister of Lands, and Agriculture*¹⁴ as cited in *Horana Plantations Ltd*¹⁵. While the court has not been entirely clear on what the threshold is for meeting the burden of proof concerning urgency, guidance can be taken from the following passage in *Horana Plantations Ltd*:

In the Indian Supreme Court judgment in the case of *Ram Dhari Jindal Memorial Trust Vs. Union of India and Others*, C.A. No. 3813 of 2007 it was held that the urgency clause can be invoked by the government only in exceptional cases after "applying its mind". The apex court in India said the burden of justifying acquisition by invoking the urgency clause under Section 17(1)(4) of Land Acquisition Act solely rests on the government as otherwise it amounts to depriving a person of his or her property.¹⁶

However, there still remain ambiguities in the present law as to what 'urgency' means and what the threshold is for the burden of proof required of the government.

Gaps in Existing Framework

This policy brief highlights the gaps with the Land Acquisition Act but recognises that it is a framework that can be used with reform in specific areas. The following are highlighted as requiring further attention:

¹⁴ *Marie Indira Fernandopulle and Another v E.L.Senanayake, Minister of Lands, and Agriculture* 79 (II) N.L.R. 115

¹⁵ *Horana Plantations Ltd. V Minister of Agriculture and others*, SC Appeal No. 06/2009

¹⁶ *Ibid.*

Impact Assessment Requirements

One significant failure of the Land Acquisition Act is its lack of requirement for impact assessments to be conducted prior to Section 2 or Section 4 notices being issued. While the Minister has discretion to allow for investigations of land following issuance of a Section 2 or Section 4 notice, there is no requirement for the Minister to undertake impact assessments on the land to be acquired, prior to its selection. This is crucial to ensuring that the 'public purpose' is truly met without detriment to the immediate local community. It is one of the principles under the National Involuntary Resettlement Policy (NIRP)¹⁷ and an aspect that should be integrated into legislation and fully implemented.

Judicial Procedure of Review of Objections to Section 2 and Section 38 Notices

Another gap in the current Land Acquisition Act is that it fails to set out a list of criteria that courts could look to when reviewing the validity of land acquisitions. Such criteria are valuable when they give courts the explicit jurisdiction to examine social, cultural and economic factors that may affect a land acquisition.

For example, the Australian *Lands Acquisition Act*, 1989, No. 15 as amended, has the following section, which sets out factors for review courts to consider in determining the permissibility of a land acquisition:

31 Considerations to be taken into account on review

(1) Subject to this section, the following matters are relevant to the review by the Administrative Appeals Tribunal of a pre-acquisition declaration:

- (a) the nature of the public purpose identified in the declaration;
- (b) except where the relevant interest in land is a restriction on the use of land:
 - (i) the nature of the proposed use of the relevant land;
 - (ii) the extent to which the proposed use is connected with the public purpose;
 - (iii) the extent to which the proposed use is in the public interest; and
 - (iv) the suitability of the land for, or for development for, the proposed use;
- (c) where the relevant interest in land is a restriction on the use of land:
 - (i) the nature of the proposed restriction;
 - (ii) the extent to which the proposed restriction is connected with the public purpose;
 - (iii) the extent to which the proposed restriction is in the public interest; and

¹⁷ National Involuntary Resettlement Policy; Sourced from Annex I, "Innovative Approaches for Involuntary Resettlement: Lunawa Environmental Improvement & Community Development Project", UN Habitat (2009)

- (iv) the appropriateness of the benefit of the proposed restriction being acquired by the acquiring authority;
- (d) the effect of the acquisition of the interest in land to which the declaration relates upon persons affected (within the meaning of subsection 22(10)) by the declaration;
- (e) the extent to which the environment in the area in which the relevant land is situated would be affected if the land were used or developed, or the use of the land were restricted, as the case may be, in the manner proposed and, in particular, the extent to which that use or development, or that restriction, would benefit or impair:
 - (i) an area of scenic beauty;
 - (ii) a place of architectural, historical, archaeological, geological or scientific interest;
 - (iii) the conservation of flora and fauna that should, in the public interest, be preserved;
 - (iv) the amenity of the neighbourhood; or
 - (v) public utility services;
- (f) whether there is some other means of accommodating the relevant acquiring authority's needs;
- (g) matters contained in a statement given to the applicant under section 28 of the *Administrative Appeals Tribunal Act 1975* or lodged with the Tribunal under section 37 or 38 of that Act;
- (h) practicable methods of avoiding or mitigating any injurious factors;
- (j) any other matter that the Tribunal determines, on the application of the Minister or the applicant, to be relevant to the review.

It would be extremely beneficial for Sri Lankan courts to consider the factors in Sections 31(1)(b), (d), (e), (f) and (h) of the Australian Land Acquisition Act. An examination of these factors would certainly ensure the genuineness of a purported public purpose and minimise possible negative impacts to local communities to enjoy and live on their own land. For example, Sections 31(1)(f) and (h) would provide a check by the judiciary as to whether the government was acting in the Public Trust. The concept of using a proportionality analysis to assess the validity of government actions in terms of whether they infringe on people's fundamental rights is a legal phenomenon that is quite common across the Commonwealth¹⁸. If there is to be a review test similar to that of the Australian *Lands Acquisition Act*, 1989, No. 15 as amended, it is possible that some of the land acquisitions currently underway in the North and East will be halted, if the issue was considered purely on its legal merits. In the absence of a legal and policy framework similar to that of Australia, it is still imperative that the Sri Lankan courts consider the genuineness of the government's need for the specific land in question and whether that need constitutes a public purpose as established by case law. It is also important that economic, social

¹⁸ For example, in Canada where a violation of rights under the Charter of Rights and Freedoms is found, that violation can only be allowed if it is found to meet a strict test of proportionality under section 1 of the Charter. The fact that proportionality is a transnational concept in limiting the infringement of constitutionally entrenched rights of countries is further explored in "Oxford Constitutional Theory: The Global Model of Constitutional Rights" by Kai Moller (October 2012; Oxford University Press)

and cultural factors are considered when reviewing land acquisitions; as such factors inform the genuineness and validity of purported public purposes. In the same vein, it is recommended that legislators consider legal reform: instituting a clearer test for review of land acquisitions in order to prevent abuse of powers under the Land Acquisition Act and provide transparency to processes of acquisition.

Other Legislations of Relevance

Thirteenth Amendment to the Constitution

The Thirteenth Amendment to the Constitution includes a section on land, and while it will not be extensively examined here, it is necessary to highlight key sections which have a relevance to the subject matter.

The Thirteenth Amendment lays out in List 1 of the Ninth Schedule (Provincial Council List), matters upon which Article 154(G) of the Constitution gives Provincial Councils the authority to legislate. Notable for the purposes of this brief, item 18 of the Provincial Council List states:

“Land – Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II.”¹⁹

It would appear that land acquisitions are a matter to be taken up with Provincial Councils. However, Appendix II states as follows under the sub-heading, Land and Land Settlement:

State Land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing the matter.²⁰

The Appendix then sets out special provisions which would limit the Provincial Council’s authority over land, but nonetheless it states: “Subject as aforesaid, land shall be a Provincial Council Subject, subject to the following provisions.”²¹

Recently the Supreme Court of Sri Lanka in a three member bench under the de facto Chief Justice, Mohan Peiris, rendered a decision on the question of whether Provincial High Courts had jurisdiction over issues concerning State Lands as per the Thirteenth Amendment.²² The three justices each wrote separate judgments but all decided that State Land is a matter outside the jurisdiction of Provincial High Courts and in the process also severely limited the powers over State land held by Provincial Councils. This move by the judiciary to take powers over land away from the Provincial Councils is particularly troubling given that one of the major issues raised in the recent Northern Provincial Council elections was the central government’s practices regarding land. Land is a crucial tool in the process of

¹⁹ Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

²⁰ Ibid.

²¹ Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

²² SC Appeal No. 21/13, Decision by Mohan Peiris, J.

reconciliation and this decision will likely cause minorities to feel further alienated and betrayed. The decision is further coloured by the current politicisation of the judiciary and its appearance of diminishing independence. It also begs the question whether this is a sign of things to come by way of proposed constitutional reform and the taking away of powers provided to the provincial councils.

The judgment is framed in light of the unitary state. He states in his judgment:

*The 13th Amendment to the Constitution refers to State Land and Land in two different and distinct places. In my view the entirety of State Land is referred to in List II (Reserved List) and it is only from this germinal origin that the Republic could assign to the Provincial Councils land for whatever purposes which are deemed appropriate. It is therefore axiomatic that the greater includes the lesser (Omne majus continent in se minus) and having regard to the fact that in a unitary state of government no cession of dominum takes place, the Centre has not ceded its dominium over State Lands to the Provincial Councils except in some limited circumstances as would appear later in the judgment.*²³

He reaches the conclusion that since the land stated in the Provincial Council List only originates out of List II, Provincial Councils can only have power over state land that is given to them by the Central Government.²⁴ He then treats the special provisions in Appendix II as further limitations on the Provincial Council's power over state land.²⁵

Especially of concern in the judgment is how he interprets Special Provisions 1.1 and 1:2 of Appendix II. These provisions state:

1:1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject.

1:3 Alienation or disposition of the State land within a Province to any citizen or to any organization shall be by President, on the advice of the relevant Provincial Council, in accordance with the laws governing the matter.²⁶

These provisions are relevant given the trend of large land acquisitions being conducted by the central government. Ideally the consultative process with the Provincial Councils would ensure a check on central Government actions and voice the concerns of the general public in affected areas. However, Peiris states in his decision in relation to 1:1: "The consultation specified in this special provision would not mean that the Government has to obtain the concurrence of the relevant Provincial Council," and regarding 1:3 he dismissed two major precedential cases and also states that "the advice of the

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

Provincial Council is non binding.”²⁷ This is extremely problematic as it opens the door for the State to continue engaging in land acquisition and resettlement processes that disregard the interests of local and regional communities, which would normally be represented by the Provincial Councils. The fact that these interests are not being taken into account by the central government currently is clearly indicated through the case studies in this brief.

Justice Sripavan reaches essentially the same conclusions in his decision with the main exception that he would interpret the “consultation” process in Special Provision 1:1 to mean the following:

“In terms of 1:1 above, the Government of Sri Lanka can utilize State Land “in respect of a reserved or concurrent subject.” However, this could only be done in compliance with the laws passed by Parliament and in consultation with the relevant Provincial Council, so that the Government and the Provincial Council reach consensus with regard to the use of such ‘State Land’.”²⁸

Justice Wanasundera’s decision adds nothing new to the above two judgments but simply reiterates the fact that the judiciary sees the State as having ultimate power over all State land, and the Provincial Councils being only able to exercise the powers in the Provincial Council List on land which the State chooses to allocate to them.²⁹

The Thirteenth Amendment in and of itself, even before this decision was rendered, and as was highlighted in these decisions, severely handicaps any powers the Provincial Council would have over land through Special Provision 3:4 which states:

“In the exercise of the powers devolved on them, the powers shall be exercised by the Provincial Councils having due regard to the national policy formulate by the National Land Commission.”³⁰

While the National Land Commission is required to have representatives from the Provincial Councils³¹, it would clearly be an agency dominated by the State, but interestingly has yet to be established. Peiris confirms this in his judgment on SC Appeal No.21/13 when he states in reference to Paragraph 3 of Appendix II: “It is apparent that Provincial Councils will have to be guided by the directions issued by the National Land Commission and this too reinforces the contention that State Lands lie with the Centre and not with Provincial Councils.”

In reference to State land, the Thirteenth Amendment also sets out that distribution schemes of State land should be conducted on the basis of national ethnic ratios.³² However, importantly as a safeguard for areas predominantly and historically populated by minorities, it specifies that in allocating State

²⁷ SC Appeal No. 21/13, Decision by Mohan Peiris, J.

²⁸ SC Appeal No. 21/13, Decision by Sripavan J.

²⁹ SC Appeal No. 21/13, Decision by Wanasundera J.

³⁰ Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

³¹ Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

³² Appendix II – Land and Land Settlement, Thirteenth Amendment to the Constitution

land, distribution schemes should not seek to change demographic patterns or communal cohesiveness.³³ This is important to the North and East. In light of the recent Supreme Court judgment this aspect is critical, providing a check over central government powers over state land. The case of Weli Oya discussed in this brief highlights relevant questions in this regard, raising the question of whether land alienation in the area to Sinhala communities is aimed at shifting demographics of the area.

The political dimensions of the devolution of land powers cannot be ignored. The recent Supreme Court decision and the NPC elections bring the issues back to the fore. The Supreme Court decision raises serious concerns about whether the government plans to recognise any real form of devolution. Recently the government also established a Parliamentary Select Committee (PSC) to look at the national issue of power devolution. The main opposition party, the United National Party (UNP) and the alliance with the most number of seats representing the North and East, the Tamil National Alliance (TNA) did not participate in this process, thereby making it a structure with only actors from the government and its allies. Suspicion has been cast on this process as another tactic by the government to delay fully devolving powers provided under the Thirteenth Amendment and in formulating a political solution. The lack of progress with the PSC highlights serious flaws with it and its inability to provide real answers to serious issues.

The Supreme Court decision in combination with the lack of genuineness in government processes surrounding devolution of land powers unfortunately lead to the probability that the newly elected NPC will be unable to exercise any legitimate action on matters of land in the area. Sampur and other cases in the East demonstrate the inability of the Eastern Provincial Council to play a significant role in deciding land issues in the area, a possible indicator of things in store for the North. The landslide victory by the TNA in the North, winning 30 out of the 38 seats in the NPC, is a clear message that people want change and are not swayed by the government rhetoric of development. The victory and more so the interest shown by the people in the area in ensuring an overwhelming victory for the TNA is also a clear message that full implementation of the Thirteenth Amendment is a basic minimum. Unfortunately, recent events in Colombo, by the Executive and the Judiciary, indicate a different mindset.

Other Legislation that is of Relevance

Board of Investment (BOI) Act

The Board of Investment Act establishes the powers and role of the Board of Investment. As per the Ministry of Economic Development, “The BOI is the investment promotion agency of the Government of Sri Lanka. Its main priorities are to attract Foreign and domestic investment into the economy with the

³³ *Ibid.*

objective of bringing in capital, creating job opportunities and encouraging the development of new skills.”³⁴

Section 22A of the Act enables the President to declared a licensed zone outside of the Area of Authority which is set out in Schedule A of this Act in order to facilitate the functioning of the BOI.

s. 22A

(1) Where the President is of the opinion that in any area, not included in the Area of Authority, it would be necessary to provide facilities or improvements for the establishment of undertakings by licensed enterprises and for such purpose to enable the Board to exercise certain powers under this Law, he may, by Order published in the Gazette, declare such area to be a licensed zone, and specify the boundaries of such zone.

(2) Where a licensed zone is declared under subsection (1), no person, body or authority other than the Board shall exercise, perform and discharge any powers, duties and functions relating to the approval of building plans or the planning, development or improvement under any written law, within such zone.

The role of the President in such a process is notable, especially since it is the Minister who plays a role provided under the Land Acquisition Act (discussed above). This has been seen in the case of Sampur where a gazette notice was issued in 2013 under Section 22A by the President. The immunity enjoyed by the President while in office makes it harder to challenge acts by the President and begs the question whether such powers provided by the BOI Act is to prevent affected communities from challenging acts under Section 22A. Although this may be the case, the process for acquisition of land is via the Land Acquisition Act as noted below-

Section. 28

(1) Where any land or any interest any land is required by the Board for any of its purposes, that land or interest therein may be acquired under the Land Acquisition Act by the Government for the Board and the provisions of that Act shall, save as otherwise provided in subsection (2) of this section, apply for the purposes of the acquisition of that land, or interest therein. Such land or such interest therein shall, for the purposes of the Land Acquisition Act, be deemed to be required for a public purpose.

(2) In the case of any such acquisition where the public notice of the intention to acquire that land or interest therein is published as required by the Land Acquisition Act at any time within the period of three years commencing from the date of coming into operation of section 4 of this Law,

³⁴ Board of Investment of Sri Lanka, Ministry of Economic Development: http://med.gov.lk/english/?page_id=89#sthash.SmG0hZBj.dpuf

notwithstanding anything to the contrary in the Land Acquisition Act, the market value of the land or the interest therein shall be deemed to be the market value which the land or the interest therein would have had on July 22, 1977, increased by a reasonable amount on account of improvements, if any, effected to such land, after that date.

In combination, Section 22A and Section 28 make it very clear that any zone demarcated by the BOI cannot be considered acquired land unless formal acquisition procedures as per the Land Acquisition Act have been followed. Consequently, any zones created by the BOI cannot in any way on their own preclude land owners from accessing and using their land in such zones. This is an important point to recall in the context of the Sampur case study discussed in this brief.

Urban Development Authority Law

The Urban Development Authority Law No 602 of 1981 as amended (UDA Law) was established to promote economic, social and physical development in key areas designated by the Minister.

Section 3 of the UDA Law permits the Minister in charge of the subject to designate areas as 'Urban Development Areas' which initiates economic and physical development of said area.

S. 3

(1) Where the Minister is of opinion that any area is suitable for development, the Minister may, by Order published in the Gazette, declare such area to be an Urban Development Area (hereinafter referred to as a " development area ").

(2) An Order under subsection (1) declaring an area as a development area shall define that area by setting out the metes and bounds of such area.

(3) The Authority shall develop every development area for the better physical and economic utilization of such area.

Section 16 of the UDA Law sets out that the only way the UDA can acquire land is through following proper procedures of the Land Acquisition Act, ensuring that the established process of acquisition is to be used if land is to be acquired under the UDA Law.

S. 16

(1) Where any land or any interest in land in any area declared as a development area under subsection (1) of section 3 is required by the Authority for any of its purposes, that land or interest therein may be acquired under the Land Acquisition Act by the Government for the Authority and the provisions of that Act shall, save as otherwise provided in subsection (2) of this section, apply for the purposes of the acquisition of that land or the interest therein. Such land or interest therein shall for the purposes of the Land Acquisition Act be deemed to be required for a public purpose.³⁵

³⁵ The remainder of S. 16 reads:

(2) In the case of any such acquisition where the public notice of the intention to acquire that land or interest therein is published as required by the Land Acquisition Act at any time within a period of five

Currently the Urban Development Authority falls under the Ministry of Defence and Urban Development, a portfolio under the President and his younger brother, Gotabaya Rajapaksa, the Secretary of Defense.³⁶ The linkage of the subjects of defence with urban development in the post war context raises many questions including why two very different portfolios- security and urban planning- have been to be merged. It also raises the question as to why a former military official should be the key civil administrator in this ministry, another indicator of the increased militarisation in governance in post war Sri Lanka. Militarisation is a key factor that requires urgent attention and questions remain as to why such a trend persists more than four years after the end of the war. This has been noted by domestic processes such as the Government's own Lessons Learnt and Reconciliation Commission (LLRC), the Resolution passed by the United Nations Human Rights Council and most recently by the United Nations High Commissioner for Human Rights. CPA has previously noted that this is a key impediment to a political solution and reconciliation and reiterates the call for immediate demilitarisation including ensuring governance and administration remaining with the civilian administration.

Town and Country Planning Ordinance

The Town and Country Planning Ordinance of 1946 as amended is applicable only to private lands and is "an ordinance to authorise the formulation and implementation of a national physical planning policy; the making and implementation of a national physical plan with the object of promoting and regulating integrated planning of economic, social, physical and environmental aspects of land in Sri Lanka."³⁷ Under this Ordinance, the Minister is able to gazette lands as 'urban development areas', 'trunk road development areas' or 'regional development areas', following which Section 47 of the Ordinance lays out the following severe restrictions on use of that land³⁸, saying that no person without permission can:

- (a) erect, re-erect, demolish, alter or repair any structure in that area; or

years commencing from the date of publication in the Gazette of the Order under subsection (1) of section 3 declaring an area as a development area, notwithstanding anything to the contrary in the Land Acquisition Act, the market value of the land or the interest therein for the purpose of determining the amount of compensation to be paid in respect of that land or the interest therein shall be deemed to be the market value which that land or the interest therein would have had on the date of publication in the Gazette of the Order under subsection (1) of section 3 declaring such area as a development area under this Law, increased by fifty per centum of the difference between that market value and

- (a) in the case of any land or interest therein, in respect of which no Order under the proviso to section 38 of the Land Acquisition Act has been made, the market value of the land or interest therein on the date of publication in the Gazette of the notice under section 7 of that Act; or
- (b) in the case of any land or interest therein, in respect of which an Order under the proviso to section 38 of the Land Acquisition Act has been made, the market value of the land or interest therein on the date of publication of such Order.

³⁶ <http://www.uda.lk/> last visited on 31 August 2013

³⁷ Town and Country Planning Ordinance 1946

³⁸ Centre for Policy Alternatives, "Brief Note: Legal Framework Governing Places of Religious Worship" April 2012; accessed here: <http://www.cpalanka.org/brief-note-legal-framework-governing-places-of-religious-worship-in-sri-lanka/>

(b) lay out, construct, widen, extend or close, or attempt to lay out, construct, widen, extend, or close, any road, in that area; or

(c) develop any land in that area, or subdivide, convey, assign or otherwise dispose of or deal with any such land, in such manner as to constitute any part of the land into a separate holding.³⁹

Once land is gazetted, a National Physical Plan is formulated for the area, and if the plan requires, the Minister may acquire the land under the Land Acquisition Act, as per Section 58 of the Ordinance.⁴⁰ It is important to note that there have been recent instances where land is zoned under the Ordinance as an “Urban Development Area” but then referred to as a ‘sacred area,’ with the true intent being a religious purpose.⁴¹ Demonstrating this intention to use the Ordinance for religious purposes, an Amendment bill was introduced in 2011 that would allow private land areas to be zoned as ‘sacred areas’ by the Ordinance.⁴² Fortunately, it was withdrawn in Parliament following a case where CPA challenged the bill on the grounds it was not submitted first to the Provincial Councils.⁴³ However, the amendment speaks to the nature of the Ordinance and the opportunity within the Ordinance for vague zoning terms to be misused by the Government. It is imperative that the Ordinance be re-visited and amended to clarify terminology and create a better system of regulation of its use.

These laws and several others⁴⁴ ensure that the process provided in the Land Acquisition Act are to be adhered to for any acquisition that is to take place by the Government and its agents. Any diversion from this formal process is illegal. This brief challenges several of the current initiatives by the government and its agents on the basis of legality, with questions raised as to whether the acquisitions in question are in effect adhering to the process and standard provided in the established legislation. The numerous questions and discrepancies of such processes begs the question of whether the inability to adhere to the established legal framework is not merely ignorance of the legal framework and systems in place but a much more fundamental question of disregarding the rule of law in Sri Lanka.

Emergency Regulations

It is important to note the role of Emergency Regulations and similar legislation in facilitating the abuse of established land acquisition processes. Since 1971, with few exceptions, Sri Lanka has constantly been in a state of emergency, facilitated by the Public Security Ordinance of 1947, and more recently, the Prevention of Terrorism Act of 1979. In this State of Emergency, the Sri Lankan government has had broad powers to enact emergency regulations notwithstanding other laws. These emergency regulations

³⁹ Town and Country Planning Ordinance 1946

⁴⁰ Centre for Policy Alternatives, “Brief Note: Legal Framework Governing Places of Religious Worship” April 2012

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Road Development Authority Act No 73 of 1981

have led to an increased militarisation of the country, seen for example, with the establishment of several High-Security Zones, particularly in the East, Colombo and Kandy. As will be discussed further in the Jaffna case study, this militarisation in turn has led to land acquisitions with a highly questionable public purpose.

On 31 August 2011, the Sri Lankan government finally lifted the state of emergency declared under the Public Security Ordinance by allowing the emergency regulations to expire.⁴⁵ However, at the same time, the government broadened powers under the PTA and enacted tough regulations that in many ways continued the existence of a state of emergency without the legal checks and balances that come along with a declaration under the Public Security Ordinance.⁴⁶

Nonetheless, the repeal of emergency regulations in August 2011 terminated the legal basis for the existence of High-Security Zones across Sri Lanka. This however has not been true in practice and the military continues to control wide swathes of land that were formerly HSZs, denying access to the land's true owners. In several cases CPA has noted the use of HSZs in areas of the North, although there is no legal basis for the existence of such zones. Emerging out of this is also the alarming pattern of land acquisitions by the government to establish a permanent military presence in such areas, with purported 'public purposes' ranging from building a military base to developing a military-run hotel.⁴⁷ This increasing militarisation after the war by the Sri Lankan government in spite of expired emergency regulations, casts serious doubt on whether the government is truly acting with public purpose or in the public trust. In order to move towards an effective and sustainable democracy, it is crucial that the government repeals the PTA and refrains from enacting any further emergency-type legislation.⁴⁸

The Requisitioning of Land Act

An antiquated Act that is no longer used but functionally still legal is the Requisitioning of Land Act. This Act gives the President the power to approve possession of any lands by "competent authorities" for a time designated by the President that can be extended indefinitely.⁴⁹ While there are no known cases where the Act is used, its mere presence raises concerns whether it can be used at any given time. Further, it violates fundamental principles of justice as unlike the Land Acquisition Act there is not even a limitation of requiring the "competent authority" to be acting in the public purpose. In fact, the Act lists

⁴⁵ CPA Statement on the Termination of the State of Emergency, 28 August 2011

⁴⁶ Centre for Policy Alternatives, "The Need to Repeal and Replace the Prevention of Terrorism Act (PTA)," 9 May 2013; accessed here: <http://www.cpalanka.org/the-need-to-repeal-and-replace-the-prevention-of-terrorism-act-pta/>

⁴⁷ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

⁴⁸ This was more recently reiterated by the UN High Commissioner for Human Rights-<http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true&LangID=E>, last visited on 31 August 2013

⁴⁹ Requisitioning of Land Act, Section 2

very broad and disconnected purposes for which the President can authorise a “competent authority” to possess said land.⁵⁰ It is recommended that this Act be immediately repealed.

Concepts to consider from other Commonwealth jurisdictions

This section provides a brief examination of certain concepts concerning land acquisitions that are applied in other Commonwealth countries, aspects that should be considered in the Sri Lankan context. This is by no means an exhaustive analysis of the legal systems in all Commonwealth countries but highlights a few principles from select countries. In particular, this brief commends India on their recent passage of a revolutionary law concerning land acquisitions that will hopefully spark a serious discussion of land policy reform in Sri Lanka.

India

On 27 September 2013, the President of India gave his approval to the *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill, 2013*, turning the historic bill into law.⁵¹ The groundbreaking nature of the legislation is most clear in its preamble:

An Act to ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition for industrialization, development of essential infrastructure facilities and urbanization with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post acquisition social and economic status and for matters connected therewith or incidental thereto.⁵²

The law serves as an example to many other countries around the world, including Sri Lanka, of how to align land acquisitions correctly with public purpose. While this report cannot examine in full detail all of the innovative and progressive aspects of this law, the brief would like to draw attention in particular to Chapter II: Determination of Social Impact and Public Purpose. Section 4(1) of Chapter II of the law sets out:

⁵⁰ *Ibid.*

⁵¹ “President gives nod to Land Acquisition Bill,” 27 September 2013, *The Hindu*, accessed here: <http://www.thehindu.com/news/national/president-gives-nod-to-land-acquisition-bill/article5175768.ece>

⁵² *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 No.30 of 2013*, Gazette of India Extraordinary, 2013/Asvina 5, No. 40, 27 September 2013, accessed here: <http://www.prsindia.org/uploads/media/Recent%20Acts/LARR%20Act,%202013.pdf>

4. (1) Whenever the appropriate Government intends to acquire land for a public purpose, it shall consult the concerned Panchayat, Municipality or Municipal Corporation, as the case may be, at village level or ward level, in the affected area and carry out a Social Impact Assessment study in consultation with them, in such manner and from such date as may be specified by such Government by notification.⁵³

The Chapter goes on to set out criteria that must be assessed in the Social Impact Assessment and importantly these include: an analysis of whether the acquisition will actually serve a public purpose; an estimate of the affected families and possible displacement; whether the acquisition is as minimally impairing as possible; and whether there is a possible alternate location for the acquisition.⁵⁴ It should also be noted that this assessment applies to almost all forms of land acquisition including those acquired for purposes of national security (naval, military, etc.), infrastructure, and public-private partnerships.⁵⁵ Further, the law states that consent is required from 80% of displaced people in cases of public-private partnerships.⁵⁶ This component would be particularly relevant to development projects in Sri Lanka. This brief would submit that the Sri Lankan government in reforms of the Land Acquisition Act should adopt this mandatory Social Impact Assessment.

South Africa

The South African government considered advancing reconciliation when drafting laws post-apartheid and this is reflected in the South African *Expropriation Bill, 2008* which is one piece of legislation featured in South Africa's ongoing debate concerning land acquisitions.⁵⁷ Section 10 of the Act sets out the criteria that the government must consider when determining whether to expropriate land. In addition to the benefit of setting out clear criteria, Section 10 also importantly forces the government to consider, "the need for land, water and related reform in order to redress the results of past racial discrimination."⁵⁸

Canada

In Canada, every province has its own 'Expropriation Act' in addition to the Federal 'Expropriation Act' but this analysis will look solely at the Federal 'Expropriation Act'. Similar to Sri Lanka, the Federal 'Expropriation Act' sets out that land may be acquired whether it is required for a 'public purpose' but also where it may be required for a 'public works'.⁵⁹ Most expropriation cases in Canada refer to situations where the government is attempting to acquire Aboriginal lands and do not challenge

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Expropriation Bill, B16 – 2008, Republic of South Africa, accessed here: <http://www.pmg.org.za/files/bills/080416b16-08.pdf>

⁵⁸ *Ibid.*

⁵⁹ Expropriation Act, RSC, 1985, c. E-21, s 4(1).

whether the land is truly being acquired for a 'public purpose' but rather focus on the fiduciary duty owed by the government to Aboriginal peoples. In *Osoyos Indian Band v Oliver (2001)*, the Canadian Supreme Court decided, “...once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band.”⁶⁰ This fiduciary duty in Canadian law is analogous to the idea of a 'public trust doctrine' in Sri Lankan law. Ultimately, the Sri Lankan government should incorporate the idea of a fiduciary duty in their practice of land acquisitions due to the particular vulnerability of the group of people affected and the inherent nature of expropriation. Applying this fiduciary duty, the government should consider the best interests of the individuals affected, and only take the minimum amount of land required to serve the public purpose and not any more. The best interests of the individuals can be determined by viewing the guiding principles of the Sri Lankan constitution found in Section 27, and particularly relevant to this case, Section 27 (2) (c) which sets out the right to adequate housing.⁶¹

⁶⁰ *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 52.

⁶¹ The Constitution of the Democratic Socialist Republic of Sri Lanka.

Chapter 2 – Policy Framework

As discussed in the previous chapter, the governing legal framework on land acquisitions in Sri Lanka is the Land Acquisition Act. Several other laws have relevance regarding land acquisitions, which also need to be factored in when discussing acquisitions in Sri Lanka. In addition to the legal framework however, it is also important to examine the policy dimension and how it influences the implementation of the law and developments on the ground. This is particularly important given the apparent confusion in government policy on land acquisitions.

In a document posted to the Sri Lankan Ministry of Resettlement's website in July of 2013 entitled the 'Draft Resettlement Policy', the confusion is apparent. Section 9 of the document states "Land owned by IDPs and returnee refugees identified as required for public purposes will only be acquired through due legal process."⁶² This provides no reference to what the government considers 'due legal process' and as will be highlighted in this policy brief, there clearly appears to be a disconnect between the government's understanding of 'due legal process' with respect to land acquisitions and the case law.

This Chapter will therefore briefly review the relevant policy options pertaining to land acquisition in Sri Lanka, and the impact of their implementation or lack thereof. For an analysis of international policy relevant to the issue of land acquisitions in Sri Lanka, please refer to Annex I.

Actors

Before delving into the actual policy it is necessary to highlight the various actors involved in Land Acquisition processes. A key trend to note is the centralisation of power and the consequent importance of central government actors in land administration, policy, decision-making and control. In particular, the central government plays a significant role with regard to resettlement, acquisition and development of land in the Northern and Eastern provinces. Also noteworthy is the militarisation of decision making and the involvement of the defence establishment on issues related to land in the North and East.

President

As demonstrated by the President's ministerial portfolio, wide powers remain with him including those that have a relevance over land. Notably, after the Eighteenth Amendment, the President is also in

⁶² The policy can be accessed here:

http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDEQFjAB&url=http%3A%2F%2Fwww.resettlementmin.gov.lk%2Fdownload%2FEnglish%2520-A%2520FRAMEWORK%2520FOR%2520RESETTLEMENT%2520POLICY%2520updated%2520on%252029-07-2013.docx&ei=Jet-Usz3GaemygGwk4GIAw&usg=AFQjCNG_6IM9y8JR9BAHJlh_BBeQfHhwSw&sig2=Y49E28lKGc62zW4IFxPwlQ&bvm=bv.56146854,d.aWc

charge of all judicial appointments. This directly affects the outcome of several of the ongoing cases challenging land acquisitions.⁶³

Relevant Ministries

A brief look at positions in key ministries highlights that power is heavily centralized in a few key individuals, none more important than the President himself who personally has control over several ministerial portfolios that directly affect land issues.

Minister for Lands and Land Development: This Minister has the powers of the Land Commissioner General, Department of Land Settlement and Department of Land Use Policy Planning among other powers.⁶⁴

Minister of Defence and Urban Development: The Ministry of Defence and Urban Development is arguably the most powerful ministry in Sri Lanka. Currently the President is the Minister of Defence and Urban Development, while his brother, Gotabaya Rajapaksha, is the Secretary to the Ministry of Defence. Together they hold control over the Sri Lankan Army, Navy, Air Force, Department of Registration of Persons, Department of Police, Urban Development Authority and Department of Coast Conservation.⁶⁵ The grouping of Urban Development with Defence raises several questions about the militarisation of development in the country.

Minister of Finance: The President also holds the position of Minister of Finance and thus controls several key financial institutions and the finances of the country, thereby exercising control over other line ministries including land.⁶⁶

Minister of Economic Development: The Minister of Economic Development is another brother of the President, Basil Rajapaksa, who has powers over economic development and conservation which impact land.⁶⁷

Mahaweli Authority

As will be seen in the Weli Oya case study, the Mahaweli Authority is an important actor in land development throughout Sri Lanka. The Mahaweli Authority gives the Minister in charge expansive powers to develop areas connected to the Mahaweli water system and river basins.⁶⁸ Particularly

⁶³ *Ibid.*

⁶⁴ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Mahaweli Authority of Sri Lanka, <http://www.mahaweli.gov.lk>

relevant to this report, is its System L, which includes Weli Oya and covers an area of 163.393 hectares. System L was officially given to the Mahaweli Authority in 1988, but as the Weli Oya case study highlights, much of the resettlement in the area began before the official designation of the land as a “special area” under the Mahaweli Authority.⁶⁹ The Mahaweli Authority has broad powers including alienation of state land, holding land kachcheris and issuing documents. It is therefore important to critically examine the practices of the Mahaweli Authority.⁷⁰ As will be discussed in the Weli Oya case study, it is clear that certain aspects of the Mahaweli Development Scheme are being used to promote redistribution of ethnic groups within the scheme.

Presidential Task Force (PTF)

The PTF is the prime example of the centralisation of power over activities in the North. The body was created in 2009 by the President and includes the Minister for Economic Development, the Secretary of Defense, the Army Commander and the Northern Province Governor among its 19 members. Approval from the PTF is required for all activities in the North and it is mandated to “prepare the strategic plans, programmes for resettlement of internally displaced persons, economic development and social infrastructure of the Northern Province.”⁷¹ It should be noted that given its broad powers, the PTF should be gazetted or enacted by the legislature, but it is unclear whether either has occurred, and thus whether it has a valid legal basis.⁷² The PTF has had a significant impact on the activities of NGOs, humanitarian agencies and other civil society actors who have to apply to the PTF for permission to conduct activities.⁷³ With the election of the NPC, it is to be seen whether the PTF will play an active role in the North.

Provincial Councils

According to the Thirteenth Amendment, Provincial Councils were allocated certain powers over land, as discussed in the previous chapter. In a recent decision however, the Supreme Court of Sri Lanka in SC Appeal No. 21/13, strictly limited those powers, essentially saying that the Provincial Councils will only have powers over land, which the central government allocates to them.⁷⁴ The decision follows the recently held NPC elections where the TNA achieved a resounding victory, with land being a crucial issue.⁷⁵ In an interview, the newly elected Chief Minister of the NPC, C.V Wigneswaran, stated unequivocally in response to the question of land:

⁶⁹ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

⁷⁰ *Ibid.*

⁷¹ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ SC Appeal No. 21/13, Decision by Mohan Peiris, J

⁷⁵ <http://www.dailymirror.lk/news/infographics/36078-provincial-council-elections-2013--results-and-preferential-votes-northern-province.html>

“Police and land powers should be granted to the local people first...Their lands have been taken over by the army, they are unable to get back to their original positions, they live in makeshift houses, there is cultural degradation. How can law and order be in the hands of people not indigenous to an area?”⁷⁶

The devolution of powers over land to the Provincial Councils is an extremely important issue that raises serious questions about the legitimacy of the Provincial Councils’ powers and the intentions of the central government.

Military

Four years after the war has ended, the military continues to have a large presence in the North and East despite continued calls for demilitarisation by the local and international community. The military’s presence is not simply limited to security activities either. Increasingly the military appears to be expanding its control over administrative activities. In the context of land, many instances of land acquisitions over the last two years have centred on land being taken for a ‘military purpose’ with military personnel controlling access to the land. This is discussed in detail later in this brief. Further, the military exerts its power at the highest level through the involvement of the Secretary of Defence in key decision-making bodies in Sri Lanka. The military is not perceived as a neutral actor and their presence in administrative roles further antagonises and marginalises minority communities.

District and Local Actors

There are many actors at the district and local level that play key roles in land administration however; the power over land acquisitions remains strongly centralized.

District Secretary: The District Secretary (also referred to as the Government Agent) is in charge of all administrative services for their district, and plays an important role coordinating activities.⁷⁷

Divisional Secretary: The Divisional Secretary is a position that has significant control over land administration in the provinces without being accountable to the Provincial Councils, and in many ways serving as an extension of Presidential power.⁷⁸

Local Authorities (Municipal Councils, Urban Councils and Pradeshiya Sabhas): These authorities have limited power over land, as the central government continues to hold tight rein over any issues pertaining to land.⁷⁹

⁷⁶ <http://www.hindustantimes.com/comment/interviewsnews/sri-lankan-issue-being-used-by-tn-for-political-gains-says-justice-cv-wigneswaran/article1-1095241.aspx>

⁷⁷ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

Land Circular 2013/01

Before delving into the issues of land acquisition specifically, it is necessary to examine the government's general land policy issues with respect to the North and East. While the government released a Land Circular in 2011, after much criticism and a challenge in Court, it was withdrawn and a new Land Circular was released in January 2013 entitled 'Accelerated Programme on Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces'.⁸⁰ While the new Circular is an improvement of the 2011 Circular, there are several problems with the Circular that require attention.

- A key concern with the Circular is the notion of 'lost lands' under 2.2.1.2. The Circular sets out "a number of scenarios through which land can be 'lost' such as lands being vacated or the occupants chased away during the conflict; being used for 'development activities under government institutions and armed forces' and 'where other people have permanently settled on those lands'."⁸¹
 - It is of especial concern that the Circular fails to define what constitutes 'development activities' clearly and that it attributes such activities as capable of being conducted by government institutions and *armed forces*. This points once again to the increasing militarisation of development activities, which are traditionally roles fulfilled by civil administrators. The ambiguity also appears to leave room for the government to maneuver around the requirements of the Land Acquisition Act and the Urban Development Authority law when taking land for purported 'development' projects, as there is no mention of 'public purpose' here. Further, this vague mention of 'development' may be expansive enough to include what would normally be seen as commercial enterprises such as the industrial zone currently being developed in Sampur.
- The Circular also implies that if land is 'lost' in one of the methods mentioned, then an acquisition process is to commence. This raises serious concerns, as it appears to imply that land being 'lost' in one of the ways mentioned provides sufficient 'public purpose' under the Land Acquisition Act.⁸²
- The Circular also appears in section 2.2.1.2 to prioritize development projects over the issue of landlessness. This again raises concerns about the true intent of the 'public purpose' and whether acquisition can occur in such scenarios.⁸³
- Finally, with respect to the issues outlined in this report, the Circular fails to provide a mechanism for appeals of individuals who receive unsatisfactory or problematic outcomes through the Circular's policies.⁸⁴

⁸⁰ For full commentary by CPA on 2013 Circular see: Centre for Policy Alternatives, Commentary on Accelerated Programme on Solving Post Conflict State Land Issues in the Northern and Eastern Provinces, March 2013. Access here: <http://www.cpalanka.org/commentary-on-accelerated-programme-on-solving-post-conflict-state-lands-issues-in-the-northern-and-eastern-provinces/>

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

These concerns have been raised by CPA and shared with key government actors.⁸⁵ Reports from areas in the North indicate that the Circular is being implemented but there is limited information as to progress made and as to whether the Circular is able to address some concerns on the ground. While concerns with some aspects of the Circular have been raised and highlighted here, the salient aspects of it including holding land kachcheris and that initiatives are to be led by the civilian administration and not military need to be noted.

National Involuntary Resettlement Policy

The National Involuntary Resettlement Policy (NIRP) is a government policy that has specific relevance to land acquisition. The NIRP was adopted in 2001 but has not been adhered to since, with the exception of the Lunawa Project where it was successfully used.⁸⁶ NIRP when it was adopted was overwhelmingly welcomed as a progressive way forward to ensuring that development did not compromise the integrity and well-being of the communities affected by development projects.⁸⁷ NIRP, while primarily dealing with resettlement and compensation for those individuals affected by development projects, also in its principles advocates impact assessments to be conducted before the land acquisition process, to ensure minimal impact. The first two principles of NIRP state:

- “Involuntary resettlement should be avoided or reduced as much as possible by reviewing alternatives to the project as well as alternatives within the project.”
- “Where involuntary resettlement is unavoidable, affected people should be assisted to re-establish themselves and improve their quality of life.”⁸⁸

These principles aim to avoid or reduce involuntary resettlement by reviewing alternate project sites. Interestingly NIRP also provides compensation for those who do not have title to land, and importantly, advocates local participation in the resettlement and relocation process.⁸⁹ NIRP also provides that where individuals choose to take compensation as opposed to replacement land, compensation should be provided before the development project begins.⁹⁰ NIRP therefore is an important policy that if implemented would greatly mitigate the detriments to local populations affected by development projects and coinciding land acquisitions. The government has failed to implement the policy in its land acquisition processes. This is seen in the case of Sampur where there has been no regard for individuals that face involuntary resettlement as a result of the proposed development projects. The government should introduce legislation that ensures the NIRP is fully enforced.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ National Involuntary Resettlement Policy; Sourced from Annex I, “Innovative Approaches for Involuntary Resettlement: Lunawa Environmental Improvement & Community Development Project”, UN Habitat (2009)

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

National Action Plan for the Protection and Promotion of Human Rights (2011-2016)

Another policy adopted by the government is the National Action Plan for the Protection and Promotion of Human Rights. It was adopted by the Cabinet of Ministers in 2011 to fulfill the pledge Sri Lanka made at its 2008 Universal Period Review at the United Nations Human Rights Council (UNHRC).⁹¹ The plan sets out goals in eight key areas and the accompanying ministries responsible for achieving those goals over a 5-year timeline.⁹² The Human Rights Action Plan has since been neglected by the very same government that introduced it. The following section briefly examines the section of the plan that relates to land issues⁹³:

Goal 3.2: Ensure the right to land and housing for all displaced persons

- Issue 3.2a: Displacement due to setting up of economic and development zones
- Activities:
 - Provide interim housing and land for those dispossessed of land
 - Timeframe: immediate
 - Agencies responsible: Ministry of Construction, Engineering Services, Housing & Common Amenities; Ministry of Lands and Land Development; Minister of Resettlement
 - In cases where original cannot be returned the provision of alternate land of equal worth and value and/or compensation
 - Timeframe: +3 months
 - Agencies responsible: Ministry of Lands

This goal was agreed to after several months of deliberation and eventual editing by the government, indicating on the face of it that this is a basic standard the government has agreed to through a national process. It is important to keep in mind that the government has insisted on 'home grown' solutions, using this to counter any form of international involvement. In this context, it is important to give due priority to the Human Rights Action Plan and other national documents and initiatives including the LLRC (discussed below). It is also to be assumed that the government's passionate defence of national initiatives and frameworks imply the government's confidence in a functioning national structure and system. This is far from the truth. A case in point is Sampur It is critical that the government reconsider the current policy of disregard for people displaced from the aforementioned development zones. This is also important in the current climate of increasing military-led development leading to prolonged displacement of communities. In 2012, the military launched its own resort-brand, Laya, and has already

⁹¹ "Sri Lanka unveils 5-year action plan to protect human rights," October 2011, John Paul Putney, accessed at: <http://jurist.org/paperchase/2011/10/sri-lanka-unveils-5-year-action-plan-to-protect-human-rights-in-response-to-international-pressure-.php>

⁹² *Ibid.*

⁹³ Ministry of Plantation Industries and Office of Special Envoy on Human Rights, National Plan for the Protection and Promotion of Human Rights; accessed here: http://www.hractionplan.gov.lk/List_of_goal-3-8-103.html#A168

proceeded to open one resort in the former HSZ of Kankesanthurai.⁹⁴ These developments raise serious questions about whether due process under the Land Acquisition Act is being followed, especially concerning the definition of 'public purpose'. That the government should adhere to the above NHRAP goal regarding displaced persons must also be highlighted.

Lessons Learnt and Reconciliation Commission (LLRC) & Action Plan

In addition to policies introduced by the government, there are recommendations in the LLRC and the subsequent National Plan of Action to Implement the Recommendations of the LLRC that set out clear principles in relation to land acquisition.

The LLRC had an entire chapter dedicated to land issues, emphasising the importance of land issues in reconciliation in post-war Sri Lanka. This brief draws attention in particular to the following two recommendations in the LLRC Report, Paragraph 6.104⁹⁵:

⁹⁴ "Soldiers at Your Service" (August 2013), Brendan Brady, accessed at: http://www.slate.com/articles/news_and_politics/roads/2013/08/sri_lankan_army_goes_into_tourism_business_after_crushing_the_tamil_tigers.html?utm_source=tw&utm_medium=sm&utm_campaign=button_chunky

⁹⁵ Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, November 2011; accessed here: http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf

(1) Any citizen of Sri Lanka has the inalienable right to acquire land in any part of the country, in accordance with its laws and regulations, and reside in any area of his/her choice without any restrictions or limitations imposed in any manner whatsoever. The land policy of the Government should not be an instrument to effect unnatural changes in the demographic pattern of a given Province. In the case of inter provincial irrigation or land settlement schemes, distribution of State land should continue to be as provided for in the Constitution of Sri Lanka.

(3) The Commission appreciates the fact that the two HSZs in Palaly and Trincomalee-Sampoor respectively have been reduced and that an estimated 21, 491 persons have been returned to their own land. However, in the two reduced HSZ areas an estimated 26, 755 persons are still displaced. The Commission recommends that the two existing HSZs in Palaly and Trincomalee-Sampoor, as well as small extents of private land currently utilized for security purposes in the districts be subject to review with a view to releasing more land while keeping national security needs in perspective. The Commission also recommends that all families who have lost lands and or houses due to formal HSZs or to other informal or ad hoc security related needs be given alternate lands and or compensation be paid according to applicable laws. The Commission further recommends that provision of alternate lands and or payment of compensation be completed within a specific time frame.

The first recommendation if implemented would clearly prevent the recent colonisations of Weli Oya and incorporation of Weli Oya under the Mullaitivu administration.⁹⁶ The second recommendation has also not been enforced by the government in relation to either the Palaly or Trincomalee-Sampur zones. While legally no HSZs can exist after the lapse of the emergency regulations, both areas are still being treated as HSZs with restriction on entrance and administration entrusted to military actors. Adding to the inconsistency between policy and action, the National Plan of Action to Implement the Recommendations of the LLRC states that the government had already complied with the recommendation relating to the HSZs in the LLRC, specifically that land has been released where possible and steps were being taken to re-locate or to pay compensation to the affected parties under the applicable statutes. Despite this statement, many individuals in Sampur continue to be displaced despite there being no notices to acquire their land, and little or no efforts made by the government to offer re-location options or compensation. Similarly, in the Palaly HSZ, there has been no evidence to suggest that 6381 acres are *necessary* for a military cantonment. Therefore, there appear to be inherent

⁹⁶ For more information see: Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

contradictions between the policy put forward and accepted by the government and its actions on the ground.

The confusion created by this is furthered by the contradictions in statements made by various politicians.

- In May 2011, Minister for Economic Development, Basil Rajapaksa said, *“We do not want HSZ[sic] in the country any further as we have no enemies among ourselves. The entire country is now under a single peace zone....”*.⁹⁷
- An even clearer indicator was given by, Commander Security Forces Jaffna Major General Mahinda Hathurusinghe at a meeting with the technical mission of Office of High Commissioner for Human Rights (OHCHR) in September 2012 when he stated that *“we (the Army) have no plan of acquiring civilians' lands to establish military camps in Jaffna. Army has already earmarked government lands for that purpose. However, government will acquire some lands necessitated for the expansion of the Palaly airport and the Kankesanthurai harbour after paying compensation to legitimate owners”*.
- Even more recently, in March 2013, Secretary of the Presidential Task Force for Resettlement, Development and Security, S.B. Divarathne, made a statement to journalists that there existed no HSZs in Jaffna.⁹⁸
- On the international stage, Ambassador Ravinatha Aryasinha, Sri Lanka's permanent representative to the UN in Geneva during his national statement to the UNHRC on 27 May 2013, stated, *“While some lands have been earmarked for use in the expansion of the Palaly airport – KKS harbour complex as part of the redevelopment of the area after almost 3 decades of conflict, owners of private lands acquired would be given compensation at market rates, and additionally alternate lands in adjacent areas.”*⁹⁹

Interestingly, none of the acquisition notices in relation to the land of the former Kankesanthurai HSZ mention any purpose concerning the airport or the harbour. This confusion in policy and the lack of clarity and transparency as to the government's intentions with respect to land, further existing

⁹⁷“Resettling civilians in HSZs begins”, Daily Mirror, 12 May 2011

⁹⁸ “No HSZs in Jaffna”, March 2013, Ceylon Today; accessed here: <http://www.ceylontoday.lk/51-26133-news-detail-no-hszs-in-jaffna.html>

⁹⁹ “Full Text: Sri Lanka's Statement Today at the 23rd Session of the Human Rights Council”, Colombo Telegraph, May 2013; accessed here: <https://www.colombotelegraph.com/index.php/full-text-sri-lankas-statement-today-at-the-23rd-session-of-the-human-rights-council/>

assumptions that land is being taken arbitrarily and without a real public purpose. Moreover, confusion arises as it appears that many of the decisions being taken on the ground in the Jaffna land acquisition for example seem to be directed by the military.¹⁰⁰ In the case of Jaffna, civil administrators even deferred to the military when it came to allowing access to the land.¹⁰¹

Accepted and stated policy objectives ranging from NIRP to the National Plan of Action to Implement the Recommendations of the LLRC all seem to recommend a focused method of land acquisitions with minimal prejudice to the public interest. However, it is apparent examining the three case studies highlighted in this brief that the government is acting in many ways contrary to these policies. As opposed to adopting an approach that entrenches the rights of local communities to be affected by displacement, the government appears to be prioritising development projects and purported military activities, with no clear explanation as to the necessity of either.

¹⁰⁰ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

¹⁰¹ *Ibid.*

Chapter 3 – Ground Realities in the North and East

The previous chapters discussed the legal and policy framework in Sri Lanka relevant to land acquisition, highlighting established structures that can be used when land is needed for a ‘public purpose’. The due process provided in current legislation is meant to avoid unjust and arbitrary seizures of land, which can lead to displacement and deprive people of their lands. While this policy brief critiques the present framework, it also recognizes that this framework is a starting point, which requires reform and full implementation. What in reality has occurred is the acquisition of large tracts of land by the government and its agents for various purposes, raising questions of the legality of such practices and as to whether they meet the standards provided in the present framework. The nature of such acquisitions also raise concerns over whether the present framework is being used and in some instances abused, to support purposes outside of the public need and interest, leading to assertions of ongoing land grabs.

The evidence collected by CPA in the last few years, with a specific focus on developments in the post war period, demonstrates that land acquisitions do not in most instances meet the criteria provided by law. There are instances where the law has been used to take over land, which is justified by the government and its agents as a ‘public purpose’ but critiqued on the basis of information publicly available as being used for something other than a ‘public purpose’. The cases examined in the North and East also demonstrate specific trends including the pre-eminent role and involvement of the central government and military, acquisitions of lands predominantly belonging to minorities and a lack of due process. The centralisation and militarisation in land issues is not new to Sri Lanka but what is different is the degree of involvement of such actors and the nature of their involvement.

The cases discussed in this chapter highlight the issues caused by the growing role of these trends in land acquisitions and related matters. What is also notable is the ethnic dimension to these practices, with minorities being disproportionately affected. Incidents in areas outside of the North and East including in Kalpitiya and Dambulla demonstrate that all ethnic communities can be affected by illegal and arbitrary land acquisitions, however most of the cases documented in the North and East indicate that it is primarily Tamil and Muslim communities who are being affected. A trend reported in the post war context, is the distribution of lands, previously occupied by minorities to Sinhalese communities, with questions being raised as to whether the Sinhalese communities are new to the area or displaced as a result of the war. The Weli Oya case is one where available information points to Sinhala communities receiving land from the government as opposed to Tamils who previously resided in the area and are yet to return to the area. The preference given to the majority community in land alienation has raised concerns of ‘Sinhalese’ in the area. Accordingly, it has implications for the use and control of state land and impacts on changing ethnic demographics.

This chapter discusses three specific cases involving lands belonging to, controlled and used by minorities. CPA notes the grievances of all ethnic groups in terms of land ownership and control and the cases documented here do not imply that these cases require more attention than others. This policy brief attempts to highlight the increasing obstacles faced by minorities in controlling and owning their land. The cases selected in the brief are chosen on the basis of the different issues and complexities in each of the cases and to demonstrate the current trends in terms of alienation of state land and acquisition of private lands and the confusion at times regarding both these issues.

The focus of the brief is on land acquisitions under the Land Acquisition Act. It looks primarily at private lands. In addition, the policy brief also examines the case of land alienation in Welisariya, which seems to indicate that in addition to state land, private lands may also be included in the alienation schemes. The policy brief makes the case that although land acquisitions are meant to pertain to private land, the case of Welisariya demonstrates the complexities and confusion regarding the actual status of land. As a result, questions arise as to whether the government is able to alienate such lands and as to whether such questionable alienation amounts to land grabs. Further, questions are raised on the ethnicisation of land alienation and as to whether state land is being used for specific purposes including the establishment of new settlements to change the demographics of an area.

The cases that highlight the government's egregious land acquisition practices include Jaffna and Sampur. Welisariya, as already indicated, raises questions of as to whether some lands involved are in effect private lands. The three cases illustrate three different ways in which the government is controlling land. In Jaffna, the government is doing so by taking private lands for purported military reasons. In Sampur, the government is attempting to take lands for commercial purposes under the guise of development without adhering to the due process provided by the Land Acquisition Act. And finally, in Welisariya, the issues identified above remain. The problems on the ground including lack of documentation compound the issue. The fact that the alienation is primarily for the benefit of the majority community raises questions of ethnicisation of land issues in the area and leading changes to ethnic demographics via the use of land settlement schemes. The Welisariya case is also of interest as it falls within the Mahaweli L scheme, a project that falls within the purview of the central government.

This policy brief attempts to use the three cases discussed below to illustrate the tools and strategies used by the government to control land in the North and East - a practice of land acquisition tantamount to land grabbing.

Case Study: Jaffna

In April 2013, the government issued a Section 2 notice under the Land Acquisition Act that stated that 6381 Ac 38.97 P of land was to be acquired for the following purpose: "to formally vest the land where Defence Battalion Headquarters (Jaffna) – High Security area (Palali and Kankasanthurai) is located".

The land taken was from the following GN divisions of Valikamam North, Valikamam East, Kopay, Telipellai, Kankasanthurai West, Kankasanthurai Central, Wimannamum South, Theiyyaddi South, Palali South, Ottampulam and Walallai.¹⁰² This acquisition is being challenged both politically and legally, with over 2000 petitioners having filed a writ application at the Court of Appeal¹⁰³, and some others having filed a fundamental rights case at the Supreme Court.¹⁰⁴ There are many concerns surrounding this particular land acquisition including: (1) The large percentage of this land that is private; (2) The necessity of this large an acquisition for military purposes; (3) The genuineness of the 'public purpose'; (4) The legal errors in the acquisition notices; and (5) The contradiction that arises from this land grab with the public statements politicians and military officials.

The historical context of this land is of central significance. While a small portion of the land being acquired may have been state land, the vast majority of the land is private land and has been in families for generations. As was demonstrated by protests in April 2013 along with the several thousand petitioners in the court cases mentioned above, there are many individuals with claims over the land in question.¹⁰⁵ Further, the leader of the TNA, Sampanthan, claimed in a statement that, "Many Northern families are unable to return to their land and resettle because of this involvement by the Government."¹⁰⁶ Interviews with land owners who have land in areas of Valikamam also support the argument that the majority of land that is presently being occupied by the military is private land and has been private land for generations.¹⁰⁷ One older gentleman who was displaced from his land in the early 1990s, stated, "My grandfather built the house I grew up in, and there were many of my family members who lived around me in their own land."¹⁰⁸ A significant number continue to be displaced within Jaffna and are unable to find durable solutions as a result of land not being released and lack of aid from the government.

Comparative Analysis of Military Base Sizes

Setting aside for a moment, the issue of whether a military cantonment in the current context is a "public purpose", the question remains as to whether 6381 acres of land is required for a military cantonment.

¹⁰² Gazette No 1807/23 of the Democratic Socialist Republic of Sri Lanka, 26 April 2013, available at [http://documents.gov.lk/Extgzt/2013/PDF/Apr/1807_23/1807_23\(E\).pdf](http://documents.gov.lk/Extgzt/2013/PDF/Apr/1807_23/1807_23(E).pdf)

¹⁰³ "Appeal Court issues Notice on Respondents in cases by 2176 Jaffna Tamils seeking relief against land grab by Rajapaksa regime," 30 May 2013, Colombo Telegraph; accessed here: <https://www.colombotelegraph.com/index.php/appeal-court-issues-notice-on-respondents-in-cases-by-2176-jaffna-tamils-seeking-relief-against-land-grab-by-rajapaksa-regime/>

¹⁰⁴ "Jaffna Tamils' Land Grab FR Cases: Justice Sripavan Advises DSG how to grab lands correctly," 12 June 2013, Colombo Telegraph; accessed here: <https://www.colombotelegraph.com/index.php/jaffna-tamils-land-grab-fr-cases-justice-sripavan-advises-dsg-how-to-grab-lands-correctly/>

¹⁰⁵ <http://www.therepublicsquare.com/politics/2013/04/29/governments-decision-to-acquire-6000-acres-of-land-in-jaffna-results-in-protest/>

¹⁰⁶ <http://www.eyesrilanka.com/2013/08/09/tna-uses-kadiringamar-land-case-to-address-northern-land-acquisition/>

¹⁰⁷ Interviews conducted with land owners in Jaffna, Colombo and in Toronto, Canada, April– October 2013

¹⁰⁸ Interview with Tamil Sri Lankan gentleman in Toronto –25 October 2013; Translation from Tamil to English

This amount of land is essentially two-thirds of Colombo City area. Very few statistics are publicly available on the size and population of military bases/cantonments in Sri Lanka, and therefore the analysis is limited. It is therefore necessary to turn to a comparative analysis of military bases/cantonments in other countries.

This brief examined the size and population of various military cantonments around the world and determined each base's rate of persons per acre (see Table I). A calculation was then done to see by each of these rates, how many acres would be required to support a military cantonment of 13,200 personnel, the number of personnel in the North given most recently by Ambassador Ravinatha Ariyasinha, Sri Lanka's permanent representative to the UN in Geneva, in his national statement address to the UNHRC on 27 May 2013.¹⁰⁹ Conversely, it was also calculated based on each rate, how large of a population of personnel would justify a base of approximately 6300 acres.

Table 1

Country	Size of Country (km ²)	Name of Base	Size of Base (Acres)	Population	People/acre Rate	# of acres needed for population of 13,200	Size of population needed for 6,300 acres
United States (Japan)	9,147,420 ¹¹⁰	Okinawa	1,186 ¹¹¹	18,000 marine s ¹¹²	15.2	868.4	95,760
United States	9,147,420 ¹¹³	Fort Hood	15,874 (218,823) ¹¹⁴	79,501 ¹¹⁵	5.0	2640	31,500
India	2,973,190 ¹¹⁶	Delhi Cantonment	10,521 ¹¹⁷	116,352 ¹¹⁸	11.1	1189.2	69,930
India	2,973,190 ¹¹⁹	Pune Cantonment	3,200 ¹²⁰	79,454 ¹²¹	25	528	157,500

¹⁰⁹ <http://www.colombotelegraph.com/index.php/full-text-sri-lankas-statement-today-at-the-23rd-session-of-the-human-rights-council/>

¹¹⁰ "World Development Indicators: Land area in square kilometres," The World Bank (2011), accessed on 13 Nov 2013 at: <http://data.worldbank.org/indicator/AG.LND.TOTL.K2>

¹¹¹ <http://www.commondreams.org/views04/0115-08.htm>

¹¹² <http://www.bbc.co.uk/news/world-asia-22039186>

¹¹³ "World Development Indicators: Land area in square kilometres" *supra* note 99

¹¹⁴ http://www.recenter.tamu.edu/mdata/pdf/Fort_Hood_Fact_Sheet.pdf

¹¹⁵ *Ibid.*

¹¹⁶ "World Development Indicators: Land area in square kilometres" *supra* note 99

¹¹⁷ <http://www.cbdelhi.in/history.aspx>

¹¹⁸ *Ibid.*

¹¹⁹ "World Development Indicators: Land area in square kilometres" *supra* note 99

¹²⁰ <http://blog.mapsofindia.com/2012/03/26/pune-cantonment-home-to-the-national-war-memorial-southern-command/>

¹²¹ *Ibid.*

India	2,973,190 ¹²²	Meerut Cantonment	8,817 ¹²³	93,684 ¹²⁴	10.6	1245.3	66,780
Pakistan	770,880 ¹²⁵	Mangla Cantonment	296 ¹²⁶	10,000 ¹²⁷	33.8	390.5	212,940
Bangladesh	130,170 ¹²⁸	Dhaka Cantonment	2125 ¹²⁹	131,864 ¹³⁰	62.1	212.6	391,230

At one end of the spectrum, we have Fort Hood, the largest US domestic military base at a rate of 5 people/acre. Even at that rate, to support a population of 13,200 personnel as estimated by the government, a military base would only have to consist of 2640 acres. However, given the size of the United States of America and the size of their army, it is a rate that would not be reasonable to apply to Sri Lanka, which is in geographical size almost 150 times smaller.

Therefore, it is necessary to examine military bases in a country that is much more comparable in geographical and military size, Bangladesh. The largest base in Bangladesh, which also contains the Army Headquarters is the Dhaka Cantonment which measures at 2125 acres with a population of 131,864 personnel. At their rate of 62.1 people/acre, a military base in Sri Lanka of 13,200 personnel should require only 212.6 acres. Even if one were to set aside the Bangladesh base as an example of an under-funded army, which it is not, one could simply look to India, and see that even the largest base in Delhi has a rate of 11.1 people/acre, which would suggest a requirement of only 1189.2 acres for a population of 13,200 personnel in Sri Lanka. The aforementioned numbers are on the basis that the figure of 13,200 given by Ravinatha Aryasinha is accurate, however even if it is not, calculations available in the table demonstrate that the number of personnel required to justify the size of 6300 acres is unreasonable.

The Dhaka figure requires a population of 396,198 personnel; the Delhi figure a population of 70,829 personnel. Even applying the incomparable US Fort Hood figure, a population of 31,905 personnel is required. What this comparative analysis therefore highlights, is the absence of a reasonable explanation for the acquisition of over 6000 acres to establish a Defence Battalion Headquarters in compliance with the public purpose requirement under the Land Acquisition Act.

Public Purpose: There are serious concerns relating to how ‘public purpose’ is being defined by the Government as stated in the Section 2 notice referred to previously. The data from comparative cases

¹²² “World Development Indicators: Land area in square kilometres” *supra* note 99

¹²³ <http://cbmeerut.org.in/>

¹²⁴ *Ibid.*

¹²⁵ “World Development Indicators: Land area in square kilometres” *supra* note 99

¹²⁶ <http://www.cbp.gov.pk/page.php?Pld=41&Sld=20>

¹²⁷ *Ibid.*

¹²⁸ “World Development Indicators: Land area in square kilometres” *supra* note 99

¹²⁹ <http://www.citypopulation.de/php/bangladesh-dhaka.php>

¹³⁰ *Ibid.*

highlighted in the box demonstrate the weakness of the justification for 6381 acres to house a military cantonment of approximately 13,200 military personnel. Further, there have already been reported instances of military personnel using the occupied land to grow agricultural produce, raising questions as to whether this fits in with what is termed 'public purpose'.¹³¹ There also several rumours about other purported uses of the land including several media reports of a proposed yogurt factory.¹³² The army's own website¹³³ advertises a hotel run by the army and recent reports also indicate new construction taking place inside the area that is yet to be acquired.¹³⁴

All of this lends credibility to the belief that the land is not being acquired for military purposes only, but rather that there are underlying commercial purposes for which the military wishes to use the land. If this is the case, the Section 2 notice published for the area is in clear violation of the law for not stating the true purpose for which the land is being acquired.¹³⁵ Moreover, it is hard to see how military-run commercial enterprises could in any way benefit either the local population or the general population as a whole. In fact, they would more likely be detrimental, taking market share away from local civilians and corporations engaged in the same commercial practices. It has been reported that some of the land that is to be acquired may go to enterprises that were in existence prior to the war such as the KKS harbor and Palaly airport. While a case can be made for these two entities requiring land to function, a Section 2 notice to acquire land for such purposes should clearly state this. Furthermore, even if land was to be acquired for such purposes, it still does not account for the magnitude of land that is being acquired.

Another reason to be concerned about this present land acquisition are the many legal errors present in the Section 2 notice. First, paragraph 3 of the notice (P1) refers to "regularizing handover of area on which High Security Zone [Palaly and Kankesanthurai] is established", despite there being no HSZ established in the areas specified by the notice for acquisition.¹³⁶ By law, all previously existing HSZs established by Emergency Regulations lapsed with the end of the state of emergency in 2011.¹³⁷ With there being no HSZ to speak of, paragraph 3 of the acquisition notice must be considered an incorrect statement. In addition, there is clearly inconsistency within the notice itself. While paragraph 3 refers to land "on which High Security Zone [Palaly and Kankesanthurai] is established", paragraph 1 refers to "a land" in the "area" as indicated in the Schedule being required, and paragraph 2 refers to all of the land

¹³¹ Field interviews in Jaffna, April 2013

¹³² Field interviews in Jaffna, May 2013

¹³³ Laya Hotels website; accessed here: <http://www.layahotels.lk>

¹³⁴ This ongoing construction was cited recently in a case filed by Lakshman Kadirgamar's son in the Court of Appeal: <https://www.colombotelegraph.com/index.php/govt-grabs-lakshman-kadirs-land-in-jaffna/>

¹³⁵ *Manel Fernando v D.M. Jayaratne, Minister of Agriculture and Lands and others 2000 (1) S.L.R. 112*; See Chapter 1 for discussion of case

¹³⁶ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

¹³⁷ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

indicated in the schedule as “a land”.¹³⁸ While these contradictions may seem minute upon first glance, they amount to huge variances in the area of land that is to be taken, depending on which phrase is interpreted. While this may be due to not having exact information of the area, which is a requirement for when issuing a Section 2 notice, this also raises a fundamental question as to whether the confusion and variances are deliberate. The lack of exact data can lead to more land being taken than originally planned at the cost of more people being displaced and deprived of their land.

There has also been non-compliance with section 2(2) of the Land Acquisition Act, which specifies that Section 2 notices should be made available in all three languages. CPA visited and was refused entry to the land that was to be acquired by the military on 24 April 2013. CPA was directed to a Section 2 notice in Tamil, which was hanging from a tree near the entry to the so called HSZ. Later a notice in Tamil and English for the same land with a different date was seen on the notice board of the Tellipallai Divisional Secretariat.¹³⁹ No public notices were seen in Sinhala.¹⁴⁰

Furthermore, there is possibly a case of non-compliance with Section 4 of the Land Acquisition Act, which requires the Minister to direct district officers to give notice to owner(s) of the land in question. Paragraph 4 of the notice states “Person claiming ownership over the land: cannot be identified”.¹⁴¹ It is highly unlikely that this is correct as records of those displaced and living in government run welfare camps are with the government. Some land owners may now be residing outside of Jaffna and overseas. Several interviewed by CPA who live outside of Jaffna were only aware of the land acquisition notices from media reports and after the cases were filed in the Court of Appeal.¹⁴²

In addition to legal errors in the Section 2 notice, there are also issues with a purported order under Section 38 Proviso A of the Land Acquisition Act that was subsequently published on 24 April 2013 and gazetted on 26 April 2013.¹⁴³ First, the purported order was not preceded by a valid or proper notice under Section 2 or 4 of the Land Acquisition Act.¹⁴⁴ Furthermore, there is a question of the necessity of such an order given that the land has been in the possession of the State for over a decade in most cases, and it is consequently implausible that there would be any urgency with regard to the State having to immediately possess the land. Therefore, the legal errors present in the Section 2 notice and the Section 38a proviso, also make the land acquisition in Jaffna unlawful. These legal errors must be given due attention as they illustrate the government’s disregard for due process and the law. It is also worth noting that the Section 38a notices were only made public after thousands of litigants filed a case in the Court of Appeal, raising the question of whether it was hurriedly introduced to prevent any legal action being taken to stop the acquisition.

¹³⁸ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Field Interviews, April – May 2013

¹⁴³ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

¹⁴⁴ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

In a disturbing move, the military has proceeded with demolitions of homes in Valikamam North despite the ongoing court cases concerning the land. The TNA Provincial Councillor Dharmalingam Sithdharthan told the Daily FT on 29 October 2013 that partially damaged homes (damaged by shelling during the war) were being “uprooted” by the military.¹⁴⁵ In response, the Daily FT reported that Military Spokesman Brigadier Ruwan Wanigasooriya stated, “The land was legally acquired by the Lands Ministry and handed over to the military. We are within our rights to carry out development work in the area.”¹⁴⁶ Reportedly, TNA leader R. Sampanthan received assurances from the President on November 1st following the reports of demolitions that the activity would stop¹⁴⁷, but other reports suggest that on conflicting instructions from other members of the central government the military has increased the pace of demolitions.¹⁴⁸ This once again indicates the central role of the military in the Jaffna land acquisition, despite the presence of a civilian administrative structure.

This large acquisition of land in Jaffna in addition to being illegal, only perpetuates fears among the local Tamil community that the government is not concerned with their interests, and that military control and occupation over Jaffna will remain indefinitely. The present drive to acquire such large tracts of private land also highlights the trends of centralisation, militarisation and ethnicisation. These trends reinforce community suspicions of ethno- demographic change and seriously impede meaningful reconciliation and national unity.

Case Study: Sampur

Sampur has been subjected to an ongoing process of development and acquisition resulting in protracted displacement since 2006.¹⁴⁹ A Special Economic Zone (SEZ) was gazetted in 2006 that covered a large area around Trincomalee Bay, stretching from Nilaveli through Trincomalee Town and Gravets, past Kinniya and Muttur into Sampur.¹⁵⁰ In May 2007, a HSZ was established under Emergency Regulations in Trincomalee that covered 11 Grama Niladhari (GN) divisions.¹⁵¹ Following a legal challenge by some residents and CPA and an undertaking by the Attorney General’s department in the Supreme Court to allow people to return to their land, the HSZ was re-gazetted and reduced to 4 GN

¹⁴⁵ “Military demolishes homes in former HSZ in Valikamam”, 30 October 2013, Daily FT; accessed at: <http://www.ft.lk/2013/10/30/military-demolishes-homes-in-former-hsz-in-valikamam/>

¹⁴⁶ *Ibid.*

¹⁴⁷ “President Mahinda Rajapaksa ordered Jaffna commander to stop destruction houses in Valigamam North”, 1 November 2013, Lanka Sri News; accessed at:

<http://www.lankasrinews.com/view.php?24SAld0aaTnYOd423AMe322cAmZ3edeZBAIc02eWAA2edIO5nac03dQA42>

¹⁴⁸ “SL military steps up demolition of houses in Valikamam North, Jaffna,” Sunday 3 November 2013, TamilNet; accessed at: <http://www.tamilnet.com/art.html?catid=13&artid=36790>

¹⁴⁹ Centre for Policy Alternatives, Trincomalee High Security Zone and Special Economic Zone, September 2009; accessed here: <http://cpalanka.org/wp-content/uploads/2009/11/Trincomalee%20High%20Security%20Zone%20and%20Special%20Economic%20Zone.pdf>

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

divisions in October 2008.¹⁵² There were serious questions then as to what the consequences of the overlapping SEZ and HSZ would be. Land owners from the area and CPA challenged the HSZ, as it stood on the grounds that Article 12 and Article 14 of the Constitution were being violated, and raised the important point that “there is no military necessity or security concern provided to justify preventing or hampering civilians accessing their land and property.”¹⁵³ While the Supreme Court refused leave to proceed on the basis of national security, they “stated that resettlement and development should be carried out on a planned basis.”¹⁵⁴ Nonetheless, when the Emergency Regulations were lifted in 2011, the HSZ became legally inoperative, and with its removal, technically all restrictions on movement into the former HSZ should also have lapsed.¹⁵⁵

However, following the lapse of emergency in 2011 land owners who had land in the former HSZ were still restricted from entering the land by the military.¹⁵⁶ While the SEZ was still valid, there was no legal basis to restrict land owners from accessing and occupying their land and therefore there was in fact a violation of their constitutional right to freely move and reside in their own residence (Article 14).

It has been reported that acquisition processes have commenced for land in the SEZ that is being set aside for construction of a Coal Power Plant¹⁵⁷; yet, the remaining land from the former HSZ was not included in this acquisition process. In May 2012, affirming speculation, a Gazette Extraordinary create a ‘Special Zone for Heavy Industries’ purportedly within the provisions of Section 22A of the Board of Investment of Sri Lanka Law, No.4 of 1978, encompassing the remaining areas of the former HSZ.¹⁵⁸ However, Section 22A only provides for the establishment of ‘licensed zones’ and thus the use of the term ‘Special Zone for Heavy Industries’ raises a legal technicality question about the validity of the gazette.¹⁵⁹ Further, while the law does not provide any basis for restricting access to one’s own property in such a ‘licensed zone’, property owners in the area have still not been allowed access.¹⁶⁰ Seven land owners from the area filed a fundamental rights application in the Supreme Court challenging the gazette of the Special Zone for Heavy Industries.¹⁶¹

There are many issues surrounding the legality of actions in respect of the Sampur land. As stated above, with the lapse of Emergency Regulations in 2011 there is no legal basis for refusing entry to land

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

¹⁵⁶ “Displaced Sampur residents file fundamental rights petition against demarcation of heavy industries zone in their lands,” June 2012; accessed here: <http://dbsjeyaraj.com/dbsj/archives/7328>

¹⁵⁷ Centre for Policy Alternatives, Trincomalee High Security Zone and Special Economic Zone, September 2009

¹⁵⁸ SC FR No. 309/2012

¹⁵⁹ Section 22A, Board of Investment of Sri Lanka Law, No.4 of 1978

¹⁶⁰ SC FR No. 309/2012

¹⁶¹ “Displaced Sampur residents file fundamental rights petition against demarcation of heavy industries zone in their lands,” June 2012; accessed here: <http://dbsjeyaraj.com/dbsj/archives/7328>

owners. It is important to note that establishing a 'licensed zone' under Section 22A of the BOI Act does not provide the basis for non-entry, and in fact, Section 28 of the BOI Act makes very clear that land can only be acquired for BOI projects through proper procedures in the Land Acquisition Act.¹⁶² However, this refusal of entry by the military continues to be the case, and as mentioned, these landowners have suffered major livelihood challenges as a result. Moreover, the Ceylon Electricity Board has built a fence enclosing the land with cement and barbed wire that traverses agricultural and paddy land belonging to the IDPs, making the Agrarian Development Act No 46 of 2000 applicable.¹⁶³

Section 32 of the Act makes it an offence where a person "uses any extent of paddy land for a purpose other than an agricultural purpose or does any other act for such purpose" or "constructs any structure within any extent of paddy land or does any act in furtherance of such purpose" without obtaining written permission from the Commissioner-General.¹⁶⁴ Section 34(1) of the Act states: "No person shall use an extent of paddy land for any purpose other than for agricultural cultivation except with the written permission of the Commissioner-General."¹⁶⁵ Finally Section 82(1) of the Act states: "Where any government department, public corporation, person or body of persons proposed to construct a tank, dam canal watercourse or commence any development project, within the area of authority of Farmers' Organisation, it shall be the duty of the head of such department or corporation or such person or such body of persons to inform the Farmers' Organisation of the proposed construction or project and invite its comments thereon."¹⁶⁶ As far as the paddy and agricultural land in Sampur is concerned, none of the above mentioned sections of the Agrarian Development Act No 46 of 2000 have been complied with in regard to the Ceylon Electricity Board fence and any other developments in the area.¹⁶⁷

The establishment of a Special Zone for Heavy Industries appears to infringe on Article 12 and Article 14 in the Constitution. While the process of land acquisition has commenced for land in the area that is being allocated for a purported Coal Factory, the remainder of the land has not been dealt with through the proper channels of the Land Acquisition Act despite reports that development plans for the land have commenced. On 16 June 2013 the Sunday Times reported that "more than 819 acres has been given on a 99-year lease as a BOI venture to Sri Lanka Gateway Industries (Pvt) Ltd., a company registered in Singapore."¹⁶⁸ On 20 June 2013, the government itself reported that the development of the heavy industry zone will occur in 3 phases at a cost of US\$ 4 billion including the construction of: a deep water jetty, a stockpile yard, an iron ore and coke production plant, a ship-building and repair facility, plant and machinery manufacturing, an automobile assembly plant and other smaller support industries.¹⁶⁹ The article stated: "Investment Promotion Minister Lakshman Yapa Abeywardena told the cabinet last

¹⁶² Board of Investment of Sri Lanka Law, No.4 of 1978

¹⁶³ SC FR No. 309/2012

¹⁶⁴ Agrarian Development Act No 46 of 2000

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ SC FR No. 309/2012

¹⁶⁸ "[US \\$4b heavy industry zone in Sampur.](#)" *Sunday Times Sri Lanka*, 16 June 2013

¹⁶⁹ "[Special Zone for Heavy Industries at Sampur to proceed.](#)" 20 June 2013, News Line

week that the proposed zone would result in the creation of over 10,000 employment opportunities, township development and enhancement of social infrastructure in the area.”¹⁷⁰

It is hard to comprehend however, how such projects will support social infrastructure and development in the area, when even those whose land the projects are being built on are not receiving any kind of support from the government or the companies partnering with the government in this venture. Moreover, it is abundantly clear that the government has not legally acquired the land for its proposed development projects. As mentioned above, demarcating a ‘licensed zone’ under Section 22A of the Board of Investment of Sri Lanka Law, does not automatically confer on the government the ability to acquire land. Land must still be acquired via due process under the Land Acquisition Act as per Section 28 of the BOI Act. To date, there have been no Section 2 nor Section 4 notices posted with regard to acquiring land in the 4 GNs in Sampur, aside from the land on which the Coal Power Plant is being built. There have also been no attempts to compensate those displaced from Sampur aside from the land of the Coal Power Plant, and officials continue to send mixed messages to the IDPs. For example, Minister of Economic Development, Basil Rajapaksa, in parliamentary debates on 21 October 2011 stated, “*Any land which is not necessary and which will not be acquired for the construction of the power plant will be given back to these people and they will be resettled...*” and, “*...any land which will not be required for the Indian-Sri Lanka power plant will be handed over to the people,*” and finally, “*we will never unnecessarily keep anybody out of their own lands.*”¹⁷¹

In addition to the legal issues with Sampur, there are serious concerns with respect to the disregard the government, military, navy and industrial actors have shown for the displaced from Sampur (note here that the following section when referring to the displaced from Sampur is referring specifically to the displaced from the 4 GNs which were part of the HSZ and now part of the SEZ and Special Zone for Heavy Industries). Since 2006, a large majority of the 4000 displaced persons from the 4GNs have been living in protracted displacement, with only a small portion accepting relocation.¹⁷² Given the abysmal conditions of the welfare centres, especially considering the lack of aid, camp maintenance and general social indignities in such environments, many of the displaced have shifted to transitional shelters with the help of humanitarian agencies or are living with host families.¹⁷³ In particular, the petitioners challenging the Special Zone for Heavy Industries are currently residing in transitional shelters in Kattaparichchan.¹⁷⁴ The conditions in these transitional shelters however are not better and many of the owners of the land on which these shelters are built are demanding back their land.

¹⁷⁰ *Ibid.*

¹⁷¹ “‘Development’ Ousts Tamil Families from Sampoor,” July 2012, Sunday Leader; accessed here: <http://www.thesundayleader.lk/2012/07/22/development-ousts-tamil-families-from-sampoor/>

¹⁷² Mirak Raheem, “Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka”, Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

In addition to housing issues, the displaced also face immense livelihood challenges as demonstrated by displaced fisherman and farmers who are living in transitional shelters in Kattaparichchan.¹⁷⁵ While there are 181 IDP families who earned a livelihood through fishing prior to displacement, only 25 of these families are currently able to fish in their displaced area.¹⁷⁶ Further, these 25 families share one rented motorboat and 5 rented canoes, and must work in shifts as the residents of Kattaparichchan have primary fishing rights.¹⁷⁷ With regard to farming it is important to note the extent of paddy fields present and available in Sampur with displaced residents saying there were approximately 4000 acres of agricultural land and 45 tanks.¹⁷⁸ The government offered seasonal passes to displaced farmers for 300 acres; the cultivation of which enabled support for a large portion of IDPs in Kattaparichchan.¹⁷⁹ However, following the challenge of the May 2012 Gazette demarcating a Special Zone for Heavy Industries, the passes were revoked for the following 'Maha' cultivation season.¹⁸⁰ The lack of farming and fishing opportunities means that many of the most vulnerable including the elderly and widows, have had to travel to other areas in search of work.¹⁸¹ There has also been no assistance from the government with respect to providing a substitute for food, as dry rations were stopped in December 2011. The IDPs therefore continue to live in poverty, and without real livelihood opportunities and organised government support, are forced to depend on assistance from others.¹⁸² There have also been reports of intimidation and harassment of IDPs who have voiced their need to return including those who have protested and litigated, a fundamental right of all citizens.¹⁸³ It is imperative that all actors desist from such acts and that due process is used to ensure land owners are allowed to return to their land and in the event land is acquired, the established process is followed.

While development and industry are necessary to grow Sri Lanka's economy, it is imperative that such projects not be undertaken illegally without due process. The idea of 'public purpose' is that land acquisitions occur with the public interest in mind, and provide some benefit to the community directly affected. In the case of Sampur, there has been no consideration of the interest of the residents who continue to insist on return. As of now, if the intention of the government is to refuse return to the residents of Sampur, no resettlement plans have been put to them. This of course contravenes the National Involuntary Resettlement Policy, discussed above. The IDPs from Sampur have been living in uncertainty since 2006, plagued by poverty, a lack of permanent housing and livelihood and unable to return to their ancestral lands. The government must give priority to their interests and concerns when

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ "Sampur's displaced population yet await 'Nagenahira Navodaya'," 27 March 2013, Vimarsanam Vimansa; accessed here: <http://vimarsanam-vimansa.org/report/sampurs-displaced-population-yet-await-nagenahira-navodaya/>

¹⁷⁹ Mirak Raheem, "Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka", Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

moving forward with projects in the Special Zones for Heavy Industries, and companies and foreign governments must ask for accountability on these issues before deciding to invest in these projects.

Case Study: Weli Oya

Before an analysis of current land issues in Weli Oya, it is necessary to first have an understanding of the contextual history. Since 1984, Manal Aru/Weli Oya has been a place of serious contention with respect to government-orchestrated demographic shifts. Before 1984, almost all agricultural lands in the then Manal Aru area were “occupied by either Tamil villages or were held under long term lease by Tamil individuals and business concerns.”¹⁸⁴ Starting in 1984 however, most of these Tamil settlers were driven out by military officials in the area and Sinhalese settlers were recruited by the military to settle in these villages.¹⁸⁵ It has been noted that these activities appeared to have been conducted by the military, separate from any civil administration in the area.¹⁸⁶ Given the strategic importance of Weli Oya as a border town between the North and East it is presumed that the military chose to establish a Sinhalese settlement there as a buffer to militant activities.¹⁸⁷

This all happened under the guise of the Mahaweli Development Authorities, who included Manal Aru in what was called the Mahaweli System L.¹⁸⁸ Significantly though, Mahaweli System L did not actually come into operation until April 1988, and differed from the previous Mahaweli schemes which while promoting Sinhalese settlement, still benefited the local Tamil and Muslim civilians.¹⁸⁹ In this case, by 1985 almost all Tamil civilians in the Manal Aru area had been driven out due to violence and military pressure.¹⁹⁰ In 1988, a reported 3,364 families were given land in System L, with a large majority of the families being Sinhalese.¹⁹¹ The Sinhalese settlers who were brought in to live in Weli Oya then faced continuous attacks by the LTTE, and experienced multiple waves of displacement.¹⁹² Further, the development proposed by the Mahaweli System L to bring water to the area, was not followed through,

¹⁸⁴ University Teachers for Human Rights (Jaffna), “From Manal Aaru to Weli Oya and the Spirit of July 1983” September 15 1993

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ University Teachers for Human Rights (Jaffna), “From Manal Aaru to Weli Oya and the Spirit of July 1983” September 15 1993

¹⁸⁸ Mahaweli Authority of Sri Lanka: <http://www.mahaweli.gov.lk>

¹⁸⁹ University Teachers for Human Rights (Jaffna), “From Manal Aaru to Weli Oya and the Spirit of July 1983” September 15 1993; Mahaweli Authority of Sri Lanka: <http://www.mahaweli.gov.lk>

¹⁹⁰ University Teachers for Human Rights (Jaffna), “From Manal Aaru to Weli Oya and the Spirit of July 1983” September 15 1993

¹⁹¹ Bhavani Fonseka & Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, Centre for Policy Alternatives, December 2011

¹⁹² University Teachers for Human Rights (Jaffna), “From Manal Aaru to Weli Oya and the Spirit of July 1983” September 15 1993; Mirak Raheem, “Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka”, Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

and the settlers endured many hardships as a result.¹⁹³ For example, settlers from the villages of Monaraweewa and Gajabapura in Weli Oya were displaced in 1999 as a consequence of the continued violence and many went to live in a temporary IDP welfare centre in Boralukanda while others went to live with family in other areas.¹⁹⁴ As of June 2007, there were 124 families (458 persons) living in the Boralukanda welfare centre, and currently there are 132 families still living in what is now the Boralukanda colony.¹⁹⁵ The colony arose out of a decision made by the then President Chandrika Kumarayunge when she visited the Boralukanda Welfare Centre in 2005 and ordered that all of the temporary shelters be converted to permanent housing.¹⁹⁶ There were many issues that arose out of this spontaneous conversion, and the lack of planning has resulted in several problems for the displaced persons. Foremost, was the lack of livelihood opportunities, with the absence of an irrigation scheme, and prevention from access to the local tank for fishing, given the competition from the host community who saw them as 'outsiders'.¹⁹⁷

In September 2011, the Sinhalese families who were displaced from Monaraweewa and Gajabapura in Weli Oya returned to the area.¹⁹⁸ The land they returned to however was quite different from that which they had left, with almost all of the infrastructure having been wiped out by the war.¹⁹⁹ The Mahaweli Development Authority had given an undertaking to these families that they would be provided with 1.5 acres of land, but in reality they were only provided with an area that was 40m by 50m.²⁰⁰ Further, these areas appear to have very little livelihood opportunities, and the same irrigation-related issues that faced settlers in the 80s and 90s remain.

Despite the challenges facing returnees and the major absence of development or infrastructure, the government seems intent on bringing in as many new Sinhalese settlers as possible to the area. As of April 2013, it was reported that approximately 4800 Sinhala families had been brought to Weli Oya and that President Mahinda Rajapaksha on a visit to the area on April 20th, instructed government officers to speed up the settlement process.²⁰¹ It was reported in October 2013 that the Mahaweli Authority was

¹⁹³ CPA Field Research, December 2012; Mirak Raheem, "Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka", Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ Mirak Raheem, "Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka", Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

¹⁹⁷ CPA Field Research, December 2012; Mirak Raheem, "Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka", Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Fact finding report on the recent tensions between Muslims and Tamils in Mulliyawalai*, Women's Action Network, 28 April 2013

even attempting to clear protected forest reserves in Weli Oya to procure land for more settlements.²⁰² However, by the same token, Tamils who were displaced from the area before 1984, have not been given the same benefits.²⁰³ Certain reports have even alleged that Tamil farmers who were displaced prior to 1984 and who recently tried to resettle in the area, have been forbidden by the local officials from cultivating their paddy fields and have been chased out by other Sinhalese settlers. There are also questions as to what form of land documentation was given to the Sinhala settlers who were brought to the area.

It is important to place these actions in context. In October 2011, the government placed the Weli Oya Division Secretariat for 'administrative' purposes under the Mullaitivu District Secretariat²⁰⁴, separating it from the Anuradhapura District despite much of the population preferring to be administered by the Anuradhapura District.²⁰⁵ This action made Mullaitivu the area with the second-highest percentage of Sinhalese persons in the North (18.1%), according to the 2011 census when there were 3,966 people in Weli Oya.²⁰⁶ Given that recent reports suggest the population of Weli Oya has grown to 4800 families, with an ambitious plan of settling many more, questions must be asked about the intention of the government to increase the Sinhala population in the area.²⁰⁷

There were concerns as to whether such new settlements would impact elections, particularly the NPC elections recently held in September 2013. Given that in 2011, the total number of voters in Mullaitivu was 53,771, including Weli Oya, the incorporation of Weli Oya into the district did have an impact on the September elections.²⁰⁸ Mullaitivu has an allocation of 5 seats out of a total of 38 seats for the NPC²⁰⁹, and thus it appeared before the election that the incorporation of Weli Oya into Mullaitivu would ensure that the party in government at the centre – the United Peoples Freedom Alliance (UPFA) -would win at least one seat. As it transpired, the UPFA won 1 out of the 5 seats in the Mullaitivu District, mirroring the demographic change caused by the incorporation of Weli Oya into the Mullaitivu District.²¹⁰

Another important issue that must be raised with respect to Weli Oya is the role of the military and government actors. According to a report by the Women's Action Network in April 2013: "Sinhala

²⁰² <http://www.nation.lk/edition/news-online/item/22099-mahaweli-authority-trying-to-clear-forest-reserves.html>

²⁰³ *Fact finding report on the recent tensions between Muslims and Tamils in Mulliyawalai*, Women's Action Network, 28 April 2013

²⁰⁴ "Weli Oya goes to Mullaitivu", 18 October 2011, Daily Mirror

²⁰⁵ CPA Field Research, December 2012; Mirak Raheem, "Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka", Centre for Policy Alternatives commissioned by the Norwegian Refugee Council, September 2013

²⁰⁶ Dr. Rajasigham Narendran, Post-war Northern Province: Some facts and fallacies, <http://dbsjeyaraj.com/dbsj/archives/5101>

²⁰⁷ *Fact finding report on the recent tensions between Muslims and Tamils in Mulliyawalai*, Women's Action Network, 28 April 2013

²⁰⁸ Department of Elections: <http://www.slections.gov.lk/ep.html>

²⁰⁹ Field Report: Jaffna and Kilinochchi Districts, Centre for Policy Alternatives, April 2013

²¹⁰ <http://www.dailymirror.lk/news/infographics/36078-provincial-council-elections-2013--results-and-preferential-votes-northern-province.html>

settlement is taking place under the tight fist of the governor, specially appointed military officers and Sinhala government officers in these two areas. Even NGOs can't have access to Weli Oya and Thalapogawewa without the prior permission from respective District Secretariats."²¹¹ With the end of the war, there is no reason why the military should continue to remain involved in civilian affairs, and their presence can only distort, resettlement efforts.

Further, there appears to be no reason why the government should not consider the grievances of Tamil civilians who were forcibly evicted from the area prior to 1984, especially noting that the government is bringing in 'busloads' of new settlers. Perceptions of government action are just as important as the true intentions behind those actions, and in order to find sustainable peace and reconciliation, the government must be perceived by all citizens as acting in their best interest. By pursuing aggressive colonisation efforts that favour one ethnicity and disregard another, the government is giving weight to fears that they are trying to shift demographics of a region, as occurred in the 1980s when the Mahaweli System L project commenced.²¹² This fear was articulated by the leader of the TNA, R.Sampanathan in an address on 5 September 2007 where he stated: "You want to create a Sinhalese district between Trincomalee and Mullaitivu breaking the Tamil linguistic continuity in such a way that you think you are going to find peace. This is what happened when you created Manal Aru (Weli Oya) which you are still fighting over."²¹³

The Weli Oya case raises questions as to how the Central Government is using state land to change demographics in the area. While it is not clear whether private land is in question, information gathered by CPA indicates that permit land previously given to Tamil farmers is now being given to Sinhala farmers. While this is not a clear cut case of land acquisition or land grab as seen in the two previous cases, the different methods used to change land control need to be noted. The Weli Oya case is unique in that a central government actor is the key actor with no role for local actors on land alienation. It is also noteworthy that ethnicisation is evident as preference is given to the Sinhala community, old and new groups, with little attention given to the Tamil community.

This pattern is also noted in nearby Vavuniya North where Tamil villagers returning to their land following displacement have found Sinhalese farmers cultivating their land with permission from the Mahaweli Authority who they claim have given them the land on lease.²¹⁴ The Tamil villagers reported that subsequently Sinhalese officials visiting the area in 2010 instructed them to clear jungle area in Mullaitivu District and begin farming there despite that land being quite far and not preferable to the

²¹¹ *Fact finding report on the recent tensions between Muslims and Tamils in Mulliyawalai*, Women's Action Network, 28 April 2013

²¹² S.I Keethapocalan, *Social Cubism: A Comprehensive Look at the Causes of Conflict in Sri Lanka*, 8 ILSA J. Int'l & Comp. L. 921 (2001-2002)

²¹³ By J.S. Tissainayagam, *Ramifications of land alienation in the East*, The Sunday Times Online – Telescope Column, 16 September 2007, quoting an address on 5 September 2007 by TNA leader, R. Sampanathan

²¹⁴ Bhavani Fonseka & Mirak Raheem, *Land in the Northern Province: Post-War Politics, Policy and Practices*, Centre for Policy Alternatives, December 2011

villagers' own lands.²¹⁵ While some of these farmers were later told by government officials they could reclaim their land, it is unclear whether that process has in fact happened or whether they continue to face obstacles.²¹⁶

The evidence of 'Sinhalisation' in Weli Oya is a pattern that must be noted with concern. It is being reported in other districts in the country as well. Reports from the area highlight another situation of accelerated settlement of 'new' Sinhalese families into other areas of the Northern province including the area of Kalabogawewa, currently administered by the Vavuniya South DS Division.²¹⁷ This area until the end of the war was known as 'Kokkunchankulam', a Tamil area that was administered by the Vavuniya North DS. From 2012 to 2013, 2,484 families were settled in the area, and interviews indicate that they were all landless Sinhalese families from the Central and Southern provinces.²¹⁸

A further concern raised with these new settlements is the involvement of the military. CPA has been informed of an incident where lands had been recently given to 80 Sinhala families in Agbopura village and 106 Tamil families in Karuppanichchankulam village in the Vavuniya DS division.²¹⁹ In these two cases, land had been given to the people by the military and the civil administration had not been involved in the land alienation. It must be set out that the military has no formal role in land alienation in accordance with existing legislation. This process is strictly within the purview of the civil administration as provided in the present legal framework. Whilst this is the law of the land, this example is yet another that highlights the ground realities in the North and East.

The land grabs, along the lines discussed in the previous two cases may not be evident in Weli Oya. The role of the central government and its agents in manipulating and controlling land and the evidence of 'Sinhalisation' raises serious concerns as to what is planned for the area. CPA notes with concern the issues raised in the Weli Oya case and the role of the state. Weli Oya reinforces fears of the minority community, both Tamil and Muslim, that land either belonging to or controlled by them for decades can be taken away via state policy. Such practices can happen without any public knowledge or debate, with no information available publicly to shed light on the nature of land alienation, the history of land control in the area and the plight of those affected.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ Information shared by an organisation working in the North, November 2013

²¹⁸ *Ibid.*

²¹⁹ Information received from partners in the North, November 2013.

CONCLUSION

The present policy brief highlights some trends and practices in the North and East. The disturbing trends emerging from the area reveal a system in place that uses different tactics and strategies to dispossess and displace people from their lands and introduce new settlements. This will have long term implications for land ownership patterns in the area and thereby impact demographics in an area that was previously dominated by the minorities.

The involvement of the state and its agents to acquire and alienate land in the North and East and the nature and pace at which it is presently occurring raises fundamental questions about the status of land, whether a land is state or private and its implications for ownership trends. These questions also have far-reaching implications for devolution and governance in the area, begging the question of whether trends of further centralisation and militarisation regarding land issues are signs of things to come and accordingly key impediments to reconciliation and unity. Although the present policy brief is narrow in its focus on different trends on land acquisitions and related issues, the implications are significant and cannot be ignored. It is time to take stock of ground realities and initiate reform.

RECOMMENDATIONS

- The Thirteenth Amendment to the Constitution should be fully implemented; ensuring land is devolved to the Provincial Councils.
- The National Land Commission should be established immediately.
- Legal and policy reform related to land should be done in conformity with the Thirteenth Amendment and in a transparent and participatory manner.
- The Ministry of Lands should make public the progress made with the Land Circular (2013/1) including the status of land alienations in the North and East.
- Land alienation and other administrative functions should be the sole responsibility of the civil administration and in accordance with the legal framework.
- Make public the legal basis for the creation of the PTF, providing clarity on its functions and role in the post war context, and explain the need for such an entity in the present context.
- The Government should make public and widely publicise all policies, circulars, gazettes and other documents formulated in relation to land in the North and East as well as the rest of the country.
- Existing policies such as the NIRP should be full implemented and incorporated into government and donor projects.
- The Government should publicly provide information concerning development and other plans that require lands in the North and East. This should include special projects such as the Mahaweli Development Scheme, tourist projects and any projects where land is required for a military presence.
- A comprehensive survey should be conducted to map the status of lands in the North and East which is complemented by an initiative by the Ministry of Lands to identify what is state land versus private land. Such a survey should involve local officials and be conducted transparently. Findings from the survey should be made public for comments by affected communities and other interested parties.
- Land documents that are lost, destroyed or damaged should be replaced. This entails a comprehensive review of land documentation for both state and private land and investigations of whether land is state or privately owned.
- Demilitarisation in the North and East should commence immediately. This includes halting the involvement of the military in civil administration.
- An assessment should be done by the civil administration on the military occupation in Sri Lanka in

order to identify a strategy for returning land to its rightful owners. This assessment should examine damage caused to areas that have been occupied by the military and recommend a scheme for compensation.

- There should be a information campaign which informs the public on the reasons for occupation of the areas still under military occupation.
- Areas to be acquired by the government should be acquired in accordance with the Land Acquisition Act. Areas that are not yet legally acquired should be accessible to legal owners.
- Return initiatives should support all communities who are displaced and not differ by ethnicity or any other reasons. Attention should be placed on return programmes and land alienation; contextualized by sensitivities around claims of attempts at colonization and Sinhalisation. Return initiatives should be the sole responsibility of the civil administration and not be influenced by political and military aspects.
- Relocation should be a last option and the authorities should provide information on all options available to affected communities.

Annex I – International Policy Considerations

While this brief focuses primarily on an analysis of domestic law and policy, it is necessary to consider international policy, which has a relevance on land rights in Sri Lanka. The Annex briefly examines key international conventions and declarations that are relevant to the focus of this policy brief, setting out the obligations of the government provided by the international framework. It also examines recent statements made by the international community in relation to Sri Lanka where there is a focus on land rights. As set out in this section, the international policy framework and the government's own obligations and promises to the international community provide a comprehensive framework for the respect of land rights.

Treaties, Conventions and Protocols

Sri Lanka has been a member of the United Nations since 1955 and is currently a signatory to the following treaties and conventions that impact on its land practises²²⁰:

- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Elimination of all forms of racial discrimination
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

There are several articles in the aforementioned treaties and conventions that impact directly upon Sri Lanka's current land acquisition practices and create obligations that Sri Lanka is currently not fulfilling.

In the context of land acquisitions, Article 12 of the ICCPR is particularly noteworthy:

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Also relevant, is Article 1 in both the ICCPR and ICESCR:

²²⁰ <http://www.unhcr.ch/tbs/doc.nsf/NewhvVAllSPRByCountry?OpenView&Start=1&Count=250&Expand=164#164>

Article 1

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

And finally with significant importance in the context of claims of land redistribution schemes along ethnic lines is Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination:

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.

...(d) Other civil rights, in particular:

...(v) The right to own property alone as well as in association with others;

By failing to adhere to these articles the Government is reneging on its obligations as a signatory to these treaties. This has consequences at the respective treaty-monitoring bodies. It is imperative that Sri Lanka honour its commitment to the principles laid out in these treaties, and re-formulate its land acquisition processes in conformity with the principles of justice and international law.

Guiding Principles

The Guiding Principles on Internal Displacement

In addition to the above treaties and conventions, an important framework that sets out standards to be followed by governments in handling situations of internal displacement is "The Guiding Principles on Internal Displacement".²²¹ These principles were placed before the UN Human Rights Commission in 1998 and since then have been continuously referenced in resolutions unanimously adopted by the General Assembly.²²² In 2005 at the World Summit they were formally recognized as "an important international framework for the protection of internally displaced persons."²²³

The principles notably set out that persons should be protected against arbitrary displacement from their homes and defines arbitrary displacement to include policies aimed at shifting demographic compositions of a population and "cases of large-scale development projects, which are not justified by

²²¹ <http://www.idpguidingprinciples.org>

²²² <http://www.idpguidingprinciples.org>

²²³ <http://www.idpguidingprinciples.org>

compelling and overriding public interests.”²²⁴ Further and in line with the National Involuntary Resettlement Policy adopted by Sri Lanka and described above, Principle 7 sets out that:

“Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.”

These principles importantly establish that the responsibility for providing for the rights and protection of internally displaced persons rests with the government and that this responsibility must be carried out even through times of armed conflict and emergency. Especially, since Sri Lanka is no longer in a situation of active armed conflict or emergency, it is necessary that the government re-evaluate its land policies to adhere to the Guiding Principles and its framework. As was seen in the chapter on case studies, it is abundantly clear that the government’s current land acquisition practices pay little attention to the effects on displaced persons and in certain instances, even lead to further displacement.

Pinheiro Principles

Another international framework that is both important and relevant to land acquisitions in Sri Lanka are what are known as the Pinheiro Principles, named after the Special Rapporteur who led their development. The Pinheiro principles are designed to provide guidance to governments, UN agencies, NGOs and others in handling issues on property, land and restitution to displaced persons and refugees post-conflict. The principles were formally endorsed by the Sub-Commission on the Promotion and Protection of Human Rights -an advisory body to the UN Commission on Human Rights that existed at the time- in August of 2005. The principles are centred in international human rights and humanitarian law, and provide a comprehensive look at one of the major issues concerning displacement.

This brief would especially like to draw attention to principle 5, “The right to be protected from displacement”, set out below:

- 5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.
- 5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend those protections to everyone within their legal jurisdiction or effective control.
- 5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation of expropriation of land as a punitive measure or as a means or method of war.

²²⁴ Principle 6 of the Guiding Principles on Internal Displacement; <http://www.idpguidingprinciples.org>

- 5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participation in displacement.

In the Sri Lankan context, the government must consider the Pinheiro principles when formulating land and land acquisition policies.

Universal Periodic Reviews

The Universal Periodic Review (UPR) is a tool that was created through the UN Security Council in 2006 and involves a process of reviewing the human rights record of all UN member states. The UPR is conducted by a working group of member states but allows for any member states to participate in the process if they wish. The working group ultimately publishes a report with recommendations to the State in question and the report is adopted, thereafter, by the Human Rights Council. The State is then expected to follow through on the recommendations. The UPR is currently in its second cycle of reviews and Sri Lanka has been reviewed twice, in 2008 and again in 2012.²²⁵

The recommendations set out in the UPR outline critical areas in human rights that Sri Lanka must address in order to comply with international law and human rights norms. The section below highlights the recommendations -both those endorsed and not endorsed by Sri Lanka- that pertain to land and displacement issues.

Sri Lanka's Universal Periodic Review (2012)²²⁶

UPR (2012) Recommendations:

127 (recommendations Sri Lanka accepts):

127.94 Ensure the protection of IDP's rights to voluntary and safe return to adequate restitution by, inter alia, putting in place and implementing long-term housing and property restitution policies that comply with international standards (Finland);

127.95. Ensure legal ownership and return or restitution of houses and lands to internally displaced persons, according to international standards (Holy See);

127.99 Continue measures underway to address land issues, including amending the Prescription Ordinance, whereby displaced landowners will be able to defeat the adverse claims based on the running of time (Bhutan);

²²⁵ The Universal Periodic Reviews include the following documents: National Report, Compilation of UN information, Summary of stakeholders' information, questions submitted in advance, Addendums, Outcome of the Review and Report of the Working Group.

²²⁶ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKSession14.aspx>

128 (recommendations Sri Lanka rejected):

128.33. Implement the constructive recommendations of the LLRC, including the removal of the military from civilian functions, creation of mechanisms to address cases of the missing and detained, issuance of death certificates, land reform; devolution of power; and disarming paramilitaries (United States of America)

Sri Lanka's Universal Period Review (2008)²²⁷

82 (Recommendations Sri Lanka endorsed)

32. Take the measures necessary to ensure the return and restitution of housing and lands in conformity with international standards for internally displaced persons (Belgium);

33. Take measures to protect the rights of IDPs, including long-term housing and property restitution policies that meet international standards, and protecting the rights to a voluntary, safe return and adequate restitution (Finland);

34. (a) Adopt necessary measures to safeguard the human rights of IDPs in accordance with applicable international standards and that particular emphasis be given *inter alia* to increase information sharing as well as consultation efforts to reduce any sense of insecurity of the IDPs; (b) facilitate reintegration of IDPs in areas of return and (c) take measures to ensure the provision of assistance to IDPs and the protection of human rights of those providing such assistance (Austria);

UN Resolutions (2012 & 2013)

In March of 2012 and 2013²²⁸ two resolutions on Sri Lanka was adopted the UN Human Rights Council. By all counts these resolutions were watered down in terms of human rights protection and accountability. Nonetheless, the resolutions called on Sri Lanka to implement the recommendations of the LLRC and affirm its commitment to international law by upholding international human rights principles.

Report and Statement by UN High Commissioner of Human Rights

In February of 2013 the Office of the UN High Commissioner on Human Rights released a report in the twenty-second session of the UN Human Rights Council as part of advice on the resolution to be passed on Sri Lanka, which clearly outlines many of the ongoing contradictions in Sri Lankan policy relating to

²²⁷ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKSession2.aspx>

²²⁸ "Promoting reconciliation and accountability in Sri Lanka", Resolution adopted by the Human Rights Council in Nineteenth Session on 3 April 2012, accessed here: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/126/71/PDF/G1212671.pdf?OpenElement>; "Promoting reconciliation and accountability in Sri Lanka", Resolution adopted by the Human Rights Council in Twenty-Second session on 9 April 2013, accessed here: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/127/55/PDF/G1312755.pdf?OpenElement>

human rights. Notably, the Commissioner highlighted the failure of the Government to follow through in action on recommendations set out in the National Action Plan for the Protection and Promotion of Human Rights and the LLRC recommendations. Further, the Commissioner specifically highlighted “land grabs” as one of the main issues in the context of land-related challenges. The Commissioner also drew attention to the issues of militarisation in Sri Lanka and noted that a serious issue is that of military occupation where it is unclear whether due process for acquisition is being followed.

The High Commissioner’s statement at the end of her trip to Sri Lanka in August 2013 sets the tone on the present human rights situation in Sri Lanka. Her comments on land and militarisation echo the findings of this report and should be considered by all relevant actors:

I was concerned to hear about the degree to which the military appears to be putting down roots and becoming involved in what should be civilian activities, for instance education, agriculture and even tourism. I also heard complaints about the acquisition of private land to build military camps and installations, including a holiday resort. This is only going to make the complex land issues with which the Government has been grappling even more complicated and difficult to resolve. Clearly, the army needs some camps, but the prevalence and level of involvement of soldiers in the community seem much greater than is needed for strictly military or reconstruction purposes four years after the end of the war.

I understand the Secretary of Defence’s point that the demobilisation of a significant proportion of such a large army cannot be done overnight, but urge the government to speed up its efforts to demilitarise these two war-affected provinces, as the continued large-scale presence of the military and other security forces is seen by many as oppressive and intrusive, with the continuing high level of surveillance of former combatants and returnees at times verging on harassment.²²⁹

The United Nations Human Rights Council should carefully examine the High Commissioner’s statements and reports on Sri Lanka and pressure the Sri Lankan government to follow through on all of its recommendations, including those pertaining to land.

This section provides a glimpse into the international framework that can be used to provide protection of land rights including an individual’s right to own and access their land and not be forcibly displaced. The findings of key international actors confirm the findings in the policy brief, highlighting the grave situation faced at the individual level of owning, accessing and occupying one’s land and the larger issues of a political solution and reconciliation.

²²⁹ <https://www.colombotelegraph.com/index.php/full-speech-un-high-commissioner-for-human-rights-navi-pillay-at-the-press-conference-on-her-mission-to-sri-lanka/>