Contents

1	*Human Rights Committee View*	Page 1
2	*The judgment of the Supreme Court*	Page 17
3	Articles	
	THE SINGARASA CASE: QUIS CUSTODIET…?—Sir Nigel Rodley	Page 25
	Comment on the Singarasa Case Relating to the Status of the International Covenant on Civil & Political Rights in Sri Lankan Law—Prof. John Cerone	Page 43
	The Singarasa Case – A brief comment – RKW Geenesekere	Page 49

Human Rights Committee- View

Communication No. 1033/2001 : Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001. (Jurisprudence)

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Eighty-first session

5 - 30 July 2004

Views of the Human Rights Committee under

the Optional Protocol to the International Covenant

on Civil and Political Rights*

- Eighty-first session -

Communication No. 1033/2001

Submitted by: Mr. Nallaratnam Singarasa (represented by counsel, Mr. V. S. Ganesalingam of Home for Human Rights as well as Interights)

Alleged victim: The author

State party: Sri Lanka

Date of communication: 19 June 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 2004,

Having concluded its consideration of communication No. 1033/2001, submitted to the Human Rights Committee on behalf of Mr. Nallaratnam Singarasa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Nallaratnam Singarasa, a Sri Lankan national, and a member of the Tamil community. He is currently serving a 35 year sentence at Boosa Prison, Sri Lanka. He claims to be a victim of violations of articles 14, paragraphs 1, 2, 3 (c), (f), (g), and 5, and 7, 26, and 2, paragraphs 1, and 3, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. V.S. Ganesalingam of Home for Human Rights as well as Interights.

1.2 The International Covenant on Civil and Political Rights entered into force for the State party on 11 September 1980 and the first Optional Protocol on 3 January 1998.

Facts as submitted by the author

2.1 On 16 July 1993, at about 5a:m, the author was arrested, by Sri Lankan security forces while sleeping at his home. 150 Tamil men were also arrested in a "round up" of his village. None of them were informed of the reasons for their arrest. They were all taken to the Komathurai Army Camp and accused of supporting the Liberation Tigers of Tamil Eelam (known as "the LTTE"). During his detention at the camp, the author's hands were tied together, he was kept hanging from a mango tree, and was allegedly assaulted by members of the security forces.

2.2 On the evening of 16 July 1993, the author was handed over to the Counter Subversive Unit of the Batticaloa Police and detained "in the army detention camp of Batticaloa Prison". He was detained pursuant to an order by the Minister of Defence under section 9(1) of the Prevention of Terrorism Act No. 48 of 1979 (as amended by Act No. 10 of 1982 and No. 22 of 1988) (hereinafter "the PTA"), which provides for detention without charge up to a period of eighteen months (renewable by order every three months), if the Minister of Defence "has reason to believe or suspect that any person is connected with or concerned in any unlawful activity". **(1)** The detention order was not served on the author and he was not informed of the reasons for his detention.

2.3 During the period from 17 July to 30 September 1993, three policemen including a Police Constable (hereinafter "the PC") of the Criminal Investigation Department (hereinafter "the CID"), assisted by a former Tamil militant, interrogated the author. For two days after his arrest, he alleges that he was subjected to torture and ill-treatment, which included being pushed into a water tank and held under water, and then blindfolded and laid face down and assaulted. He was questioned in broken Tamil by the police officers. He was held in incommunicado detention and was not afforded legal representation or interpretation facilities; nor was he given any opportunity to obtain medical assistance. On 30 September 1993, the author allegedly made a statement to the police.

2.4 Sometime in August 1993, the author was first brought before a Magistrate, and remanded back into police custody. He remained in remand pending trial, without any possibility of seeking or obtaining bail, pursuant to section 15(2) of the PTA. **(2)** The Magistrate did not review the detention order, pursuant to section 10 of the PTA, which states that a detention order under section 9 of the PTA is final and shall not be called in question before any court. **(3)**

2.5 On 11 December 1993, the author was produced before the Assistant Superintendent of Police (hereinafter "the ASP") of the CID and the same PC who had previously interrogated him. He was asked numerous personal questions about his education, employment and family. As the author could not speak Sinhalese, the PC interpreted between Tamil and Sinhalese. The author was then requested to sign a statement, which had been translated and typed in Sinhalese by the PC. The author refused to sign as he could not understand it. He alleges that the ASP then forcibly put his thumbprint on the typed statement. The prosecution later produced this statement as evidence of the author's alleged confession. The author had neither *external* interpretation nor legal representation at this time.

2.6 In September 1994, after over fourteen months in detention, the author was indicted in the High Court in three separate cases.

a) On 5 September 1994, he was indicted in Case no. 6823/94, together with several named and un-named persons, of having committed an offence under sections 2(2)(ii), read together with section 2(1)(f) of the PTA, of having caused "violent acts to take place, namely, receiving armed combat training under the LTTE Terrorist Organisation", at Muttur, between 1 January and 31 December 1989.

b) On 28 September 1994, he was indicted in Case no. 6824/94, together with several other named persons and persons unknown, of having committed an offence under section 2(1)(a), read together with section 2(2)(i), of the PTA, of having caused the death of army officers at Arantawala, between 1 and 30 November 1992.

c) On 30 September 1994, he was indicted in Case no. 6825/94, together with several other named persons and persons unknown, on five counts, the first under section 23(a)of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 with the Public Security (Amendment) Act No. 28 of 1988, of having conspired by unlawful means to overthrow the lawfully constituted Government of Sri Lanka, and the remaining four under section 2(2)(ii), read together with section 2(1)(c), of the PTA, of having attacked four army camps (at Jaffna Fort, Palaly, Kankesanthurai and Elephant Pass, respectively), with a view to achieving the objective set out in count one.

2.7 On the date of submission of the communication, the author had not been tried in Cases nos. 6823/94 and 6824/94.

2.8 On 30 September 1994, the High Court assigned the author State-appointed counsel. This was the first time the author had access to a legal representative since his arrest. He later retained private counsel. He had interpretation facilities throughout the legal proceedings; he pleaded not guilty to the charges.

2.9 On 12 January 1995, in an application to the High Court, defence counsel submitted that there were visible marks of assault on the author's body, and moved for a medical report to be obtained. On the Court's order, a Judicial Medical Officer then examined him. According to the author, the medical report stated that the author displayed scars on his back and a serious injury, in the form of a corneal scar on his left eye, which resulted in permanent impairment of vision. It also stated that "injuries to the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force".

2.10 On 2 June 1995, the author's alleged confession was the subject of a *voir dire* hearing by the High Court, at which the ASP, PC and author gave evidence, and the medical report was considered. The High Court concluded that the confession was admissible, pursuant to section 16(1) of the PTA, which renders admissible any statement made before a police officer not below the rank of an ASP, provided that it is not found to be irrelevant under section 24 of the Evidence Ordinance. Section 16(2) of the PTA put the burden of proof that any such statement is irrelevant on the accused. **(4)** The Court did not find the confession irrelevant, despite defence counsel's motion to exclude it on the grounds that it was extracted from the author under threat.

2.11 According to the author, the High Court gave no reasons for rejecting the medical report despite noting itself that there were "injury scars presently visible on the [author's] body" and acknowledging that these were sequels of injuries "inflicted before or after this incident." In holding that the confession was voluntary, the High Court relied upon the author's failure to complain to anyone at any time about the beatings, and found that his failure to inform the Magistrate of the assault indicated that he had not behaved as a "normal human being." It did not consider the author's testimony that he had not reported the assault to the Magistrate for fear of reprisals on his return to police custody.

2.12 On 29 September 1995, the High Court convicted the author on all five counts, and on 4 October 1995, sentenced him to 50 years imprisonment. The conviction was based solely on the alleged confession.

2.13 On 9 October 1995*,* the author appealed to the Court of Appeal, seeking to set aside his conviction and sentence. On 6 July 1999, the Court of Appeal affirmed the conviction but reduced the sentence to a total of 35 years. On 4 August 1999, the author filed a petition for special leave to appeal in the Supreme Court of Sri Lanka, on the ground that certain matters of law arising in the Court of Appeal's judgment should be considered by the Supreme Court. **(5)** On 28 January 2000, the Supreme Court of Sri Lanka refused special leave to appeal.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as he was convicted by the High Court on the sole basis of his alleged confession, which is alleged to have been made in circumstances amounting to a violation of his right to a fair trial. Basic procedural guarantees that safeguard the reliability of a confession and its voluntariness were omitted in this case. In particular, the author submits that his right to a fair trial was breached by the domestic courts' failure to take into consideration the absence of counsel and the lack of interpretation while making the alleged confession, and the failure to record the confession or to employ any other safeguards to ensure that it was given voluntarily. The author submits that the appellate courts' failure to consider these issues is inconsistent with the right to a fair trial and argues that the trial court's failure to consider other exculpatory evidence, in preference to reliance on the confession, is indicative of its lack of impartiality and the manifestly arbitrary nature of the decision. He adds that it was incumbent upon the appellate courts to intervene in this situation where evidence was simply disregarded.

3.2 The author claims that the delay of four years between his conviction and denial of leave to appeal to the Supreme Court amounted to a violation of article 14, paragraph 3(c). He claims a violation of article 14, paragraph 3(f), as he was not provided with a qualified and *external* interpreter when he was questioned by the police. He could neither speak nor read Sinhalese, and without an interpreter was unable adequately to understand the questions put to him or the statements, which he was allegedly forced to sign.

3.3 The author claims that reliance on his confession, in the given circumstances, and in a situation in which the burden was on him to prove that the confession was

not made voluntarily, rather than on the prosecution to prove that it was made voluntarily, amounts to a violation of his rights under article 14, paragraph 3(g). To him, this provision requires that the prosecution prove their case without resort to evidence "obtained through coercion or oppression in defiance of the will of the accused," and prohibits treatment, which violates the rights of detainees to be treated with respect for the inherent dignity of the human person. **(6)** He invokes the Committee's General Comment No. 20, which states that "the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment", and observes that measures required in this respect would include, *inter alia*, provisions against incommunicado detention, and prompt and regular access to lawyers and doctors. **(7)**

3.4 The author claims a violation of article 14, paragraph 2, as, in light of the existence of the confession, which was considered a voluntary one, the onus was placed on the author to establish his innocence and therefore was not treated as innocent until proven guilty as required by this provision. The author claims that section 16(2) of the PTA shifts the burden on the accused to prove that any statement, including a confession, was *not* made voluntarily and therefore should be excluded as evidence, and as such is itself incompatible with article 14, paragraph 2. In particular, where the confession was elicited without safeguards and with complaints of torture and ill-treatment, the application of section 16(2) of the PTA amounts to a violation of article 14, paragraph 2. The author claims a violation of article 14, paragraph 5, because of the decision of the Court of Appeal to uphold the conviction despite the abovementioned "irregularities".

3.5 Article 7 is said to have been violated with respect to the treatment described in paragraphs 2.1 and 2.3 above. On account of *ratione temporis* considerations (see para.3.11), the author submits that the torture is principally relevant to the fair trial issues, addressed above. However, in addition, it is submitted that there is a continuing violation of the rights protected by article 7, insofar as Sri Lankan law provides no effective remedy for the torture and ill-treatment to which the author was already subjected. The author submits that, both through its law and practice, the State party condones such violations, contrary to article 7, read together with the positive duty to ensure the rights protected in article 2, paragraph 1, of the Covenant.

3.6 The author claims that the decision to admit the confession, obtained through alleged violations of his rights, and to rely on it as the sole basis for his conviction, violated his rights under article 2, paragraph 1, as the State party failed to "ensure" his Covenant rights. It is also claimed that the application of the PTA itself violated his rights under articles 14, and 2, paragraph 1.

3.7 The author claims a violation of article 2, paragraph 3, read together with articles 7 and 14, as the constitutional bar to challenging sections 16 (1) and (2) of the PTA effectively denies the author an effective remedy for the torture to which he was subjected and his unfair trial. The PTA provides for the admissibility of extra-judicial confessions obtained in police custody and in the absence of counsel, and places the burden of proving that such a confession was made "under threat" on the accused. **(8)** In this way, the law itself has created a situation where rights under article 7 may be violated without any remedy available. The State must enforce the prohibition on torture and ill-treatment, which includes taking "effective legislative,

administrative, judicial and other measures to prevent torture in any territory under its jurisdiction". **(9)** Thus, if in practice legislation encourages or facilitates violations, then at a minimum this falls foul of the positive duty to take all necessary measures to prevent torture and inhuman punishment. The author claims a separate violation of article 2, paragraph 3, alone, as the explicit ban under Sri Lankan law on constitutional challenges to enacted legislation prevented the author from challenging the operation of the PTA.

3.8 The author claims that the trial and appellate courts' failure to exclude the author's alleged confession, despite its having been made in the absence of a qualified and independent interpreter, amounted to a breach of his right not to be discriminated against under article 2, paragraph 1, read together with article 26. He claims that the application of the PTA resulted in, and continues to cause, indirect discrimination against members of the Tamil minority, including himself.

3.9 The author claims a violation of article 14, paragraph 3(c), in relation to cases nos. 6823/94 and 6824/94, as he was detained pending trial for over seven years since his initial indictments (eight since his arrest), and had not been tried on the date of submission of his communication.

3.10 The author submits that he has exhausted domestic remedies, as he was denied leave to appeal to the Supreme Court. As regards constitutional remedies, he notes that the Sri Lankan Constitution (article 126(1)) only permits judicial review of executive or administrative action , it explicitly prohibits any constitutional challenge to legislation already enacted (article 16, article 80(3) and article 126(1)). **(10)** The courts have similarly held that judicial review of judicial action is not permissible. **(11)** Thus, he was unable to seek judicial review of any of the judicial orders applicable to his case, or to challenge the constitutionality of the provisions of the PTA, which authorized his detention pending trial (in respect of Cases nos. 6823/94 and 6824/94), the admissibility of his alleged confession, and the shifted burden of proof regarding the admissibility of the confession.

3.11 The author argues that the communication is admissible *ratione temporis.* In respect of Case no. 6825/94, the Court of Appeal's judgment of 6 July 1999, which upheld the author's conviction, and the Supreme Court of Sri Lanka's denial of leave to appeal, on 28 January 2000 refusing leave to appeal, were both given after the First Optional Protocol came into force for Sri Lanka. He submits that the right to a fair trial comprises all stages of the criminal process, including appeal, and the due process guarantees in article 14 apply to the process as a whole. The alleged violations of the rights protected under article 14, by the Court of Appeal, are the primary basis for this communication. His claims are said to be admissible *ratione temporis* inasmuch as they relate to continuing violations of his rights under the Covenant. He argues that the denial of a right to a remedy in relation to the claims under article 2, paragraph 3, read together with articles 7 and 14 (para. 3.7), continues. As to his claims under article 14, the author remains incarcerated without prospect of release or retrial, which amounts to a continuing violation of his right not to be subjected to prolonged detention without a fair trial. With respect to Case nos. 6823/94 and 6824/94, the author submits that he has remained incarcerated pending trial for a total of eight years at the time of submission of his communication, three of which were after the entry into force of the Optional Protocol.

3.12 Regarding a remedy, the author submits that release is the most appropriate remedy for a finding of the violations alleged herein, as well as the provision of compensation, pursuant to article 14, paragraph 6, of the Covenant.

The State party's submissions on admissibility and merits

4.1 By submission of 4 April 2002, the State party argues that the communication is inadmissible *ratione personae*. It submits that it did not receive a copy of the power of attorney and if it were to receive same it would have to check its "validity and applicability". Even if the authorisation were presented to the State party, it submits that an author must personally submit a communication unless he can be prove that he is unable to do so. The author provided no reason to demonstrate that he is unable to present such an application himself.

4.2 The State party argues that the author did not exhaust domestic remedies. Firstly, he could have requested the President for a pardon, to grant any respite of the execution of sentence, or to substitute a less severe form of punishment, as he is empowered to do under article 34(1) of the Constitution. Secondly, he could also have applied to the Supreme Court under article 11 of the Constitution, which prevents torture or other cruel, inhuman or degrading treatment or punishment, about his allegations of torture by army personnel and police officers. Such action would constitute "executive action" in terms of articles 17 and 26 of the Constitution. **(12)** If the Supreme Court had found that the author was subjected to torture, it could have made a declaration that his rights under article 11 had been violated, ordered payment of compensation by the State, payment of costs of the legal proceedings and, if warranted, ordered the immediate release of the author.

4.3 Thirdly, the State party submits that the author could have complained to the police, alleging that he was subjected to torture as defined by section 2, read together with section 12, of the Convention against Torture. Criminal proceedings could then have been instituted in the High Court by the Attorney General. Fourthly, he could have instituted criminal proceedings directly against the perpetrators of the alleged torture in the Magistrates Court, pursuant to section 136(1) (a) of the Code of Criminal Procedure Act (No. 15 of 1979). If the Supreme Court had found that the author was subjected to torture or if criminal proceedings had been instituted against the alleged perpetrators, he would either not have been indicted or criminal proceedings, already instituted, would have been terminated.

4.4 With respect to the complaint that his rights under article 14, paragraph 3(c), were violated as he was detained pending trial in Cases Nos. 6823 and 6825, both of which have not yet come to trial, the State party submits that the author could have petitioned the Supreme Court, and complained of a violation, by "executive action" of his "fundamental rights", guaranteed by articles 13 (3), and/or (4), of the Constitution. Such a finding by the Supreme Court could have led to the indictments being quashed or the author's release.

4.5 In its merits submission of 20 November 2002, the State party denies that any of the author's rights under the Covenant were violated or that any provisions of the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 (which are promulgated under the Public Security Ordinance) or the PTA violate the

Covenant. With respect to the claims under article 14, it submits that the author received a fair and public hearing before a competent, independent and impartial tribunal established by law; he was afforded the presumption of innocence,which is secured under domestic law and recognised as a constitutional right.

4.6 On the issue of access to an interpreter, the State party submits that a person conversant in both Tamil and Sinhalese was present when the author's confession was recorded. This translator was called by the prosecution as a witness during the trial, during which the author had the opportunity to cross-examine him and also to test his knowledge and competency. The State party submits that it was only after this evidence was recorded, during the *voir dire* hearing, that the Court accepted the confession as part of the evidence in the trial. It adds that the author had the free assistance of an interpreter conversant in Tamil during the trial and was also represented by a lawyer of his choice, who was also conversant in Tamil.

4.7 The State party submits that the author had the right to remain silent, or to make an unsworn statement from the dock or to give sworn evidence from the witness stand which could be cross-examined. It denies that he was compelled to testify at trial, to testify against himself or to confess guilt. Rather he elected to give evidence and on doing so the Court was entitled to consider such evidence in arriving at its verdict. The State party explains that under the Sri Lankan Evidence Ordinance, a statement made to a police officer is inadmissible, but under the PTA, a confession made to a police officer not below the rank of ASP is admissible, provided that such statement is not irrelevant under section 24 of the Evidence Ordinance.**(13)** The voluntariness of such a statement or confession, before admission, may be challenged. Although the burden of proving its case, beyond a reasonable doubt, rests with the prosecution, the burden of proving that a confession was not made voluntarily lies with the person claiming it. According to the State party, this is consistent with "the universally accepted principle of law, namely, he who asserts must prove" and, the reliance on confessions does not amount to a violation of article 14, paragraph 3(g), of the Covenant, and is permissible under the Constitution. It argues that the burden on an accused to prove that a confession was made under duress is not beyond reasonable doubt but in fact is "placed very low", and requires the accused to "show only a mere possibility of involuntariness."

4.8 On the claim of torture, the State party submits that the trial court and the Court of Appeal made clear and unequivocal findings that these allegations were inconsistent with the medical report adduced in evidence, and that the author had failed to make such allegations to the Magistrate or to the police, prior to the trial.

4.9 On the claim of alleged discrimination with regard to the manner in which the confession made by the author was recorded and considered by the Court, the State party reiterates its arguments raised on the circumstances surrounding his confession, in paragraph 4.6 above. On the issue of a violation of article 14, paragraph 5, it notes that the author was afforded every opportunity to have his conviction and sentence reviewed by a tribunal according to law, and that he merely seeks to question the findings of fact made by the domestic courts before the Committee. Finally, the State party informs the Committee that, following the author's conviction in Case no. 6825/94, the charges in Case nos. 6823/94 and 6824/94 were withdrawn.

The author's comments

5.1 Regarding the State party's argument that the communication is inadmissible *ratione personae*, the author submits that the power of attorney was included in the submission, and notes that his imprisonment prevented him from submitting the communication personally. He adds that it is common practice for the Committee to accept communications from third parties, acting in respect of individuals incarcerated in prison.

5.2 On the issue of exhaustion of domestic remedies, the author submits that the obligation to exhaust all available domestic remedies does not extend to non-judicial remedies and a Presidential pardon which, as an extraordinary remedy, is based upon executive discretion and thus does not amount to an effective remedy, for the purposes of the Optional Protocol.

5.3 The author reaffirms he was unable to seek constitutional remedies in respect of any of the judicial orders or relevant legislation relating to the admissibility of the alleged confession, or detention pending trial, given that the Sri Lankan Constitution does not permit judicial review of judicial action, or of enacted legislation. Thus, he could not pursue constitutional remedies in respect of the decision of the domestic courts to admit the alleged confession, or domestic legislation which renders admissible statements made before the police and places the burden of proof regarding the irrelevance of such statements on the accused.

5.4 On whether the author could have sought to have the perpetrators of the alleged torture prosecuted, he submits that the obligation to exhaust domestic remedies does not extend to remedies which are inaccessible, ineffective in practice, or likely to be unduly prolonged. He recalls that the applicable laws do not conform to international standards and in particular to the requirements of article 7 of the Covenant. Consequently, remedies against torture are ineffective. The author did not file a criminal complaint that the alleged confession was extracted from him under torture, given his fear of repercussions while he remained in custody. He notes than when he placed these allegations on record, during the *voir dire* hearing before the High Court, no investigations were initiated.

5.5 On the issue of exhaustion of domestic remedies, in relation to the author's detention pending trial and the delay in trial, the author submits that only "available remedies" must be exhausted. There is no specific right to a speedy trial under the Constitution, and, to date, the courts have not interpreted the right to a fair trial as including the right to an expeditious trial. Furthermore, the Constitution explicitly provides for the possibility of detention pending trial and, in any event, stipulates that constitutional remedies are not applicable to judicial decisions, for example when a court decides to grant frequent adjournments at the request of the prosecution, leading to trial delays.

5.6 On the merits, the author reiterates the arguments in his initial communication. With respect to the information provided by the State party on Case Nos. 6823/94 and 6824/94, the author confirms that the charges relating to the former case have been withdrawn and therefore "provides no further submissions in respect of these proceedings". However, no information is available on whether the charges in the

latter case have been dropped, and the author submits that he may still be brought to trial on this charge.

Issues and proceedings before the Committee

Consideration of Admissibility

6.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

6.2 As to the question of standing and the State party's argument that author's counsel had no authorisation to represent him, the Committee notes that it has received written evidence of the representative's authority to act on the author's behalf and refers to Rule 90 (b) of its Rules of Procedure, which provides for this possibility. Thus, the Committee finds that the author's representative does have standing to act on the author's behalf and the communication is not considered inadmissible for this reason.

6.3 Although the State party has not argued that the communication is inadmissible *ratione temporis*, the Committee notes that the violations alleged by the author occurred prior to the entry into force of the Optional Protocol. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the Covenant. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations of the State party. **(14)** The Committee observes that although the author was convicted at first instance on 29 September 1995, i.e. before the entry into force of the Optional Protocol for the State party, the judgement of the Court of Appeal upholding the author's conviction, and the Supreme Court's order refusing leave to appeal were both rendered on 6 July 1999 and 28 January 2000, respectively, after the Optional Protocol came into force. The Committee considers the appeal courts decision, which confirmed the trial courts conviction, as an affirmation of the conduct of the trial. In the circumstances, the Committee concludes that it is not precluded *ratione temporis* from considering this communication. However, as to the author's claims under article 26, article 2, paragraph 1 alone and read together with article 14, and his claim under article 9, paragraph 3, relating to his automatic remand in detention without bail, the Committee finds these claims inadmissible *ratione temporis*.

6.4 With respect to the State party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee reiterates its previous jurisprudence that such pardons constitute an extraordinary remedy and as such are not an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 Having regard to the author's claim of a violation of article 7 and considering it as limited to torture raising fair trial issues, the Committee notes that this issue was considered by the Appellate Courts and dismissed for lack of merit. On this basis, and considering that the author was refused leave to appeal to the Supreme Court, the Committee finds that the author has exhausted domestic remedies.

6.6 As to the claim of a violation of article 14, paragraph 5, as the Court of Appeal upheld the author's conviction, despite alleged "irregularities" during the trial, the Committee notes that this provision provides for the right to have a conviction and sentence reviewed by a higher tribunal. As it is uncontested that the author's conviction and sentence were reviewed by the Court of Appeal, the fact that the author disagrees with the outcome of the court's decision is not sufficient to bring the issue within the scope of article 14, paragraph 5. Consequently, the Committee finds that this claim is inadmissible *ratione materiae*, under article 3 of the Optional Protocol.

6.7 The Committee therefore proceeds to the consideration of the merits of the communication regarding the claims of torture as limited in paragraph 6.4 above and unfair trial - article 14 alone and read with article 7.

Consideration of the Merits

7.1 The Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the claim of a violation of article 14, paragraph 3 (f), due to the absence of an *external* interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing only, a right which was granted to the author. **(15)** However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers – the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

7.3 As to the delay between conviction and the final dismissal of the author's appeal by the Supreme Court (29 September 1995 to 28 January 2000) in Case no. 6825/1994, which has remained unexplained by the State party, the Committee notes with reference to its *ratione temporis* decision in paragraph 6.3 above, that more than two years of this period, from 3 January 1998 to 28 January 2000, relate to the time after the entry into force of the Optional Protocol. The Committee recalls its jurisprudence that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay. **(16)** In the circumstances, the Committee considers that the delay in the instant case violates the author's right to review without delay and consequently finds a violation of article 14, paragraphs 3(c), and 5 of the Covenant.

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3 (g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt. **(17)** The Committee considers that it is implicit in this principle that *the prosecution* prove that the confession was made without duress. It further notes that pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant.

7.5 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 14, paragraphs 1, 2, 3, (c), and 14, paragraph (g), read together with articles 2, paragraph 3, and 7 of the Covenant.

7.6 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including release or retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.

7.7 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about

the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Notes

1. Section 9(1) of the PTA provides as follows: "Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time."

2. Section 15(2) of the PTA (as amended by Act. 10 of 1982) provides as follows: "Upon the indictment being received in the High Court against any person in respect of any offence under this Act or any offence to which the provisions of section 23 shall apply, the Court shall, in every case, order the remand of such person until the conclusion of the trial." The author makes no specific claim with respect to this issue.

3. Section 10 of the PTA provides as follows: "An order made under section 9 shall be final and shall not be called into question in any court or tribunal by way of writ or otherwise."

4. Section 16 of the PTA provides as follows: "(1) Notwithstanding the provisions of any other law, where any person is charged with an offence under this Act, any statement made by such person at any time, whether - (a) it amounts to a confession or not; (b) made orally or reduced to writing; (c) such person was or was not in custody or presence of a police officer; (d) made in the course of an investigation or not; (e) it was or was not wholly or partly in answer to any question, may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance: Provided however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent."(2) The burden of proving that any statement referred to in subsection (1) is irrelevant under Section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant. (3) Any statement

admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1)."(emphasis added).

The author notes that section 17 of the PTA further provides that sections 25, 26 and 30 of the Evidence Ordinance, which include additional restrictions on the admissibility of confessions, are not applicable in any proceedings under the PTA. Section 24 of the Evidence Ordinance provides as follows: "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

5. Article 128 of the Constitution permits appeal to the Supreme Court only on matters of law.

6. Saunders v UK (1996) 23 EHRR 313, CCPR General Comment No. 13, of 13 April 1984; Kelly v Jamaica, Case no.253 /87, Views adopted on 4 August 1991.

7. CCPR General Comment No. 20, of 10 March 1992.

8. In this respect, the author notes that the recent report of the United Nations Special Rapporteur on Summary and Extra Judicial Executions refers to repeated allegations of confessions being extracted under torture from persons accused of offences under the PTA Report by Special Rapporteur, Mr. Bacre Waly Ndiaye, Addendum, submitted pursuant to Commission on Human Rights resolution 1997/61, E/CN.4/1998/68/Add.2, 12 March 1998.

9. Article 2, paragraph 1, of the Convention against Torture.

10. Article 126(1), Constitution of Sri Lanka provides as follows: "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right." (emphasis added). Article 16 (1) of the Constitution provides: "All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter [Chapter III on Fundamental Rights]." Further, Article 80(3) Constitution of Sri Lanka provides: "No court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of [any Act of Parliament] on any ground whatsoever."As a former Chief Justice of Sri Lanka, Justice S. Sharvananda, has commented (see Justice S. Sharvananda, *Fundamental Rights in Sri Lanka*, (Sri Lanka: 1993) at p. 140): "Article 80(3) vests enacted law with finality in the sense that the validity of an Act of Parliament cannot be called in question in any court or tribunal. In this Constitutional scheme, there is no room for the introduction of the concept of 'due process of law' or notions of reasonableness of the law and natural justice as has been done by the Supreme Court of India in Maneka Gandhi's case A.I.R. (1978) SC

597 at 691-692. As stated earlier, in Sri Lanka, it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his liberty contrary to the court's notions of justice or due process."

11. *Velmurugu v AG* (1981) 1 SLR 406; *Saman v Leeladasa* SC Appl. No. 4/88 SC Minutes 12 December 1988.

12. Article 17 provides that, "every person shall be entitled to apply to the Supreme Court, as provided by article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this chapter". Article 26 provides that, "the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by the executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."

13. Section 28 provides that, "The provisions of this Act (Prevention of Terrorism Act) shall have effect not withstanding anything contained in any other written law and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other written law the provisions of this Act shall prevail".

14. E. and A. K. v. Hungary, Case no. 520/1992, Decision of 7 April 1994, and K. V. and C. V. v. Germany, Case no. 568/1993, Decision of 8 April 1994, Holland v. Ireland, Case no. 593/1994, Decision of 26 October 1996.

15. B.d.B. v. Netherlands, Case no. 273/1988, Decision of 30 March 1989, and Yves Cadoret v. France, Case no. 221/1987, Decision of 11 April 1991 and Herve Le Bihan v. France, Case no. 323/ 1988, Decision of 9 November 1989.

16. Lubuto v. Zambia, Case no. 390/1990, Views adopted on 31 October 1995; Neptune v. Trinidad and Tobago, Case no. 523/1992, Views Adopted on 16 July 1996; Sam Thomas v Jamaica, Case no. 614/95, Views adopted on 31 March 1999; Clifford McLawrence v Jamaica, Case no.702/96, Views adopted on 18 July 1997;Johnson v. Jamaica, Case no. 588/1994, Views adopted on 22 March 1996.

17. Berry v. Jamaica, Case no. 330/1988, Views adopted on 4 July 1994.

THE JUDGEMENT OF THE SUPREME COURT

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. SpL(LA) No. 182/99	Nallaratnam Singarasa
	Presently serving a term of imprisonment
C.A. Appeal No. 208/95	Kalutara
H.C. Colombo 6825/94	
	<u>Petitioner</u>
	Vs.
	The Hon. Attorney General
	Attorney General's Department
	Colombo 12
	<u>Respondent</u>

BEFORE:	Sarath N Silva,	Chief Justice
	Nihal Jayasinghe	Judge of the Supreme Court
	N.K. Udalagama	Judge of the Supreme Court
	N.E. Dissanayake	Judge of the Supreme Court
	Gamini Amaratuga	Judge of the Supreme Court

COUNSEL: R.K W Goonesekera with Savithri. Goonesekera, Sunya Wiekremasinghe, V S Ganeshalingam and Saliya Edirisignhe intd by E Mariampillai, for the Petitioner.

Yasatha Kodagoda, D.S.G. with Harshika de Silva S.C. for the Attorney General

ARGUED ON: 5.12.2005

WRITTEN SUBMISSIONS: Petitioner – 25.1.2006
Respondent – 24.2.2006

DECIDED ON: 15.09.2006

<u>Sarath N Silva, C.J.</u>

The Petitioner was indicted for trial before the High Court on five charges that he, between 1.5.90 and 31.12.1991 at Jaffna, Kankasanthurai and Elephant Pass together with Asoka Palraj, Sornam, Pottu Amman; Dinesh, Susikumar and others unknown to the prosecution, conspired to overthrow the lawfully elected Government by means other than lawful and in order to accomplish the said conspiracy attacked the Army camps in Jaffna Fort, Palaly and. in Kankesanthurai.

The charges were under the Emergency Regulations and the Prevention of Terrorism (Temporary Provisions) (Act No. 48, of I979 as amended.

After trial the High Coat convicted the Petitioner on all the charges and sentenced him to terms of 10 years R.I., on each to run consecutively. The' Petitioner appealed from the said conviction and sentence to the Court: of Appeal. The' appeal was argued on 23.6.1999 and 6.7. 1999, and written submissions were tendered. Upon a consideration of the matters raised in the appeal the Court of Appeal dismissed the Petitioner's appeal on 6.7.1999, subject to a reduction of sentence on each charge to 7 years R.I. to run consecutively. The Petitioner sought Special Leave to from the judgment of the Court of Appeal and a Bench of this Court composing of Mark Fernando, J, Wadugodapitiya, J, and Wijetunga J, having considered the submissions of counsel refused special leave to appeal on 28.1.2000.

The Petitioner has filed this application on 16.8.2005 for revision and/or review of the judgment of this Court delivered on 28.1.2000, and to set aside the conviction and Sentence imposed by the High Court and affirmed by the Court of Appeal respectively. The application is made on the basis of and pursuant to the findings of the Human Rights Committee at Geneva established under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2000' made under Optional' Protocol to the Covenant.

It is appropriate at this stage to refer to the International Covenant on Civil and Political Rights (the Covenant) adopted by the General Assembly of the United Nations on 16.12.1966, to which Sri Lanka acceded on 11.6.1980. The Covenant contains certain rights as laid down n the Universal Declaration of Human Rights which the fundamental right contained in Articles 10 to 14 of the Covenant states as follows:

1. "Each party to the present Covenant undertakes to respect and ensure to all individuals within' its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status;
2. Where not' already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Thus it is seen that the Covenant is based on the premise of legislative or other measures being taken by each State Party "in accordance with its constitutional processes……to give effect to the rights recognized in the covenant". In Sri Lanka fundamental rights have been guaranteed by the constitution of. 1972 and in the present Constitution and enforced by this Court, even prior to ratification of the Covenant in 1980. The Government has not considered it necessary to make any amendment to the provisions in the Constitution as to fundamental rights and the measures for their enforcement as contained in the Constitution, presumably on the basis that these provisions are an adequate compliance with the requirements Article 2 of the Covenant referred to above.

The general premise of the Covenant as noted above is that individuals within the territory of a State Party would derive the benefit and the guarantee of rights as contained therein through the medium of the legal and constitutional processes that are adopted within such State Party. This premise of the Covenant is in keeping with the framework of our Constitution to which reference would be made presently, which is based on the perspective of municipal law and international law, being two distinct systems or the dualist theory as generally described. The classic distinction of the two theories characterized as monist and dualist is that in terms of the monist theory internationa1 law and municipal law 'constitute

single legal system. Therefore the generally recognized rules of international law constitutes an integral part of the municipal law and produce direct legal effect without any further law being enacted within a country. According to the dualist theory international law and municipal law are two separate and independent legal systems, one national and the other international. The latter, being international law regulates relations between States based on customary law and treaty law, Whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution.

The constitutional premise of the United Kingdom (U K) adheres to the dualist theory. This was brought into sharp focus when UK together with Demark and Ireland signed the Treaty of Accession to be a party of the European Community in 1972. Since membership of the Community presupposes a monist approach, which entails direct and immediate internal effect of "Community treaties" without the necessity of their transformation into municipal law, the UK Parliament enacted the European Communities Act in 1972.

Section 2 of the Act which in effect converts UK to a monist system in the area of European Community Law reads as follows:

"All such rights, powers, liabilities and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in laws and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right" and similar expressions shall & read as referring to one to which this subsection applies."

The Preliminary Note in Ha1sbury's Statutes exemplifies the distinction between a dualist and monist constitutional premise in relation to the contents of sections 1 and 2 of the European Communities Act 1972 as follows:

Sections 1, 2 determine the position of Community treaties in the British legal system It was necessary to do so because following the "dualist theory international treaties to which the United Kingdom is a party bind merely the Crown qua state but have to be implemented by statute in order to have internal effect The membership of the community presupposes a 'monist" approach which entails direct and immediate internal effect of treaties without the necessity of their transformation into municipal law. By virtue of S. 2(1) the pre:-accession Community treaties, became part of the United Kingdom Law. Post accession treaties, on the other hand become as they stand effective by virtue of Orders in Council when approved by resolution of each House of Parliament (S 1(3))" (Halbury Statutes – Fouth Executive Director. Vol. 17 p32).

Thus 'community rights' become effective in the U K through the medium of the 1972 Act and other municipal legislation but the continued adherence to the dualist theory in the U.K. is clearly seen in the following dictum of Lord Denning:

"Thus far I have assumed that our Parliament whenever it passes legislative intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an A - with the intention of repudiating the Treaty or any provisions in it - or intentionally of acting inconsistently with it – and says so in express terms - then I should have thought that it would be the duty of our courts to follow the statute (Macarthys vs Smith) (1979) 3 All ER 325 at 328.

In this background I would refer to the relevant provisions of our Constitution. Articles 3 an 4 of the Constitution are as follows:

3. 'In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the power of government fundamental rights and the franchise".
4. "The sovereignty of the People shall be exercised and enjoyed in the following manner:

(a) the legislative power of the People Shall be exercised by Parliament consisting of elected representative of the People and by the People at a Referendum;
(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;
(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution or created and established by law, except in matters relating to the Privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law;
(d) the fundamental rights which are by the Constitution declared and recognised shall be respected secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and
(e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified be an elector as hereinafter provided, has his name entered in the register of electors.

Article 5 lays down that the territory of the Republic of Sri Lanka shall consist of twenty five administrative district set out in the first schedule and its territorial waters.

It is seen from these Articles forming its effective framework that our Constitution is cast in a classic Republican mould where Sovereignty within and in respect of the territory constituting one country, is reposed in the People. Sovereignty includes legislative, executive and judicial power, exercised by the respective organs of government for and in trust for the People. There is a functional separation in the exercise of power derived from the sovereignty of the People by the three organs of government, the executive, legislative and the judiciary. The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumcised by the Constitution and written law that derive its authority there from. This is a departure from the monarchical form of government such as the UK based on plenary power and omnipotence

For instance, the dicta of Megarry V-C that –

"….it is a fundamental principle of the English Constitution that Parliament is supreme. As a matter of law the courts of England recognize Parliament as being omnipotent in all save the power to destroy its omnipotence." (Manuel vs A.G. (1982 3 AER 786 at 795),

would not apply to the Parliament of Sri Lanka which exercises legislative power derived from the people whose sovereignty is inalienable as laid down in .Article 4(a) referred. Above.

The same applies to the exercise of executive power. There could be no plenary executive power that pertain to the Crown as in the U K and the executive power of the President is

derived from the People as laid down in Article 4(b). Hence the statement in Halsbury's Statute cited to above that –

international treaties to which the United Kingdom is a party bind in the Crown qua state but have to be implemented by statute in order to internal effect;"

has to be modified in its application to Sri Lanka to interpose the essential element constitutionality and should read as follows;

'internationa1 treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law would bind the Republic qua State but have to be implemented by statute enacted under the constitution to have internal effect.'

This limitation on the power of the executive to bind the Republic qua state is contained in Article 33 which lays down the power and functions of the President. The relevant provision being Article 33 (f) which reads as follows:

"to do all such acts and things; not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do". .

Thus, the President as Head of State is empowered to represent Sri Lanka and under customary International Law enter into a. treaty or accede to a Covenant, the contents of which is not inconsistent with the Constitution or written law. The limitation interposes the principle of lega1ity being the primary meaning of the Rule of Law, "that everything must be done according to law (Administrative Law by Wade and Forsyth - 9th Executive Director. Page 20).

In this background, I would examine the submissions that have been made. Counsel for the Petitioner contended that Sri Lanka acceded to Covenant (as 'referred to above) on. 11.6.1980 and to its Optional Protocol on 3.10.1997. The Petitioner produced the Declaration made by Sri Lanka upon accession to the Optional Protocol which would be reproduced later. The Petitioner' contends that pursuant to this Declaration he addressed a communication to the Human Rights Committee at Geneva alleging that the conviction and sentence entered and imposed by the High Court, affirmed by the Court of Appeal and the dismissal of his appeal by this Court is a violation of his rights set forth in the Covenant. That the Committee came to a finding forwarded to the Government that the conviction and sentence imposed "disclose violations of Article 14 paragraphs 1, 2, 3 and,paragraph 14(g) read together with Article 2 paragraphs 3 and 7 of the Covenant. The Committee came to a further finding that Sri Lanka as a 'State 'party is tinder an ob1igation to provide the Petitioner with an effective end appropriate remedy including release or retrial and compensation."

I pause at this point to note only two matters that require attention. They are:

i) the alternative .remedies specified by the Committee cannot be comprehended in the context of our court procedure. A release and compensation (to be sought in a separate civil action) predicate a baseless mala fide prosecution. Whereas a retrial is ordered when there is sufficient evidence but the conviction is flawed by a serious procedural illegality. The High Court convicted the Petitioner on the basis of his confession after a full voir dire inquiry as

to its voluntariness. If the confession is adequate to base a conviction, a retrial (as contemplated by the Committee) would be a superfluous re-enactment of the same process. ii) The Petitioner has been convicted with having conspired with others to overthrow the lawfully elected Government of Sri Lanka and for that purpose attacked several Army camps. The offences are directly linked to the Sovereignty of the People of Sri Lanka and the Committee at Geneva, not linked with the Sovereignty of the People has purported to set aside the orders made at all three levels of Courts that exercise the judicial power of the People of Sri Lanka.

The objection of the Deputy Solicitor General to the application is based on the matter stated at (ii) above He submitted that judicial power forms part of the Sovereignty of the People and could be exercised in terms of Article 4 (c) of the Constitution, cited above, only by Courts, Tribunals or institutions established or recognized by the Constitution or by law. This basic premise is elaborated in Article 105(1) which reads as follows:

"Subject to the provisions pf the Constitution the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –

a) the Supreme Court of the Republic of Sri Lanka;
b) the Court of Appeal of the Republic of Sri Lanka;
c) the High Court of the Republic of Sri Lanka and such other Courts of First Instance, Tribunals or such institutions as Parliament may from time to time ordain and establish.

The resulting position is that the Petitioner cannot seek to "vindicate and enforce' his rights through the Human Rights Committee at Geneva, which is not reposed with judicia1 power under our Constitution. A fortiori it is submitted that this Court being "the highest and final Superior Court of record in the Republic" in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the Petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution.

On the other hand Counsel for the Petitioner contended that Sri Lanka acceded to the Optional Protocol in 1997 and made the Declaration cited above and the Petitioner invoked the jurisdiction of the Committee at Geneva in the exercise of the rights granted by the Declaration. Therefore he has a legitimate expectation that the findings of the Committee will be enforced by Court. In the alternative it was submitted that this Court should recognize the findings and direct the release of the Petitioner from custody. The respective arguments of Counsel run virtually on parallel tacks, one based on legitimate expectation and the other on unconstitutionality They converge at the basic issues as to the legal effect of the accession to the Covenant in l980, the accession to the Optional Protocol and the Declaration made in 1997. These issues have to be necessarily considered in the framework of our Constitution which adheres to the dualist theory as revealed in the preceding analysis, the sovereignty of the People of Sri Lanka and the limitation of the power of the President as contained in Article 4(1) read with Article 33(1) in the discharge of function for the Republic under customary international law.

The President is not the repository of plenary executive power as in the case of the Crown in the U K. As it is specifically laid down in the basic Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the people. The President exercises the executive power of the People and is empowered to act for the Republic under Customary International Law and enter into treaties and accede

to international covenants However, m the light of the specific limitation in Article 33(f) cited above such acts cannot be inconsistent with the provisions of the Constitution or written law. This limitation is imposed since the President is not the repository of the legislative power of the People which power in terms of Article 4(a) exercised by Parliament and by the People at a Referendum. Therefore when the President in terms of customary international law acts for the Republic and enters into a treaty or accedes to a covenant the content of which is not inconsistent with the Constitution or the written law, the act of the President will bind the Republic qua State But, such a treaty or a covenant has to be implemented by the exercise of legislative power by Parliament and where found to be necessary by the People at a Referendum to have internal effect and attribute rights and duties to individuals. This is in keeping with the dualist theory which underpins our Constitution as reasoned out in the preceding analysis.

On the other hand, where the President enters into a treaty or accedes to a Covenant the content of which is "inconsistent with the provisions of the Constitution or written law" it would be a transgression of the limitation in Article 33(f) cited above and ultra vires. Such act of the President would not bind the Republic qua state. This conclusion is drawn not merely in reference to the dualist theory referred to above but in reference to the exercise of governmental power and the mutations thereto in the context of Sovereignty as laid down in Articles 3, 4 and of 33(f) of the Constitution.

In this background I would now revert to the accession to the Covenant 1980 and the Optional Protocol in 1997.

As noted in the preceding analysis, the Covenant is based a the premise of legislative or other measures being taken by each State Party "accordance with its constitutional processes …to give effect to the rights recognized in the……Covenant" (Article 2) Hence the act of the then President in 1980 in acceding to the Covenant is not per se inconsistent with the provisions of the Constitution or written law of Sri Lanka. The accession to the Covenant binds the Republic qua state But, no legislative or other measures were taken to give effect to the rights recognized in the Convention as envisaged in Article 2 Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka.

It appears from the material pleaded by the Petitioner that in 1997 the then President as Head of State and of Government acceded to the Optional Protocol and made a Declaration as follows:

"The Government of the Democratic Socialist Republic of Sri Lanka pursuant to Article (I) of the Optional Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement."

There are three basic components of legal significance in this Declaration relevant to the matters at issue –viz:

i) A conferment of the rights set forth in Covenant on an individual subject to jurisdiction of the Republic;
ii) A conferment of a right on an individual within the jurisdiction of the Republic to address a communication to the Human Rights Committee in respect of any violation of a right in the Covenant that results from acts, omissions, developments or events in Sri Lanka;
iii) A recognition of the power of the Human Rights ‵Committee to receive and consider such a communication of alleged violation of rights under the Covenant.

Components 1 and 2 amount to a conferment of Public Law rights. It is therefore a purported exercise of legislative power which comes within the realm of Parliament and the People at a Referendum as laid m Article 4(e) of the Constitution cited above. Article 76(1) of the Constitution reads as follows:

(1) Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power;
(2) It shall not be a contravention of the provisions of paragraph (1) of this Article for Parliament to make, in any law relating to public security, provision empowering the president to make emergency regulations in accordance with such law."

Therefore the only instance in which the Parliament could even by law empower the President to exercise legislative power is restricted to the making of regulations under the law re1ating to Public Security. It has not submitted the President had any authority from Parliament, post or prior to make the declaration cited above. Therefore, components 3 and 2 of the Declaration are inconsistent with the provisions of Article 3 read with Article 4(c) read with Article 75 (which lays down the law making power) of the Constitution.

Component 3 is a purported conferment of a judicial power on the Human Rights Committee at Geneva "to vindicate a Public Law right of an individual within the Republic in respect of acts that take place within the Republic is inconsistent with the provisions of Articles 3 read with 4(c) and 105(1) of the Constitution.

Therefore the accession to the Optional Protocol in 1997 by the then President and Declaration made wider Article 1 is inconsistent with the provisions of the Constitution specified above and is in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.

I wish to add that the purported accession to the Optional Protocol in 1997 is inconsistent with Article 2 of the Covenant which requires a State Party to take the necessary steps in accordance with its constitutional processes …..to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the …..Covenant." I cited the European Communities Act 1972 of the U K as an instance in point where steps were taken to give effect to a treaty obligation before the treaty came into force. No such steps were taken to give statutory effect to the rights in the Covenant. Without taking such measures, in 1991 the Optional Protocol was acceded to purporting to give a remedy through the Human Rights Committee in respect of the violation of rights that have not beep enacted to the law of Sri Lanka The maxim ubi Jus ibi Remedium postulates a. right being given in respect of which there is a remedy. No remedy is conceivable in law without a right.

In these circumstances the Petitioner cannot plead a legitimate expectation to have the findings of the Human Rights Committee enforced or given effect to by an order of this Court.

It is seen that the Government of Sri Lanka has in its response to the Human Rights Committee (produced by the Petitioner with his papers) set out the correct legal position in this respect, which roads as follows:

"The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or retrial of a convicted person after his conviction is confirmed by the highest appellate Court, the Supreme Court of Sri Lanka. Therefore, the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a retrial. The government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka."

If the provisions of the Constitution were adhered to the then President as Head of Government could not have acceded to the Optional Protocol in 1997 and made the Declaration referred to above The upshot of the resultant incongruity is a plea of helplessness on the part of the Government revealed in the response to the Human Rights Committee cited above, which does not reflect well on the Republic of Sri Lanka.

For the reasons stated above I hold that the Petitioner's application is misconceived and without any legal base.

The application is accordingly dismissed.

THE *SINGARASA* CASE: *QUIS CUSTODIET…*? – A TEST FOR THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT±

Nigel Rodley*

This Essay considers the 2006 Sri Lankan Supreme Court case, *Singarasa* v. *Attorney General*, which declared unconstitutional the State's eight-year-old accession to the Protocol permitting the Human Rights Committee to examine complaints of violation of the International Covenant on Civil and Political Rights (ICCPR). It places the decision in the context of the Committee's earlier findings of Covenant violations by Sri Lanka resulting from actions by the Court. This forms the basis of a discussion of problems of identifying questionable judicial conduct and the relevance of the *Bangalore Principles of Judicial Conduct*.

* * *

It is a great privilege to be able to contribute to this celebration of the work of

David Kretzmer, a personal friend as well as a valued colleague. David and I met in 1995 when he invited me to participate in a symposium on the issue of torture, at the Hebrew University, Jerusalem. Six years later we found ourselves colleagues on the U.N. Human Rights Committee; it thus seemed appropriate to choose a topic for this Essay that arises out of the work of the Committee.

* * *

I Introduction

In September 2006, the Supreme Court of Sri Lanka held that Sri Lanka's accession to the Optional Protocol to the International Covenant on Civil and Political Rights**1** was unconstitutional.**2** At one fell swoop, it precisely placed the Sri Lankan State in a condition of at least potential unlawfulness under international law. It also purported to deprive Sri Lankans of a right they had enjoyed since 1998, namely, to submit petitions "communications" to, and have them examined by, the Human Rights Committee established under the ICCPR.

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1 Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter OP].
2 *Nallaratnam Singarasa* v. *Attorney General*, S.C. SPL (LA) No.182/1999 (2006), reprinted in *LST Review* 17:227-228 (2006), pp.9-18.

This Essay examines the case which seems to be an example of judicial waywardness. It puts it in the context of two other Sri Lankan cases before the Human Rights Committee, in which the Committee had found violations of the ICCPR resulting from Supreme Court judgments. The cases together are taken as posing a difficult conceptual problem: at what point does the fundamentally important institution of judicial independence mutate into judicial despotism? Alternatively, the question may be framed thus: when does the inevitable elasticity that must be acknowledged to inhere in the judicial process of textual interpretation snap and leave us with the uncontrolled application of judicial caprice? A recently adopted international text, the *Bangalore Principles of Judicial Conduct*, is examined with a view to seeking guidance on how to approach the problem.

II The *Singarasa* Case

The case in question, *Nallaratnam Singarasa* v. *Attorney General*,**3** concerned a Petitioner who was serving a thirty-five-year prison sentence for terrorism-related offenses, consisting of attacks against military establishments and conspiracy to overthrow the government. The key evidence on which he was convicted in 1995 was an allegedly coerced confession which he claimed had been obtained in 1993 after four months' detention during which he was tortured. The Sri Lankan High Court held a *voir dire*, that is, a mini-trial or trial within the trial for the purpose of examining an allegation that a confession had been made involuntarily. However, unlike the practice in ordinary cases, where the burden of proof is on the prosecution to establish that the confession was made voluntarily (without "inducement, threat or promise"), under Section 16 of the Prevention of Terrorism Act (PTA) the burden of proof shifts to the defence. The Sri Lankan courts rejected the claim. They seemingly considered inconclusive a medical certificate that found, over a year after the confession, "injury scars presently visible" on Mr. Singarasa's body. There could evidently be no certainty as to the time the injuries were sustained. The High Court, in particular, is quoted as having been mainly influenced by the fact that Mr. Singarasa did not complain to anyone about the beatings at the time (when, for example, he was brought before a Magistrate after some 10 weeks *incommunicado* detention).

After having pursued his case unsuccessfully through the Sri Lankan courts, Singarasa availed himself of the right of individual petition to the Human Rights Committee under the Optional Protocol.**4** The Committee could not deal with the facts directly since the interrogation and conviction took place before the Optional Protocol came into force for Sir Lanka.**5** However, the Court of Appeal decision upholding the conviction (while reducing the sentence from 50 years to 35 years imprisonment) took place in 1999 and the Supreme Court denial of leave to appeal took place in 2000. Accordingly, the Committee could consider the issues dealt with in the Court of Appeal as falling within its jurisdiction *ratione temporis*.

The Committee found violations of several ICCPR provisions: Articles 14(1) (fair hearing) and 14(3)(f) (right to an interpreter), because of reliance on a confession made in the absence of an independent interpreter; 14(3)(c) (trial without delay) and 14(5) (right to review by higher tribunal), because of the nearly five years between conviction and final dismissal of appellate proceedings; and Article 14(3)(5) (right not to be compelled to testify against oneself), read together with Articles 2(3) (right to a remedy) and 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment). Addressing the crucially important

3 *Ibid*.
4 *Nallaratnam Singarasa* v. *Sri Lanka*, Communication No.1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004). The Human Rights Committee can only consider cases after domestic remedies have been exhausted (OP, *supra* note 1, Art. 5(2)(b)). In this case the conviction in the High Court was upheld by the Court of Appeal—sentence reduced from 50 to 35 years—and leave to appeal to the Supreme Court was denied by the latter Court. See: R.K.W. Goonesekere, "The Singarasa Case—A Brief Comment", *LST Review* 17:227-228 (2006), pp.25-6 (the author was lead Counsel for Singarasa before the Supreme Court); John Cerone, "Comment on the Singarasa Case Relating to the Status of the International Covenant on Civil and Political Rights in Sri Lankan Law", *ibid*., p.27.
5 Although Sri Lanka was a Party to the ICCPR since 1980, the consistent practice of the Committee was that the Optional Protocol does not extend to acts occurring after the applicability of the Covenant for a State Party, but before the OP is in force for the same State Party (*Aduayom* v. *Togo*,

compelled testimony issue, the Committee acknowledged an argument made by the government that the burden of proof was in fact "very low", with "a mere possibility of involuntariness" being enough to sway the Court in favour of the accused. However, it noted that the Court had drawn an adverse inference from the absence of complaint by Mr. Singarasa and this was "manifestly unsustainable" in the light of his expected return to the same detention. The "appropriate remedy" should include "release or retrial and compensation."**6**

What turned a routine Committee case into a *cause célèbre* was the decision of Mr. Singarasa, armed with the Committee's "views", to seek relief before the Supreme Court of Sri Lanka. It should be understood from the beginning that the brief for the Petitioner did *not* argue that the Committee's views were *per se* enforceable in the Sri Lankan courts.**7** After all, as the Committee itself has accepted, States are not required to incorporate the ICCPR into their national legislation, so as to make its provisions directly justiciable in their Courts.**8** Since Sri

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Communication No.422-24/1990, U.N. Doc. CCPR/C/51/D/422-24/1990 (1996), despite a compelling dissent by Committee member Mr. Fausto Pocar). Since new States Parties may expect to rely on the established practice of the Committee in respect of such procedural matters, the Committee is unlikely to revisit the issue: see, Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant On Civil And Political Rights—Cases, Materials, and Commentary* (2nd ed. 2004), pp.56-57; Manfred Nowak, *U.N. Covenant On Civil And Political Rights—CCPR Commentary* (2nd rev. ed. 2005), pp.854-56. These two commentaries provide helpful guidance on the interpretation of the ICCPR in general and the practice of the HRC in particular. A valuable treatise on the early work of the HRC is found in Dominic McGoldrick, *The Human Rights Committee—Its Role in the Development of the International Covenant on Civil and Political Rights* (with an updated introduction, 1994).

6 *Singarasa* v. *Sri Lanka*, *supra* note 4, Sections 7.4-7.6. Also the Committee urged that the impugned sections of the Prevention of Terrorism Act should be "made compatible with the provisions of the Covenant" (*ibid.*).

7 The Petition is reproduced in *LST Review* 17:227-228 (2006), pp.1-8.

8 See, Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Section 13, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004): "Article 2, Section 2 ["obligation to take steps to give effect to Covenant rights in the domestic order]… does not require that the Covenant be directly applicable in the Courts, by incorporation of the Covenant into national law." The Committee does consider that incorporation might ensure "enhanced protection" and so urges all relevant States to consider incorporation. General Comments of the Committee are non-country-specific texts, based on the Committee's experience, aimed at advising States Parties and others of its understanding of the nature and scope of State obligations under the Covenant and the Optional Protocol.

Lanka is one of those "dualist" States that had not incorporated the ICCPR, there could have been no question of the ICCPR being enforceable in the Sri Lankan Courts. Nor did the Petitioner claim that the Committee's views were *per se* binding. The Petitioner's argument was subtler and more mainstream: it asked the Court to exercise its inherent powers of revision and/or review to address a situation in which the government had argued, in its response to the Committee's views, that the State did not have the "legal authority to execute the decision of the Human Rights Committee to release the convict or grant retrial". Such an argument was inconsistent with the idea that any branch of government, not just the

Executive, could engage the responsibility of the State[9] and so frustrated a "legitimate expectation" that the government would "consider itself bound to give effect" to the Committee's views.[10]

The reaction of the Respondent Attorney General was to deny that any inherent powers of revision/review the Court may have extended to reopening the case as finally disposed of by the Supreme Court in 2000. He then went on to accuse the Petitioner of unconstitutionally and unlawfully trying to persuade the Supreme Court that it is obliged to give effect to the Committee's views. Indeed, the Petitioner's argument amounted to "an interference with the independence of the judiciary" and even "a violation of the sovereignty of the people."[11] In sum, the Attorney General, who is the legal representative of the Government of Sri Lanka, which had in effect argued to the HRC that the Government's hands were tied because of the actions of the judicial branch, was now urging the Supreme Court to believe that the Petitioner (not the Government!) was threatening the independence of the Sri Lanka judiciary with his invitation to reopen the case.

The 'Alice in Wonderland' (or perhaps Alice Through the Looking Glass) reasoning did not, however, go as far as to question the validity of Sri Lanka's acceptance of the Optional Protocol. It merely sought to maintain, however inflexibly, the standard dualist *status quo*, namely, that there could be a violation of international law on the international plane from which the domestic legal system would be insulated. It took the powerful intellect of the Chief Justice of Sri Lanka to come to the unlitigated conclusion that Sri Lanka's very ratification of the Protocol was *ultra vires* and invalid.[12] He expatiated on traditional dualist doctrine, according to which treaties that are not incorporated into the internal law of the State are not enforceable in its Courts. Thus, the ICCPR, the validity of Sri Lanka's accession to which is not contested, "binds the Republic *qua* State", but "does not have internal effect" and its rights "are not rights under the law of Sri Lanka".[13] So far, so trite.

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9 As stated in the same General Comment 31, *ibid*., Section 4: "All branches of government (executive, legislative and judicial) … are in a position to engage the responsibility of the State Party."
10 The Petition, *supra* note 7. There were two further grounds of appeal (miscarriage of justice and unconstitutionality of the relevant emergency regulations on which the first charge was based) that were not connected to the case.
11 The Written Submissions of the Respondent (the Attorney General) are reproduced in Home for Human Rights, *Beyond the Wall - Quarterly Journal*, 4:2 (2006), pp.26-31.
12 *Nallaratnam Singarasa* v. *Attorney General*, *supra* note 2, p.17, Sarath N. Silva, C.J.
13 *Ibid*., p.15.

The problem resided in the government's accession to the Protocol. Here the Chief Justice found the accession not only unconstitutional, but "inconsistent with Article 2 of the ICCPR" itself, which obliges States to provide a remedy for a violation of the Covenant.[14] The judgment focused on a declaration made by the government at the time of accession, aiming at establishing admissibility thresholds for Communications. In substance, the offending language of the Declaration is in fact the language that rehearses the basic obligations under

the Protocol, namely, the granting of the right of individual petition.

The key elements of the asserted constitutional impropriety seem to be, according to the learned Chief Justice, *first*, that the government has, by acceding to the Protocol, conferred ICCPR rights directly on an individual subject; *second*, it has conferred a right of individual petition to the Committee; and *third*, it has empowered the Committee to receive and consider such a Communication. He then asserts that the first and second considerations "amount to a conferment of Public Law rights" that should be the prerogative of Parliament, not the President. He further asserts that the third element (empowering the Committee to receive complaints) is a violation of the constitutional provisions vesting judicial power in the Sri Lankan Courts.**15** None of these assertions is explained.

Finally, we are instructed that accession to the Protocol involves violating the Covenant Article 2 obligation on a State Party to "take the necessary steps in accordance with its constitutional processes… to adopt such laws or other measures as may be necessary to give effect to the right recognized" in the Covenant.**16** This followed from the failure to provide legislative authority for the "remedy" offered by the Protocol (access to the Committee). Perhaps the best one can say for this point is that it is not illogical in terms of the first, constitutional, assertions. The problem is that these have been reached on the basis of complete misunderstanding of the international legal significance of accession to the Protocol.

The Committee is not a Court. Even when dealing with individual Communications, its conclusions (views) are not *per se* binding as a matter of international law. Certainly, they are not without legal significance; for example, it is the opinion of the Committee which adopts such views "in a judicial spirit"**17** that States Parties are required to give the views serious consideration in good faith.**18** However, they no more create obligations under international law, to be recognized as justiciable in domestic law, than the accession to the ICCPR itself. It is inherent in the dualist paradigm that a State may, by the application of its internal law, be placed in violation of its obligations under international law. This applies to the Covenant itself, and the Protocol does not change that. It follows that the Protocol simply does *not* for any State Party create any public law right that was not already created by the ICCPR, depending on where on the monist/dualist continuum the State in question lies. Moreover,

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14 *Ibid*., p.17.
15 *Ibid*.
16 *Ibid*. On the nature of Covenant Article 2 obligations, see General Comment 31, *supra* note 8.
17 See, Human Rights Committee, General Comment 33, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, Section 11, U.N. Doc. CCPR/C/GC/33 (2008).
18 Accordingly, the Committee has established the function of Special Rapporteur on Follow-Up to Views, mandated to promote compliance with the views.

since the Committee's views are not as such binding in international law, even less are they binding on the internal legal system. Accordingly, the suggestion that the Committee has been invited to intrude on the judicial monopoly that may be given to a State's Courts is preposterous.

What then are the consequences under international law of the Court's finding that Sri Lanka's acceptance of the Protocol was unconstitutional? Is the accession by Sri Lanka a nullity? The answer is clearly negative. Article 46 of the Vienna Convention on the Law of Treaties,**19** articulating a well-established rule of customary international law,**20** provides:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

In the present case, far from the asserted unconstitutionality being objectively evident to any State conducting itself in accordance with normal practice and in good faith, it was not even evident to the Executive branch of the Sri Lankan State or anyone else, including the whole country's legal profession until the Court revealed it. Such a finding was not argued by the Respondent Attorney General in the original Supreme Court case. Indeed, there is reason to believe that the Executive was taken aback by the finding, was embarrassed by it, and is seeking a way out that would not involve denouncing the Protocol. In brief, on the plane of international law, the state of Sri Lanka—or, in the words of the Chief Justice, the Republic *qua* Republic—is still bound by the Protocol. Any individual wishing to communicate an alleged violation of the Covenant to the Committee will be entitled to do so, and the Committee in turn will be bound to give it full consideration. Similarly, the State Party is free to denounce the Protocol, any such denunciation taking effect one year from the time of denunciation. Until that time Sri Lankans will continue to be able to engage the Committee's complaints procedure and the Committee will be required to execute that procedure to a conclusion.

The State Party will also remain obligated to cooperate with the Committee in good faith while it discharges those functions. For it is axiomatic under customary international law that, in the words of the Vienna Convention, a State Party "may not invoke the provisions of

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19 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, entered into force Jan. 27, 1980.
20 See, 1 *Oppenheim's International Law* (Robert Jennings and Arthur Watts, eds., 9th ed. 1996), p.1222 (internal ordinary law) and pp.1287-88 (internal constitutional law). The customary international law status of the rule is relevant in view that Sri Lanka is not a party to the Vienna Convention.

its internal law as justification for its failure to perform a treaty".**21** To the extent that it does

so, it will on the plane of international law be in continuing default of its responsibilities.**22**

Since the Court's reasoning in the *Singarasa* case does not hold water, one is left wondering what the underlying thinking might have been. This cannot be known, but the relevance of a number of Optional Protocol cases in which the Committee has found violation of the ICCPR by Sri Lanka cannot be excluded. For, while in the typical Committee case it is the executive and legislative branches that tend to be primarily responsible for a breach (as was arguably the case in the *Singarasa* case) in a number of the Sri Lankan cases it has been the behaviour of the Courts, indeed the Supreme Court itself, that has placed the State in violation of the Covenant.

III Other Sri Lankan Cases before the Committee

Two cases briefly preceding the Supreme Court's *Singarasa* judgment are considered in this section. The first in time is that of *Anthony Fernando* v. *Sri Lanka*.**23** The author (the Optional Protocol word for Petitioner) appears to have been a vexatious litigant. The salient facts were summarized by the Supreme Court as follows:

> The Petitioner was informed that he cannot persist in filing applications of this nature without any basis and abusing the process of this Court. At that stage the Petitioner raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning the Petitioner persisted in disturbing the proceedings of the Court from the bar table of the Court. At this stage… the Petitioner was sentenced to one-year R.I. for the offence of committing contempt of Court.**24**

The Human Rights Committee had no difficulty in finding a violation of ICCPR Article 9 which guarantees "liberty and security of person" and prohibits "arbitrary arrest or detention." The Committee acknowledged a traditional judicial authority in Common Law jurisdictions to maintain order and dignity in Court by the exercise of a summary power to impose penalties for contempt of Court, and that financial penalties might have been justifiable, but the imposition of "a draconian penalty without adequate explanation and without independent

21 Vienna Convention, *supra* note 19, Art. 27. This rule is also one of customary international law: *Oppenheim's International Law*, *supra* note 20, pp.84-85.
22 The government is understood to have sought to resolve the problem by securing the adoption by Parliament of a law that would give partial effect to the Covenant, International Covenant on Civil and Political Rights (ICCPR) Act No.56/2007, aimed at incorporating those provisions considered not already to be part of Sri Lankan law. According to the Supreme Court, the legislation has indeed attained its objective of full incorporation of the ICCPR: SC Ref. No.01/2008; however, it is not clear how this would solve the problem of the "unconstitutionality" of the accession to the Protocol as declared by the Supreme Court.
23 *Anthony Fernando* v. *Sri Lanka*, Communication No.1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003 (2005).
24 *A.M.E. Fernando* v. *Attorney General* [2003] 2 SLR 52, at 57. R.I. stands for "rigorous imprisonment", known otherwise in those Common Law countries that retain it as 'imprisonment with hard labour".

procedural safeguards" falls within the Article 9 prohibition. The lack of a "reasoned explanation" from the Court or the State Party "as to why such a severe and summary penalty was warranted" was key to the Committee's reasoning. The Committee was evidently not impressed by the Court's apparent reliance on Fernando's refusal to apologize.**25** It finally noted pointedly that the "fact that an act constituting a violation of Article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State Party as a whole."**26** In other words, it was the Supreme Court itself that perpetrated the violation.

Seven months later, the Committee adopted its views on the next case of interest, *Sister Immaculate Joseph et al.* v. *Sri Lanka*.**27** The authors were members of a Catholic religious order that had been established in the country since 1900 as an unincorporated entity, and which decided to seek incorporation, requiring the passing of a statute. In the usual way, a private member's Bill was introduced to achieve this object. It set out, *inter alia*, the purposes of the Order (Clause 3),**28** which were apparently both typical of any such order and representing no new element in the Order's traditional practices in Sri Lanka; it also gave authority to the corporation to acquire, hold and dispose of moveable and immovable property (it was the possibility of obtaining the latter power that seems to have motivated the request for incorporation).

The Bill appears to have met objection from a private citizen. This meant that consideration of its constitutionality automatically fell to the Supreme Court. It was uncontested that in previous such cases, the affected parties were informed of the challenge, but in this case neither the private member nor the Order was informed. The challenge was based on Articles 9 and 10 of the Sri Lankan Constitution. Article 9 requires the Republic to "give Buddhism the foremost place" and to "protect and foster the *Buddha Sasana*", though this had to be achieved while respecting the rights of freedom of religion protected explicitly by Articles 10 and 14(1)(e).

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25 *Ibid*. at 62.
26 *Ibid*.
27 *Joseph et al.* v. *Sri Lanka*, Communication No.1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).
28 Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation), Clause 3 reads:
(a) The general objects for which the Corporation is constituted are hereby declared to be –
(b) to spread knowledge of the Catholic religion;
(c) to impart religious, educational and vocational training to youth;
(d) to teach in Pre-Schools, Schools, Colleges and Educational Institutions;
(e) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions;
(f) to establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics for the infants, aged, orphans, destitutes and sick;
(g) to bring about a society based on love and respect for one and all; and
(h) to undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation.
Colombo: In the matter of a petition under Article 121 of the Constitution, S.C. SD No.19/2003 (2003).

The challenge was supported by the Attorney General. In the absence of the Order and the private member, it was a non-adversarial proceeding. Thus it was that the Court managed to find the Bill inconsistent, not only with Article 9 (protection of Buddhism), but also with Article 10 (freedom of religion, in this case, of Buddhism). On the latter issue, the Court considered that the Bill would:

> …create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperience [sic], defenceless and vulnerable people to propagate a religion. The kind of [social and economic] activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in Article 10 of the Constitution.**29**

Indeed, "the Constitution does not recognize a fundamental right to propagate a religion".**30** In other words, the Order's activities would themselves violate the freedom of religion of those who came under their influence. As to Article 9 of the Constitution, "the propagation and spreading of Christianity as postulated in terms of Clause 3 [of the Bill] would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*".**31**

Insofar as the offending clause merely sought to describe existing practices, the Court did not make clear on the basis of what information it could have arrived at its conclusions. Certainly, the Order was not in a position to present information on its activities.

The Justices also adjudicated two European Court of Human Rights cases that in fact stood for the opposite of what they claimed for them. The first, *Kokkinakis* v. *Greece*,**32** involved a Jehovah's Witness couple convicted of the crime of proselytism, which appeared to consist merely of seeking to convert persons from Greek Orthodox Christianity. For such conversions to be impugnable as necessary to protect the rights of the latter believers, the Court held that they would have had to involve the use of incentives or pressure, of which there was no evidence in this case. Accordingly, European Convention on Human Rights Article 9 (freedom of religion) *had* been violated. In the second case, *Larissis et al.* v. *Greece*,**33** the three applicants, who were Greek Air Force officers and adherents of the evangelical Christian Pentecostal Church, were convicted of proselytism for attempting to convert their subordinates in the military; two of them were also convicted of the same offence in respect of civilians. The European Court of Human Rights found no violation of Article 9 in respect of the convictions for attempted conversion of the junior military personnel, precisely because of the possibility of undue influence stemming from the hierarchical relationship. In contrast, however, the Court did find a violation of Article 9 in respect of the two applicants convicted for attempting to convert civilians.

29 *Ibid*., Section 2.2.
30 *Ibid*.
31 *Ibid*., Section 2.3.
32 *Kokkinakis* v. *Greece*, App. No.14307/1988, 17 E.H.R.R. 397, 419 (1994) (judgment of May 25, 1993).
33 *Larissis* v. *Greece*, 65 E.C.H.R. (Ser. A) (1998) (judgment of Feb. 24, 1998).

Of course, the Committee was no more insensitive than the European Court of Human Rights to the possibility that the activities at issue could, "through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly propagate religion." The problem for the Committee was rather that the Supreme Court's decision had "failed to provide any evidentiary or factual foundation for [its] assessment".**34** (In fact, the government had argued that the Order would be able to continue with its activities, which was hardly reconcilable with the apocalyptic prophecies of the Supreme Court.) Finally, the Committee observed, with a verbal straight face, that "the international case law cited by the decision [of the Supreme Court of Sri Lanka] does not support its conclusions".**35** Accordingly, it found a violation of ICCPR Article 18(1) (freedom of religion). It also found a violation of the first sentence of Article 26 (equality before the law) for failure to provide the authors with the opportunity to be heard.**36**

IV Framework for Evaluating Questionable Judicial Behaviour

The temptation to speculate that the *Singarasa* case is no more than a petty settling of scores with the Committee must be resisted, at least in the absence of direct evidence to that effect. So must the thought that the Court under its present Chief Justice ♦ is simply overly executiveminded, especially in the context of the serious terrorism problem that has confronted the authorities. The Committee has dismissed other Communications precisely because the alleged victims have found a remedy from the same Supreme Court;**37** and in 2007 and 2008 the Court struck down unconscionable Executive-Branch attempts arbitrarily to remove or detain Tamil residents of Colombo.**38** Indeed, all speculation regarding the motivation of the judges in any of the cases discussed would be inappropriate here. The problem is how to address the judicial eccentricity evinced in the decisions.

It is taken as a given that judicial independence is a value to be prized. Indeed, it may be considered at the heart of the very notion of the rule of law. If a litigant cannot be guaranteed that his or her cause will be decided by an honest assessment of the facts and a conscientious

34 *Joseph et al.* v. *Sri Lanka*, *supra* note 27, Section 7.3.
35 *Ibid*.
36 This was because of the absence of notification of the proceedings, while in other cases there had been notification (*ibid*., Section 7.4). It also found a violation of Article 26 on the grounds of discrimination on the basis of religious belief, since other religious bodies "with objects of the same kind as the authors' Order" had been provided incorporated status (*ibid*. Section 7.4).
♦ Ed. Note: Since the writing of this article, Chief Justice Asoka de Silva was appointed by President Mahinda Rajapakse as Sri Lanka's 32nd Chief Justice on 8 June 2009, consequent to the retirement of Sarath N. Silva.
37 *Dahanayake et al.* v. *Sri Lanka*, Communication No.1331/2004, Section 6.5, U.N. Doc. CCPR/C87/

D/1331/2004 (2006) (villagers dispossessed of their property because of road development found not victims of discrimination under Article 26 as already awarded compensation by the Supreme Court for violation of Sri Lankan Constitution Article 12 that is drafted in similar terms to ICCPR Article 26).

38 Simon Gardner, "Sri Lanka Court Blocks State Deportation of Tamils", *Reuters*, 8 June 2007, www.reuters.com/article/world News/IDUSSP4209420070608; "Sri Lanka Court Limits Arrests as Rights Concerns Mount", *AFP*, 7 Jan. 2008, www.afp.google.com/article/ALeqM5hsTEW1NLr CM6IHgxnn4igh2JOHIw; S.S. Selvanayagam, "S.C. Bans Eviction of Tamils from Colombo", *Daily Mirror* (Colombo), 6 May 2008, p.1.

application of the law to the facts, unencumbered by extraneous influences, then the outcome will merely be a decision for the sake of a decision; having nothing to do with the law, it will be the negation of the rule of law.

At the same time, it must be recalled that the law does not always easily yield an answer to an issue. If it did, we would not need benches of several judges to decide a question, often by a majority. In other words, even the most highly qualified professionals may disagree on the correct legal outcome of a case. The disagreement may flow from genuine differences in evaluation of the evidence. They may also result from disagreement about what the applicable law is. It is precisely this type of disagreement that is the typical stuff of appellate jurisdiction.

Differences of understanding of the content of the law is the subject of standard jurisprudential commentary. One need only think of Lon Fuller's memorable vignettes illustrating the major schools of interpretation (founding fathers/strict constructionist/ positivist, historical, natural law/teleological, American legal realist) in his famous imagined "Case of the Speluncean Explorers."**39** The application of different theories can lead to different outcomes. This reality is likely to be even more accentuated when it comes to interpreting the sorts of broad norms that are found in national constitutional bills of rights or in general human rights treaties.

Allowing, then, all latitude for what approaches might legitimately fall within the realm of respectable judicial philosophy, there remains the vexing question as to how to determine when a Court goes beyond those bounds and hands down decisions not dictated by any doctrinally recognizable exposition of the law. In short, we are seeking guidance as to what criteria may be helpful in identifying decisions that are unsustainable on the facts or the law or both. An appropriate source for such guidance may be the *Bangalore Principles of Judicial Conduct*.**40**

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39 66 Harvard Law Review 616 (1949).

40 *The Bangalore Principles* were the work of a Judicial Group on Strengthening Judicial Integrity convened by the U.N. Centre for International Crime Prevention. At its first meeting, held in Vienna in April 2000 in conjunction with the Tenth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, the Group, consisting mainly of Common Law judges and the U.N. Commission of Human Rights Special Rapporteur on the independence of judges and lawyers, identified the need for a code against which the conduct of judicial officers may be measured. A

draft code was adopted at the second meeting in Bangalore (February 2001), by the Group (including at this point the Chief Justice of Sri Lanka). The Group felt that to have full international status, the draft needed to be scrutinized by judges of other legal traditions. After a consultative process a revised draft was adopted by a Round-table Meeting of Chief Justices from the civil law system. A number of judges from the International Court of Justice also participated. This is the text of the Bangalore Principles: see, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 26-29, Annex, Explanatory Note, U.N. Doc. E/CN.4/2003/65 (14 Jan. 2003) (prepared by Dato Param Cumaraswamy). The Principles are also annexed to Economic and Social Council Resolution 2006/23, 27 July 2006, by which the Council "[i]nvites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles… when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary" (*ibid*., Section 1). In September

The independence of the judiciary is generally understood in the manner spelt out by the Bangalore Principles: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom."**41**

This fundamentally important notion is both an injunction to the judiciary and an obligation on the other branches of government as on the judiciary itself. Hence the U.N. Basic Principles on the Independence of the Judiciary**42** establish "the duty of all governmental and other institutions to respect and observe the independence of the judiciary", a principle to be "guaranteed by the State" as a whole (Principle 1). But it is broader than simply insulation from official influence (at the macro level). According to the Bangalore Principles, a judge is to be independent "in relation to society in general" and (at the micro level) "in relation to the particular parties to a dispute which the judge has to adjudicate" (Principle 1.2). Indeed, the judicial function has to be exercised "free of any extraneous inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason" (Principle 1.1).**43**

In terms of the kind of adjudication that may be at stake in the examples given in the present paper, the issue of judicial independence as understood above may not necessarily arise. On the contrary, it could at the extreme be one of untrammelled judicial wilfulness, that is, judges imposing their preferred outcome, regardless of authentically legal constraints. This, as indicated, raises the question of what notions other than independence may be relevant to assess judicial conduct going beyond the admittedly wide and elastic margins of tolerable variations in judicial interpretative style. The structure of the Bangalore Principles is instructive. Each of the Principles is presented as corresponding to an overarching "value". Independence is the first of these. The other five are impartiality, integrity, propriety, equality and, competence and diligence.

It is perhaps the first of these five—impartiality—that provides most purchase. According to the second of the Bangalore Principles: "Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself, but also to the process by which the decision is made." Thus, a judge is expected to "perform his or her judicial duties without

2007, the Judicial Integrity Group approved a commentary on the Principles: United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007) [hereinafter Commentary]. For an interesting insight into the problems of judicial interpretation and the possible relevance of the Bangalore Principles, see, Michael Kirby, "International Law—The Impact on National Constitutions," *American Society of International Law Proceedings*, 99th Annual Meeting (1 Jan. 2005), 1. This is the Grotius Lecture of Justice Kirby, one of the architects of the Bangalore Principles.

41 The Bangalore Principles, *supra* note 41, Principle 1.3.

42 The U.N. Basic Principles on the Independence of the Judiciary were adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by G.A. Res. 40/32, U.N. GAOR, 40th Sess., Supp. No.53, U.N. Doc. A/RES/40/32 (29 Nov. 1985), and G.A. Res.40/146, U.N. GAOR, 40th Sess., Supp. No.53, U.N. Doc. A/RES/40/146 (13 Dec. 1985). According to ECOSOC Resolution 2006/23, *supra* note 41, "the Bangalore Principles… represent a further development and are complementary to the Basic Principles on the Independence of the Judiciary" (*ibid*. Section 2).

43 Here the Bangalore Principles broadly track language from Principle 2 of the Basic Principles.

favour, bias or prejudice".**44** Leaving aside the issue of favour for the moment, since it goes more to the values of integrity and propriety, we can conceive of bias, in the words of the official Commentary to the Bangalore Principles, as "a leaning, inclination, bent or predisposition towards one side or another or a particular result".**45** This formula captures the distinction between an inclination dictated by the identity of one of the parties (partisan bias) and a prejudice dictated by a pre-existing conception of the preferred way to resolve the factual or legal issues of the dispute (substantive bias). In any event, impartiality is then defined as the absence of bias.

On its own, this could provide some basis on which to assess the sort of adjudication under consideration. Especially helpful is Leader's elaboration of the concepts:

> for a judge to be impartial in deciding a dispute between two parties she must respect some constraint which might produce a result which the judge would not have chosen apart from those constraints. The constraint might not always apply, leaving the judge free to produce the outcome she most prefers, but if she is impartial she will yield to the constraint when it does appear right to do so. To be biased, in turn, is to respect no such constraint, but so to arrange the elements of one's procedure that one ends up deciding on a result which one would have produced without the constraint at all.**46**

As an example he posits the judge who relies in one case on an unorthodox method of statutory interpretation in support of the outcome, that elsewhere the same judge would never use.**47**

Such a conception of impartiality/bias does have some resonance in respect of adjudications that summarily sentence a verbally aggressive, unapologetic, vexatious litigant to a year's

imprisonment with hard labour, followed by a refusal to change the decision after the initiation of review proceedings (*Fernando* v. *Sri Lanka*);**48** that deny the key party to a process a possibility of incorporation without a hearing, or knowledge of one (*Sister Immaculate Joseph*); or fundamentally misrepresent or at least misconstrue the relevant (international) law (*Sister Immaculate Joseph*); or, without the issue being litigated at all, finding unconstitutional the Executive's ratification of an international instrument (*Singarasa*).

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44 The Bangalore Principles, *supra* note 41, Principle 2.1.
45 Commentary, *supra* note 41, Section 57.
46 Sheldon Leader, "Impartiality, Bias and the Judiciary", in *Reading Dworkin Critically* (Alan Hunt ed., 1992), p.241.
47 *Ibid*.
48 Indeed, paragraph 59 of the Commentary (*supra* note 41), under the heading "Abuse of contempt powers is a manifestation of bias or prejudice," explains in language evocative of the *Fernando* case (*supra* note 23):
The contempt jurisdiction, where it exists, enables a judge to control the courtroom and to maintain decorum. Because it carries penalties that are criminal in nature and effect, contempt should be used as a last resort, only for legally valid reasons and in strict conformity with procedural requirements. It is a power that should be used with great prudence and caution. The abuse of contempt power is a manifestation of bias. This may occur when a judge has lost control of his or her own composure and attempts to settle a personal score, especially in retaliation against a party, advocate or witness with whom the judge has been drawn into personal conflict.

Reflecting the origins of the Judicial Integrity Group that had been convened within the Global Programme against Corruption,**49** the Bangalore "values" of integrity and propriety go to very important issues of judicial corruption, in the sense primarily of justice being a commodity for sale, but there is nothing on the record of these cases to suggest that anything of the sort is relevant here. The fifth value, equality, could be pertinent: it requires "equality of treatment to all before the courts," an evident problem in *Sister Immaculate Joseph*. In fact, as the wording of Principle 5.2 demonstrates ("A judge shall not… manifest bias or prejudice towards any person or group on irrelevant grounds.") the value of equality folds back into that of impartiality.**50**

The final value, that of competence and diligence (is it really one value?) is more a question of pious hope than a serious guide to conduct. Parenthetically, there is some encouragement for international lawyers in Principle 6.4, by which judges are to keep themselves "informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms". Of course, this does not help in a case of misunderstanding or misrepresentation of that area of law.

At this stage, then, it is the notion of impartiality that seems most apt to identify the kind of judicial behaviour that the cases could be said to illustrate. Interestingly, in Principle 2 of the U.N. Basic Principles, the judiciary is required to "decide matters before them impartially". This could be understood to suggest that the principle/value of impartiality is itself a dimension of the principle/value of independence. That is, judicial independence requires being able to subordinate one's personal, non-legal preferences to one's professional, legal discipline. The Judge must be independent of the individual sitting on the Bench. This could

be more than a theoretical exercise. For, if impartiality is a component of independence, nonrespect of it by the judiciary would have to be understood as a failure of judicial independence. This in turn could raise the delicate issue of the extent to which others, including other branches of government, would then be obliged to continue to respect a now vitiated independence.

In the interests of safeguarding the core notion of judicial independence, that is, that others should not improperly influence the judiciary and its processes—a notion at the heart of the rule of law—it may be more prudent to acknowledge a potential tension between two complementary values (independence and impartiality).**51**

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49 Commentary, *supra* note 41, p.9.
50 The Commentary stresses the distinction, see *ibid*., Section 24:
The concepts of “independence” and “impartiality” are very closely related, yet separate and distinct. “Impartiality” refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” connotes absence of bias, actual or perceived. The word “independence” reflects or embodies the traditional constitutional value of independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
51 Note also the observation at paragraph 51 of the Commentary: “Independence is the necessary precondition to impartiality…. A judge could be independent but not impartial (on a specific case by

Yet, it may be felt that the notion of impartiality, even insofar as it covers substantive bias, does not fully capture the kinds of judicial behaviour under consideration. It is submitted that a pertinent value/principle is that of non-arbitrariness. The Shorter Oxford Dictionary offers the following definitions of the word “arbitrary”: “[d]ependent on will or pleasure, [b]ased on mere opinion or preference; hence capricious, [u]nrestrained in the exercise of will, absolute; hence despotic.” Arbitrariness is accordingly defined as capriciousness; despotism. Evidently, non-arbitrariness is behaviour that does not have the characteristics contained in the definitions. It would perhaps have been desirable to have this value/principle spelt out as an independent component of the Bangalore Principles.**52**

Nevertheless, we might return to the notion of impartiality to find our meaning. If the essence of arbitrariness is capriciousness that stems from the absence of restraint in the exercise of will, then it may be that Leader’s definition of bias (absence of impartiality) does indeed embrace the idea. He, it will be recalled, understood bias as the non-respect of a constraint that might produce a result which the judge would not have chosen apart from the constraint, or the act of so arranging the elements that one ends up deciding on a result which one would have produced without the constraint at all.

Such a reading of the concept of impartiality, that is, as containing within it the value of nonarbitrariness, could hardly be accused of doing violence to any of the other values reflected in

the Bangalore Principles. There is probably no need to fear the judge who protests that he or she is free to behave arbitrarily, because such behaviour is not explicitly ruled out by the U.N. Basic Principles or the Bangalore Principles.

There is one further concept that could be apposite to our topic: accountability. After all, what else is meant by the traditional question about who judges the judges? Here the Bangalore Principles are not silent. Indeed, in the one operative paragraph by which the individual values/principles are introduced, we find the following: "These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards".**53** Further, a concluding paragraph on implementation affirms that "effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions". Between them these injunctions reflect the practice in many States that recognizes the need for judicial discipline, as well as for systems of appointment, promotion and deployment that as far as possible are based on structures in which the judiciary has a major, if not a controlling, role.

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case basis), but a judge who is not independent cannot, by definition, be impartial (on an institutional basis)". *Supra* note 41.
52 The Commentary makes at least one reference to arbitrariness. In a section under the value of independence dealing with Principle 1.6 (high standards of judicial conduct to reinforce public confidence as a requirement for judicial independence), it affirms that "detention ordered in bad faith, or through neglect to apply the relevant law correctly, is arbitrary, as is committal for trial without an objective assessment of the relevant evidence" (*ibid*., Section 47).
53 The Bangalore Principles, *supra* note 41, Preamble.

Usually the judiciary itself will not be in a position to establish such structures unilaterally. Indeed, in many countries, the Constitution itself will lay down at least the framework for such systems. As it happens, Sri Lanka is no exception. Its Constitution provides for the establishment of a Judicial Service Commission that, in practice, runs the judiciary below the level of the Court of Appeal and the Supreme Court.**54** It is composed of the Chief Justice who serves till the end of his tenure in office and two other Supreme Court judges appointed for a three-year period by the President, who also can remove them "for cause". Two of the three form a quorum (with the Chair—usually the Chief Justice—having a casting vote). In such a structure it may be expected that, far from being subject to any internal accountability, the Chief Justice is in a position to deploy exorbitant authority over his or her colleagues in the lower courts. The Bangalore Principles are alert to this issue. "In performing judicial duties", Principle 1.4 affirms, "a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently". This Principle reflects the notion that judicial independence requires judges being independent from each other. Without a system capable of guaranteeing this dimension of judicial independence, a State like Sri Lanka in the Common Law tradition is then left with only the remedy of parliamentary impeachment, a blunt instrument that, far from guaranteeing independence and impartiality, is capable of being abused as a vehicle for political interference in legitimate

judicial functions.

V Conclusion

The cases discussed in this essay seem to reveal instances of judicial behaviour that could lend them to being characterized as arbitrary. It would be neither possible nor appropriate to speculate as to what considerations may have contributed to this. In general, when such behaviour occurs it may be asked whether it is consistent with the principle of independence of the judiciary. Clearly, if a decision can be attributed to the exercise of improper influences, for example, from another branch of government or from one of the parties to the issue in contention, then the problem can be addressed simply as one of want of judicial independence.

Where, on the other hand, the evidence does not permit any identification of improper influence, it is harder to locate the problem within the judicial independence paradigm. Insofar as arbitrariness may be seen as a form of bias or absence of impartiality, it is not impossible to see it as falling foul of a generously construed independence paradigm. This perspective would require the truly independent judge to exercise the judicial office independently of his or her own personal preferences. Failure genuinely to accept the constraint of legal discipline thus represents a departure from judicial independence.

However, an approach more consistent with ordinary understanding of the idea of judicial independence (independence from external influences) would see biased or arbitrary adjudication as potentially being in tension with the value of judicial independence which may be perceived as facilitating the biased or the arbitrary. The Bangalore Principles' value

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54 Sri Lanka Constitution, Art. 112.

of impartiality may be sufficient to address the problem of arbitrariness, but the tension with judicial independence remains.

It is suggested that a further principle may contribute to a resolution or at least mitigation of the tension, namely, the principle of accountability. In some countries, a judicial council consisting of a substantial number of members, wholly or predominantly from the judiciary and/or from the (independent) legal profession, is responsible for the administration of the judiciary, including the legal career. In many Common Law countries, like Sri Lanka, the lower judiciary may be regulated by the senior judiciary, although the Executive is often the formal granter of legal appointments, itself an issue from the perspective of judicial independence.

The only formal accountability process, at least for the senior judiciary, is that of parliamentary impeachment. This is a two-edged sword that can involve a significant threat to the independence of the judiciary, from another branch of government. Precisely because it

is understood as such, it is a rarely used remedy. This leaves us with the all-too-impotent reflection that perhaps the greatest challenge for all systems is that of devising institutions that are indeed able independently and impartially (and non-arbitrarily) to ensure the proper management of the judiciary without infringing its independence.

Comment on the Singarasa Case Relating to the Status of the International Covenant on Civil & Political Rights in Sri Lankan Law

Professor John Cerone*

I. The Relationship between International Law & Domestic Law, In General

A brief overview of the relationship between international law and municipal legal systems in general provides a context for appreciating the significance of the 15 September 2006 decision of the Sri Lankan Supreme Court

A- The Status of International Law within the Domestic Legal Sphere

International law generally does not dictate how international obligations are to be implemented within the domestic sphere. In the absence of a specific obligation to alter some facet of a state's internal legal framework,[1] it is usually up to each state to determine how to give effect to its international obligations. That being the case, there is no established international legal standard governing how international law is to be received in the municipal sphere. Ma result, there is a great variety among states in the degree of reception of international law into the domestic legal system.

That great variety of configurations falls along a spectrum from monism to dualism. A monist state would be one that envisions international law as part of the domestic legal order. In essence, there is but one legal system into which international law flows freely. In contrast, dualist states would regard the international and municipal legal systems as two discrete spheres, such that norms of international law cannot be received into the municipal sphere in the absence of some act of the relevant national authorities expressly transforming those norms into domestic law. In monist systems, international law is generally accorded a normative status hierarchically superior to that of statutory domestic law.[2] In a dualist system, once transformed into domestic Law, the formerly international norms would have the same status as other domestic laws.

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[1] For example, some treaties expressly require states to enact domestic legislation criminalizing certain conduct. See, e.g, the Convention Against Torture arid Other Cruel. Inhuman or Degrading Treatment Or Punishment, 1465 V.N.T.S. 85, 113 (Dcc. 10 1964).

[2] See, e.g, GRONDWET [Ow.] [Constitution) ch. .5, 2, art. 94 (Net) Constitution of the Netherlands. This article of the Dutch Constitution accords treaty rules a status higher than that of domestic legislation. Thus, courts may exercise judicial review of Dutch legislation by testing it against the Netherlands' Only obligations.

B. The Status of Domestic Law in the International Legal System

It is a basic maximum of international law that a state may not invoke its domestic law to justify a failure to fulfill its international obligations. This fundamental rule finds expression in Article 27 of the Vienna Convention on the Law of Treaties (VCLT),[3] which provides:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

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Article 46 provides a very narrow exception to this basic rule. Article 46 states:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest Wit would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Thus, a state may invalidate its consent only if:

a) there has been a violation of its domestic law regarding competence to conclude treaties;
b) the rule violated must be of fundamental importance (Le. constitutional); and
c) the violation of the rule was manifest (i.e. obvious to other states).

Again, this exception is very narrow and relates only to rules governing competence to conclude treaties.[4] A treaty that contains provisions that conflict with rules of domestic law, even rules of domestic constitutional law unrelated to competence to conclude treaties, is valid as long as the treaty was otherwise properly concluded.[5]

II. Analysis of the Court's Decision

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[3] While Sri Lanka is not a party to the VCLT, the majority of the provisions of the VCLT are widely regarded as having achieved the status of customary law.

[4] See Meetings of the Committee of the Whole, U.N. Conference on the Law of Treaties, 2nd. Sess., 43rd Meeting, at 243 (Ruiz Varela) (1968) (noting that the ultra vi res exception can only be invoked when there is a defect in the manner of consent); see Meetings of the Committee of the Whole, U.N. Conference on the law of Treaties, 2nd. Sess., 43rd. Meeting, at 245 (Yassen) (1968) ("[The provision] related neither to the whole of internal constitutional law nor even to the whole of the law of treaties in internal law, but only to the provisions concerning competence to conclude treaties,.. further [the rule] did not deal solely with violations of all kinds, but was concerned solely with manifest violation.').

[5] See Meetings of the Committee of the I3TøIe, U.N. Conference on the Law of Treaties, 2nd. Sess., 43rd. Meeting, at 243 (Ruiz Varela) (H)68) ('[The provision] was not intended to permit States to invoke their constitutional law as a pretext for evading the scrupulous performance of obligations under treaties duly concluded and in force.").

The Decision at issue relates to the Petitioner's application to have his conviction and sentence set aside. His application is based on the findings[6] of the Human Rights Committee (the monitoring body established under the International Covenant on Civil and Pelitical Rights (ICCPR)) that his conviction and sentence violated various provisions of the JCCPK. Thus, the threshold issue before the Court was the legal status and relevance of that find ing within Sri Lankan law.

In addressing this issue, the Court examines two distinct issues, at times conflating them: the status of the ICCPR and its First Optional Protocol (ICCPR-OP) within Sri Lankan law and whether Sri Lanka is a party to these treaties.

The Court concludes that neither of these instruments has any "legal effect within the Republic." It also finds that the ICCPR-OP "does not bind the Republic qua state," implying that Sri Lanka never validly became a party to that treaty. It does concede, however, that Sri Lanka is bound by the ICCPR.

A. The Status of the ICCPR & ICCPR-OP within Sri Lankan Law

The Court holds that as Sri Lanka is a dualist state, the "Covenant does not have internal effect and the rights under the Covenant are not rights under Sri Lankan law." It holds similarly that the International Covenant on Civil and Political Rights OP "has no legal effect within the Republic." This holding entails a finding that the provisions of these instruments do not form part of Sri Lankan law and may not be invoked in Sri Lankan courts.[7]

The Court begins by examining the text of the ICCPR. Article 2(2) of the Covenant requires states parties to "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant" Relying on this provision, the Court seems to imply that the ICCPR pre-supposes a dualist' approach. However, a more balanced view, and one supported by the drafting history of the Covenant as well as state practice in implementing the Covenant, is that the ICCPR was drafted in such a way to accommodate the broad range of legal systems that exist throughout the work!, be they monist or dualist Hence, the Covenant obliges states parties to adopt such "laws or other measures as may be necessary'. In a more monist system, it may not be necessary to enact any legislation to give effect to the Covenant rights.

In any event, the Court does not need to rely on the text of the ICCPR to support its conclusion that Sri Lanka has a dualist legal system. As noted above, the manner in which international norms are received into the domestic applicable law, whether directly or through the enactment of legislation, is Left to the

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[6] The Committee expresses its findings in individual cases in the firm of "views." Art. 5, First Optional Protocol to the ICCPR. While these "views" are not legally binding as such, the Committee's interpretations of the Covenant are generally regarded as highly authoritative, An argument could be constructed that the general obligation to perform treaty obligations in good faith (Art 26, VCLT) implies a duty to seriously consider, if not defer to, the Committee's views.

[7] This would apply a fortiori to views of the Human Rights Committee. Nonetheless, to say that the provisions of these instruments do not form part of Sri Lankan law does not necessarily entirely foreclose their relevance to domestic legal proceedings. Some common law jurisdictions employ interpretational presumptions to avoid falling afoul of international obligations. For example, United Slates courts follow the Charming Betsy rule, which holds that an Act of Congress ought never to be interpreted to conflict with the international obligations of the United States so long as any other reasonable construction is possible. Similar presumptions are applied in many other domestic legal systems, including the United Kingdom and several other Commonwealth countries. To the extent that Sri Lanka has adopted a similar rule, there may still be room to argue that domestic law should be constructed, where possible, so as to conform with the international obligations of Sri Lanka.

discretion of states so long as they ultimately fulfill their international obligations. The ICCPR certainly obliges states parties to ensure that their domestic legal system is capable of giving effect to the Covenant rights, but it does not require states parties to recognize the ICCPR provisions as such in their domestic law. Thus, the Sri Lankan Supreme Court's characterization of the Sri Lankan legal system as dualist, as well as the implication that the provisions of the ICCPR may not be invoked in Sri Lankan courts, is effectively unchallengeable.[8]

However, if a state party does not recognize the ICCPR provisions as part of its applicable law, that State must adopt legislation or other Legal measures to give effect to the rights. If Sri Lanka has failed to do so, then it is in breach of its obligation under Article 2(2) of the Covenant.

More significantly, in the course of its analysis, the Court demonstrates a confusion that underlies each of its holdings in this case. The Court fails to distinguish between rights under international law and rights under Sri Lankan law. Indeed, it is within dualist legal systems that this distinction hears its greatest significance,

The Court seems to presume that, by its terms, the ICCPR cannot confer rights on individuals within the jurisdiction of Sri Lanka until such time as the Sri Lankan legislature adopts legislation transforming the provisions of the ICCPR into domestic law. It also seems to presume that accession to the ICCPR-OP purported to confer ICCPR rights upon individuals, and invokes this purported conferral in an attempt to invalidate Sri Lanka's accession, as discussed below.

In fact, ills the ICCPR that confers rights upon individuals within Sri Lanka's jurisdiction. The ICPPR-OP confers a competence on the Human Rights Committee and arguably provides a procedural right to individuals to petition the Committee. All of these rights are rights under international Jaw. Whether they form rights under domestic law is a separate matter, and will depend on each State's legal system.

This confusion ultimately leads the Court to conflate the question of monism or dualism with the separate question of whether Sri Lanka validly expressed its consent to be bound by the ICCPR and OF, and thus whether Sri Lanka may be regarded as a party to these treaties.

B. Whether Sri Lanka is a Party to the Covenant & OP

The Court holds that although the "Covenant does not have internal effect" within Sri Lanka, it does "bind the Republic qua state,"[9] It reaches this result by relying on the reference in art. 2(2) to the adoption of legislation giving effect to the rights recognized in the Covenant. In light of this provision, the Court views the ICCPR as not conferring any rights of itself, thus obviating arty conflict with the Sri Lankan Constitution.

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[8] It should be noted, however, that this may not be the case with respect to the reception of norms of customary international law into the domestic legal sphere. The United Kingdom has traditionally been staunchly dualist with respect to the reception of treaty norms into its municipal system (though this is changing, as the Court notes, in the field of European Union law). Nonetheless, the UK has recognized for centuries that customary law formed part of its domestic law. Customary law, or the law of nations, was deemed, to form part of the common law. Customary law similarly constitutes part of the applicable law in the US. having inherited the common law of England upon attaining independence. As a Commonwealth country, Sri Lanka may be in a similar legal position.

[9] This phrase seems to refer to the question of whether or not Sri Lanka is bound by the treaty; that is, whether Sri Lanka is a party to the treaty.

On the other hand, the Court found that Sri Lanka's accession[10] to the ICCPR-OP was invalid and thus "does not bind the Republic qua state." The Court's holding that Sri Lanka's accession to the OP was invalid is premised on what the Court interprets constitutional defects in the expression of Sri Lanka's consent to be bound by the treaty. It found in particular that the President of Sri Lanka acted ultra vires in acceding to the treaty; that is, that the President lathed constitutional authority to consent to this treaty.

The Court examines relevant constitutional provisions and determines that the ability of the President to enter into treaties is conditioned upon compliance with the Constitution and other domestic written law.[11] It then holds that:

> *the President as Head of State is empowered to represent Sri Lanka and under customary international law enter into a treaty or accede to a covenant, the contents of which is not inconsistent with the Constitution or written law.*

This implies that the President is not empowered to express consent to be bound by a treaty that in any way conflicts with any provision of domestic law, While this may be the case under Sri Lankan law, this clearly cannot be invoked to invalidate state consent to be bound on the international plane. As stated, the rule fashioned by the Court is a clear departure from the, rule set forth in art. 46 of the VCLT described above.[12]

In addition, the specific constitutional infirmities cited by the Court are premised on a problematic understanding of the ICCPR and OP as noted above. The Court examined Sri Lanka's accession to the ICCPR, as well as the Declaration made by the President upon accession, and found that they entailed "three bnsic legal components":

a) A conferment of Covenant rights on individuals subject to the jurisdiction of Sri Lanka[13]
b) A conferment on such individual of a right to petit ion the Committee;
c) A recognition of the competence of the Committee to receive and consider such communications.

The Court determined that the first two components constituted the conferral of public law rights upon individuals and thus violated the provisions of the Constitution reserving legislative power to the Sri Lankan Parliament. It found that the third component conferred a judicial power on the Human Rights Committee and thus violated the constitutional provision reserving this power to the Sri Lankan courts.

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[10] Accession generally refers to the act of expressing consent to be bound by a treaty by a state thai was not a signatory state (i.e. a state that signed the treaty during the period in which the treaty was open for signature). However, usage of this term is not entirely consistent in international practice.

[11] Note that under the law of treaties, Heads of State and Heads of Government are considered to represent their state for the purpose of performing all acts relating to the conclusion of a treaty. VCLT art. 7.

[12] The only way Sri Lanka could in the fixture invoke this newly formulated rule' to invalidate its consent to be bound by a treaty would be if Sri Lanka clearly adopted it as a fundamental rule specifically regarding competence to conclude treaties, and if it did so in such a way that the rest of the world would be on notice of this rule (such that violation of the rule would be manifest). In any event, there are very strong reasons to refrain from adopting such a rule. Other states would be extremely reluctant to enter into a treaty relationship with a state that conditioned the validity of its consent on compliance with all provisions of domestic law. First of all, this condition seems to attempt an end run around article 46, the purpose of which is to promote stability and the fulfillment of legitimate expectations in international legal relation It would also require all states to have extensive expertise in Sri Lankan law in order to enter into a treaty with Sri Lanka. It would be very difficult for states other than Sri Lanka to know whether any of the provisions of a treaty text conflict with any of Sri Lankan law.

[13] As noted above, this finding is questionable. These rights are more properly understood as being confenedhy thelCCPR, not the OP.

Both findings are questionable. Again, the Court failed to distinguish between rights under international law and rights under the domestic law. Neither the ICCPR nor the ICCPR-OP confers rights under Sri Lankan law; thus, the legislative function of the Sri' Lankan Parliament is not encroached upon.

The Court's determination that judicial power has been conferred upon the Committee seems problematic in at least two respects. First, the power conferred upon the Committee is not judicial. The Committee is not a court, and its views are not binding as such.[14] Second, any quasi-judicial power possessed by the Committee is not the judicial power of Sri Lanka. II is a quasi-judicial power and jurisdiction created by international law.[15]

In any event, even if the Court's assessment of these constitutional defects was entirely correct, this could not serve as a basis for invalidating Sri Lanka's accession to the ICCPR-OP as a matter of international law.[16]

III Conclusion

According to the Supreme Court, Sri Lanka is bound by the ICCPR, but is not bound by the ICCPR-OP. This seems to imply that Sri Lanka is validly a party to the former, but not the latter. The Court also views the Covenant as being purely executory; that is, the Covenant does not of itself confer rights on individuals within Sri Lanka's jurisdiction.

The Court's findings that (I) Sri Lanka is not bound by the ICCPR-OP, and (2) that the Covenant does not confer rights on individuals, seem to be questionable as a matter of international law. The constitutional conflict cited by the Court is deafly insufficient to invalidate Sri Lanka's consent to be bound on the international plane. As for the conferral of rights, the ICCPR clearly confers rights on individuals under international law. The question of whether the ICCPR creates rights under domestic law is a separate matter.

The Court finds that as a matter of Sri Lankan law, the ICCPR has no internal effect.[17] This flows from

[14] As noted above, however, there is arguably an obligation to give serious consideration to the views of the Committee

[15] In addition, many other States have similar provisions in their domestic constitutions. This has not posed an obstacle to those states accepting the jurisdiction of international courts and quasi-judicial bodies. See e.g. the case of Sierra Leone and the creation of the Special Court for Sierra Leone (Sierra Leonean constitutional provision reserving judicial power to Sierra Leonean courts not seen as obstacle to entering into treaty to create Special Court for Sierra Leone).

[16] Again, it is unclear whether the Court's finding that the OP "does not bind the Republic qua State" equates with a finding that Sri Lanka is not a party to the OP. It may be that the Court is not pronouncing upon the latter issue and is instead simply attempting to state that the Court is not bound to abide by the findings of the Committee. This of course is a separate matter it could have addressed this issue without reaching the question of the validity of the President's consent. It could simply have relied on the fact that the Committee's views are not binding. It could also have simply noted that Sri Lanka is a dualist county and invoked that fact as a reason for not extending judicial cognizance to the Committee's views.

[17] The Court also finds that the ICCPR-OP has no internal effect, but this would be foreclosed in any event by its finding that Sri Lanka was not validly a party to the International Covenant on Civil and Political Rights-OP in the first place.

The Singarasa Case - A Brief Comment

RKW Goonesekere*

The recent judgement of the Supreme Court seeking to invalidate Sri Lanka's accession to the Optional Protocol to the ICCPR has led to questions as to how this judgement came to be given.

An application was made to the Supreme Court in 2005 for the exercise of the Court's inherent power of revision of a conviction and sentence in 1995. This was after the views of the United Nations Human Rights Committee had been conveyed to the State, that Singarasa should be released or refried as his right to a fair trial had been breached. Singarasa had petitioned the UN Human Rights Committee by virtue of the right given to him by an international agreement or treaty entered into by the Sri Lankan State, namely the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The Supreme Court constituted a Divisional Bench of five judges to hear the application.

The legality or constitutionality of Sri Lanka's accession to the Optional Protocol to the ICCPR did not arise in this case, was not raised by Court and was never argued. Indeed the time given to make oral submissions was limited and an application on behalf of the Petitioner for a further date of hearing was ignored.

The Supreme Court could have, in passing, in the judgement, raised the question of the treaty ratification process and left it to be decided in a suitable case, after hearing the Attorney-General on behalf of the executive Head of State and the Minister of Foreign Affairs, who takes the initiative and is responsible for registering the instrument of ratification or accession in the UN.

Singarasa's application to Court was not an application to enforce or implement the views expressed by the Human Rights Committee (HRC) of the UN on an individual's communication in terms of the Protocol. It is a matter of common knowledge that the views of the I-IRC are not decisions binding on national courts. All that Singarasa did was to ask for a revision or review of the decisions of the Supreme Court and other courts given earlier. This is possible in our law.

The views expressed by the HRC were relied on solely to seek to persuade the Court to take a fresh look at the facts and the law in Singarasa's case. The Supreme Court was invited to reconsider the conviction and sentence of 50 years imprisonment (reduced in appeal to 35 years) in the light of the HRC's views as to the requirements of a fair trial, which is a right guaranteed in our Constitution. Unfortunately the Supreme Court has seen it only as an attempt to substitute for the decisions of our courts the views of the HRC and, without Leo king at the facts or the law on confessions to the police, pronounced on the constitutionality of the State's accession to the Optional Protocol in 1997. This also explains why the Court said the application was misconceived and without any legal base.

There could be no misunderstanding in the minds of Judges that the Petitioner's substantive ease was that there had been a grave miscarriage of justice in his conviction, and a number of reasons were given in the petition which were totally independent of the views of the HRC. There is no reference in the judgement to these other arguments and they have not been considered. As stated above, time was not given for MI argument even though judgement was delivered after many months.

In its views communicated to the State, the mc of the UN had recommended that the Prevention of Terrorism Act (PTA) provision, which cast on the accused the burden of proving that a confession made to the police was not voluntary, should be amended. Singarasa had been convicted, after the confession

the Court's finding that Sri Lanka has a dualist legal system. As international law leaves this matter to States, this finding cannot be challenged on the basis of international Jaw. However, Sri Lanka is still bound by the Covenant. Its failure to give effect to the rights within its domestic law constitutes a breach of its obligations under the ICCPR. Further, the Covenant itself confers rights on individuals. If Sri Lanka fails to respect and ensure those rights to individuals within its territory and subject to its jurisdiction; it baa violated the Covenant giving rise to its international responsibility.

The rule formulated by the Court for invalidating Sri Lanka's consent to be bound is likely an aberration. The Sri Lankan government is not likely to adopt such a position. It certainly would not do so in the context of treaties that were reciprocity based (as opposed to human rights treaties). However, the Court's adherence to a strict notion of dualism is not anomalous. States are increasingly exhibiting dualist tendencies, particularly in the area if human rights. The judgement in issue represents one such example.

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was held admissible, for not leading any evidence to show that the alleged attacks on Army camps (which formed the basis of the charges) had not taken place or that he was not involved in them, It was a golden opportunity for the Supreme Court to have emerged as the true guarantor of the rights and freedoms of people by including in a judgment — even a judgement refusing the application — a recommendation to this effect.

Singarasa was a Tamil youth of 19 or 20 who had no schooling and spoke only Tamil. His conviction was solely on the basis of a confession which was denied by him at his trial. The evidence was that he made the confession in Tamil to a police officer who understood Tamil but could not write Tamil; his confession was translated into Sinhala and written down by the same police officer. At the end of Singarasa's statement, the police officer read out to Singarasa in Tamil what he had written in Sinhala before taking his thumb impression on the record. This was all done in the presence of a senior police officer to whom a confession under the emergency regulations or the PTA had to be made. This officer understood only a little Tamil end the translation into Sinhala was also for his benefit. The Supreme Court could also have commented on the undesirability of a procedure that permitted a police officer to record a statement confessing to committing serious crimes, in Sinhala, when it was made in Tamil. Had the Supreme Court done only this we would have been disappointed but satisfied that the cry for justice by Singarasa, sentenced to prison for 35 years, had been heard. It is responses like this that have made the Supreme Court of India the highly respected body it is.

Nowhere in our Constitution is it said that the Supreme Court is Supreme; it is but another court exercising the judicial power of the People who are Sovereign. It is the People's right to say that the Supreme Court's pronouncement taking away a valuable right conferred on the People was per incuflam and in excess of the Court's jurisdiction. A treaty solemnly entered into by the State in the exercise of the executive power and in terms of international law as reflected in the Vienna Convention on Treaties is not, it is submitted with respect, subject to judicial review. There is a procedure in the Protocol for a State Party to denounce the Protocol, but until this is done, the Protocol is in force in the country.

It must not be forgotten that Sri Lanka's accession to the Optional Protocol of the International Covenant on Civil and Political Rights was one of the major accomplishments of the late Lakshman Kadirgamar during his distinguished career as Foreign Minister. Both Bench and Bar, at the unveiling of his portrait at the Law Library, paid tribute to Kadirgamar's eminence as a lawyer and to his outstanding contribution to the country as Foreign Minister.

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