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STATE SOVEREIGNTY, PEOPLES' RIGHTS AND INTERNATIONAL TREATIES; THE OPTIONAL PROTOCOL TO THE *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*

LAW & SOCIETY TRUST

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Editor's Note .....

On 23rd August 2004, the UN Human Rights Committee communicated a violation of rights of Nallaratnam Singarasa, a detainee in the Boosa prison whose conviction (on five counts of having unlawfully conspired to overthrow the Government and with that objective in mind, having attacked four army camps), rested solely on a confession.

Singarasa had complained that it was impossible for him to satisfy the burden imposed on him under Section 16(2) of the PTA to prove that the confession was extracted under duress and was not voluntary in terms of Section 16(2), as he had been compelled to sign the confession in the presence of the very police officers by whom he had been tortured.

Appeals in the domestic legal arena resulted only in Singarasa's sentence being reduced. The Communication of Views by the Committee was upon Singarasa's invocation of the individual communications remedy in terms of the Optional Protocol (OP) to the International Covenant on Civil and Political Rights (ICCPR) after his domestic remedies had been exhausted.

Specifically the Committee found a violation of Singarasa's rights under Article 14, paragraph 3 (g) of the Covenant, (no one shall "be compelled to testify against himself or confess guilt"). Medical evidence indicating that he had been tortured was a factor that had weighed in the minds of the members of the Committee. The State was directed to provide Singarasa with an effective and appropriate remedy, including release or retrial and compensation. Sri Lanka was also cautioned to avoid similar violations in the future and to ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant. This Communication has been published in the *LST Review, Volume 15, Issue 202, August 2004.*

On 15th August 2005, a petition was filed invoking the powers of revision and/or review of the Supreme Court concerning its earlier affirmation of the findings of the High Court that Singarasa's confession had been voluntary and not induced. The Views of the Committee were cited in this instance as persuasive authority and at no point was there any attempt made to 'domestically implement" the Views.

On 15.09.2006, a judgement was delivered by the Bench presided over by Chief Justice Sarath Nanda Silva where the revision/review application filed by Singarasa was dismissed as misconceived and without legal basis.

The Presidential act of accession to the Protocol (which enabled the Committee to receive and consider individual communications from any individual subject to Sri Lanka's jurisdiction) was held to amount to an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee. The constitutional articles found to be violated in this regard were respectively Article 3 read with Article 4 (c) read with Article 75 and Article 3 read with Article 4 (c) and Article 105(1) of the Constitution.

This Double Issue of the Review carries the Petition, Written Submissions thereof and the Judgement in the *Singarasa Case*.

The judgement renders Sri Lanka's accession to the Protocol under the ICCPR of no force and effect within the domestic context. Needless to say, the State's obligations in international law will continue in force unless and until it denounces the Optional Protocol. Denouncing of the ICCPR Protocol by the State will carry with it serious consequences in the international law sphere, particularly in the context of the recent intensification of the conflict in the North-East.

Then again, the country's election to membership of the UN Human Rights Council imposes a particular obligation which will itself be in issue if the Government continues to be ambiguous in respect of the domestic implementation of its international law commitments. Undoubtedly this judgement will now make the Government acutely uncomfortable when it sends its representatives before international committees to plead Sri Lanka's conformity with treaty commitments.

It is a relevant point that, given the Court's finding that accession to the ICCPR Protocol has offended Article 3 (read with Article 4 of the Constitution), any law passed seeking to give domestic effect to the Views of the UN Committee would now have to be approved by a two thirds majority in Parliament as well as by the people at a Referendum as mandated by Article 83(a) of the Constitution.

From another perspective, the judgement in issue affects not only the right of individual communications in respect of the OP to the ICCPR but also similar such accessions to other treaties involving consideration of individual communications by monitoring bodies. These include most notably, accession to the Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It will also have the effect of stopping short in its tracks, ongoing campaigns to strengthen State resolve to accede to the Protocol to the Convention Against Torture which again permits the Committee Against Torture to receive individual communications.

A judgement of this nature from a divisional bench of the highest court in the land has far reaching consequences in the context of the State's obligations in international law. The deliverance of such a judgement **directly** effects all areas of the law and has immediate impact on the teaching of international human rights law in our universities and colleges. In any other country, such a decision would have given rise to constructive and critical analysis. Unfortunately, this has not been the case in Sri Lanka.

Indeed, there has been striking paucity of comment in regard to the reasoning and findings of the Court by the public, civic society organisations, those belonging to the legal and judicial services and most importantly legal academics. Only one or two exceptions have been evidenced to this general lack of response.

In an effort to remedy this lacuna at least to some extent, the Review publishes a brief comment by senior counsel ***RKW Goonesekere*** and an analytical review by professor of law ***John Cerone*** on the judgement of the Court.

In continuation of these discussions, we publish the Petition and the Views in the most recent Communication of Views by the UN Committee in *Lalith Rajapakse v Sri Lanka*. In addition, the Review contains a Counter Response by the Applicant in *Fernando v Sri Lanka* where the Sri Lankan Government had, yet again, declared its inability to give effect to the Views of the Committee. This instance involved a finding by the Committee that the arbitrary sentencing of a lay litigant for contempt of court amounted to a violation of ICCPR, Article 9 (1).

Concluding observations by ***Basil Fernando*** points generally to the value and importance of using the OP to ICCPR at a time when the implementation of rule of law standards in Sri Lanka has become fraught with difficulty.

Kishali Pinto Jayawardena

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

In the matter of an application for revision and/or review of the Judgement and order in SC (SPL) L.A. No. 182/99 dated 28.01.2000 and pursuant to the findings of the Human Rights Committee set up under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2001 made under the Optional Protocol thereto

SC (Spl) L.A. No. 182/99
CA No. 208/95
HC Colombo No. 6825/94

Nallaratnam Singarasa
Presently serving a term of imprisonment at
The Kalutara Prisons

PETITIONER

Vs.
Hon Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

May it please Your Lordships

On this 15th day of August 2005

The Petition of the Petitioner appearing by his registered attorney Eugene Mariampillai respectfully states as follows

1. The Petitioner is a citizen of Sri Lanka and was a resident of Karavaddi, Navatkudah, Batticaloa. The Petitioner had no schooling and was not able to read or write in any language at the time of his arrest. Since the time he can remember, he used to work as a cowherd and a casual labourer and was supporting his parent, his brothers and sisters.

2. On 16 July 1993 while the Petitioner was sleeping at home, he was arrested by Sri Lanka security forces and brought to Komanthurai Army Camp. There were about 150 other Tamil youths who had been arrested in a 'round up' operation by the security forces and brought to the Camp at the same time. At the Camp, the Petitioner was hung on a mango tree and assaulted by soldiers. On the same day evening, the Petitioner was handed over to the Counter Subversive Unit of the Battticaloa police and detained under a detention order made under the Prevention of Terrorism Act (PTA) Section 9 (1). The Petitioner was subjected to assaults, threats and abuse by the police while in custody.

3. In or about August 1993, the Petitioner was produced before a Magistrate and remanded back to custody of the Batticaloa police.

4. On 30 September 1993, PC Hashim of the Batticaloa police got the Petitioner to put his thumb impression on several typed pages in Sinhala after getting particulars of Petitioner and his family. On 11 December 1993, the Petitioner was taken to ASP Herath's office where allegedly a confessionary statement was made to the ASP and recorded by PC Hashim.

5. On 2 September 1994, the Attorney General filed indictment against Petitioner on five counts and indictment was served on 30 September 1994 (**P2(a)** annexed).♦

6. The first count was under Regulation 23 (a) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 1989 having conspired by unlawful means to overthrow the Government with several other persons and persons unknown. The remaining four counts were under the PTA Section 2 (2) (ii) read with 2 (1) (e) of having attacked four army camps at Jaffna Fort, Palaly, Kankesanthurai and Elephant Pass with a view to achieving the objective set out in count 1.

7. The trial commenced in the High Court of Colombo before Honourable High Court Judge Shiranee Tilakawardena on 30 September 1994. The Petitioner pleaded not guilty to all five counts. When ASP Herath was called to give evidence for the prosecution, objection was taken by the Petitioner's Counsel to the admissibility of the confession on the ground that it was not voluntary. At the *voir dire* inquiry that followed, the ASP and PC Hashim testified to their version of what took place when the Petitioner was brought before ASP on 11 December 1993. The Petitioner was called as a witness and denied the version given by the police witnesses. The Petitioner maintained that apart from giving personal details of himself and his family to the ASP, he made no statement relating to his involvement with the LTTE or attacks on Army Camps. He further stated that PC Hashim who was doing the translation from Tamil to Sinhala was also typing while looking at a paper taken from a file. The *voir dire* inquiry proceedings are annexed marked **P1(a).**

8. In assessing the evidence at the *voir dire* inquiry, the learned High Court Judge found an inconsistency in the replies given by the Petitioner when questioned as to the time the Petitioner was in the ASP's office when the typing of the statement was being done. Only for this reason and totally ignoring the entirety of the Petitioner's testimony or the nature of the burden resting on him, evidence of the police witnesses was accepted and the confession was admitted in evidence as voluntary made by the Petitioner. The *voir dire* order is annexed marked **P1(b).**

9. At the resumed trial, the prosecution witnesses were the same ASP and PC Hashim. The Petitioner gave evidence and denied the charges.

10. By her judgement on 29 September 1995, the learner High Court Judge referred to the charges and the evidence given by the police witnesses including the confession. The judgement concluded "although the forthright and unhesitating evidence of this Police officer was subject to a test of probability and a test of consistency *per se*, no damage has been done to it. As such, I conclude that the evidence of this witness to be the truth." The Petitioner was found guilty on all five counts and on 4 October 1995 was sentenced to 10 years rigorous imprisonment for each

♦ Ed Note; The annexures to this petition are not published here.

count, sentences to run consecutively. The judgement of the High Court marked **P1(c)** and the order marked **P1(d)** are annexed.

11. On appeal, the Court of Appeal (Justices Jayasuriya and Kulatilake) accepted that the prosecution case rested solely on the confession, and rejected the contention that there should be corroboration of the facts in the confession by independent evidence. Applying the test of "testimonial trustworthiness and credibility" the Court held the Petitioner's confession to the ASP was voluntary and that it was properly recorded. The medical evidence that the Petitioner had been assaulted after arrest and his evidence that the statement produced as his confession was not made by him was dismissed without examining the circumstances. The Court was again influenced by the alleged inconsistency in Petitioner's evidence as to the time he spent in the ASP's office. On 6 July 1999, the Appeal was dismissed and conviction reaffirmed but the sentence was reduced to seven years on each count. The judgement and order of the Court of Appeal is marked **P2(e)** and annexed.

12. The Petitioner's application for special leave to appeal to the Supreme Court was refused with no reasons given on 28 January 2000. The Supreme Court order is annexed marked **P2(g)**.

13. THE PETITIONER ON 21 NOVEMBER 2001 SUBMITTED A COMMUNICATION TO THE UN COMMITTEE ON HUMAN RIGHTS (HRC) established by Article 28 of the International Covenant on Civil and Political Rights (ICCPR). Such communications are provided for under the Optional Protocol to the said Covenant. Sri Lanka had acceded to the International Covenant on Civil and Political Rights on 11 June 1980 (entry into force on 11 September 1980) and to its Optional Protocol on 3 October 1997 (entry into force on 3 January 1998). The State joined issue with the Petitioner at the Human Rights Committee, and the HRC after considering all the material placed before it by the petitioner and the State found the following violations:

    a) That both the evidentiary provisions of the PTA which have been relied upon to convict the Petitioner, and the factual circumstances surrounding his alleged confession, negate the provisions of the ICCPR relating to fair trial.

    b) The Petitioner's right to a review of the High Court decision without delay (Art. 14.3(c) and 14.5 of the International Covenant) was violated.

    c) That the burden of proving whether a confession was not voluntary was on the accused by PTA Section 16 and even if the threshold of proof is placed very low and a "a mere possibility of involuntariness would suffice to sway a court in favour of the accused" (as stated by the Government) there had been a willingness of the Courts at all stages to dismiss complaints of torture and ill treatment. This was a violation of Article 14.2 and 14.3(g) of the Covenant (which relate to the presumption of innocence and the guarantee not be compelled to testify against oneself or to confess guilt).

    d) That PTA Section 16 violated Art. 14.2 and 14.3*g) of the Covenant (referred to above).

The aforesaid findings of the UN Human Rights Committee are annexed marked **P3(d).**

The relevant parts of Article 14 of the Covenant are reproduced below for convenience of reference.

14.2 "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."

14.3(g) "Not to be compelled to testify against himself or to confess guilt.

14. The Human Rights Committee in a concluding comment said "In accordance with Article 2, para 3(a), of the Covenant, the State party is under an obligation to provide the author (i.e. the Petitioner) 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." The HRC also wished to receive from the state, within 90 days, information about the measures taken to give effect to its views **(P3(d)** above).

15. The Government of Sri Lanka thereafter, in its response to the Human Rights Committee dated 2 February 2005, stated that it has declined to do anything on the ground that "the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant retrial." (Annexed marked **P3(e)).**

16. The Petitioner submits that this response is an inaccurate representation of the State's obligations under the ICCPR. The ICCPR obliges the State to provide "an effective remedy" for violations of the rights guaranteed by the Covenant (Article 2(3)(a)). The executive branch of the State may not point to the fact that an act incompatible with the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility (General Comment 31 of the Human Rights Committee and Article 27 of the Vienna Convention on the Law of Treaties). General Comment 31 is annexed **(P3(f);** for convenience the relevant extract is reproduced below;

> 4. "The obligations of the Covenant in general and Article 2 in particular are binding on every state party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at what ever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact than an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relive the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of the Treaties, according to which the State Party 'may not invoke the provisions of its internal law as justification for its failure to perform the treaty'. Although Article 2 paragraph 2 allows State Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent State Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty." (*emphasis added*)

17. When therefore, the HRC forwarded its views to the State, Article 2(3) of the ICCPR requires the State to give an effective remedy for the findings of the violation. The individual claiming such remedy is also given the right, *inter alia*, to a judicial remedy from a local court and its enforcement. For convenience of reference, Article 2(3) of the ICCPR is reproduced below.
Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity;
b) To ensure than any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c) To ensure that the competent authorities shall enforce such remedies when granted.

18. The said response of the State to the UN Human Rights Committee has also incorrectly alleged that the Petitioner had been charged and convicted of the murder of innocent civilians including Buddhist monks. At no stage during the trial of the Petitioner has there transpired any such charge or evidence or even suggestion, the case being entirely confined to an allegation of conspiracy to overthrow the government by unlawful means and attacks on army camps.

19. The Petitioner respectfully states that the State's responses frustrates the legitimate expectation of the Petitioner that the Government, by acceding to the Optional Protocol, would consider itself bound to give effect to the views of the Human Rights Committee.

20. In the exercise of the above mentioned rights of the Petitioner, the Petitioner humbly begs that Your Lordships' Court be pleased to exercise its inherent powers of revision and/or review and set aside the Petitioner's conviction and sentence, make order for his immediate release and award suitable compensation.

21. AS A SECOND GROUND the Petitioner respectfully submits that the facts and law have been erroneously applied to secure his conviction resulting in a grave miscarriage of justice. In all the extraordinary circumstances of the case and in all humility, the Petitioner begs that Your Lordships' Court be pleased to exercise its inherent powers of revision and/or review and set aside the Petitioner's conviction and sentence for the following reasons:

a) The Court of Appeal and Supreme Court's affirmation of the judgement of the High Court despite the lack of any evidence beyond an alleged extra-judicial confession in circumstances that violated human rights was manifestly unfair and amounted to a denial of justice.

b) The failure to consider the denial of access to an independent interpreter at the recording of the purported confession.

c) The two police witnesses testified at the trial only as to the making of the alleged confession. They admitted that they had no knowledge of the attacks on the army camps, and that no investigations had been undertaken to ascertain the truthfulness of the alleged confession.

The second test for the acceptance of the confession, namely that it is "true and trustworthy" is wrongly claimed by the Court of Appeal to have the high authority of Soertsz J in *King vs Ranhamy* (43 NLR 221). Even if such tests can be said to be recognised in our law, the Court of Appeal has radically altered it by adding that it can be satisfied by "the presumption and guarantee of testimonial trustworthiness and truth." This is particularly unjustifiable where a confession is retracted at the trial and no evidence other than the alleged confession was placed before was placed before the trial court to establish the charges.

d) The basic procedural guarantees that have been broadly recognised on the national and international level as necessary to safeguard the voluntariness and reliability of a confession were discarded in this case, rendering the confession on its face unreliable.

e) The Court of Appeal neither considered nor remedied the decision of the High Court to shift the burden of proof on to the accused to prove his innocence. PTA Section 16 makes the confession to the police in certain circumstances admissible, but this in no way alters the burden of proof resting on the prosecution to prove guilt beyond any reasonable doubt.

f) The burden of proof has been made by the High Court and Court of Appeal to depend entirely on the credibility of the accused's testimony. If the burden on an accused to have a PTA confession rejected is to show a mere possibility of involuntariness, the evidence in this case has amply done so. Unfortunately in the connection, undue importance has been given to the alleged inconsistency as to the time the Petitioner says he was in the ASP's office.

g) All the evidence was interpreted against the Petitioner. The benefit of the doubt was not given to the Petitioner although PC Hashim was involved in recording both statements.

h) This was not an appropriate case for the Court of Appeal to say that the evidence should be weighed and not counted having regard to the relative position of the two parties.

i) The trial court's complete failure to consider other exculpatory evidence in preference to reliance on one piece of questionable inculpatory evidence in the form of a "confession" is indicative of its lack of impartiality.

j) The failure by the Court of Appeal to treat the Petitioner as innocent until proven guilty when it said "....in the course of the evidence [the accused] did not impugn or assail aforesaid presumption and guarantee of testimonial worthiness and truth of the contents of the confession. He has omitted in his evidence to state facts refuting conspiracy to act together on their part to commit the imputed illegal acts nor stated that he has never attacked the army camps. In these circumstances, the learned High Court Judge was correct in her adjudication as regards the truth and veracity of the contents of the confession." The Court of Appeal has erred in not taking into account the Petitioner's denial of involvement in conspiracy. The Court of Appeal erred seriously when it said that the Petitioner had failed in his evidence to deny taking part in the attacks on the Army Camps. The Court also failed to take into account the prosecution's failure to cross-examine the Petitioner.

k) The Petitioner's right to a fair trial was breached by the Court's failure to take into consideration the following exculpatory evidence:

(i) medical evidence that the Petitioner was subjected to assault while in custody before recording the confession;

(ii) lack of effective and independent translation of the nature and content of the document which the Petitioner was asked to "sign" and which was later presented in evidence as his confession;

(iii) the making of the alleged confession at a time when the Petitioner was denied access to a lawyer, having had no access to a lawyer for five months at the time when the alleged confession was made.

22. AS A THIRD GROUND FOR SEEKING YOUR LORDSHIP'S INDULGENCE to set aside the Petitioner's conviction and sentence by way of revision or review, the Petitioner states that Emergency Regulation 60 of the Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 1989 which was the basis for Petitioner's conviction on count 1 of the indictment was *ultra vires* Articles 13(3) and 13(5) of the Constitution, null and void. For this reason the conviction on count 1 was bad in law. Since counts 2 to 5 were linked to a finding of guilt on count 1 Petitioner could not have been found guilty on counts 2 to 5 as well. The convictions on counts 2 to 5 are also bad in law.

23. Following from paragraph 22 above, the Petitioner states that count 1 being bad in law, the convictions and sentences on counts 2 to 5 are bad in law for misjoinder of charges by virtue of section 174 of the Code of Criminal Procedure (Act No. 22 of 1994). 15 of 1979.

24. FROM 1993 THE PETITIONER HAS SPENT HIS LIFE in police custody and detention, remand prison and a prison for convicted criminals. Since the age of 20 years up to now, when he is 32 years of age, for the best part of a young man's life, the Petitioner has been deprived of his liberty and he stands to remain so. He was convicted of serious crimes solely because the Courts regrettably preferred to believe two police officers who said the Petitioner had confessed to the crimes of his own free will and without prompting.

25. The Petitioner states that a copy of the Petition has been forwarded to the Honourable Attorney General.

26. The Petitioner states that he has not previously invoked the jurisdiction of this Court by way of revision in respect of this matter.

WHEREFORE the Petitioner prays that Your Lordships' Court be pleased to;

a) permit the Petitioner to support this application;
b) issue notice on the Hon. Attorney General;

c) make order granting the Petitioner leave to proceed with the application for revision/review;

d) set aside the conviction and sentence imposed on the Petitioner by the High Court on 29 September 95 and 4 October 95, respectively;

e) set aside the conviction and order of the Court of Appeal dated 6 July 88;

f) set aside the judgement and order of the Supreme Court dated 28 January 2000;

g) make order for the release of the Petitioner;

h) make order for the granting of compensation in a suitable amount;

i) make order for costs; and

j) grant such other and further relief as to Your Lordship's Court shall seem meet.

Signed

Attorney at Law for the Petitioner

Settled by

Saliya Edirisinghe
V.S. Ganesalingam
Suriya Wickremasinghe
R.K.W. Goonesekere
Attorneys at Law

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

S.C. SpL(LA) No. 182/99
C.A. Appeal No. 208/95
H.C. Colombo 6825/94

Nallaratnam Singarasa
Presently serving a term of imprisonment
Kalutara

Petitioner

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent

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 Wickremasinghe, V S Ganeshalingam and Saliya dirisinghe and instructed by E Mariampillai, for the Petitioner.	
		Yasantha 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	

Sarath N Silva, C.J.

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 Asokan, 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 Court 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 judgement 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 the 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 in the Universal Declaration of Human Rights which the fundamental rights contained in Articles 10 to 14 of the Constitution are based. Article 2 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 of 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, international law and municipal law constitute a 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 the 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 Halsbury'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))" (Halsbury Statutes – Fourth Ed. 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 legislation 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 and 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 circumscribed 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 of constitutionality and should read as follows;

> *international 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 legality being the primary meaning of the Rule of Law, "that everything must be done according to law (Administrative Law by Wade and Forsyth - 9th Ed, Page 20).

In this background, I would examine the submissions that have been made. Counsel for the Petitioner contended that Sri Lanka acceded to the 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 under an obligation 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 of 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 judicial 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 tracks, 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 1980, 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 functions 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 in 1980 and the Optional Protocol in 1997.

As noted in the preceding analysis, the Covenant is based on 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 down in 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 relating to Public Security. It has not been *(sic)* submitted that *(sic)* 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" and *(sic)* 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 under 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 been 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.

Chief Justice

Nihal Jayasinghe

I agree **Judge of the Supreme Court**

N.K. Udalagama

I agree **Judge of the Supreme Court**

N.E. Dissanayake

I agree **Judge of the Supreme Court**

Gamini Amaratuga

I agree **Judge of the Supreme Court**

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

In the matter of an application for revision and/or review of the Judgement and order in SC (SPL) L.A. No. 182/99 dated 28.01.2000 and pursuant to the findings of the Human Rights Committee set up under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2001 made under the Optional Protocol thereto

In SC (Spl) L.A. No. 182/99
CA Appeal No. 208/95
& H.C, Colombo Case No. 6825/94

Nallaratnam Singarasa vs. Attorney General

Written Submissions on behalf of the Petitioner in SC (Spl) L.A. No. 182/99

1) It is important to understand why the UN Human Rights Committee (HRC) found that in convicting Singarasa, the State had violated the obligations it had undertaken when ratifying the International Covenant on Civil and Political Rights (ICCPR). Singarasa's convictions in the first instance carried a sentence of 50 years rigorous imprisonment later reduced to 35 years.

2) The Committee's views communicated to the State stated that Singarasa had been denied a fair trial as mandated by ICCPR Article 14(1). (Fair trial is also a fundamental right in our Constitution, Article 13 (3)). This fair trial guarantee has been judicially interpreted by our courts in *Wijepala v. The Attorney General* [2001] 1 Sri L.R. 46 to include "anything and everything necessary for a fair trial." (p. 49).

3) The HRC found that the sole basis of the conviction was an alleged confession typed in Sinhala when whatever statement the accused made orally would have been in Tamil. The HRC pointed out that the alleged 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." This alone was sufficient for the Committee to say that the element of a fair trial was denied. The Committee in its views did not specify why particular care in the interrogation and interpretation was necessary on the special facts of this case, namely that the accused was an illiterate youth who spoke only Tamil, or, important, that under our law there could be a conviction without other evidence. But although unspoken, these factors could not have been far from their minds.

4) The Committee made no comment on the PTA law on confessions except to state that it was a violation to place on the accused the burden of proving that a confession was not made voluntarily. The accused had complained of a severe assault after arrest. The Committee ruled that Article 14(3(g) of the ICCPR meant that it was for the prosecution to prove the confession was voluntary and that there could be no shifting of the burden, even by placing a low standard of

proof, on the accused. PTA section 16 therefore was in violation of Article 14(3)(g) of the Covenant. There was also a finding that the shifting of the burden resulted in a violation of Article 14(2) of the Covenant, namely that an accused is presumed to be innocent.

5) The reference by the Committee to "a confession obtained in such circumstances" could only refer to a doubt as to the genuineness of the statement even before the question of whether it was voluntary could be considered. If a man says, as the accused did, that he had no idea what was recorded but he was forced to put his mark (thumb impression) to it, it is not just a case of a statement obtained by threat, promise or inducement; it is not his statement at all.

6) During the course of the hearing of this application, some confusion arose regarding exhaustion of domestic remedies. The position on this is as follows. The Optional Protocol provides that individuals who claim their rights have been violated and who have exhausted all domestic remedies may submit written communications to the Committee - Article 2. The requirement of exhaustion of domestic remedies is a matter for the Human Rights Committee to determine when deciding to exercise its jurisdiction. This was in fact gone into in the present case, The State argued that domestic remedies had not been exhausted, and the HRC did not agree with this contention. (Vide in general the part of the HRC's views headed Consideration of Admissibility, and in particular paras 6.4 and 6.5). The Committee having ruled on admissibility, which is a matter pertaining only to its own practice and rules of procedure, this issue is not now of any relevance to the Supreme Court when considering the Committee's views.

7) In view of the unfortunate doubts suggested by Deputy Solicitor General Kodagoda on the quality of the members comprising the Human Rights Committee we are submitting a summary of the qualifications and background of those who participated in the Singarasa case Annex "A"[♦] (data from the UN website http://www.ohchr.org/englishlbodies/hrc/members.htm). 'Without doubt the views expressed by them in the Singarasa case are entitled to great respect.

8) Having disapproved of his conviction, the Human Rights Committee is asking the State *inter alia* to release Singarasa who has now been in continuous custody for over 12 years, or to order a retrial. The alternative of retrial can only be on the basis that PTA Section 16 is amended so as to be in keeping with the ICCPR as recommended by the Committee. This is unlikely to take place in the near future and release would be the just solution along with compensation. It would also be the legitimate expectation of any citizen who has been enabled by the State to petition a grievance to the HRC, that the State would follow the recommendations of the Committee after due inquiry where the State is given ample opportunity to present its case. The doctrine of legitimate expectation as a substantive right giving rise to a remedy has been recognized by our courts in *Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others* [1999] 1 Sri L.R. 393; *Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others* [2003] 2 Sri L.R. 23; *Dr. MN Sri Skandarajah v. VC Abeygunawardena, Secretary, Ministry of Health & Indigenous Medicine and Others*, S.C.(FR) Application No. 490/2000, S.C. Minutes 25.10.2004. In the case *Minister for Immigration v. Teoh* [1995] 3 LRC 1 (Law Reports of the Commonwealth) the High Court of Australia recognised that the doctrine of legitimate expectation can be relied upon to ask for a right provided by an international covenant which

[♦] Ed Note; The annexures to these Written Submissions are not published here.

Australia had ratified - in this instance the Convention on the Rights of the Child, This report is reproduced as Annex "B".

9) What should the State's reaction be to the Committee's views? It is a request to the State to do something, not to do nothing. The State in its response has not refused but has stated that it is unable to give effect to the Committee's recommendations because a judicial order has interposed. In its response, the State has also incorrectly claimed that the Petitioner, who has only ever been charged in connection with attacks on army camps, had been convicted of "murder of innocent civilians including Buddhist monks".

10) The ICCPR is a treaty and it is a basic tenet of the law of treaties, now reaffirmed in the Vienna Convention on the Law of Treaties, that a state party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27). It is for this reason that the Human Rights Committee has said that "the executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provision of the Covenant was carried out by another branch of government as a means of seeking to release the State Party from responsibility for the action and consequent incompatibility." This is from para 4 of General Comment 3 1 of the Human Rights Committee.

11) The ICCPR and the Protocol, both ratified by Sri Lanka, must be read together. The Protocol sets out the procedure for the HRC to entertain an individual grievance, while Article 2 of the ICCPR indicates the appropriate remedy that the State is obliged to take if it is found that there is merit in the complaint. Article 2 is clear that the State in ratifying the Covenant, has undertaken to give an "effective remedy" and this is explained further by requiring the state to ensure that the aggrieved party's right to the remedy is determined by "competent judicial, administrative or legislative authorities and to develop the possibility of judicial remedy." It is respectfully submitted that it is not the legislature alone that can provide the remedy. The judiciary can act in the interests of the citizen by developing a judicial remedy.

12) It is in that expectation that the application has been made to Your Lordships' Court. General Comments to the ICCPR are made by the HRC under Article 40(4) of the Covenant and are recognised as part of the jurisprudence of the Human Rights Committee. General Comment 31 of the HRC at para 4 says clearly "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local -- are in a position to engage the responsibility of the State Party." The appeal to the Supreme Court for a remedy is for this reason, bearing in mind that the court is the only Court having a human rights jurisdiction and is regularly engaged in promoting and protecting human rights.

13) We are not asking the Court to substitute for the decision of a local court, the views of the Human Rights Committee, but in the exercise of its inherent jurisdiction to review the conviction of Singarasa in the light of the observations of a body of experts. The Court's respect for standards and principles set in international instruments is demonstrated in many judgements. These include: *Mediwake and Others v. Dayananda Dissanãyake, Commissioner of Elections and Others* [2001] 1 Sri L.R. 177; *Centre for Policy Alternatives ('Guarantee,) Limited and Another v,*

Dayananda Dissanayake, Commissioner of Elections and Others [2003] 1 Sri L.R. 277; *Farwin v. Weyasiri, Commissioner of Examinations and Others* [2004] 1 Sri L.R. 99; *Nadeeka Hewage and Others v. University Grants Commission of Sri Lanka and Others*, SC Application No. 627/2002 (FR), SC Minutes 8.8.2003; *Warnakulasooriya Merina Ratnaseeli Fernando v. D.M Jayaratne and Others* SC (FR) Application No. 528/2000, SC Minutes 27,9.2001; *A.H. Wickramatunga and Others v. HR. de Silva, Chief Valuer, Department of Valuation and Others* SC Application, No. 551/98 (FR), SC Minutes 31.8.2001. More recently, the Solicitor-General addressing the UN Committee on the Torture Convention (CAT) on November 11 2005 (as reported by the Asian Human Rights Commission 6 December 2005) affirmed the position that "the Courts of our country are bound to give expression to international covenants where Sri Lanka is a party, when called upon to interpret any statute." He added that" Sri Lanka has always been mindful of its obligations and respected secured and advanced human rights to its society." The Foreign Minister articulated the same views recently in Parliament. He said:

> *My Ministry attaches great importance and priority to the promotion and protection of human rights in all our international endeavours. I am pleased to inform this House that Sri Lanka has continued to play a very positive and proactive role in promoting human rights. We will continue to follow this practice through co-operation at various international human rights fora.*
> *Hansard Volume 162 - No 11 of 22nd December, 2005 col. 1450*

14) By this application, the Supreme Court is given the opportunity, while noting the views of the Human Rights Committee on the conviction of Singarasa, to re-examine, in the interests of justice, the conviction under our law, including the PTA. There are two reasons for making this respectful request;

a) Even if the burden of proving that the confession was not voluntary shifted to the accused, the presumption of innocence was not shaken. This presumption was a cardinal principle of our criminal law well before it was elevated to the level of a constitutional right. When the facts relating to the recording of the confession, the evidence given by the accused at the *voire dire* inquiry and the trial, the paucity of the prosecution evidence, are all taken together, the reasonable conclusion is that the accused had discharged that burden. He did not have to prove beyond reasonable doubt or even by a balance of probability that section 24 of the Evidence Ordinance applied. The prosecution had failed to establish his guilt beyond reasonable doubt because an accused is entitled to rely on the presumption of innocence. The trial judge was impressed only by the manner in which the police officers gave evidence and dismissed out of hand the evidence given by the accused and his lowly background.

b) Assuming that the 'confession' was voluntary and is admissible in evidence, still its value has to be tested, especially when it is retracted on oath by the accused, and there is no other prosecution evidence. The tests are truth and reliability. Voluntariness of a confession does not ensure a conviction because a court must be satisfied that it is also true and reliable. There was no evidence to support the truth of the facts related in the confession, namely that attacks on the army camps specified had in fact taken place. But both the trial judge and the Court of Appeal accepted the truth of these facts, giving only the reason that no man would admit to

facts against his interest unless they were true. The other recognised test of reliability of the confession was not considered at all.

15) This is in marked contrast to a later Supreme Court decision where the relevant facts are similar. Shortly after Singarasa, the Court of Appeal in *Theivendian* affirmed the conviction of an LTTE suspect citing the authority of Singarasa on the law. This was a case where the only evidence was that of an alleged confession, and there was no independent evidence that the attacks on army persons on which the charges were based had in fact taken place. On appeal, the Supreme Court set aside the conviction. The judgement of the Court of Appeal in Singarasa, which is specially referred to in the judgement of Ameer Ismail J, must be considered as having been disapproved. It is submitted that the 1000 PTA indictments admitted by the Attorney General in his response to the HRC's views as having been withdrawn and the 338 persons who were in detention having been discharged, were all due to the realisation that after *Theivendran* there was no possibility of obtaining a conviction,

16) In any event, the conviction on charge 1 is on an entirely different footing, and cannot stand as it clearly contravenes the provisions of our law. This was a charge not under the PTA, but under the emergency regulations, which cannot override the provisions of the constitution. The conviction may therefore be considered as made *per incuriam*. This first charge, which dealt with conspiracy to overthrow the lawfully constituted government of Sri Lanka, was a charge under emergency regulations, i.e. regulation 23(a) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989.

17) Here again the only evidence against the Petitioner was an alleged confession, which had been taken under the provisions of regulation 50 of the emergency regulations. Regulation 60 of the emergency regulations placed the burden of proving that the confession was not voluntary on the Petitioner, in violation of his constitutional rights to the presumption of innocence and fair trial guaranteed by Articles 13(5) and 13(3) of the constitution, respectively. The relevant portions of the emergency regulations are annexed marked "C".

18) Article 155(2) of the Constitution prohibits emergency regulations from overriding the provisions of the Constitution and therefore emergency regulation 60 could not have placed the burden on the Petitioner to prove that the confession was not voluntary.

19) If Your Lordships' Court were to quash the conviction and sentence on the first charge, an appropriate alteration may be made of the sentences on the other charges which, once the element of conspiracy to overthrow the government is removed, only amount to simple mischief, An alteration for the sentences to run concurrently instead of consecutively would serve the end result of the release of Singarasa, now aged 32, who has spent over twelve years of his life in custody.

20) In the world order of today, we cannot talk of state sovereignty as we did before. The changes that were brought about after World War II require rethinking not only of the relationship of State and State but also of State and State including its inhabitants. Experts have in recent years considered what happens to the notion of sovereignty when a state of its own volition subscribes to overarching principles outside national laws, primarily intended for the benefit of the people and the country. They have highlighted that doctrines of international law on *dualist* or *monist*

theories cannot claim to be unaffected. The law of treaties now reaffirmed in the Vienna Convention says that when a state ratifies a covenant or treaty there is a contract, and *pacta sunt servanda.* We can say therefore that the concept of sovereignty is qualified, because we regularly go before international tribunals to plead compliance. Or we can say that by ratification the State has recognized that the only true sovereignty is sovereignty of the people. The court has a unique opportunity to enunciate such principles in this case, relying on the recognition of the sovereignty of the people as the lodestar of our Constitution, as reflected in the Preamble and in the substantive provisions.

21) There are examples of the attitude of our courts to obligations undertaken by the state in international agreements. An illustration is how the court reacted when the UN Stockholm Declaration and the UN Rio de Janeiro Declaration were cited to support an argument,

> are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions. *SC Application No. 884/99 (F.R.) Tikiri Banda Bulankulama v Secretary, Ministry of Industrial Development* S.C. Minutes 2 June 2000 (Eppawela case) per Amerasinghe J at page 22.

22) The Supreme Court in referring to the provisions of Article 9 of the International Covenant on Civil and Political Rights and to its Optional Protocol to which Sri Lanka is a party, stated;

> A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.
>
> Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognises.
> *Weerawansa v. The Attorney-General and Others [2000] 1 Sri L.R. 387, page 409.*

Sgd

Attorney at Law for the Petitioner
25 January 2006

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 retried 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 HRC 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 looking 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 case was that there had been a grave miscarriage of justice in his conviction, and a number of reasons were

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♦ Attorney at Law. Senior Counsel in the *Singarasa Case*.

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 full argument even though judgement was delivered after many months.

In its views communicated to the State, the HRC 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 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 judgement – 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 and 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 incuriam* 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.

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. As a 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.

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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[1] For example, some treaties expressly require states to enact domestic legislation criminalizing certain conduct. *See, e.g.*, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 113 (Dec. 10 1984).

[2] *See, e.g.*, GRONDWET [GW.] [Constitution] ch. 5, § 2, art. 94 (Neth.) 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' treaty obligations.

[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.

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 if it 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 (i.e. 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

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 Political Rights (ICCPR)) that his conviction and sentence violated various provisions of the ICCPR. Thus, the threshold issue before the Court was the legal status and relevance of that finding 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

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[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 vires* 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 Whole*, U.N. Conference on the Law of Treaties, 2nd. Sess., 43rd. Meeting, at 243 (Ruiz Varela) (1968) ("[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.").

[6] The Committee expresses its findings in individual cases in the form 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.

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 ICCPR-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 world, 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 discretion of states so long as they ultimately fulfil 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.

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[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 States 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.

[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.

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 bears 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, it is 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 law*. 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 OP, 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 any conflict with the Sri Lankan Constitution.

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 as 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 lacked 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:

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[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.

[10]Accession generally refers to the act of expressing consent to be bound by a treaty by a state that 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.

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 basic 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 petition 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.

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

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[12] The only way Sri Lanka could in the future 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 relations. 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 provisions of Sri Lankan law.

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

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

power possessed by the Committee is not the judicial power of Sri Lanka. It 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 (1) 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 clearly 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 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 law. 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 has 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 of human rights. The judgement in issue represents one such example.

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[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. If 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* country 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 ICCPR-OP in the first place.

Sundara Aratchchige Lalith Rajapakse v Sri Lanka

The Petition to the United Nations Human Rights Committee

1. Information concerning the Petition

1.1 The Author

The author of this petition is Sundara Aratchchige Lalith Rajapakse, a 19 year old logger and a national of Sri Lanka. He normally resides at Vivekasthana Para, Kapuwatta Ja-Ela, Sri Lanka.

1.2 Representation

The author is assisted by the *Asian Legal Resource Centre* of 19/f, Go Up Commercial Building, 998 Canton Road, Mongkok, Kowloon Hong Kong, and the *World Organization Against Torture*, 8 Rue du Vieux-Billard, P.O. Box 21, CH-1211 Geneva 8, Switzerland (A letter of authorization from the Applicant is attached Annex I).

All correspondence regarding this Application should be addressed to c/o Isabel Ricupero at the *World Organization Against Torture*, P.O. Box 21, 8 Rue du Vieux-Billard, CH-1211 Geneva 8, Switzerland.

1.3 State Party :

Sri Lanka

1.4 Alleged Breaches of the ICCPR

It is alleged that the Applicant's illegal arrest, detention and torture by police officials, and the subsequent lack of adequate and timely remedies for these violations, including protection from threats and other acts of intimidation involve breaches of Articles 2.3, 7, 9, and 9.1 of the Covenant by the State of Sri Lanka.

2. Summary of the Facts Alleged

2.1 Arrest and Torture

2.1.1. The Applicant, a 19 year old logger, was arrested at a friend's house on 18 April 2002 at approximately 10 p.m. by several police officers from the Kandana Police Station. At the moment of arrest, he was beaten on his back and other parts of the body with the wooden handle of an axe, hit on the forehead with a boot by one officer, and then dragged to a jeep that was waiting outside the house. He was subsequently taken to Kandana Police Station where he was detained in a cell. While in custody at Kandana Police Station, he was continuously tortured and suffered serious injuries.

2.2.2. During the evening and night of the 19th he was brutally tortured. Several police officers forced him to lie on a bench and then severely beat him all over his body. His head was held underwater for prolonged periods; he was beaten on the soles of his feet with blunt instruments; and books were placed on his head and then hit with blunt instruments.

2.2.3. On 20 April, at approximately 10 a.m., the Applicant's grandfather, Mr Elaris Alwis who had gone to Kandana police station searching for him, found him lying unconscious on the floor of a police cell. In great distress, Mr. Alwis sought the help of a Member of Parliament, who made inquiries. When Mr. Alwis returned to the police station he was informed that the Applicant had been taken to Ragama General Hospital.

2.2 Medical Treatment and Recovery

2.2.1. On his arrival at Ragama Hospital, Mr. Alwis found the Applicant, still unconscious, lying on a stretcher. On returning to Ragama Hospital later on the same day, Mr. Alwis and the Applicant's mother learnt that he had been transferred to Colombo National Hospital. Following his transfer, the Applicant remained unconscious for 15 days. After that period, the Applicant began to slowly recover. Nevertheless, he only began to speak with some clarity after 13 May. On 15 May, the Applicant was transferred to a remand hospital at Welikade.

2.2.2. On 16 May 2002, the UN Special Rapporteur on Torture issued an urgent appeal on behalf of The Applicant.[1]

2.2.3. On the following day, 17 May immediately after obtaining bail (see below), the Applicant was taken back to the National Hospital in a private van by his mother and grandfather, Mr. Alwis. He was readmitted to the hospital where he remained for treatment until June. His treatment was paid for by the Asian Human Rights Commission and private individuals.

2.3 Legal Proceedings

2.3.1 Proceedings relating to the Applicant's arrest

On 20 April, few hours after the Applicant was hospitalized, one of the police officers involved in the attack filed three B-reports[2] before an acting Magistrate, at the Wattala Magistrate Courts, and obtained an order to detain the Applicant in remand custody.

On 16 May 2002, an application was made to the Magistrate Court of Wattala for the Applicant's release. The Magistrate issued an order that the Applicant should be brought before the Magistrate Courts on the 17 May 2002. As the police did not comply with this order, the Magistrate issued further directions that the Applicant b immediately brought before the court together with a medical report regarding his condition. The Applicant was produced before the Magistrate on 17th May along

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[1] See *Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted pursuant to Commission resolution 2002/38,* Addendum, E/CN.4/2003/68/Add.1, 27 February 2003, pp. 310, paras. 1625-1627.

[2] First report to the court.

with the medical report issued by the National Hospital when he was transferred to the Remand Prison on the 15 May.

The Magistrate then vacated the previous order that had been issued to detain the Applicant in remand custody, granted him personal bail, and rescheduled the hearing in relation to the three B-reports.

On 29 September 2003, the Applicant was acquitted of the two charges that the police officers had filed against him at the Magistrate's Court of Wattala. The complainants in the cases robberies alleged to have been committed by the Applicant stated that they had made no complaint against the victim so the court found that no evidence had been presented against him.

2.3.2 Criminal Proceedings Regarding the Torture suffered by the Applicant

On 24 July 2002, the Criminal Investigation Department (CID) initiated an investigation into the torture suffered by the Applicant on the advice of the Attorney General who acted on the basis of a complaint made to him by the Asian Human Rights Commission. The Applicant's statement was recorded on 22 August 2002. A statement of a Judicial Medical Officer, which was recorded on 11 October 2002 stated that the Applicant had been assaulted.[3]

The Judicial Medical Officer's (JMO) report, which was submitted on 11 October 2002, notes the following injuries: "healing scab abrasion 2 inches x 3 inches on the right scapular region, healing scab abrasion 1 inch x 1 inch on the back of the right elbow, healing scab abrasion 2 inches x 1 1/2 inches on the front of the right chest, contusion 2 inches x 3 inches on the back of the left hand, contusion 2 inches x 3 inches on the front of the left forearm., contusion 1 inch x 1 1/2 inches on the medical side of the left hand, contusion 1 inch x 2 inches on the lateral side of the left hand, contusion 2 inches x 2 inches on the sole of the left foot, contusion 2 inches x 1 inch on the sole of the right foot and cerebral contusion." This last injury is described as an injury which endangers life.

The Prosecution of Torture Perpetrators Unit filed a criminal action under the Torture Act (Act No. 22 of 1994) against Sub-Inspector Peiris and other officers before the Negambo Magistrates Court and the case is currently pending.

However, the alleged perpetrators were not taken into custody. No administrative/disciplinary procedures were taken against the alleged perpetrators and they have continued to work as law enforcement officers.

2.3.3 Proceedings to ensure Reparations; the Fundamental Rights Petition

A petition for violation of fundamental rights was filed before the Supreme Court on 20 May 2002. On 13 June 2002, the Supreme Court of Sri Lanka issued leave to proceed in the fundamental rights application and a hearing was scheduled for 23 October 2003. On that date a new hearing was scheduled for the following January. On January 23 2004, the case came before the Supreme Court and was postponed until 26 April 2004.

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[3] *Ibid* Note 1.

2.4 Threats and Intimidation

2.4.1. The policemen involved in the acts of torture were neither suspended from their duties nor taken into custody. In particular, the officer in charge of the police station, who is the first respondent in the fundamental rights case, continues to hold his post as the Officer-in-Charge of the Kandana Police Station.

2.4.2. The Applicant has been subjected to constant pressure to force him to withdraw his complaint. He has been repeatedly called to testify alone at a police station even though he has already made a statement regarding the torture he suffered. One of the accused, has contacted several persons who work at human rights organizations that have aided the Applicant with his case, to request that they put pressure him to abandon legal proceedings.

2.4.3. On the evening of 14 October 2003, four persons visited the Applicant's house and asked for the Applicant, who was not at home at the time. When the Applicant's family inquired about their identities, the four persons answered that they had been sent by a Sub-Inspector from the Kandana Police Station and that the Applicant should go with them to meet with the Sub-Inspector (who was not named) at the police station. When inquiries were made with the Kandana Police, they reported that they had not sent anyone to bring the Applicant to the police station. The Applicant's family complained regarding this matter to the National Human Rights Commission Hotline.

2.4.4. Because of many past instances in Sri Lanka in which criminals have been hired as assassins by interested parties, his family fears for the Applicant's life. They have requested that he not leave the house after six in the evening.

2.4.5. Threats were also made against Mr. Elaris Alwis (the Applicant's grandfather), to force him to withdraw the complaint he had made to the Human Rights Commission of Sri Lanka (HRC). After the complaint against the police was lodged an attempt was made, through an intermediary, to poison Mr. Elaris Alwis. This incident was brought to the attention of the police authorities through the National Human Rights Commission.

2.4.6. The Applicant and his family have made several complaints regarding the threats made against him and his grandfather, Mr. Elaris Alwis.

2.5 Physical and Psychological Consequences of the Torture suffered

The Applicant was by profession a logger, which required that he climb large trees and carry heavy loads. He was also the main source of income in his family which consists of his mother, two young sisters and his grandfather. Since the attack on his person, and as a result of both the physical consequences and the constant fear he has been living in, he has not been able to continue his profession and has been living on charity. His situation is such that he has often been unable to get proper nourishment. He has complained of headaches, fits and bleeding from one ear. As a result of both the violence and the continuing threats that have been made against him, he has been living in extreme psychological distress.

3. Admissibility

3.1. Sri Lanka acceded to the International Covenant on Civil and Political Rights on 11 September 1980 and to its First Optional Protocol on 3 January 1998. The alleged breaches of the ICCPR took place after Sri Lanka's accession to both instruments and the Human Rights Committee is therefore competent to examine the present case.

3.2. The petition is in conformity with the requirements of Article 5 of the Optional Protocol, and Rule 90 of the Rules of Procedure of the Human Rights Committee.

3.3. In particular, regarding Article 5.2 (a) of the Optional Protocol and Rule 90(e), we wish to confirm that the present matter has not at, any time, been submitted to another procedure of international investigation or settlement.

3.4. As for Article 5.2 (b) and the question of **exhaustion of domestic remedies,** it should be noted that the Applicant has attempted to obtain redress both through criminal procedures and through a fundamental rights petition in order to obtain compensation. As a result, he and family members have been the object of threats and other acts of intimidation.

3.5. **Regarding criminal proceedings against the alleged perpetrators** it is submitted that: 1) action taken in the criminal investigations and proceedings in this case demonstrated extreme lack of diligence and that the proceedings are currently at a standstill; 2) and that it is highly unlikely that these proceedings will result in convictions.

3.6. An assessment of the effectiveness and the reasonableness of the length of the proceedings should take into account the circumstances of the case at hand and the general effectiveness of the proposed remedy in Sri Lanka.

3.7 Regarding the case at hand, an evaluation should be made of what positive action was taken by the authorities to ensure that a thorough investigation of the facts took place that would lead to the prosecution and conviction of those responsible for the acts of torture inflicted on the petitioner.

3.8 In this respect, it should be noted that: 1) no criminal investigation into the acts of torture suffered by the victim was initiated for over three months in spite of the fact that the Applicant had suffered injuries so severe that he had to be hospitalized for more than one month; 2) that the alleged perpetrators were neither suspended from their duties nor taken into custody permitting them to place pressure and threaten the Applicant; 3) and that investigations are currently at a standstill.

3.9. The United Nation's Committee Against Torture (CAT) has consistently ruled that, under the Convention against Torture to which Sri Lanka is party, allegations of torture should be investigated promptly, within very short delays.[4] The CAT also considers that no formal complaint needs to be

[4] See UN Committee Against Torture, *Encarnación Blanco Abad v Spain*, 14 May 1998, CAT/C/20/D/59/1996, para. 8.2 and 8.6 ; *Khaled M'Barek v Tunisia*, CAT/C23/D/60/1996, 24 January 2000, paras. 11.5-11.7.

lodged and that it is sufficient that the victims bring the facts to the attention of the authorities.[5] In the case of *Encarnación Blanco Abad* the Committee considered delays of three weeks and more than two months in initiating procedures into allegations of torture to be excessive and, in the case of Khaled M'Barek, the Committee considered unwarranted a delay of 10 months in ordering an inquiry into allegations of torture. The Committee stated:

> *... The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.*[6]

3.10 The Applicant was arrested on 18 April 2002 and taken unconscious to the hospital two days later, on the 20th of the same month. In spite of the extreme gravity of his situation no action was taken by the authorities to investigate the acts of torture which had been carried out by the policemen who arrested the Applicant for over three months. On 16 May 2002, the Special Rapporteur on Torture issued an urgent action regarding the Applicant's situation. A criminal investigation was only initiated on 24 July 2002. The delay of more then three months before even opening an investigation is clearly unjustifiable.

3.11. Moreover, the alleged perpetrators of the attack on the Applicant have not been taken into custody nor suspended[7] **and are still carrying out their professional duties as police officers.** A risk thus exists that evidence will be tampered with. Investigations would seem to be currently at a standstill.

3.12. Finally, regarding the general efficiency of the remedies under examination, it should be considered that in Sri Lanka, it is common for cases to suffer long delays both at the Attorney General's Department and in the Courts.

3.13. The Human Rights Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful.[8] Moreover, it is important to recall that international jurisprudence has recognized that safeguards against serious violations of human rights, such as the one that exists in cases of torture entail, independently of other remedies, an obligation to carry out

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[5] *"The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention. Encarnación Blanco Abad v Spain,* Ibid, para. 8.6

[6] *Encarnación Blanco Abad v Spain*, Ibid, para. 8.2

[7] The Recommendations of the UN Special Rapporteur on Torture include : (k) When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place and, unless the allegation is manifestly ill-founded, the public officials involved should be suspended from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings....in *Report of the Special Rapporteur on the question of torture submittedin accordance with Commission resolution 2002/38,* E/CN.4/2003/68, 17 December 2002, p. 10, k. This document is a revised version of the recommendations issued by the previous Special Rapporteur, see E/CN.4/2002/76, 27 December 2001 p. 5, annex I, j.

[8] UN Human Rights Committee, Joseph Semey v Spain, Communication 986/2001, 07/30/2003, CCPR/C/78/D/986/2001, para.8.2 ; Joseph Semey v. Spain, Communication 986/2001, 07/30/2003, CCPR/C/78/D/986/200, para. 8.2 ; Luis Asdrúbal Jiménez Vaca v. Colombia, Communication 859/1999, 03/25/2002, CCPR/C/74/D/859/1999, para. 6. *Cesáreo Gómez Vázquez v. Spain* (communication No. 701/1996.

full and effective investigation.[9] Such an obligation implies that victims of torture be entitled, in addition to the payment of compensation, to *"a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."*[10]

3.14. The lack of progress in proceedings together with the fact that the alleged perpetrators have remained at liberty and have continued to work as police officers has resulted in pressure being brought by the perpetrators on the Applicant to withdraw his complaint and in additional danger to his life. Other witnesses have also been subjected to pressure.

3.15. Considering that, in Sri Lanka, criminal procedures for torture have generally been demonstrated to be ineffective[11] together with the extreme lack of diligence shown by the authorities in the present case, we submit that the criminal proceedings opened cannot be considered to constitute an effective remedy to the violations alleged.

3.16. As for **reparations**, in Sri Lanka, the Supreme Court has jurisdiction to hear petitions for Fundamental Rights and grant compensation to victims of torture. Such a petition was filed on 20 May 2002 but that the examination of the case has been constantly postponed. To date, no decision has been taken in the case in spite of the seriousness of the facts alleged, the gravity of the Applicant's physical condition, and of the serious psychological trauma from which he is suffering. As there is no procedure to ensure that cases of exceptional gravity are heard expeditiously, victims of torture in urgent need of medical assistance, as in the present case, are forced to obtain what help they can from private individuals. In such cases, the petition for Fundamental Rights cannot be considered to constitute an effective remedy.

3.17. The European Court assesses the reasonableness of the length of a proceeding according to the particular circumstances of the case, including, notably, the complexity of the case, the conduct of the parties and what is at stake for the Applicant. [12] In cases where delays have a "quality of irreversibility" the Court has states that:

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[9] The Human Rights Committee has stated : " It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fall to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication." *Jose Herrera and Emma Rubio de Herrera* v. Colombia, 2 November 1987, Communication N° 161/1983, UN Doc. U.N. Doc. Supp. No. 40 (A/43/40) at 190 (1988).para. 10.5 See also *Nydia Erika Bautista de Arellana v Colombia*, CCPR/C/55/D563/1993, 13 November 1995 para. 8.6; *Victor P. Dmukovsky, Zaza Tziklauri, Petre Gelbakhini, and Irakli Dokvadze v. Georgia*, CCPR/C/62/D/623, 624, 625, 626, & 627/1995, para. 18.6; *José Vicente, Amado Villafañe Chaparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo v Colombia*, CCPR/C/60/612/1995, 12 August 1995, paras. 8.8-10 *Ian Chung v Jamaica*, CCPR/C/62/D591/1994, 18 June 1998, para. 8.2; European Court of Human Rights Askoy v. Turkey, Judgement of 18 December of 1996, Reports 1996-VI, para. 98 ; Inter-American Court of Human Rights, Velásquez Rodriguez Case, Judgment of 29 July 1988, Series C, N°4 para 174.

[10] European Court of Human Rights, *Askoy v. Turkey*, Ibid, para. 98.

[11] To be considered effective, a remedy must be available " as a matter of reasonable possibility " see Brownlie p. 499.

[12] See European Court of Human Rights, *H v. the United Kingdom*, 26 May 1987, para. 71 ; *Buchholz* pf 6 May 1981, Series A, N° 42, para. 49 ; *Zimmermann and Steiner*, 13 July 1983, Series A N° 66, para. 24.

...the authorities are under a duty to exercise exceptional diligence since, ...there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing.[13]

3.18. In the present case, special emphasis should be placed in what is at stake for the complainant. The Applicant suffered severe injuries from his attack and it still enduring the continuing effects from his ordeal. His capacity to work has been affected and he is suffering from severe headaches, bleeding of an ear, and serious psychological trauma.

3.19. Lack of adequate medical and psychological treatment accessible in a timely manner in cases of such extreme gravity can result in irreversible consequences for the health of the victim. Monetary compensation granted after the victim has suffered irreversible damage cannot be considered to be an adequate remedy. As there is no alternative process to ensure victims of torture suffering from severe trauma and injuries rehabilitation in a timely manner, a procedure that is not concluded with sufficient celerity to guarantee the full rehabilitation of the victim cannot be considered to be an effective remedy in the sense of article 2.3 (see below).

3.20 International law demands recourse solely to remedies that are sufficient and effective, that is, capable of providing redress for the violations suffered. [14] In the present case neither the criminal nor the civil procedure can be considered as such.

3.21. In view of the above, we submit that the requirements set forth by article 5 of the Optional Protocol and Rule 90 of the Rules of Procedure of the Human Rights Committee have been complied with and that the present communication is admissible.

4. The Rights Breached

5.1 Article 7- Freedom from Torture

5.1.1. The Applicant was severely beaten at the time of his arrest on April 18. On the night and evening of the following day, on 19 April several police officers hit him all his body after forcing him to lie on a bench; the soles of his feet were hit with blunt instruments; books were placed on his head and these were hit with blunt instruments; his head was then held underwater for prolonged periods. So severe was the treatment inflicted that he was taken to a hospital unconscious and had to remain in treatment for over a month. The medical examiner concluded that the injuries suffered were of a nature to endanger his life.

5.1.2. The treatment deliberately inflicted on the Applicant with the intent of obtaining a confession was so severe that it must be considered to amount to torture as defined by article 1 of the UN Convention against Torture and in violation of the prohibition contained in Article 7 of the UN Covenant on Civil and Political Rights.

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[13] European Court of Human Rights, *H v. the United Kingdom*, Ibid, para. 85.
[14] See European Court of Human Rights, De Wilde, Ooms and Versyp judgment, Judgment of 18 June 1971, Series A N°12, p. 33, para. 60.

5.2 Article 9 - Right to Liberty and Security of the Person

5.2.1. The Applicant's arrest was not carried out according to the proper procedure established by the law of Sri Lanka, in particular Article 13(1) of the Constitution, as no reason was given for his arrest, no complaint had been filed against him and no statement was taken.

5.2.2. Further, the Applicant's detention from evening of April 18 to the morning of 20 April at the police cell of Kandana police station exceeded the legal limit of 24 hours established by law.

5.2.3. The Applicant's illegal detention in remand custody from 18th of April to 17th of May 2002 while in hospital, was contrary to Article 13(2) of the Constitution as the remand order was found to be illegal by the learned Magistrate of the Wattala Magistrate Court.

5.2.4. Thus the Applicant's arrest and detention were carried out in a manner which was incompatible with the law of Sri Lanka and in breach of Article 9 of the Covenant.

5.3 Article 9.1- Right to Security of the person

5.3.1. The Human Rights Committee has recognized that Article 9 protects persons outside the context of a formal deprivation of liberty and has considered that this article has been breached in situations where victims has been threatened by public authorities.[15]

5.3.2. Another international body, the Inter-American Commission on Human Rights has found, in a case involving threats against a victim, that there had been a violation of the right to physical, mental and moral integrity.[16]

5.3.3. In the present case, the persons alleged to have been responsible for torturing the Applicant were neither suspended from their duties nor taken into custody. In addition, the Applicant has been subjected to numerous threats and acts of intimidation and though the authorities have been duly notified they have not taken adequate action.

5.3.4. By failing to take adequate action to ensure that the Applicant was protected from threats issued by the police officers who tortured him or other person acting on their behalf, the State of Sri Lanka has breached Article 9.1 of the Covenant.

5.4 Article 2.3 –Right to Redress

5.4.1. The Human Rights Committee has consistently found that States party to the Covenant have a duty to provide an effective and enforceable remedy to violations of that instrument. Remedies recommended by the Committee have included compensation, the release of persons arbitrarily

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[15] See *Mr Rodger Chongwe v. Zambia,* CCPR/C/70/D/821/1998, 9 November 200, para5.3, *Also Delgado Paez v. Colombia,* 12 July 1990, document CCPR/C/39/D/195/1985; Carlos Dias v Angola, paragraph 8.3, adopted on 20 March 2000, document CCPR/C/68/D/711/1996.

[16] The Commission stated: "Article 5(1) of the Convention states that all persons have the right to have their "physical, mental and moral integrity respected." Agents of the Government of Guatemala attacked Dianna Ortiz's physical, moral and mental integrity when they threatened her by letter and by personal confrontation, suggesting that she was going to be harmed and that she should leave the country." Case 10.526, Report No. 31/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 332 (1996).

detained and that criminal proceedings be expedited, leading to the prompt prosecution and conviction of the persons responsible. The Committee has also on a number of occasions ruled that the duty to provide a remedy includes an obligation to ensure that similar events do not occur in the future. [17]

5.4.2. In the case of ***Luyeye Magana ex-Philibert v. Zaire*** the Committee concluded that the lack of effective remedies was in itself a violation of the Covenant.[18]

5.4.3. Regarding the obligation to provide a remedy for the crime of torture Committee has stated:

> *Article 7 should be read in conjunction with Article 2, paragraph 3.... The right to lodge complaints against maltreatment prohibited by Article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.... The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[19] (emphasis added)*

5.4.4. The Committee clearly stated that in cases of torture, complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective, and that the notion of an effective remedy must include as full rehabilitation as may be possible.

5.4.5. In the present case, the State of Sri Lanka has failed to comply with the above. Iinvestigations into the acts of torture suffered by the Applicant were only initiated three months after the assault took place, no disciplinary or other action was taken against the alleged perpetrators and criminal proceedings would appear to be at a standstill. The Applicant has thus been the object of threats and other acts of intimidation. Furthermore, in spite of the Applicant's poverty and urgent need for medical and psychological support no decision has yet been taken on his fundamental rights petition which, if no further postponement take place, will be examined almost two years after it was initiated.

6. Conclusion

Considering the above we respectfully request that the Human Rights Committee:

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[17] See for example : *Floresmilo Bolaños v. Ecuador*, Communication No. 238/1987 (26 July 1989), U.N. Doc. Supp. No. 40 (A/44/40) at 246 (1989) para. 10 ; *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 (1991), 6 November 1991, para 8 ; *Luyeye Magana ex-Philibert v. Zaire*, Communication No. 90/1981, 30 March 1981, U.N. Doc. Supp. No. 40 (A/38/40) at 197 (1983), para. 8 ; *Nydia Erika Bautista de Arellana v Colombia*, CCPR/C/55/D563/1993, 13 November 1995, para 10; *Mr. Abdul Karim Sesay et al. v. Sierra Leone*, Communication No. 840/1998 (12 and 13 October 1998), CCPR/C/72/D/840/1998 para. 6.4;*Chisala Mukunto v. Zambia*, Communication No. 768/1997, U.N. Doc. CCPR/C/66/D/768/1997, 2 August 1999, para. 8.

[18] *Luyeye Magana ex-Philibert v. Zaire para. 8.*

[19] *General Comment No. 20 on Article 7 concerning prohibition of torture and ill-treatment: Adopted at the Committee's forty-fourth session in 1992, 10.03.92* para 14. See also *Hugo Rodriguez v Uruguay* 19 July 1994, Communication 322/1988, para. 12.3.

Declare that the State of Sri Lanka has breached Article 2.3(a) in connection with Articles 7 and 9 and 9.1 of the International Covenant on Civil and Political Rights;

Recommend that the State of Sri Lanka adopt all necessary action to:

1) ensure that the Applicant receives full reparation, including rehabilitation without delay;

2) take all appropriate measures to ensure that the criminal procedures relative to the assault and torture of the Applicant are concluded promptly;

3) adopt any measures necessary to ensure that the Applicant is not submitted to further threats in connection with the procedures that have been initiated in consequence attack against him.

Geneva, 26 January 2004

Human Rights Committee - *Lalith Rajapakse* v *Sri Lanka* (Decision)

HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10-28 July 2006

VIEWS

Communication No. 1250/2004

Submitted by	:	Sundara Arachchige Lalith Rajapakse (represented by counsel, the Asian Human Rights Commission and the World Organisation against Torture)
Alleged victims	:	The Author
State Party	:	Sri Lanka
Date of Communication	:	28 January 2003 (initial submission)
Document references	:	Special Rapporteur's rule 97 decision, transmitted to the State party on 26 January 2004 (not issued in document form). CCPR/C/83/D/1250/2004 - decision on admissibility dated 31 March 2005.
Date of adoption of Views	:	14 July 2006
Subject matter	:	unlawful arrest; ill-treatment and torture in detention; threats from public authorities; failure to investigate.
Procedural issues	:	None
Substantive issues	:	unlawful and arbitrary detention; torture in custody; liberty and security of the person
Articles of the Covenant:		7, 9 and 2, paragraph 3
Article of the Optional Protocol	:	5, paragraph 2 (b)

On 14 July 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1250/2004. The text of the Views is appended to the present document.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-seventh session concerning

Communication No. 1250/2004*

Submitted by	:	Sundara Arachchige Lalith Rajapakse (represented by counsel, the Asian Human Rights Commission and the World Organisation against Torture)
Alleged victims	:	The author
State Party	:	Sri Lanka
Date of communication	:	28 January 2003 (initial submission)

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

Meeting on 14 July 2006,

Having concluded its consideration of communication No. 1250/2004, submitted to the Human Rights Committee on behalf of Sundara Arachchige Lalith Rajapakse 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 authors of the communication and the State party,

Adopts the following:

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

1. The author is Mr. Sundara Arachchige Lalith Rajapakse, a Sri Lankan citizen, who was nineteen years old at the time of his arrest on 18 April 2002.[1] He claims to be a victim of violations by Sri

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glele Ahanhanzo, Mr. Walter Kahn, Mr. Ahmed Tawfik Khahil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipolito Solari-Yrigoyen.

Lanka of Articles 2, paragraph 3; article 7; and article 9 of the International Covenant on Civil and Political Rights. He is represented by counsel: the Asian Human Rights Commission and the World Organisation against Torture. The Optional Protocol entered into force for Sri Lanka on 3 January 1998.

Facts as presented by the author

2.1 On 18 April 2002, the author was arrested by several police officers at a friend's house. On arrest, he was beaten and dragged into a jeep outside the house. He was subsequently taken to Kandana Police station, where he was detained. He was charged with two counts of robbery. During his detention, he was subjected to torture for the purposes of obtaining a confession, which caused serious injuries and may be described as follows; he was forced to lie on a bench and beaten with a pole; held under water for prolonged periods; beaten on the soles of his feet with blunt instruments; and had books placed on his head which were then hit with blunt instruments.

2.2 On 20 April 2002, the author's grandfather found him lying unconscious on the floor of a police cell. He sought the help of a member of parliament, who made inquiries. When he returned to the police station, he was informed that the author had been taken to Ragama Hospital. A few hours after the author was hospitalised, one of the police officers, allegedly involved in the attack, obtained an order to remand him in custody. Subsequently, the author's mother and grandfather learned upon returning to Ragama Hospital, that the author had been transferred to Colombo National hospital. Following his transfer, he remained unconscious for 15 days and did not speak with clarity until after 13 May 2002. On 15 May 2002, he was transferred to a remand hospital at Weilikade.

2.3 On 16 May 2002, the United Nations Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment sent an urgent appeal to the State party, on behalf of the author. The same day, an application for the author's release was made to the Wattala Magistrates Court. On 17 May 2002, the author was produced before a magistrate, along with a medical report issued by the National Hospital. The medical report, undated, states that the "most likely diagnosis alleged to assault due to traumatic encephalitis". He was granted bail and subsequently taken back to the National Hospital by his mother and grandfather. He remained there for treatment until June 2002.

2.4 On 20 May 2002, the author filed a petition for violation of his fundamental rights in the Supreme Court of Sri Lanka. On 13 June 2002, the Supreme Court of Sri Lanka granted leave to proceed in the fundamental rights application; a hearing was scheduled for 23 October 2003. Since then, the hearing has been postponed twice and was expected to take place on 26 April 2004 (updates provided below).

2.5 The author was subjected to constant pressure to withdraw his complaint and has been living under extreme psychological stress, which has prevented him from working and supporting his family, whose members are now obliged to live on charity. His family fears for his life. He has been repeatedly called to testify alone at a police station, even though he has already made a statement. Threats were also made against his grandfather, to force him to withdraw the complaint he had made to the Human Rights Commission of Sri Lanka. Both the author and his family have made several complaints about the threats against him and his grandfather to the National Human Rights

[1] The exact date of his birth is not provided.

Commission Hotline, and to the National Human Rights Commission. The author does not mention the outcome of these complaints.[2]

2.6 On 24 July 2002, the Attorney General initiated an investigation into the torture allegedly suffered by the author, on the basis of which he filed a criminal action under the Torture Act against certain police officers in the Negambo Magistrates Court. This case remains pending, and the alleged perpetrators have neither been taken into custody nor suspended from their duties. A statement made by a judicial medical officer, on the basis of a report, dated 12 June 2002, which was recorded on 11 October 2002, confirmed that the author had been unconscious, described his injuries[3] and stated that "cerebral contusion following assault is the most likely diagnosis, but it is difficult to differentiate from Encephalitis. Most likely diagnosis alleged to assault due to traumatic encephalitis". This last injury is one which is described as an injury that "endangers life".

2.7 On 29 September 2003, the author was acquitted of two charges of robbery, as it transpired that the alleged victims had not made a complaint against him.

The complaint

3.1 The author claims that the treatment deliberately inflicted upon him, with the intent of obtaining a confession, amounted to torture, prohibited under Article 7 of the Covenant.

3.2 He claims that his arrest was not made in accordance with the procedures established under Sri Lankan law, as no reason was given for his arrest, no complaint had been filed against him, no statement was taken and his detention exceeded the legal limit of 24 hours. All the above is also said to violate Article 9.

3.3 The author claims that the State party's failure to take adequate action to ensure that he was protected from threats issued by police officers violates Article 9, paragraph 1, of the Covenant.[4]

3.4 He claims that as the State party failed to ensure that the competent authorities investigate his allegations of torture promptly and impartially, it violated his right to an effective remedy under Article 2, paragraph 3, of the Covenant.

3.5 On exhaustion of domestic remedies, the author notes that he sought to obtain redress both through criminal procedures, and through a fundamental rights petition in order to obtain compensation. As a result of which he and his family have been threatened and intimidated. An assessment of the effectiveness and the reasonableness of the length of the proceedings should take into account the circumstances of his case and the general effectiveness of the proposed remedy in Sri

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[2] He provides press reports on the threats received.

[3] Healing scab abrasion 2"x3" on the right scapular region; healing scab abrasion 1"x 1" on the back of the right elbow; healing scab abrasion 2"x 1,1/2" on the front of the right chest; Contusion 2" x 3" on the back of the left hand; Contusion 2" x 3" on the front of the let forearm; Contusion 1"x 1,1/2" on the medial side of the left hand; Contusion 1"x2" on the lateral side of the left hand; contusion 2"x 2" on the sole of the left foot; Contusion 2" x 1" on the sole of the right foot."

[4] The author refers to the Committee's jurisprudence. See Case No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, Case No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, Case No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000.

Lanka. In this context, he notes that: no criminal investigation was initiated for over three months after the torture, despite the severity of his injuries, and the necessity to hospitalise him for over one month; the alleged perpetrators were neither suspended from their duties nor taken into custody, enabling them to place pressure on and threaten the author; and the investigations are currently at a standstill. Moreover, considering that the criminal procedures for dealing with torture allegations in Sri Lanka have generally been demonstrated to be ineffective, and that the authorities have shown a lack of diligence in the present case, the pending criminal or civil procedures cannot be considered to constitute an effective remedy for the alleged violations.

The State party's submission on admissibility

4.1 On 15 April 2004, the State party provided its submission on admissibility. It stated that the Criminal Investigation Department (CID) of the Police commenced their investigation on 24 July 2002, upon a direction of the Attorney General. Having concluded its investigations, the CID forwarded its report to the Attorney General who advised it to record further witness statements and to organize an identification parade. Subsequently, the Attorney General indicted the Sub-Inspector of Police under the Convention against Torture Act on 14 July 2004. If convicted, this police officer will be sentenced to a mandatory jail term of not less than seven years and a fine. The State party submitted that the Attorney General would take steps to direct counsel for the State, conducting the prosecution, to inform the trial judge of the need to expedite the proceedings in this case.

4.2 The State party confirmed that the fundamental rights application, in which the author seeks damages, against officers of the Kandana Police, for his alleged illegal arrest, detention and torture, remains pending. It submitted that the author has not claimed undue delay in the matter and made no attempt to request the Supreme Court to expedite the hearing of this case. Where similar requests were made to the Supreme Court on legitimate grounds, the Supreme Court acceded to such requests by giving priority to such cases. In sum, the State party submitted that the entire communication is inadmissible for failure to exhaust domestic remedies.

4.3 On the basis of the State party's submission and on behalf of the Committee, on 25 April 2004, the Special Rapporteur on New Communications considered that the admissibility of the communication should be considered separately from the merits.

The author's comments on the State party's submission

5.1 On 5 July 2004, the author commented on the State party's submission. He reiterated his initial argument on admissibility, and informed the Committee that there had been no developments in the criminal proceedings since the communication was registered. Despite the State party's submission that it would ensure an expeditious hearing of the criminal case, it did not indicate a date for the hearing, nor did it explain why the matter has been delayed for two years: this constitutes, in his view, an unreasonable delay. He added that this case would probably not be heard for some time, that there had been only one conviction in a case of torture in Sri Lanka and that that case was not heard until eight years after the torture took place.

5.2 As to the fundamental rights case pending before the Supreme Court, he observed that this case was adjourned for the third time on 26 April 2004 and was rescheduled for hearing on 12 July 2004.

This delay is said to be unreasonable and in contravention of Sri Lankan law, under which the Supreme Court should hear and dispose of any fundamental rights applications within two months of filing. As to the State party's remark that the author may request the Supreme Court to expedite his case, the author was unaware of any such special procedure for making applications and claimed that the hearing of cases is a matter entirely at the discretion of the courts. The author noted that the State party makes no comment on the efficiency of criminal procedures in Sri Lanka in cases of torture generally. He explained that due to his extreme poverty an indefinite delay before he receives compensation would have serious consequences both for him and his family, as he is unable to afford proper medical and psychological treatment.

5.3 The author submitted that the procedure in itself is deficient, as is demonstrated by the fact that only one person has been charged in the criminal case although several were involved in the allegations. The State party's argument that the author only identified one individual in the identification parade is hardly satisfactory, since the author was in a coma for over two weeks following the alleged torture, and obviously under those circumstances his capacity for identification was limited. In addition, other evidence existed upon which other officers could have been charged, including documentary evidence submitted by the police officers themselves to the Magistrates Court and Supreme Court. In his view, sole reliance on the author's identification, particularly in the circumstances of this case, has resulted in the complete exoneration of the other perpetrators. The author also argued that the only charge filed against the police officer in the criminal proceedings is that of torture; no charges have been filed regarding the illegal arrest and/or detention.

5.4 The author observed that the State party offered no information on what measures have been adopted to put a stop to the threats and other measures of intimidation to which he has been subjected and adds that there is no witness protection programme in Sri Lanka.

5.5 On 10 December 2004, the author provided an update on the proceedings to date. He submitted that his hearing before the Supreme Court was again postponed and given a new hearing date of 11 March 2005. This is the fourth time the case had been rescheduled. According to the author, whether the case would be heard on that day would depend on how busy the Court is, and the case may very well be postponed again. The hearing in the High Court was scheduled to take place on 2 February 2005 which, according to the author, could take several years to determine. He stated that these prolonged delays have exacerbated his exposure to threats and serious risk of harm at the hands of those that do not wish him to pursue judicial remedies. He referred to the recent murder of a torture victim, Mr. Gerald Perera, in mysterious circumstances just a few days before a hearing in the High Court of Negombo, where he was to provide testimonial evidence against seven police officers accused of having tortured him, and fears the same fate. According to the author, Mr. Perera was assassinated on 24 November 2005, and during the criminal inquiry into the case, several police officers admitted that his murder was motivated by fears that they may go to jail if he had given evidence against them in the Negombo High Court. Threats to the author had continued and he had been forced into hiding to protect himself against harm.

5.6 On 10 March 2005, the author explained that the hearing in the criminal case, which was due to take place on 2 February 2005, was postponed again until 26 May 2005. Local counsel assisting the author filed a motion with the court on 2 February 2005 to expedite the case. The motion was denied on the grounds that a new judge had been assigned to the case and that it would be up to this judge to

schedule the case according to his priorities. On 14 March 2005, the author stated that the 11 March 2005 hearing before the Supreme Court was not heard on the merits but postponed until 26 June 2005.

The Committee's admissibility decision

6.1 During its 83rd session, on 8 March 2005, the Committee examined the admissibility of the communication. It noted that the issues raised by the author were still pending before the High Court as well as the Supreme Court, despite nearly three years having passed since their institution, and the police officer alleged to have participated in the torture of the author still continues under indictment in the criminal case. It considered it significant that the State party had not provided any reasons why either the fundamental rights case or the indictment against the police officer could not have been considered more expeditiously, nor had it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case preventing its determination for nearly three years.

6.2 The Committee found that the delay in the disposal of the Supreme Court case and the criminal case amounted to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. On 8 March 2005, the Committee declared this communication admissible.

The State party's submission on the merits

7.1 On 27 September 2005, the State party provided its submission on the merits. It largely reiterates its arguments that the case is inadmissible for lack of exhaustion of domestic remedies and that it is currently in the process of providing the author with an effective remedy. On the facts, it informs the Committee of the Attorney General's role as a party in all fundamental rights applications, during which he/she is represented by counsel. He/she does not appear for any respondents in fundamental rights applications, where allegations of torture are made, even though in all other matters he/she defends public officers in actions filed against them.

7.2 The State party informs the Committee that, as the outcome of the author's fundamental rights application to the Supreme Court would affect the determination of the High Court matter, the case to the Supreme Court was adjourned until completion of the proceedings before the High Court. The Supreme Court made an order that the author should file a motion in the Supreme Court when the High Court trial has concluded. The Supreme Court requested the High Court to expedite the police officer's trial.

7.3 On the sequence of High Court hearings, the State party submits that the police officer in question was indicted on 14 July 2004 and the case was fixed for trial on 13 October 2004. As the prosecution witnesses, including the author, were not present, the case was adjourned. The summonses were re-issued and the case fixed for hearing on 2 February 2005. Following a request by the police officer's counsel, the case was adjourned until 26 May 2005. On that date, the trial began and the author's evidence-in-chief was led. However, his evidence could not be concluded on that date as the author informed the Court that he was ill. The case was fixed for 12 July 2005, on which date the author's evidence-in-chief was concluded. The trial for cross-examination was fixed for 28 November 2005. The State party submits that the prosecution had not moved for any postponement of the case other than on 13 October 2004, when the author and the other prosecution witnesses did not attend. Counsel

for the prosecution requested the trial judge to expedite the case and informed him of the communication to this Committee.

7.4 The State party urges the Committee to refrain from making any determination on the merits of this case until the conclusion of the High Court trial, as its Views could prejudice either the prosecution or the defence. If the police officer is convicted, the fundamental rights application would be taken up by the Supreme Court and a determination with regard to compensation for the author could be made.[5] The Supreme Court could direct that compensation be paid by the State party and/or the police officer convicted.

7.5 The State party provides general information on the High Courts in Colombo, including their heavy workload, and argues that to give preference in one case would be at the expense of others. The High Court exercises original jurisdiction in criminal trials and exercises provincial appellate jurisdiction. In the Negombo High Court, at the time of writing the submission, there were 365 cases on the trial roll and a further 167 cases to be fixed for trial. There have been two cases of conviction for torture by the High Court and an equal number of acquittals. As to the Supreme Court, there are nearly a thousand applications filed before it every year. Thus, although the Constitution provides for the disposal of applications within a period of two months, it is impossible to do so. The State party provides further information of a general nature on administrative remedies within Sri Lanka, including making applications to the Human Rights Commission and National Police Commission, which it considers are independent bodies.

7.6 On the complaints of violations of articles 2, 7 and 9, the State party submits that the author has invoked the jurisdiction of the Supreme Court, which was adjourned to prevent prejudice to the prosecution in the criminal trial. Thus, an effective remedy was provided, and a diligent investigation is currently being pursued. It also submits that "the police have at the request of the author given him special police protection on the basis of his complaint that he is under threat."

The author's comments on the State party's submission

8.1 On 27 September 2005, the author provided the following comments on the State party's submission. He submits that the State party's repeated contention that the complaint is inadmissible, due to non-exhaustion of domestic remedies, is unjustified in light of the Committee's decision on admissibility, as well as the lapse of an additional year, since its consideration, in which no progress has been made in the domestic proceedings. The State party does not provide an adequate explanation for the failure of the Courts to address these serious issues within a reasonable time; nor does it provide any timeframe for consideration. On the contrary, based on the current domestic law and practice, there is little prospect of a final judicial decision in the near future. The decision to postpone the hearing of the Supreme Court was taken on the basis of a submission made by the police officer's counsel. Assuming the police officer is convicted, he will have the right to appeal to the Court of Appeal, which will take several years, and subsequently, as a matter of law, to the Supreme Court, which can also cause additional delays. As the hearing of the fundamental rights case has been

[5] It does not appear that the consideration of the fundamental rights application in the Supreme Court is dependent upon a guilty verdict in the High Court. The Supreme Court case will be considered when the High Court case is determined and upon an application by the author.

adjourned until the end of the High Court trial, there is no reason why it will not be adjourned until the entire process is over.

8.2 The author submits that, as the State party does not deny the facts of the case as submitted by him, but relies merely on the fact that the matter is being dealt with by the domestic courts, the Committee should give due weight to his account of the facts. In addition, he refers to the jurisprudence of the Committee that, when substantiated allegations made by authors of a communication go unrefuted, they must be considered to be established. The author reiterates its arguments on the merits, in particular with respect to his claim under article 2, paragraph 3. He refers to the lack of progress in the proceedings,[6] in which the total time of the recording of evidence, since the filing of the indictment in July 2004 to date, is less than two hours of actual court time. There are ten witnesses in this case and the taking of evidence from the first witness (the author) is still not yet completed. Thus, recording the evidence of the other witnesses may take many more years.

8.3 According to the author, neither he nor any of his witnesses absented themselves from court since the summonses were served. He takes no responsibility for any of the postponements, and submits that it is not within his power to make any application to expedite his case. He has written to the Attorney General, who is in such a position, as well as to human rights organisations, but no measures have been taken to respond to his requests. The Attorney General is party to the proceedings of both the High Court and the Supreme Court and, is the only party who can apply for the case to be expedited. He submits that the issue of important generalised delays was raised by the Committee against Torture in its Concluding Observations on Sri Lanka in November 2005, which recommended to the State party to ensure speedy trials, especially for victims of torture.

8.4 In the author's view, the unreasonably prolonged domestic delays are reducing the chances of a fair outcome. Important evidence could be lost while waiting for trial. In particular, one of his key witnesses, his grandfather, is now 75 years of age and the author fears that he may pass away or have memory loss due to age before the end of the proceedings. The author refers to a report of the Special Rapporteur on Torture[7] to demonstrate that it is quite common in the State party for the accused to be acquitted due to the absence of witnesses.

8.5 While awaiting the hearing, the author submits that he has had to leave his home and his job out of fear of reprisals by police officers and subsists thanks to the charity of a human rights organisation. He states that both the Committee against Torture and the Special Rapporteur on Torture have

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[6] He provides the chronology before the High Court as follows:

14.07.04	-	Indictments served on the accused
29.07.04	-	Case called again
13.10.04	-	Case called for trial but no evidence taken.
02.02.05	-	A trial date but no evidence is heard.
26.05.05 -	-	The evidence of the author commences: evidence taken for about 45-50 minutes.
12.07.05	-	The author's examination in chief continues: evidence taken for about 25 minutes.
23.08.05	-	The author's cross examination begins: evidence recorded for about 45 minutes.
28.11.05	-	The case is called and postponed without recording any evidence.
04.05.06	-	The next scheduled date.

[7] E/CN.4/2004/56/Add.1, 23 March 2004.

perceived the extremely precarious situation of victims of torture who decide to seek justice before Sri Lankan courts. They have called on the State party to provide witness protection to victims of torture, since there is no witness protection programme in the State party.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided for under Article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes due note of the State party's argument reiterating its view that domestic remedies have not been exhausted. The Committee reiterates its finding that the delay in the disposal of the Supreme Court case and the criminal case amounts to an unreasonably prolonged delay within the meaning of Article 5, paragraph 2 (b), of the Optional Protocol. This view is only strengthened by the fact that both cases, nearly one and a half years after the admissibility decision, continue to be pending.

9.3 With regard to the merits of the communication, the Committee notes that criminal proceedings, against one of the alleged perpetrators, have been pending in the High Court since 2004, and that the author's fundamental rights application before the Supreme Court has been adjourned, pending determination of the High Court proceedings. The Committee reiterates its jurisprudence that the Covenant does not provide a right for individuals to require that the State party criminally prosecute another person.[8] It considers, nevertheless, that the State party is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations.

9.4 The Committee observes that, as the delay in the author's fundamental rights application to the Supreme Court is dependant upon the determination of the High Court case, the delay in determining the latter is relevant for its assessment of whether the author's rights under the Covenant were violated. It notes the State party's argument that the author is currently availing himself of domestic remedies. The Committee observes that the criminal investigation was not initiated by the Attorney General until over three months after the incident, despite the fact that the author had to be hospitalised, was unconscious for 15 days, and had a medical report describing his injuries, which was presented to the Magistrates Court on 17 May 2002. While noting that both parties accuse each other of responsibility for certain delays in the hearing of this case, it would appear that inadequate time has been assigned for its hearing, viewed in light of the numerous court appearances held over a period of two years, since the indictments were served (four years since the alleged incident), and the lack of significant progress (receipt of evidence from one out of 10 witnesses). The State party's argument on the High Court's large workload does not excuse it from complying with its obligations under the Covenant. The delay is further compounded by the State party's failure to provide any timeframe for the consideration of the case, despite its claim that, following directions from the Attorney General, Counsel for the prosecution requested the trial judge to expedite the case.

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[8] Case No. 213/1986, *H.C.M.A. v. the Netherlands*, adopted 30 March 1989; Case No. 275/1988, S.E. v. Argentina, adopted 26 March 1990; Case Nos. 343-345/1988, *R.A., V.N. et al. v. Argentina*, adopted 26 March 1990.

9.5 Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus, the author's Supreme Court fundamental rights case will not be determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated Article 2, paragraph 3, in connection with 7 of the Covenant. Having found a violation of Article 2, paragraph 3, in connection with Article 7, and in light of the fact that the consideration of this case, as it relates to the claim of torture, remains pending before the High Court, the Committee does not consider it necessary, in this particular case, to determine the issue of a possible violation of Article 7 alone of the Covenant.

9.6 As to the claim of violations of Article 9, as they relate to the circumstances of his arrest, the Committee notes that the State party has not contested that the author was arrested unlawfully, was not informed of the reasons for his arrest or of any charges against him and was not brought promptly before a judge, but merely argues that these claims were made by the author in his fundamental rights application to the Supreme Court which remains pending. For these reasons, the Committee finds that the State party has violated Article 9, paragraphs 1, 2 and 3, alone and together with Article 2, paragraph 3.

9.7 The Committee notes that the State party contests the claim under Article 9, paragraph 1 that it failed to take adequate action to ensure that the author was and continues to be protected from threats issued by police officers, since he filed his petition in his fundamental rights case. The Committee also observes that the author denies that there is any witness protection programme within the State party and that he has had to go into hiding out of fear of reprisals. The Committee recalls its jurisprudence that Article 9, paragraph 1 of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.[9] The interpretation of Article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the current case, it would appear that the author has been repeatedly requested to testify alone at a police station and has been harassed and pressurised to withdraw his complaint to such an extent that he has gone into hiding. The State party has merely argued that the author is receiving police protection but has not indicated whether there is any investigation underway with respect to the complaints of harassment nor has it described in any detail how it protected and continues to protect the author from such threats. In addition, the Committee notes that the alleged perpetrator is not in custody. In the circumstances, the Committee concludes that the author's right to security of person, under Article 9, paragraph 1 of the Covenant has been violated.

10. The Human Rights Committee, acting under Article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose violations of Article 2, paragraph 3 in connection with Article 7; article 9, paragraphs 1, 2 and 3, as they relate to the circumstances of his arrest, alone and together

[9] Case No. 821/1998, *Chongwe v. Zambia*, Views adopted on 25 October 2000, Case No. 195/1985, *Delgado Paez v. Colombia*, Views adopted on 12 July 1990, Case No. 711/1996, *Dias v. Angola*, Views adopted on 18 April 2000. Case no. 916/2000, *Jayawardena v. Sri Lanka*, Views adopted on 22 July 2002.

with Article 2, paragraph 3; and Article 9, paragraph 1, as it relates to his right to security of person, of the Covenant.

11. The Committee is of the view that the author is entitled, under Article 2, paragraph 3(a), of the Covenant, to an effective remedy. The State party is under an obligation to take effective measures to ensure that: (a) the High Court and Supreme Court proceedings are expeditiously completed; (b) the author is protected from threats and/or intimidation with respect to the proceedings; and (c) the author is granted effective reparation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. 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 and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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

Fernando v Sri Lanka

Response on Behalf of the Author to the Submission from the Government of Sri Lanka in response to the Views of the Human Rights Committee in Communication No 1189/2003, 31 March 2005(CCPR/C/83/D/1189/2003)

ISSUES

1. Background - Views by the UNHRC in Communication Number 1189/2003

1.1.1. This Submission[1] is made by Counsel for the Author *Kishali Pinto-Jayawardena* upon the United Nations Human Rights Committee (UNHRC) forwarding the Response of the Government (as detailed below) following the Communication of Views (CCPR/C/83/D/1189/2003). This Communication found the sentencing of Anthony Michael Fernando to one year rigorous imprisonment by Sri Lanka's Supreme Court in February 2003 for contempt of court, to amount to a violation of ICCPR, Article 9(1).

1.1.2. The following pertinent points were manifest in the Views adopted by the UNHRC concerning the said Communication;

a) Courts, notably in common law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for 'contempt of court." Here, however, the only disruption indicated by the State party is the repetitious filing of motions by the victim for which an imposition of financial penalties would have been sufficient and one instance of 'raising his voice' in the presence of the court and refusing thereafter to apologise;

b) No reasoned explanation had been provided by the court or the State party as to why such a severe and summary penalty was warranted in the exercise of the court's power to maintain orderly proceedings. Article 9(1) of the Covenant forbids any 'arbitrary' deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition;

c) Importantly, the Committee took the view that "that an act constituting a violation of Article 9(1) is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole";

d) The State party was required to provide payment of compensation for the violation and to ensure that similar violations would not take place in the future. Legislative change was called for, underscoring the need to enact a Contempt of Court Act for Sri Lanka

[1] Legal services, as has been the case throughout in the filing of this Communication, were provided voluntarily and in the public interest for the Author, Anthony Michael Fernando currently living outside Sri Lanka. Acknowledgement is made herewith of the ready assistance rendered to Counsel in finalising this Submission by the Asian Human Rights Commission (AHRC), the International Centre for the Protection of Legal Rights (INTERIGHTS) and Article XIX.

2. Government Response (dated 8 August 2005) Re Inability to give effect to the Communication in terms of Article 2, Paragraph 3 (a)

2.1. In its reply to the aforesaid Communication of Views, the Government of Sri Lanka, (the Government), re-iterated its firm commitment to its international obligations and particularly to its obligations under the Optional Protocol to the International Covenant on Civil and Political Rights.

2.2. The Government stated however that, at the time that Sri Lanka decided to become a Party to the Optional Protocol, it was not envisaged that the competence of the Human Rights Committee would extend to a consideration, review or comment of any judgment given by a competent Court in Sri Lanka, in particular on findings of fact and on sentences imposed by such Court upon a full consideration of evidence placed before it. Consequently, the Government declared the following;

a) The Government is unable to consider the payment of compensation to any person on the basis of a conviction and sentence passed by a competent court in Sri Lanka. In the present case, the author was convicted by the Supreme Court, which is the apex Court in Sri Lanka and sentenced by the said court. As such, payment of compensation on the basis of the conviction and sentence would tantamount to an undermining of the authority of such Court and would be construed as an interference with the independence of the judiciary.

b) The Government is unable to prevent similar judgements of this nature as it has no control over future decisions or judgements of Court, nor can it give directions to the Supreme Court in relation to any future judgement.

c) Due to the aforementioned reasons, the Government regrets that it is unable to give effect to the views of the Committee under Article 2, Paragraph 3 (a) of the Covenant referred to in Paragraph 11 of the views of the Committee.

d) With regard to the Committee's view on the need of legislative changes, the Government of Sri Lanka informs the Committee that it will refer the matter to the Law Commission of Sri Lanka for its consideration.

3. First Counter-Response on Behalf of the Author - General Submissions

3.1. It is a matter of common acceptance that the ICCPR is a treaty that creates binding obligations on the State Parties at an international level. In accordance with the customary international law principle of *pacta sunt servanda* enshrined in Art 26[2] of the Vienna Convention on the Law of Treaties, every treaty is binding on states parties and must be performed by them in good faith. It is submitted that on this basis alone and by failing to enforce the UNHRC's views, Sri Lanka is in breach of this basic principle of international law.

3.2. The First Optional Protocol to the ICCPR (the Optional Protocol) established the competence of the UNHRC to receive and examine individual complaints alleging that the rights recognized under the ICCPR have been violated.[3] Sri Lanka acceded to the Optional Protocol on 3 October 1997. At that time the State made a declaration that it recognised the competence of the UNHRC only with respect to events, or *decisions* relating to events, occurring on or after that date. No reservations were made either to the Protocol or to the ICCPR, to which Sri Lanka had acceded in 1980. This underscores the fact that the State Party is unequivocally bound in international law to give domestic effect to the Views of the UNHRC.

3.3. The Views of the UNHRC provide an authoritative interpretation of treaty obligations which are, in themselves, binding and Sri Lanka, in good faith, should thus be effectively bound under the ICCPR to make the necessary changes and provide the necessary redress to give effect to its obligations under that instrument.

Domestic Application of the ICCPR

3.4. In so far as the present application is concerned, by its above acts of ratifying the ICCPR and its Optional Protocol, the Government has agreed to abide by its norms and standards including a specific duty to bring domestic laws in conformity with those standards.

3.5. Implementation of the obligations that Sri Lanka has incurred as a result of ratification of treaties and consequent submission to the international legal regime of human rights, has a profound justification by virtue of the following;

a) It is as a concession to the concept of national sovereignty (according to which a State binds itself to that degree acceptable to that State, excepting, of course, particular *jus cogens* principles of international human rights law that binds all nations irrespective of specific agreement) that the device of reservations to treaties have evolved;

b) Thus, if a State, (for particular and deserved reasons), enters into reservations where particular treaty provisions are concerned, those reservations are respected as long as they do not detract from the substantive treaty obligation;

c) If reservations are not entered upon, then the effect of that treaty is given full force and it is not at all possible to plead non-enactment of domestic laws as an excuse for non-compliance with a treaty provision;

3.6. Consequently, it could be questioned as to what sanctity could be attached to the actions of a State party which maintains that adherence to obligations imposed by treaties to which that State party has voluntarily subjected itself in all its full force, is limited to mere rhetoric in international fora? It is emphasized that Sri Lanka has not entered any reservations to Article 2 of the ICCPR.

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[2] Article 26 provides that *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."*

[3] Optional Protocol to the International Covenant on Civil and Political Rights, Article 4(1) (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9).

3.7. International obligations are buttressed in this regard by judicial incorporation of international human rights standards in a growing body of jurisprudence in Sri Lanka since the late eighties.

3.8. *In Leeda Violet and Others v. Viclanapathirana, Officer in Charge, Police Station, Dickwella and Others,*[4] the Court of Appeal considered the views of the UNHRC to be persuasive in developing the common law regarding the writ of *habeas corpus*. The Court considered that certain views of the HRC, together with those of other human rights institutions, as well as a decision of the Supreme Court of India, "clearly demonstrate that some affirmative action is necessary [by the court]".

3.9. For several years, international standards and jurisprudence have been used as a matter of course by the Sri Lankan Supreme Court in applying and interpreting fundamental rights provisions in the Constitution. In a 1991 decision of particular importance to the Communication of Views in this instance, the Court interpreted Article 13(1)[5] of Sri Lanka's Constitution to hold that an 'arrest' includes not only a deprivation of liberty upon suspicion of having committed an offence but also any arbitrary deprivation of liberty, citing ICCPR Article 9 rights to freedom from arbitrary arrest and detention in support of its view.[6]

3.10. Some more recent decisions are referred to in the following paragraphs. In *Mediwake vs Dissanayake*[7], ICCPR, Article 25 was used by the Supreme Court in affirming the right of Sri Lankan citizens to vote at a provincial council poll in a manner that guarantees a free, equal and secret poll. The duality of the collective as well as individual aspect of the right to vote was emphasized. A similar judicial citation of ICCPR, Article 25 was evidenced in *Centre for Policy Alternatives vs Dissanayake*.[8]

3.11. In *Silva vs. Iddamalgoda*[9], the Court recognized the petitioner's right to sue and seek compensation for herself as the victim's widow and for the minor child. By doing so, in the own words of the Court, brought the "law into conformity with international obligations and standards".

3.12. In this instance, Article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was utilised. This Article provides as follows;

> *Each state shall ensure in its legal system that, the victim of an act or torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation"*[10]

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[4] [1994] (3) Sri L.R. 377 (16 November 1994), per Justice of the Court of Appeal, Sarath N. Silva, as he then was.

[5] Article 13(1) states that "No person shall be arrested except acording to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

[6] *Sirisena vs Perera*, [1991] (2) SriLR, 97

[7] [2001] (1) SriLR 177, per Justice MDH Fernando

[8] [2003] (1) SriLR, 277, per Justice MDH Fernando

[9] [2003] (2) SriLR, 63, per Justice MDH Fernando

[10] The Convention Against Torture was acceded to by Sri Lanka on January 3, 1994. Domestic legislation adopting some of the provisions of the Covenant into law was accomplished by Act, No 22 of 1994. It is notable however that Act, No 22 of 1994 does not contain any provision in regard to the right of either the victim or the dependant for compensation. Reliance was placed by the Court in this case primarily on the Article in the Convention itself rather than any provision of domestic law.

3.13. In *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others vs OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*[11] the Court, in buttressing its condemnation of the brutal treatment of the deceased by prison officials, laudably referred not only to the applicable domestic law contained in the Prisons Ordinance but also to relevant views of the UN-HRC together with provisions of international treaties and declarations concerned with the rights of prisoners.[12]

3.14. In *Shahul Hameed Mohammed Nilam and Others vs K. Udugampola and Others*[13], the judges, in finding a violation of the right to freedom from torture, conceded that, pain of mind, provided that it is of a sufficiently aggravated degree, would suffice to prove a rights violation. Domestic, regional and international precedent articulating this principle was cited.[14]

3.15. Citation of international human rights standards by Sri Lankan courts, (in regard to which the preceding discussion was only a representative sample), has been evident in the area of economic social and cultural rights as well. For instance, in *Farwin vs Wijeyasiri, Commissioner of Examinations and Others*[15], the Supreme Court, while recognising the right to higher education (as set out in Article 13 of the International Covenant on Economic, Social and Cultural Rights as well as defined as an objective of Sri Lankan State policy as laid down by Article 27(2)(h) of the Constitution, emphasized the duty on the part of the officials of the Department of Examinations to conduct examinations with adequate security measures to ensure the integrity of the examination, to ensure that answer scripts are not tampered with and to conduct a full and open investigation in respect of any serious allegation of irregularity.

3.16. In the context of the instant case, it is stated on behalf of the Author that the right to a fair trial is specifically contained in Article 13 (3) of Sri Lanka's Constitution.[16] Further, the ambit of this constitutional article has been expressly extended domestically by a liberal judicial reliance on decisions of courts in other jurisdictions.[17] Should not therefore the Author, having exhausted

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[11] SC(FR) No 700/2002, SCM 26/07/2004, per Justice Shirani A. Bandaranayake

[12] *Thomas vs Jamaica* (Communication No 266/1989, views of UN-HRC, 2nd November 1993. The Court also considered General Assembly Resolution 43/174 of 9th December, 1988 and the Standard Minimum Rules for the treatment of prisoners adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its resolutions 663 C(XXIV) of 31st July 1957 and 2076 (LXII) of 13th May 1977

[13] SC(FR) Applications No;s 68/2002, 73/202, 74/2002, 75/2002, 76/2002, SCM 29.01.2004

[14] Jurisprudence of the European Court of Human Rights (EUCT) was considered in this case, specifically *Tyrer vs UK* (1978, 2 EHHR, 1), *the Greek case (*127 B (1969) Com. Rep. 70, *Campbell and Cosans vs UK* (Case law of the EUCT, Vol. 1, pg 170)

[15] [2004] 1 SriLR 9. Similar citations are evidenced in *Wickremesinghe vs de Silva* (SC 551/98, SCM 31.8.2001) and *Hewage vs UGC*, SC 627/2002, SCM 8.8.2003

[16] *Any person charged with an offence shall be entitled to be heard, in person or by an attorney at law, at a fair trial by a competent court*

[17] See for instance, *Danwatte Liyanage Wijepala v The Attorney General*, SCM 12/12/2000 where the Sri Lankan Supreme Court declared that the 'failure to disclose to an accused, the existence and contents of the first information will result in a violation of Article 13(3) which is the right to a fair trial by a competent court' per Justice MDH Fernando. In this case, the Court applied South African judicial precedent to affirm the interlinking of the right to information with the right to a fair trial in order to entitle the accused to anything and everything necessary for a fair trial, including copies of statements made to the police by material witnesses. In the opinion of the Court, the fact that South Africa had an independent right to information (unlike Sri Lanka) did not make a difference as the right to a fair trial recognised by Article 13(3) of the Sri Lankan Constitution, in fact, included the ancillary right to all information necessary for a fair trial.

domestic remedies and engaged an international petition procedure, be entitled to have the decision enforced and be provided with redress in accordance with the rule of law and an integral part of the domestic constitutional right to a fair hearing?

Directive Principles of State Policy

3.17. From another standpoint, the relevance of international legal standards has also been affirmed by the Directive Principles of State Policy, which though non-justiciable in Sri Lanka's constitutional context, has a direct impact on legal policy in the country.

3.18. Article 27(15) of the Directive Principles of State Policy in Sri Lanka's 2nd Republican Constitution of 1978 mandates the State to '...endeavor to foster respect for international law and treaty obligations in dealings among nations." The impact of this obligation on the Sri Lankan State, insofar as domestic adherence to the norms and standards imposed on the country by reasons of treaty ratifications that the State has engaged in, is severe.

3.19. Article 27(1) states that;

> *The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society*

3.20. The manner in which this country's Supreme Court has responded to the impact of the Directive Principles is illustrative of the duties imposed by this constitutional article. For instance, when called upon to examine the constitutionality of the Provincial Councils Bill and the Thirteenth Amendment to the Constitution Bill[18] then Chief Justice Sharvananda pointed out as follows;

> *"True, the Principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation. In our view, the two Bills represent steps in the direction of implementing the programme envisaged by the Constitution makers to build a social and democratic society"* [19]

3.21. In *Seneviratne Vs U.G.C*[20] another judicial observation made this position clear;

> *"It is a settled principle of construction that when construing a legal document, the whole of the document must be considered. Accordingly, all relevant provisions of the Constitution must be given effect to when a Constitutional provision is under*

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[18] 1987] (2) Sri L.R. 312, at page 326

[19] see similar positions taken by the Supreme Court in *Maithripala Senanayake Vs Mahindasoma and Others* S.CC. Appeal No 41/96 Minutes of 14.12.96 at pages 13-14 of the judgement (unreported) and in *Saliya Mathew Vs Podinilame and Others* S.C. Appeal No 42/96, ibid

[20] [1978-79-80] 1 Sri L.R. 182, at page 216

consideration and, when relevant, this must necessarily include the Directive Principles.....(and)....the Courts must take due recognition of these and make proper allowance for their operation and function"
per Justice Wanasundera

3.22. *Weerawansa v. Attorney General and Others*, a case in the Sri Lankan Supreme Court, is also illustrative as recent precedent [21]

Should this Court have regard to the provisions of the Covenant [i.e. the ICCPR]? I think it must. Article 27(15) [of the Sri Lankan Constitution] requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes."

4. Second Counter-Response on Behalf of the Author – Re Binding Obligations under ICCPR Article 2 and the Principle of the Independence of the Judiciary

4.1. The primary reason given by the State Party that it cannot give effect to the Views of the Committee as required under Article 2, ICCPR is that, by doing so, it would offend a cardinal legal principle underlying its constitutional system, namely the independence of the judiciary.

4.2. It is submitted in the first instance that by that same reasoning, it would effectively mean that Sri Lanka would be unable to give effect to each and every Communication of Views by the Committee, given the condition that domestic remedies must be exhausted before lodging a communication to the Committee (and implying necessarily therefore that a decision of the highest domestic tribunal could be in issue in each and every case).

4.3. Consequently, the statement by the State Party that "at the time that the Government decided to become a Party to the Optional Protocol, it was not envisaged that the competence of the Human Rights Committee would extend to a consideration, review or comment of any judgment given by a competent Court in Sri Lanka, in particular on findings of fact and on sentences imposed by such Court upon a full consideration of evidence placed before it", becomes fundamentally incompatible with its professed commitment to its international obligations and particularly to its obligations under the Optional Protocol to the International Covenant on Civil and Political Rights.

4.4. In effect, this assertion by the state party makes a mockery of the said international obligations.

4.5. That portion of the views of the Committee in the Communication in issue which reiterates that;

[21] (2000) 1 Sri L.R. 387, per Justice MDH Fernando.

an act constituting a violation of Article 9(1) is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole"; is pertinent at this point.

4.6. General Comment 31 of the UNHRC[22] further expands the above obligation. Given their overriding importance in the context of these instant submissions, relevant paragraphs from the said General Comment are extracted for this purpose and reproduced in full;

Para 3

> Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

Para 4

> The obligations of the Covenant in general and Article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although Article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

Para 13

> Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity

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[22] General Comment No. 31 [80] - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004 (2187th meeting).

with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by Article 2.

Para 17

In general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

4.7. Further it is submitted on behalf of the Author that it is a longstanding principle of international law that the State is regarded as a unity and that its internal divisions, whether these be territorial, organizational, institutional or other, cannot be invoked in order to avoid its international responsibility.

4.8. Article 4 of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts declares:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[23]

4.9. In its 1991 decision on the *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice categorically re-affirmed this rule. The Court stated that:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule which is reflected in the Draft Articles on State Responsibility is of a customary character.[24]

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[23] See *Responsibility of States for Internationally Wrongful Acts* Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10).

The case principally concerned acts by the courts of Malaysia.

4.10. Regarding the internal difficulties that may exist in order to implement the recommendations made by the Committee, it is noteworthy that numerous governments have adopted measures in order to implement decisions made by UN treaty bodies[25] and that many of these also faced internal difficulties.

4.11. Some have even adopted specific legislation in order to enable the implementation of such decisions.[26] For instance, the case of *Osbourne v. Jamaica* involved a judicial decision by the courts of Jamaica which was subsequently remitted. [27]

4.12. As noted above, the Government has claimed that to implement the Committee's Views regarding compensation for the Author would engage it in an impermissible interference with the independence of the judiciary. However, it is re-iterated that this claim is not relevant from the perspective of international law, since the State, having voluntarily engaged in specific treaty obligations, is legally bound to discharge them. In addition, it is relevant to note that the Government's claim in this regard is unsustainable for the following reasons.

4.13. First, complying with international obligations is not an interference with independence of the judiciary, which would take place when the government, of its own motion, seeks to undermine a legal judgement or similar judicial act. To ratify the Optional Protocol is to recognise implicitly that apex court decisions may be overridden since the existence of such a decision is normally a pre-condition to cases going before the Committee.

4.14. Second, the fact that the decisions of the Committee stand to be implemented through the executive does not mean that, from the perspective of independence of the judiciary, these are decisions of the executive. On the contrary, these are the decisions of a monitoring committee of a treaty body to which Sri Lanka has made itself subject to by virtue of a deliberate act of accession by the State, incurring particular obligations in international law.

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[24] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999, p. 62, at p. 87, para. 62.

[25] See for example, action taken by Governments to implement recommendations made by the Human Rights Committee in the following cases: *Mukong v. Cameroon (case 458/1991)*: concerning a Cameroonian journalist jailed and held in unacceptable conditions of detention. The Cameroon Government granted compensation; *Pinto v. Trinidad and Tobago (case 512/1992)*: The Committee concluded that the complainant, a former death row inmate, had been ill-treated in detention. The petitioner later informed the Committee that he had been released as a direct result of the Committee's decision *Villacres Ortega v. Ecuador (case 481/1991)*: Committee concluded that the complainant had been tortured and ill-treated in detention. Ecuador later advised that it agreed to pay the complainant compensation in the order of USD 25,000 in Report on the Conference on Enforcement of Awards for Victims of Torture and Other International Crimes" section on UN Treaty Bodies, based largely on the presentation by Markus Schmidt, (OHCHR); REDRESS and Freshfields Bruckhaus Deringer (coming publication)

[26] In Colombia, Law 288 of 5 July 1996 enables the enforcement of awards of compensation in accordance with the Committee views and in the Czech Republic, under Act No. 517/2002, the Ministry of Justice is in charge of coordinating the implementation of the views of the Committee, *ibid*

[27] *Osbourne v. Jamaica (case 759/1997)*: The Committee found that a judicial sentence involving corporal punishment and whipping violated article 7 of the Covenant. The Government subsequently informed the Committee that the whipping sentence had been remitted, *ibid*

4.15. Third, the payment of compensation as directed by the Committee does not qualify as interference with the independence of the judiciary, which is defined at Article 161(1) of the Constitution of the Republic of Sri Lanka as follows:

> Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and discharge such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or discharge of such powers or functions.

4.16. To pay compensation in this way may be understood by some to be a criticism of the judiciary, perhaps by some even as a well-deserved criticism, but it does not qualify as interfering in the discharge by the judiciary of its functions.

4.17. Fourth, proper interpretation of a Constitution requires accommodation between all of its provisions. Those relating to the independence of the judiciary must be understood in light of those relating to the allocation of other powers and duties. Article 33 (f) of the Constitution of the Republic of Sri Lanka empowers the President to "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" and Article 27(15) [of the Sri Lankan Constitution] requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations".

4.18. No doubt the ratification of a treaty which completely eviscerates the independence of the judiciary might be constitutionally suspect. However, ratifying an international human rights treaty which, if it leads to any interference with the independence of the judiciary (which argument is, in any event contested), does so only in a very slight way, and as necessary as it is to give effect to human rights, could hardly be deemed to fall outside of this express power.

4.19. In response to the specific submission of the Government that its lack of control over the judiciary acts as a barrier to preventing future judgements of this sort, it is conceded on behalf of the Author that in principle, the government should not exercise control over the judiciary in the exercise of its proper function of interpreting and applying the law. However, it is quintessentially the role of the other branches of government and, in particular, the legislature, to set the standards which the judiciary should apply, that is, to adopt laws.

4.20. It is, moreover, perfectly legitimate for such laws to regulate contempt of court, including contempt in the face of the court, which would govern the raising of the voice by the Author in court and perhaps also allegations of abuse by the Author of the court's process. This matter is, for example, governed partly by statute in Australia and, in 1987, the Australian Law Reform Commission recommended that the common law category of contempt in the face of the court be entirely replaced by statutory offences. Of the offences recommended, the only one restricting

expression in court was framed in terms of conduct causing substantial disruption to a hearing.[28] This was not acted upon but it demonstrates the potential for legal regulation in this area.

4.21. In most common law countries, a number of courts are created by statute and it is normal for these statutes to include provisions on contempt in the fact of the court. In the US, for example, the power of the federal courts to impose punishment for contempt in the face of the court is set out in law.[29] It is also quite normal for these matters to be dealt with by statute in civil law countries.[30] Clearly, it is perfectly open to the Government to regulate future judgements of this sort by adopting a statute governing the matter which would provide for proper procedural guarantees, lacking at present and set standards about what sort of conduct would attract sanction.

5. Third Counter-Response on Behalf of the Author - Re Enacting of a Contempt of Court Act

5.1. It is submitted that this part of the response by the State Party is a blatant violation of its obligations in terms of the Covenant and the Optional Protocol in as much as the commitment envisaged therein envisages a specific undertaking on the part of the state party to enact a Contempt of Court Act rather than a vague reference to refer the same for 'consideration' to other fora.

5.2. The enactment of a Contempt of Court Act in Sri Lanka is pressing for the reason that the law, as presently interpreted and applied by the domestic courts in extremely restrictive in its application to personal liberties as made clear in the following analysis of cases. Indeed, it may be reasonably stated that the Sri Lankan law on contempt of court has effectively resulted in a 'chilling' of the freedoms of speech, expression and information on matters of public interest.

5.3. In the first instance, what amounts to contempt has been subjected to differing interpretations by the courts, the majority of which have inclined towards conservative views. This has had an inevitable impact on public discussion of vital public interest issues due to fears that journalists or citizens voicing their opinions on particular judgements of the Court or with regard to pending adjudications, will be cited for contempt.

5.4. Early cases in Sri Lanka concerning contempt of court and the press in particular, were fairly straightforward with regard to the question as to whether contempt should indeed, have been found. *In the Matter of a Rule on De Souza*[31] the deliberate and wilful publication of false and fabricated material concerning a trial held in court, calculated to hold the court or a judge thereof to odium and ridicule was ruled as amounting to contempt of court.

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[28] Report No. 35, *Contempt*, 1987.
[29] See also Section 118(1) of the UK County Courts Act 1984, which governs County Courts.
[30] See, for example, the German Judiciary Act (Gerichtsverfassungsgesetz – GVG) which empowers the chairing judge to take all actions necessary to maintain and ensure the functioning of the proceeding before court and prevent interference with the process of the court ("Sitzungspolizei", § 176 GVG).
[31] 18, NLR, 41

5.5. In a subsequent case, an article which imputed to the judges a serious breach of duty by taking an unauthorised holiday by going to race meets and thereby contributing to arrears of work, was ruled to be contempt of court.[32] In this case, Abrahams CJ opined that;

> *It would be thoroughly undesirable that the press should be inhibited from criticising honestly and in good faith, the administration of justice as any other institution. But it is equally undesirable that such criticism should be unbounded.*

5.6. A far more extreme rationale was evidenced in the mid seventies when a deputy editor of the Ceylon Daily News was sentenced for contempt when, commenting on an incident where a witness who had appeared in bush shirt and slacks before the Criminal Justice Commission (Exchange Control) (CJC) had been ordered to return to give evidence properly attired, he wrote that such attitudes were not in keeping with the new legal trends of the day. The CJC ordered six months imprisonment for the deputy editor as well as a day's imprisonment for the acting editor of the paper.[33]

5.7. The more recent case of *Hewamanne* v *Manik de Silva and Another*[34] also illustrates unduly restrictive judicial attitudes. In this case, a divided bench of the Supreme Court dismissed *inter alia*, the argument that what constitutes contempt must be reviewed and modified in the light of Articles 3 and 4 of the Constitution which vests legal and political sovereignty in the people and consequently gives the people the right to comment actively on the administration of justice. Part of this argument that was dismissed was the contention that in any case, developed jurisdictions and in particular, courts in the United Kingdom have, in recent times, allowed greater latitude to the public to criticise judges and the administration of justice.

5.8. In delivering the judgement of the majority, Wanasundera J. preferred to depart from the developing modern law that strove to balance the rights of due administration of justice and freedom of speech, reasoning on the contrary, that;

> *"the law of contempt ....would operate untrammelled by the fundamental right of freedom of speech and expression..."*

He went on to add that, (subjecting the judiciary to public discussions);

> *"....would engulf the judges and they would find themselves in a position where they would be directly exposed to the passing winds of popular excitement and sentiment..."*

5.9. In finding justification for these views, (in a somewhat unfortunate reference), the majority relied on a decision from a wholly different age (*McLeod's Case*, 1899) where a distinction had been drawn between the United Kingdom and 'small colonies consisting primarily of coloured populations', the Court warning meanwhile of the dangers of indiscriminate use of decisions of

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[32] 39, NLR, 294.
[33] The Ceylon Daily News, 6 June, 1974. The former became seriously ill as a result of the incarceration and had to be released prematurely.
[34] [1983], 1 SriLR, 1

western countries having their own social milieu and reflecting the permissive nature of their societies.

The *Sub-Judice* Rule

5.10. The *Sub-Judice* Rule currently operates in a manner that is very prohibitive of public expression of views and publication in Sri Lanka. The contentious and highly restrictive application of this Rule is very well illustrated in a fairly recent case[35] in which a provincial correspondent of a Sinhala paper, the 'Divaina', sent a report of a speech made by a member of Parliament in the opposition at a time when the presidential election petition was being heard, in which the latter said that –

> *the petition had already been proved and if the petitioner did not win her case, it would be the end of justice in Sri Lanka...*

5.11. Contempt proceedings were instituted against both the journalist and the editor. Though the latter pleaded guilty, the former took a no-guilt stand, contenting that he had merely transmitted the contents of the speech as was his duty as provincial correspondent, that he had no intention to prejudice the outcome of the election petition and that the speech in question was solely political and that the readers of the papers would take it in that context.

5.12. The Court, however, rejected this contention on the basis that the article insinuated that the judges had already made up their minds, with the effect of possibly deterring potential witnesses from coming before court. The decision in this case ran counter to the test of 'substantial likelihood of prejudice', preferring instead a far more fluid determining as to whether statements might or were likely to result in prejudice.

5.13. A succinct analysis of the decision in the 'Divaina' Case put the matter well at that time;

> *... is the exclusive judicial function of the Court to determine cases really usurped by an unbalanced and patently partisan opinion expressed by some politician? I cannot believe that is so. Is the expression of such an opinion really a pre-judgement of the pending case? Is that be so, then in every home and on every street corner every day, thousands of contempts will be committed...*[36]

Disclosure of Sources

5.14. Sri Lankan legal authority is to the effect that a court has the authority to order disclosure of sources if it thinks necessary, which principle was put to the strict test in two recent cases where indictments were filed against two newspaper editors on the basis that the newspapers had criminally defamed President Chandrika Kumaranatunge. ...[37]

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[35] [1991] 1 SriLR, 134

[36] *Freedom of Expression and Sub Judice*, Lakshman Kadirgamar, P.C., Organisation of Professional Associations (OPA) Journal, Vol. 15, 1992-3, see also in same publication, a comment by HL de Silva P.C.on *Free Press and Fair Trial*, calling for Sri Lanka to enact a law on contempt that would permit a reasonable degree of public discussion, even when judicial proceedings are pending.

[37] *The Democratic Socialist Republic of Sri Lanka vs Sinha Ratnatunge* (HC/No 7397/95) per judgement of then High Court Judge Upali De Z. Gunewardene and *The Democratic Socialist Republic of Sri Lanka vs P.A. Bandula Padmakumara* (HC/No 7580/95) per judgement of then High Court Judge Shiranee Tillekewardene.

5.15. In the *Sunday Times* Case, the editor was sentenced under both the Penal Code and the Press Council Law to one and a half years simple imprisonment suspended for seven years and a fine of approximately US $111 for publication of a gossip item in the newspaper which, (incorrectly), stated that President Kumaratunge had attended the birthday party of a parliamentarian at a hotel suite around midnight.

5.16. The trial judge in this case castigated the editor for not revealing the source of the information, proceeding to infer that such a "suppression of evidence" meant only that the editor was himself the author of the impugned item. Not long thereafter, another accused editor was acquitted of criminal defamation charges in another trial court upon publication of a substantially similar news item in a Sinhala language newspaper on the basis that the necessary intent was not found to lie.

5.17. In this instance, the trial judge in the Lakbima case adopted a directly contrary line of reasoning to her colleague in the parallel High Court as far as the rule pertaining to disclosure of sources was concerned, pointing out that the confidentiality of such sources needs to be protected as otherwise, this would lead to –

> *- very serious consequences and do much to restrain freedom of communication which is so essential to comfort and well being -*

5.18. Though both judgements came before the appellate courts, they were disposed of without any final judicial pronouncement on the relevant issues when the criminal defamation law itself was repealed in Sri Lanka on 18th June, 2002. The repeal came at a point when *the Sunday Times* appeal was before the Supreme Court following the conviction being affirmed by the Court of Appeal and the *Lakbima* case, (where the State appealed against the acquittal), was also pending in the Court of Appeal.

5.19. The *Times* editor was discharged from all proceedings and the conviction set aside by the Supreme Court after the newspaper agreed to publish a statement in the newspaper wherein the editor accepted responsibility for the impugned publication as editor, reiterated that there was no malicious intent whatsoever on the part of the writer, the newspaper or himself in wanting to defame the President and regretted the publication of the said erroneous excerpt.

5.20. The *Lakbima* appeal against the acquittal of the editor was withdrawn by the State. In consequence, contrasting judicial attitudes in regard to the circumstances in which disclosure of sources may be ordered by court were not resolved in a satisfactory manner. The above analysis highlights the pressing need for a specific enactment on contempt of court that would substantively clarify contempt powers as well as lay down fair procedures in regard to the exercise of such powers.

6. Fourth Counter Response of the Author - Why a Mere Reference to the Law Commission of Sri Lanka will not be sufficient to meet State Obligations under the Covenant.

6.1. As pointed out in the main petition filed by the Author relating to this Communication of Views, domestic pressure had been exerted towards enactment of a Contempt of Court Act for Sri Lanka

by lobby groups and Sri Lankan civil society, including the Bar Association of Sri Lanka and the Editors Guild over the past several years.

6.2. The entities before which this matter had been agitated, included the office of the Executive President, government bodies, the Sri Lankan Parliament and the Law Commission of Sri Lanka. All these efforts proved to be futile. In the foregoing, a reasonable apprehension prevails that a mere reference to the Law Commission will result in only a repetition of this same process. The said process is briefly detailed below for the better understanding of the UN Human Rights Committee.

6.3. Sustained lobbying for reform of Sri Lanka's regulatory framework relating to the media commenced from the recommendations of a government appointed committee on media law reform which, in 1996, suggested wide ranging reforms to existing media laws[38] including contempt of court.

6.4. On April, 26, 1998, the Editor's Guild of Sri Lanka was a joint signatory together with the Newspaper Society of Sri Lanka (publishers) and the Free Media Movement, to the COLOMBO DECLARATION ON MEDIA FREEDOM AND SOCIAL RESPONSIBILITY which inter-alia declared as follows;

> *There should be a Contempt of Court Act in order to clarify the substantive and procedural law concerned, which would define precisely the scope of contempt of court and the Sub-Judice Rule, broadly structured on the lines of the United Kingdom Contempt of Court Act of 1981, which specifies inter alia, the conditions under which non-divulgence of a source is permissible.*

6.5. In 1997, a Parliamentary Select Committee was set up to inquire into the Legislative and Regulatory Framework Relating to Media but concluded its deliberations without arriving at any conclusive recommendations. In August 2000, Sri Lanka's Parliament debated Motion 218/99 on legal anomalies affecting the press that had been introduced by the combined opposition. The Motion included recommendations to:

a) repeal Section 479 of the Penal Code and Sections 14 and 15 of the Press Council Law relating to Criminal Defamation;
b) replace the Press Council with a Media Council;
c) introduce a Freedom of Information Act; and
d) introduce a Contempt of Court Act.

The parliamentary debate was also concluded without any finality.

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[38] The R.K.W. Goonesekere Committee Report on Media Law Reform". Three other committees also issued recommendations regarding the broad-basing of the state-owned Lake House newspaper group, establishing a media training institute and improving conditions for media personnel. Limited action was taken by the government regarding the recommendations of the Committees on Media Training and Improvement of the Financial Status of Journalists.

6.6. In April 2000, as a specific part of the lobbying process towards media law reform, the Editors Guild presented a set of comprehensive proposals urging legal and regulatory reform to the Law Commission of Sri Lanka, including calling upon the Law Commission to draft a Contempt of Court Act.

6.7. The proposals contained an analysis of contempt laws in the United Kingdom and India and set out reasons as to why common law principles relating to contempt in the Sri Lankan context should be brought into step with modern free expression standards. However, there was no acknowledgement of these proposals and, at the time of filing this Submission, the Law Commission had not embarked upon any such law reform process. As a consequence of a renewed public demand for comprehensive media law reform in December 2001, the Government took the following steps;

a) January 2002: the appointment of the Prime Minister's Committee on Media Law Reforms;
b) June 2002: the repeal of the laws relating to criminal defamation, unanimously by Parliament;
c) Commencement of the drafting of a Freedom of Information Act;
d) The incorporation of a Press Complaints Commission as a self-regulatory mechanism intended to replace the Press Council.
e) The appointment of an All-Party Select Committee into studying the need to codify the law on contempt of court.

6.8. The said Parliamentary Select Committee sat on several occasions during the latter part of 2003 and received submissions from media bodies including the Editor Guild, the Newspaper Society, the Free Media Movement as well as from Sri Lanka's National Human Rights Commission and civil society institutions including the Civil Rights Movement.

6.9. All these submissions cumulatively called for the enactment of a comprehensive statute embodying well accepted principles on contempt of court already existing in the United Kingdom and other Commonwealth countries such as India. However due to the sudden dissolution of Parliament for political exigencies by the then president Chandrika Kumaranatunge in late 2003, the said Parliamentary Select Committee also lapsed thereafter. Despite considerable work done by the Committee during its sittings, its term was not renewed at the next Parliamentary sessions.[39]

6.10. Given the preceding sequence of events, the submission of the Views of the Committee to the Law Commission will yield little. It is further relevant that while the Commission has done a considerable amount of work in past years, the liberal nature of its recommendations for law reform in so far as rights related laws are concerned, is justly suspect.

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[39] However, public demand for a Contempt of Court Act continues to be high. On March 25th 2006, the Bar Association of Sri Lanka (BASL) approved a draft act finalised by a special committee of BASL and authorised it to be forwarded to the Government and other political parties for consideration. The BASL draft reflects common principles already embodied in drafts on contempt of court legislation proposed by, among others, the National Human Rights Commission in 2003. Considerable consensus has been reached among Sri Lankan civil society bodies and professional bodies in this regard.

6.11. This is evidenced by its recommendation of a draft Freedom of Information Law in 1997 which was distinctly conservative in content in its reluctance to affirm the right to know as a general principle. Most notably, the Commission recommended the Organised Crimes Bill in 2003[40] which was withdrawn from the public sphere after it was subjected to severe criticism by human rights activists on the basis that it took away existing life and liberty rights of citizens.

6.12. Generally, it is apprehended on behalf of the Author that entrusting the drafting of a Contempt of Court Act to the Commission is a task fraught with considerable peril. Indisputably the Government should demonstrate a sterner commitment to ICCPR obligations.

7. Conclusion

7.1. It is respectfully submitted on behalf of the Author that in the foregoing, the Sri Lankan Government should be called upon by the United Nations Human Rights Committee to satisfy his legitimate expectation that the Views of the Committee in this Communication should be given full force and effect in the domestic legal sphere. Accordingly, the Author should be provided with compensation for the violation of his rights as directed by the Committee.

7.2. Further, the serious intention of the Government to give ear to the Views of the Committee and evidence a genuine commitment to ICCPR Article 2, Paragraph 3 (a) should be manifested by its immediate direction to the Ministry of Justice and the Legal Draftsman's Department to finalise current civil society proposals in relation to a draft Contempt of Court Act and to submit the same for enactment in Parliament.

Colombo
March 6, 2006

[40] presented to Parliament on 18th February, 2003-published in the Gazette of January 24, 2003, issued on 27.01.2003.

Sri Lanka: Recourse to the Optional Protocol as a Means to Redress the Degeneration of the Rule of Law

Basil Fernando*

In ancient Sri Lanka, when the Sinhala kings and monks perceived the degeneration of Buddhism occurring the country, they sought assistance from Buddhist centres outside Sri Lanka, where vigorous traditions of the discipline were practiced. Perhaps, a parallel may be drawn between this practice of religious institutions in the past, and the legal institutions of today. Given the unparalleled desecration of legal institutions in recent times, seeking assistance from the outside to revive and strengthen these institutions is of significant value. One such avenue available is the legal intervention by the UN Human Rights Committee, (UNHRC) made possible, by Sri Lanka ratifying the Optional Protocol to the Covenant on Civil and Political Rights (ICCPR) in October 1997.

When Sri Lanka became a State party to the ICCPR, it agreed to have the principles embodied in this Covenant as the overseeing and encompassing framework and reference of civil rights in Sri Lanka. By agreeing to this Covenant the State party provided its citizens with the opportunity to have an objective framework of norms and standards when they referred to their rights. Hence when there are problems in the realization of their rights within the country itself, the citizens could refer to the Covenant and compare their plight from the perspective of the Covenant. For example, when there are limitations in the constitutional provisions, or other legal provisions or practices relating to these rights, citizens could use the Covenant as their basic reference and demand that the State remove the limitations imposed by such legal provisions or practices. Thus, the ICCPR is a constant safeguard against the degeneration of local laws and their practices.

As a State party to the Optional Protocol, Sri Lanka has further provided its citizens with an opportunity to take their grievances to an international body called the Human Rights Committee. The UN-HRC can assess their grievances in terms of the norms and standards set out in the ICCPR. Hence, a citizen who is dissatisfied with the limitations placed by the local laws and practices to the realization of his/her rights has an opportunity to test whether his/her grievances are well-founded and whether his/her rights can be better safeguarded than is being done within the framework of the State.

The logic of the Optional Protocol is based on Article 2 of the ICCPR. Under this, States who are parties to the ICCPR are obliged to provide the necessary constitutional provisions, other legal provisions or measures as may be necessary to give effect to the rights recognised in the Covenant. Furthermore, Article 2 provides that these State obligations must ensure, that persons whose rights are violated shall have an effective remedy. To ensure such a remedy, Article 2 stipulates that such a person should have the opportunity to determine his/her claim by competent judicial administrative and legal authorities, or by any other competent authority provided for, by the legal system of the

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* Executive Director, Asian Human Rights Commission, Hong Kong. This article makes no reference to the recent judgement of the Supreme Court in the *Singarasa Case* as a matter of deliberate choice and instead, focuses on discussions of the value and importance of the Optional Protocol to the ICCPR as relevant to Sri Lanka

State and to develop avenues of judicial remedy. In addition, the ICCPR requires that the State party shall ensure that the competent authorities enforce such remedies when granted.

This opening created by the State itself, by being a signatory to the Optional Protocol of the ICCPR may be a potential avenue to deal with the current chaotic condition of the rule of law in the country. The constitutional and legal provisions and practices have been perceived by the people as having overwhelmingly failed. The constitutional remedies are not only extremely limited but the limited remedies are also hard to obtain due to manifold factors. Also, the legislative processes in the country have proved to be alarmingly slow. The current legal structure is so defective that to take the necessary steps to correct such limitations and to strengthen the constitutional and the legal processes is itself a problem. The citizen has become trapped in a deadlock, which has become a normal feature of the legislative processes in Sri Lanka. Hardly any laws have been developed in recent years to revitalize the institutions that safeguard the rule of law in the country. The only significant constitutional provision was the 17th Amendment to the Constitution. Even this has not been worked out in greater detail, to achieve its full potential. Instead, implementation of this important constitutional innovation has been deliberately bypassed by the executive and the legislature during the past year, thereby depriving it of any practical effect.

In recent decades, constitutional and legal provisions to safeguard the degenerating positions of citizens' rights in Sri Lanka have been appallingly barren. Formidable forces have also emerged to prevent any form of relief being afforded to victims of violations. The Armed Forces have been bestowed with unlimited powers of arrest, detention, torture, extra judicial killings and the causing of disappearances under the pretext of emergency and anti-terrorism laws. Then there are parts of the country in which the Armed Forces and law enforcement agencies have been excluded. As a result, there are no safeguards to protect the rights of the people living in these areas. Meanwhile the police too having been used for military purposes and exposed to legally anarchic situations seem to have gone berserk. Open advocacy of extra judicial killings of those identified as criminals, have become an almost-accepted social policy. With unprecedented delays in courts, and little faith in the processes of adjudication by these institutions, ordinary citizens have become further exposed to the denial of their basic rights.

This is the situation that has to be compared with the rights promised to all Sri Lankan citizens when the State ratified the ICCPR. Between this promise and its actual reality, is not merely a gap but also a contradiction. For instance, the causing of unabated torture, extra judicial killings including large-scale disappearances and practical disabilities imposed on the enforcement of legal remedies through courts are in stark contrast to the obligations the State has undertaken by becoming a signatory to the ICCPR. When questioned about this contradiction, past governments in Sri Lanka have offered innumerable excuses including the most popular: internal conflict in the country – be it in the South, North or East. In international forums, Sri Lanka constantly sought sympathy and understanding of such excuses, implying that under the circumstances, it could not be expected to do any better.

The other convenient excuse offered particularly by government agencies, is that the lack of financial and other resources have impeded upon their proper functioning. The judiciary claims that its budget is too low to even afford proper judicial training. The Attorney General's department – which also functions as the main prosecuting agency in the country – has claimed that it lacks sufficient funds to employ an adequate number of prosecutors to handle its enormous workload. There are also

complaints of insufficient number of courthouses. The police grumble that little funding has been allocated for developing forensic facilities that would bring their work up to standards required by modern times. The police also complain of inadequate finances for training, vehicles and communications facilities. In fact, the unofficial excuse often given for the rampant use of torture at police stations is the lack of investigative training of their cadre. Conversely, institutions specially created via the 17th Amendment, for the purpose of correcting and supplementing the deficiencies of the justice institutions, also complain about the incongruity of their mission considering the poverty of available resources.

In a nutshell, the administration of justice in Sri Lanka is facing a tragic and dangerous situation. While the problems are vast, the manner of dealing with them has become ridiculously comical. And the situation is worsening each day. Such a prediction is not simply one made by cynics or a minority of critics; these days it seems to be the perception of almost every citizen in the country. In the editorial comments of newspapers in Sri Lanka one could finds expressions of desperation and subdued anger expressed by way of exhortation to the leaders, to change their ways on matters relating to the rule of law. The hidden cry everywhere is the loss of justice within the country. The hidden anger against deep injustice and the lack of legal capacity to obtain remedies is so explosive that it is quite likely to adversely impact upon most aspects of social and political development in Sri Lanka.

Under these circumstances, the avenue afforded to Sri Lankan citizens to make individual complaints to the UNHRC is invaluable for its potential to develop the necessary jurisprudence and strategies for counteracting this degeneration and developing powerful responses for change. At one time any form of intervention from UN bodies such as the Human Rights Committee may have been perceived as an "external interference". In legal circles it was thought that we have the legal luminaries capable of handling all the complexities of a legal system to develop a strong jurisprudence. Unfortunately no such beliefs exist anymore. Within the legal community there exists a heightened sense of awareness as to who is responsible for this dismal state of affairs prevailing in the legal sphere. While there is no single voice to talk about the great legal traditions of the country, there is indeed a huge chorus, which sings a requiem to the notion of justice in the country.

The sword of chauvinism, which decried external interference into the development of law and claimed indigenous development as the alternative, barely exists now. In fact, in the past the higher judiciary in Sri Lanka has taken a very conservative view on the country's obligations as a signatory to UN Covenants and Conventions such as the ICCPR.

While, countries like South Africa have followed a dynamic approach to assimilating these Covenants and Conventions into domestic law, the Sri Lanka judiciary, except on a few rare occasions, has failed to show much enthusiasm in this direction. The body of case law, which has developed, particularly under the interpretation of fundamental rights, failed to expand upon domestic jurisprudence by assimilating the riches of international jurisprudence, which has rapidly developed in the last 50 years or so. While there are some sparks in a few cases, most cases fall far below the interpretation of the rights as has occurred in more vital jurisdictions.

The very assertion that the people of Sri Lanka are not inferior to any other people elsewhere can be demonstrated only if the rights of the people of the country are respected to the highest degree as

elsewhere. The treatment of people as lesser human beings contradicts such claims on which the pride of a nation rests. The past heritage of South Asian countries including Sri Lanka is a poor one, in this regard. Despite being called a religious continent and the flourishing of various religions in the region, past decades have shown that the citizens themselves have been treated in these countries as persons of little importance. A multiplicity of factors such as caste and race and also types of absolute power exercised by rulers, have failed to usher indigenous traditions of respect for the citizens. The citizens must respect the State is the motto, rather than the State respecting the people. And unfortunately jurisprudence developed in the courts has not broken through the barriers, nor shattered the foundations of thoughts and attitudes responsible for relegating the citizenry to lesser human beings.

Under these circumstances, several Sri Lankans who have gone before the UNHRC to complain about violations of their rights at the hands of their own State should be considered as persons pioneering a significant movement, to bring in the application of more developed norms of human rights into their country. These persons have challenged some very important aspects of the prevailing jurisprudence and the legal practices. [1]

In one case, the author challenged the manner in which the contempt of court law is practiced in Sri Lanka (*Tony Fernando Case).* The view of the HRC in this case was a landmark in the development of the law on contempt of court as well as human rights. In another case, the applicant challenged one of the age-old practices of delays in courts in Sri Lanka (*Lalith Rajapakse's Case*). The UNHRC held that the delay amounted to a violation of his human rights guaranteed under the ICCPR. In yet another case, a father complained of the disappearance of his son as a breach of various provisions of the ICCPR including article 7, which prohibits torture. The UNHRC held in favour of the father and was of the view that the State party was under obligation to provide the father an effective remedy, including a thorough and effective investigation, and the son's immediate release, if he was still alive *(Sarma's Case*).

In the *Nallaratnam Singarasa Case*, the author challenged the prevailing jurisprudence on the use of confessions under the anti terrorism legislation. The UNHRC was of the view that the trial conducted in a Sri Lankan court could not be considered as a fair trial within the meaning of the provisions of the ICCPR. Another litigant challenged unfair prosecution practices as a violation of his rights including the freedom of expression (*Victor Ivan's case). Inter alia*, he challenged the filing of three actions against him by the Attorney General of Sri Lanka without reason and dragging the cases on without prosecution as amounting to intimidation and violation of his rights. The UNHRC held in his favour despite State objections.

A further case is where a Member of Parliament complained about the danger caused to him by a public speech made by the President where he was referred to as being involved with the LTTE – *Jayalath Jayawardena's Case*. The author claimed that the statement put his life at risk and that the State -- by refusing to give him sufficient security -- failed to protect his life. Here too, the UNHRC held in the author's favour.

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[1] Ed Note; Views of the Human Rights Committee in *Tony Michael Fernando vs Sri Lanka* (Communication No 1189/2003:31/3/2005,CCPR/C/83/D/1189/2003. (*The Fernando Case*). For earlier Communications of Views see LST Review, Volume 15, Issue 202, August 2004 for Views of the UN Human Rights Committee in Communication No 950/2000:31/07/2003, CCPR/C/78/D/950/2000 (The *Jegetheeswaran Sarma Case*), Views of the UN Human Rights Committee in Communication No 916/2000: 26/07/2002, CCPR/C/75/D/916/2000 (the *Jayalath Jayawardene Case*), Views of the UN Human Rights Committee in Communication No. 909/2000: 26/08/2004, CCPR/C/81/D/909/2000 (the *Victor Ivan Case*) and Views of the UN Human Rights Committee in Communication No. 1033/2004: 26/08/2004, CCPR/C/81/D/1033/2001 (the *Singarasa Case*).

Each of the aforementioned views of the UNHRC has serious and profound implications on the criminal justice system and human rights in Sri Lanka. Some of the decisions in which the HRC was of the view that rights were violated have arisen from orders made by Sri Lankan courts including the Supreme Court itself. One judgement related to the exercise of the Attorney General's discretionary powers to institute prosecutions. The issue of delay was also a slight upon the practices in local courts. In one case the powers of the Head of State, were challenged regarding a public statement she had made against a Member of Parliament that endangered his life. Therefore one would observe, that all these cases provide a framework for deeper questioning and understanding of Sri Lanka's human rights obligations vis-à-vis her citizens in terms of the power structures operating within the country. Thus they provide a basic reference from which to explore these far reaching questions and also a valuable avenue to resuscitate the overall discourse on justice – that has been silent for perilously too long.

The promulgation of the 1978 Constitution was an attempt to politically displace liberal democracy while keeping the phraseology of the separation of powers. It was a tailor-made Constitution to give legitimacy to arbitrary misuse of power by a single person – the all-powerful Executive President. With this Constitution, constitutionalism as such literally disappeared in the country. Since a Constitution is a paramount law in a country, the damage done by this Constitution to the overall legal framework of the country is beyond estimation.

To revitalize the debate on constitutionalism and reconstruct the foundations of liberal democracy discussion is required on some fundamental issues relating to democracy and human rights. Some try to confine this discussion purely to one about the nature of the State, *viz,* a unitary vs. federal state. What does a unitary or federal state mean within the framework of the present Constitution? It means perilously little. Of course, it is possible to fashion yet another constitutional mockery by adding some amendment and getting it through for the sake of political convenience. However, this will not make sense from a liberal democratic constitutional point of view for the same reasons that the 1978 Constitution does not make any such sense. Under these circumstances too, the Human Rights Committee cases can become a vital reference for a deeper debate on constitutionalism in Sri Lanka's troubled context.

Finally the UNHRC findings can also become an important source of education to a new generation of lawyers and persons concerned with legal matters. Legal education in Sri Lanka remains archaic and uninspiring. It belongs to a bygone age where legal intellect was limited to references to some instances of legislation and case law. The United Kingdom, (the very country that was instrumental in introducing great many laws in colonial times), has changed its own laws and practices drastically. Anyone from a more developed jurisdiction is likely to see the existing laws and practices in Sri Lanka as grossly primitive. However, this primitivism is still the basis of legal teaching in Sri Lanka. The consequences are that the legal intellect in Sri Lanka is extremely unprepared to deal with the extremely perplexing problems facing the country now and in the future.

Indisputably, having recourse to the UNHRC can be a stepping-stone towards developing a more dynamic jurisprudence for the country. The implications of the judgement of the Supreme Court in the recent *Sinharasa Case*, (which held that the President's act of accession to the Protocol was unconstitutional), have been commented upon elsewhere in this publication. However, unless and until the State denounces the Optional Protocol to the ICCPR, international law obligations that it has incurred will remain in force. Sri Lankans should therefore avail themselves of the individual communications remedy with even greater force in the coming years to compel the State to finally resolve a long standing inconsistency between its international obligations and domestic action in order that their rights are thereby enhanced.

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