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THE *SINGARASA* CASE: *QUIS CUSTODIET...?*

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Editor's Note ... ...

The *Singarasa case* indisputably reflects the most retrogressive decision to be handed down by the Sarath Silva Court during its (close to) ten-year term from 1999 to 2009.

Writing for a Divisional Bench of his Court on 15 September 2006, the former Chief Justice declared that Sri Lanka's 1997 accession to the *First Optional Protocol* to the *International Covenant on Civil and Political Rights* (ICCPR) was unconstitutional. Utilising a spurious argument of 'judicial power' being exercised by the United Nations Human Rights Committee, he deemed consequently that the act of Presidential accession to the Protocol without 'authority from Parliament' rendered the accession unconstitutional. The judgment catapulted the country's legal and judicial systems into needless controversy, the effects of which continue to reverberate even at this point of time.

Earlier, Sri Lanka's Supreme Court had, through careful and considered interpretation, internally incorporated suitable elements of the Committee's jurisprudence, developed under the individual communication procedure of the *First Optional Protocol*. This tend of judicial reasoning took into account the spirit of Article 27(15) of Sri Lanka's Constitution which requires the State to *"endeavour to foster respect for international law and treaty obligations in dealings among nations"*, in order to enhance rights of citizens and non-citizens alike.

The views of the Committee were, in no way, looked upon as necessitating compulsive adherence amounting to an internal exercise of 'judicial power' with commensurate coercive sanctions. To have urged such an opinion would have, in fact, invited ridicule given Sri Lanka's dualist legal order. Indeed, the application for review/revision—which resulted in this retrogressive judgment in the *Singarasa case*—merely urged that the Court re-consider an earlier order handing down a conviction under emergency laws on a detainee solely as a result of a confession which was claimed by him to have been coerced. The Committee's views were cited in this review/revision application as persuasive authority.

If at all therefore, a commonsensical approach would have been for the Court to limit itself to restatement of the common principle familiar to first year law students, that Covenant rights do not have domestic effect unless enacted into law or accepted through judicial interpretation. Instead, the former Chief

Justice's unwholesome and entirely unnecessary jettisoning of the *First Optional Protocol* itself, exemplified an abrupt break from past jurisprudence. The *LST Review* had, in Volume 17, Joint Issue 227 & 228, September & October 2006, published court documentation in relation to the *Singarasa case* as well as critical commentaries on the decision.

Taking these discussions further, we publish in this Issue of the *Review*, a devastatingly forthright review of this judgment by a pre-eminent international legal scholar, ***Nigel Rodley***. The examination of the context in which the decision was delivered as well as its possible underlying reasoning is a distinguishing feature of this analysis. Studiedly avoiding speculation that the case was no more than a 'petty settling of scores with the Committee', he yet takes into account the relevance of a number of Optional Protocol cases in which the Committee had found a violation of the ICCPR by Sri Lanka during the term of the former Chief Justice.

His consequent observation is particularly pertinent:

> *For, while in the typical Committee case it is the executive and legislative branches that tend to be primarily responsible for a breach (as was arguably the case in the* Singarasa case*) in a number of the Sri Lankan cases, it has been the behaviour of the Courts, indeed the Supreme Court itself, that has placed the State in violation of the Covenant.*

The impact of two decisions of the Committee, namely, *Anthony Fernando* v. *Sri Lanka* and *Sister Immaculate Joseph et al.* v. *Sri Lanka*, are specifically examined in this context. The further evaluation of questionable judicial behaviour against the standards of the *Bangalore Principles of Judicial Conduct* (adopted in 2001 by a core group of, *inter alia*, common law judges including the Chief Justice of Sri Lanka) is particularly instructive for this discussion.

The *Review* publishes as a supplementary to this analysis, the ***UN Human Rights Committee's*** General Comment No.33 on *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (CCPR/C/GC/33, 5 November 2008), together with the submissions of the ***Law & Society Trust (Colombo)*** and the ***Human Rights Law Resource Centre (Melbourne)*** placed before the Committee during the drafting process of General Comment No.33.

The General Comment is relevant for its exceedingly clear elucidation of the international legal principles underlying the function of the Committee as well as the authoritative nature of views issued thereto. It emphasises the fact (in paragraph 11) that, while:

> *the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.*

The substance of paragraph 13 of General Comment No.33 is also important in this respect:

> *The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.*

It is hoped that discussions in regard to the proper scheme and validity of Sri Lanka's accession to the *First Optional Protocol* to the ICCPR will benefit from the contents of the current Issue of the *Review*.

Kishali Pinto-Jayawardena

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

Sir Nigel Rodley[*]

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

* * *

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

* * *

I Introduction

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

[±] This article was originally published in 41(3) *Israel Law Review* (2008) at pp.500-521 and is reprinted here by permission of the *Israel Law Review*.

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[1] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter OP].

[2] *Nallaratnam Singarasa* v. *Attorney General*, S.C. SPL (LA) No.182/1999 (2006), reprinted in *LST Review* 17:227-228 (2006), pp.9-18.

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

II The *Singarasa* Case

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

After having pursued his case unsuccessfully through the Sri Lankan courts, Singarasa availed himself of the right of individual petition to the Human Rights Committee under the Optional Protocol.[4] The Committee could not deal with the facts directly since the interrogation and conviction took place before the Optional Protocol came into force for Sir Lanka.[5] However,

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[3] *Ibid.*

[4] *Nallaratnam Singarasa* v. *Sri Lanka*, Communication No.1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004). The Human Rights Committee can only consider cases after domestic remedies have been exhausted (OP, *supra* note 1, Art. 5(2)(b)). In this case the conviction in the High Court was upheld by the Court of Appeal—sentence reduced from 50 to 35 years—and leave to appeal to the Supreme Court was denied by the latter Court. See: R.K.W. Goonesekere, "The Singarasa Case—A Brief Comment", *LST Review* 17:227-228 (2006), pp.25-6 (the author was lead Counsel for Singarasa before the Supreme Court); John Cerone, "Comment on the Singarasa Case Relating to the Status of the International Covenant on Civil and Political Rights in Sri Lankan Law", *ibid.*, p.27.

[5] Although Sri Lanka was a Party to the ICCPR since 1980, the consistent practice of the Committee was that the Optional Protocol does not extend to acts occurring after the applicability of the Covenant for a State Party, but before the OP is in force for the same State Party (*Aduayom* v. *Togo*,

the Court of Appeal decision upholding the conviction (while reducing the sentence from 50 years to 35 years imprisonment) took place in 1999 and the Supreme Court denial of leave to appeal took place in 2000. Accordingly, the Committee could consider the issues dealt with in the Court of Appeal as falling within its jurisdiction *ratione temporis*.

The Committee found violations of several ICCPR provisions: Articles 14(1) (fair hearing) and 14(3)(f) (right to an interpreter), because of reliance on a confession made in the absence of an independent interpreter; 14(3)(c) (trial without delay) and 14(5) (right to review by higher tribunal), because of the nearly five years between conviction and final dismissal of appellate proceedings; and Article 14(3)(5) (right not to be compelled to testify against oneself), read together with Articles 2(3) (right to a remedy) and 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment). Addressing the crucially important compelled testimony issue, the Committee acknowledged an argument made by the government that the burden of proof was in fact "very low", with "a mere possibility of involuntariness" being enough to sway the Court in favour of the accused. However, it noted that the Court had drawn an adverse inference from the absence of complaint by Mr. Singarasa and this was "manifestly unsustainable" in the light of his expected return to the same detention. The "appropriate remedy" should include "release or retrial and compensation."[6]

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

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

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

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

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

Lanka is one of those "dualist" States that had not incorporated the ICCPR, there could have been no question of the ICCPR being enforceable in the Sri Lankan Courts. Nor did the Petitioner claim that the Committee's views were *per se* binding. The Petitioner's argument was subtler and more mainstream: it asked the Court to exercise its inherent powers of revision and/or review to address a situation in which the government had argued, in its response to the Committee's views, that the State did not have the "legal authority to execute the decision of the Human Rights Committee to release the convict or grant retrial". Such an argument was inconsistent with the idea that any branch of government, not just the Executive, could engage the responsibility of the State[9] and so frustrated a "legitimate expectation" that the government would "consider itself bound to give effect" to the Committee's views.[10]

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

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

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9 As stated in the same General Comment 31, *ibid.*, Section 4: "All branches of government (executive, legislative and judicial) ... are in a position to engage the responsibility of the State Party."

10 The Petition, *supra* note 7. There were two further grounds of appeal (miscarriage of justice and unconstitutionality of the relevant emergency regulations on which the first charge was based) that were not connected to the case.

11 The Written Submissions of the Respondent (the Attorney General) are reproduced in Home for Human Rights, *Beyond the Wall - Quarterly Journal*, 4:2 (2006), pp.26-31.

12 *Nallaratnam Singarasa* v. *Attorney General*, *supra* note 2, p.17, Sarath N. Silva, C.J.

13 *Ibid.*, p.15.

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

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

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

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

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

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

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

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

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

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

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

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[19] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, entered into force Jan. 27, 1980.

[20] See, 1 *Oppenheim's International Law* (Robert Jennings and Arthur Watts, eds., 9th ed. 1996), p.1222 (internal ordinary law) and pp.1287-88 (internal constitutional law). The customary international law status of the rule is relevant in view that Sri Lanka is not a party to the Vienna Convention.

its internal law as justification for its failure to perform a treaty".[21] To the extent that it does so, it will on the plane of international law be in continuing default of its responsibilities.[22]

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

III Other Sri Lankan Cases before the Committee

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

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

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

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[21] Vienna Convention, *supra* note 19, Art. 27. This rule is also one of customary international law: *Oppenheim's International Law*, *supra* note 20, pp.84-85.

[22] The government is understood to have sought to resolve the problem by securing the adoption by Parliament of a law that would give partial effect to the Covenant, International Covenant on Civil and Political Rights (ICCPR) Act No.56/2007, aimed at incorporating those provisions considered not already to be part of Sri Lankan law. According to the Supreme Court, the legislation has indeed attained its objective of full incorporation of the ICCPR: SC Ref. No.01/2008; however, it is not clear how this would solve the problem of the "unconstitutionality" of the accession to the Protocol as declared by the Supreme Court.

[23] *Anthony Fernando* v. *Sri Lanka*, Communication No.1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003 (2005).

[24] *A.M.E. Fernando* v. *Attorney General* [2003] 2 SLR 52, at 57. R.I. stands for "rigorous imprisonment", known otherwise in those Common Law countries that retain it as 'imprisonment with hard labour".

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

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

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

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[25] *Ibid.* at 62.

[26] *Ibid.*

[27] *Joseph et al.* v. *Sri Lanka*, Communication No.1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

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

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

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

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

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

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

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

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

IV Framework for Evaluating Questionable Judicial Behaviour

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

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

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[34] *Joseph et al.* v. *Sri Lanka, supra* note 27, Section 7.3.

[35] *Ibid.*

[36] This was because of the absence of notification of the proceedings, while in other cases there had been notification (*ibid.*, Section 7.4). It also found a violation of Article 26 on the grounds of discrimination on the basis of religious belief, since other religious bodies "with objects of the same kind as the authors' Order" had been provided incorporated status (*ibid.* Section 7.4).

♦ Ed. Note: Since the writing of this article, Chief Justice Asoka de Silva was appointed by President Mahinda Rajapakse as Sri Lanka's 32nd Chief Justice on 8 June 2009, consequent to the retirement of Sarath N. Silva.

[37] *Dahanayake et al.* v. *Sri Lanka*, Communication No.1331/2004, Section 6.5, U.N. Doc. CCPR/C87/D/1331/2004 (2006) (villagers dispossessed of their property because of road development found not victims of discrimination under Article 26 as already awarded compensation by the Supreme Court for violation of Sri Lankan Constitution Article 12 that is drafted in similar terms to ICCPR Article 26).

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

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

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

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

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

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[39] 66 Harvard Law Review 616 (1949).

[40] *The Bangalore Principles* were the work of a Judicial Group on Strengthening Judicial Integrity convened by the U.N. Centre for International Crime Prevention. At its first meeting, held in Vienna in April 2000 in conjunction with the Tenth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, the Group, consisting mainly of Common Law judges and the U.N. Commission of Human Rights Special Rapporteur on the independence of judges and lawyers, identified the need for a code against which the conduct of judicial officers may be measured. A draft code was adopted at the second meeting in Bangalore (February 2001), by the Group (including at this point the Chief Justice of Sri Lanka). The Group felt that to have full international status, the draft needed to be scrutinized by judges of other legal traditions. After a consultative process a revised draft was adopted by a Round-table Meeting of Chief Justices from the civil law system. A number of judges from the International Court of Justice also participated. This is the text of the Bangalore Principles: see, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 26-29, Annex, Explanatory Note, U.N. Doc. E/CN.4/2003/65 (14 Jan. 2003) (prepared by Dato Param Cumaraswamy). The Principles are also annexed to Economic and Social Council Resolution 2006/23, 27 July 2006, by which the Council "[i]nvites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles... when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary" (*ibid.*, Section 1). In September

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

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

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

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

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

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

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

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

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

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

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

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

Such a conception of impartiality/bias does have some resonance in respect of adjudications that summarily sentence a verbally aggressive, unapologetic, vexatious litigant to a year's imprisonment with hard labour, followed by a refusal to change the decision after the initiation of review proceedings (*Fernando* v. *Sri Lanka*);[48] that deny the key party to a process a possibility of incorporation without a hearing, or knowledge of one (*Sister Immaculate Joseph*); or fundamentally misrepresent or at least misconstrue the relevant (international) law (*Sister Immaculate Joseph*); or, without the issue being litigated at all, finding unconstitutional the Executive's ratification of an international instrument (*Singarasa*).

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[44] The Bangalore Principles, *supra* note 41, Principle 2.1.

[45] Commentary, *supra* note 41, Section 57.

[46] Sheldon Leader, "Impartiality, Bias and the Judiciary", in *Reading Dworkin Critically* (Alan Hunt ed., 1992), p.241.

[47] *Ibid.*

[48] Indeed, paragraph 59 of the Commentary (*supra* note 41), under the heading "Abuse of contempt powers is a manifestation of bias or prejudice," explains in language evocative of the *Fernando* case (*supra* note 23):
The contempt jurisdiction, where it exists, enables a judge to control the courtroom and to maintain decorum. Because it carries penalties that are criminal in nature and effect, contempt should be used as a last resort, only for legally valid reasons and in strict conformity with procedural requirements. It is a power that should be used with great prudence and caution. The abuse of contempt power is a manifestation of bias. This may occur when a judge has lost control of his or her own composure and attempts to settle a personal score, especially in retaliation against a party, advocate or witness with whom the judge has been drawn into personal conflict.

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

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

At this stage, then, it is the notion of impartiality that seems most apt to identify the kind of judicial behaviour that the cases could be said to illustrate. Interestingly, in Principle 2 of the U.N. Basic Principles, the judiciary is required to "decide matters before them impartially". This could be understood to suggest that the principle/value of impartiality is itself a dimension of the principle/value of independence. That is, judicial independence requires being able to subordinate one's personal, non-legal preferences to one's professional, legal discipline. The Judge must be independent of the individual sitting on the Bench. This could be more than a theoretical exercise. For, if impartiality is a component of independence, non-respect of it by the judiciary would have to be understood as a failure of judicial independence. This in turn could raise the delicate issue of the extent to which others, including other branches of government, would then be obliged to continue to respect a now vitiated independence.

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

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[49] Commentary, *supra* note 41, p.9.

[50] The Commentary stresses the distinction, see *ibid.*, Section 24:
The concepts of "independence" and "impartiality" are very closely related, yet separate and distinct. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived. The word "independence" reflects or embodies the traditional constitutional value of independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

[51] Note also the observation at paragraph 51 of the Commentary: "Independence is the necessary pre-condition to impartiality.... A judge could be independent but not impartial (on a specific case by

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

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

Such a reading of the concept of impartiality, that is, as containing within it the value of non-arbitrariness, could hardly be accused of doing violence to any of the other values reflected in the Bangalore Principles. There is probably no need to fear the judge who protests that he or she is free to behave arbitrarily, because such behaviour is not explicitly ruled out by the U.N. Basic Principles or the Bangalore Principles.

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

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case basis), but a judge who is not independent cannot, by definition, be impartial (on an institutional basis)". *Supra* note 41.

[52] The Commentary makes at least one reference to arbitrariness. In a section under the value of independence dealing with Principle 1.6 (high standards of judicial conduct to reinforce public confidence as a requirement for judicial independence), it affirms that "detention ordered in bad faith, or through neglect to apply the relevant law correctly, is arbitrary, as is committal for trial without an objective assessment of the relevant evidence" (*ibid.*, Section 47).

[53] The Bangalore Principles, *supra* note 41, Preamble.

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

V Conclusion

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

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

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

[54] Sri Lanka Constitution, Art. 112.

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

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

The only formal accountability process, at least for the senior judiciary, is that of parliamentary impeachment. This is a two-edged sword that can involve a significant threat to the independence of the judiciary, from another branch of government. Precisely because it is understood as such, it is a rarely used remedy. This leaves us with the all-too-impotent reflection that perhaps the greatest challenge for all systems is that of devising institutions that are indeed able independently and impartially (and non-arbitrarily) to ensure the proper management of the judiciary without infringing its independence.

HUMAN RIGHTS COMMITTEE
Ninety-fourth session
Geneva, 13-31 October 2008

UNITED NATIONS HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO.33 (CCPR/C/GC/33, 5 NOVEMBER 2008)

The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights

1. The Optional Protocol to the International Covenant on Civil and Political Rights was adopted and opened for signature, ratification or accession by the same act of the United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966, that adopted the Covenant itself. Both the Covenant and the Optional Protocol entered into force on 23 March 1976.

2. Although the Optional Protocol is organically related to the Covenant, it is not automatically in force for all States Parties to the Covenant. Article 8 of the Optional Protocol provides that States Parties to the Covenant may become parties to the Optional Protocol only by a separate expression of consent to be bound. A majority of States Parties to the Covenant has also become party to the Optional Protocol.

3. The preamble to the Optional Protocol states that its purpose is "further to achieve the purposes" of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, "to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant." The Optional Protocol sets out a procedure, and imposes obligations on States Parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.

4. Article 1 of the Optional Protocol provides that a State Party to it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. It follows that States Parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.

5. Article 2 of the Optional Protocol requires that individuals who submit communications to the Committee must have exhausted all available domestic remedies. In its response to a communication, a State Party, where it considers that this condition has not been met, should specify the available and effective remedies that the author of the communication has failed to exhaust.

6. Although not a term found in the Optional Protocol or Covenant, the Human Rights Committee uses the description "author" to refer to an individual who has submitted a communication to the Committee under the Optional Protocol. The Committee uses the term "communication" contained in Article 1 of the Optional Protocol instead of such terms as "complaint" or "petition", although the latter term is reflected in the current administrative structure of the Office of the High Commissioner for Human Rights, where communications under the Optional Protocol are initially handled by a section known as the Petitions Team.

7. Terminology similarly reflects the nature of the role of the Human Rights Committee in receiving and considering a communication. Subject to the communication being found admissible, after considering the communication in the light of all written information made available to it by the individual author and by the State Party concerned, "the Committee shall forward its views to the State Party concerned and to the individual."[1]

8. The first obligation of a State Party, against which a claim has been made by an individual under the Optional Protocol, is to respond to it within the time limit of six months set out in Article 4(2). Within that time limit, "the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State". The Committee's Rules of Procedure amplify these provisions, including the possibility in exceptional cases of treating separately questions of the admissibility and merits of the communication.[2]

9. In responding to a communication that appears to relate to a matter arising before the entry into force of the Optional Protocol for the State Party (the *ratione temporis* rule), the State Party should invoke that circumstance explicitly, including any comment on the possible "continuing effect" of a past violation.

10. In the experience of the Committee, States do not always respect their obligation. In failing to respond to a communication, or responding incompletely, a State which is the object of a communication puts itself at a disadvantage, because the Committee is then compelled to consider the communication in the absence of full information relating to the communication. In such circumstances, the Committee may conclude that the allegations contained in the communication are true, if they appear from all the circumstances to be substantiated.

11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

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[1] Optional Protocol, Article 5(4).
[2] Rules of Procedure of the Human Rights Committee, Rule 97(2). UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

12. The term used in Article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views".[3] These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.

13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

14. Under Article 2, paragraph 3 of the Covenant, each State Party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity". This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found:

> "In accordance with Article 2, paragraph 3(a) of the Covenant, the State Party is required to provide the author with an effective remedy. By becoming a 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 or 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. In this respect, the Committee wishes to receive from the State Party, within 180 days, information about the measures taken to give effect to the Committee's views".

15. The character of the views of the Committee is further determined by the obligation of States Parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations.[4]

16. The Committee decided, in 1997, under its rules of procedure, to appoint a member of the Committee as Special Rapporteur for the Follow-Up of Views.[5] That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State Party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response.

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[3] In French the term is "constatations" and in Spanish "observaciones".
[4] Vienna Convention on the Law of Treaties, 1969, Article 26.
[5] Rules of Procedure of the Human Rights Committee, Rule 101.

17. It is to be noted that failure by a State Party to implement the views of the Committee in a given case becomes a matter of public record through the publication of the Committee's decisions *inter alia* in its annual reports to the General Assembly of the United Nations.

18. Some States Parties, to which the views of the Committee have been transmitted in relation to communications concerning them, have failed to accept the Committee's views, in whole or in part, or have attempted to re-open the case. In a number of those cases these responses have been made where the State Party took no part in the procedures, having not carried out its obligation to respond to communications under Article 4, paragraph 2 of the Optional Protocol. In other cases, rejection of the Committee's views, in whole or in part, has come after the State Party has participated in the procedure and where its arguments have been fully considered by the Committee. In all such cases, the Committee regards dialogue between the Committee and the State Party as ongoing with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

19. Measures may be requested by an author, or decided by the Committee on its own initiative, when an action taken or threatened by the State Party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee. Examples include the imposition of the death penalty and violation of the duty of non-*refoulement*. In order to be in a position to meet these needs under the Optional Protocol, the Committee established, under its rules of procedure, a procedure to request interim or provisional measures of protection in appropriate cases.[6] Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.

20. Most States do not have specific enabling legislation to receive the views of the Committee into their domestic legal order. The domestic law of some States Parties does, however, provide for the payment of compensation to the victims of violations of human rights as found by international organs. In any case, States Parties must use whatever means that lie within their power in order to give effect to the views issued by the Committee.

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[6] Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rule 92 (previously Rule 86):
"The Committee may, prior to forwarding its views on the communication to the State Party concerned, inform the State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State Party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication".

SUBMISSION BY THE CIVIL AND POLITICAL RIGHTS PROGRAMME OF THE LAW AND SOCIETY TRUST, SRI LANKA IN REGARD TO DRAFT GENERAL COMMENT NO.33 BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE*#

1. Introduction

1.1 The Draft General Comment is of critical importance to Sri Lanka[1] following the delivering of a judgment by the country's Supreme Court in 2006 (namely the *Singarasa Case* referred to in context at a later point of time in this Submission), which has had an extraordinarily negative impact on the commitment of the State to implement the views of the Human Rights Committee in terms of the Covenant and the First Optional Protocol.

1.2 Consequently, while we welcome the reasoning underlying the Draft General Comment emphasizing the importance of treaty obligations and particularly "the place and function of the Optional Protocol in the system of standard-setting and monitoring of obligations established by the International Covenant on Civil and Political Rights" (paragraph 13 of the Draft General Comment), the following Submission is made for the anxious consideration by the Committee.

2. Submissions in Regard to the Nature of Obligations in terms of the Covenant and the Protocol

2.1 It is a matter of common acceptance that the Covenant is a treaty that creates binding obligations on the States Parties. In accordance with the customary international law principle of *pacta sunt servanda* enshrined in Article 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.

2.2 In the Draft General Comment under discussion, the nature of this obligation has been usefully explained as underscored not only by "the principle of good faith" in relation to submission to treaty body obligations (paragraph 16), but also as a result of "the

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* In response to the Committee's consultation on 'draft General Comment 33' upon conclusion of its second reading, seeking comments from interested parties (see, Office of the High Commissioner for Human Rights website, http://www2.ohchr.org/english/bodies/hrc/gc33.htm).
The submission is in response to the Draft General Comment No.33 – Advance Unedited Version available at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.CRP.3.doc.

The Submission was tendered by attorney-at-law Kishali Pinto-Jayawardena, Deputy Director and Head, Civil and Political Rights Programme, Law & Society Trust, Colombo, on 17 September 2008.

1 Sri Lanka acceded to the First Optional Protocol on 3 October 1997. At that time the State made a declaration that it recognised the competence of the Committee 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.

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".

integral role of the Committee" (paragraph 14) in terms of both the Covenant and the Protocol as well as by reason of the obligations flowing from Article 2, paragraph 3 of the Covenant (paragraph 15).

2.3 Further, as observed in paragraph 25, "the link between the Covenant and the Optional Protocol" has particular significance. The Committee has quoted one decision of the highest court of a State Party to the effect that "the ratification and entry into force of the Optional Protocol by that State Party [has] strengthened and deepened the status of Covenant rights in the general law".[3]

2.4 There is similar judicial authority in Sri Lanka in one decision which we will cite for the convenience of the Committee, where the Supreme Court observed as follows:

> 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 recognizes.[4]

3. Submissions in Regard to the Nature of the Committee's Role when Considering Communications and Issuing Views

3.1 In paragraph 26 of the Draft General Comment,* it is observed as follows:

> The Committee regards as totally unfounded any claim that, since the Optional Protocol has not been incorporated in a State's laws by statute, the views of the Committee have no legal force. Such an attitude is in contradiction to 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".

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[3] *Mabo* v. *Queensland* (1992), High Court of Australia, per Justice Sir Gerard Brennan. (As quoted in the Draft General Comment).

[4] *Weerawansa* v. *AG* [2000] 1 SLR 387, 409, Supreme Court of Sri Lanka, per Justice M.D.H. Fernando.

* Ed. Note: Draft General Comment No.33 – Advance Unedited Version is available at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.CRP.3.doc. Paragraph 26 has not been retained in the Final Version of General Comment No.33.

3.2 Paragraph 29 of the Draft General Comment* further elaborates this position by stating that:

> The Committee is therefore of the opinion that, on a correct interpretation of the Covenant and the Optional Protocol, the views expressed by it in relation to individual communications are not merely recommendatory but constitute an essential element of the undertaking by States Parties under Article 2, paragraph 3 of the Covenant to afford an effective remedy to persons whose rights have been violated.

3.3 While there can be little dispute with these observations, it is our submission that discussion of the function of the Committee in considering individual communications should be clearly defined as distinguishable from any inference that the Committee exercises 'powers' that are 'judicial' in spirit or in form in regard to the domestic legal order of States Parties who have acceded to the Covenant and the Protocol.

3.4 This is important in our view given the current phrasing of paragraph 11 of the Draft General Comment,* which reflects upon varied juristic opinion in respect of the 'judicial nature' of the Committee's role and function in this regard. Thus:

> The function of the Human Rights Committee in considering individual communications has been described as not fully that of a judicial body.[5] However, the views issued by the Committee under the Optional Protocol exhibit most of the characteristics of a judicial decision, follow a judicial method of operation, and are issued in a judicial spirit.[6] Hence, the work of the Committee is to be regarded as determinative of the issues presented.[7]

3.5 It is our submission that the present content of paragraph 11 may provide further impetus to adherents of domestic sovereignty who argue that providing recourse to the Committee by way of filing individual communications amounts to effectively providing a right of appeal to a 'higher appellate court' outside the territorial

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* Ed. Note: Draft General Comment No.33 – Advance Unedited Version is available at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.CRP.3.doc. Paragraph 29 has not been retained in the Final Version of General Comment No.33.

* Ed. Note: Draft General Comment No.33 – Advance Unedited Version is available at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.CRP.3.doc. Paragraph 11 has been retained in a rephrased form in the Final Version of General Comment No.33.

[5] Human Rights Committee (1990), *2 Selected Decisions H.R.C.*, 1-2; *Annual Report of the Human Rights Committee*, 2002, 225; N. Ando, "L'avenir des organes de supervision: Limites et possibilités du Comité des droits de l'homme", *Canadian Yearbook of Human Rights* (1991-92), 186; H. Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Commitee?" in *The Future of UN Human Rights Treaty Monitoring* (P. Alston and J. Crawford, eds) (date), 18. (As quoted in the Draft General Comment).

[6] Tomuschat, 624; T. Zwart, *The Admissibility of Human Rights Petitions* (1994), 19. (As quoted in the Draft General Comment).

[7] Tomuschat, 185; McGoldrick, 151; R. Hanski and M. Scheinin, *Leading Cases of the Human Rights Committee* (2003), 22. (As quoted in the Draft General Comment).

boundaries of a country and consequently cannot be agreed to by the political executive without explicit electoral approval by the citizens of that country.

3.6 This question is of immediate relevance to Sri Lanka given the recent ruling of a Divisional Bench of the Supreme Court in the *Singarasa Case*,[8] referred to earlier, where the Court did not only declare that the Protocol had no internal legal effect since it had not been incorporated by domestic statute but also ruled that the Presidential act of accession to the Protocol[9] amounted to an unconstitutional exercise of legislative power as a result of an unconstitutional conferment of judicial power on the Committee, with the Committee being conferred with judicial status within Sri Lanka.[10]

3.7 The said Judgment of the Supreme Court validated the position taken by the Government of Sri Lanka in its refusal (without exception) to implement the views of the Committee in the very several instances where the Committee had declared violations of the Covenant[11], which refusal has been based primarily on the reasoning that implementation would amount to an 'overruling' of a decision of Sri Lanka's highest court.

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[8] SCM 15.09.2006, judgment of Chief Justice Sarath N. Silva.

[9] Sri Lanka's accession to the Covenant itself was held not to be "*per se* inconsistent with the provisions of the Constitution or the written law of Sri Lanka". The State was bound in international law. However, the rights contained therein was declared not to have "internal effect".

[10] The President of Sri Lanka had acceded to the Covenant and the Protocol by virtue of the powers in terms of Article 33(f) of Sri Lanka's Constitution which allows the President 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 authorised to do". However, this was the very provision that the Court employed to determine that the accession to the Protocol was unconstitutional as it was "inconsistent" with the Constitution, in that the act of accession was "an act of legislative power" (which ought to have been exercised by Parliament) flowing from the conclusion of the Court that "judicial power has been conferred upon the Human Rights Committee thereof". 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). Given that the Court declared that accession to the 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 Committee would therefore 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.

[11] These Communications are as follows: *Anthony Michael Emmanuel Fernando* v. *Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31.03.2005; *Nallaratnam Singarasa* v. *Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004; *S. Jegatheeswara Sarma* v. *Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 16.07.2003; *Jayalath Jayawardena* v. *Sri Lanka*, CCPR/C/75/D/916/2000, adoption of views, 22.07.2002; *Victor Ivan Majuwana Kankanamge* v. *Sri Lanka*, CCPR/C/81/D/909/2000, adoption of views 27.07.2004 and *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka* v. *Sri Lanka*, CCPR/C/85/D/1249/2004, adoption of views, 21.10.2005. Also, *Sundara Arachchige Lalith Rajapakse* v. *Sri Lanka*, CCPR/C/87/D/1250/2004, adoption of views, 14.07.2006, *Raththinde Katupollande Gedara Dingiri Banda* v. *Sri Lanka*, CCPR/C/D/1426/2005, adoption of views 26.10.2007, *Dissanayake Mudiyanselage Sumanaveera Banda* v. *Sri Lanka*, CCPR/C/93/D/1373/2005, adoption of views 22.7.2008, *Vadivel Sathasivam and Parathesi Saraswathi* v. *Sri Lanka*, CCPR/C/93/D/1436/2005, adoption of views 8.7.2008, *Soratha Bandaranayake* v. *Sri Lanka*, CCPR/C/93/D/1376/2005, adoption of views 24.7.2008.

3.8 The Court's conclusion that 'judicial power' had been conferred upon on the Committee has, since then, been refuted by the counter argument put forward by critics of the *Singarasa* judgment to the effect that, rather than 'judicial power' being conferred upon the Committee, the rights in the Covenant should be given effect to, (as part of the international Bill of Rights), to which States have acceded to and further, that the Committee is the appropriate mechanism under the Covenant vested with that authority.

3.9 In the foregoing, it is submitted with respect that, paragraph 11 of the Draft General Comment as it is presently phrased, may undermine this argument to the extent of precluding a possible application made by concerned Sri Lankan advocates at a later point of time to a Full Bench of Sri Lanka's Supreme Court, to overrule the decision of the Divisional Bench in the *Singarasa Case*.

4. Conclusion

4.1 In this regard, it is our submission that the Draft General Comment may be further clarified by a definitive restatement of the principle that the 'determinative' nature of the Committee's role and function in considering Individual Communications and in issuing views consequent thereto, is separate from and/or wholly distinct from the question of 'judicial power' being exercised by the Committee in regard to the domestic legal systems of States Parties which have acceded to the Covenant and the Protocol.

4.2 It is our submission that, given that the Draft General Comment deals explicitly with 'The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights', there should be a categorical refutation of any such claim of the exercise, even inferentially, of any such 'judicial power', whether with or without reference by the Committee to the contested decision of Sri Lanka's Supreme Court in the abovementioned *Singarasa Case*.

4.3 It is our further submission that the general theme of the Draft General Comment may be further enriched by reference to the drafting history of the Covenant as well as State practice in implementing the Covenant and judicial interpretation in incorporating the provisions of the Covenant into domestic law, in order to emphasize the point that the Covenant was drafted in such a way to accommodate the broad range of legal systems that exist throughout the world, be they (as traditionally defined) *monist* or *dualist*.[12]

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[12] The Covenant (by Article 2, paragraph 2) obliges States Parties to adopt such "laws or other measures as may be necessary".

SUBMISSION BY THE HUMAN RIGHTS LAW RESOURCE CENTRE, AUSTRALIA IN REGARD TO DRAFT GENERAL COMMENT NO.33 BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE[♦#]

1. Introduction and Summary

1.1 Consultation Process

1) During its 92nd and 93rd sessions held in March and July 2008 respectively, the Human Rights Committee (**Committee**) initiated the drafting of a new General Comment on States Parties' obligations under the first Optional Protocol to the International Covenant on Civil and Political Rights (**General Comment**).

2) The Committee has sought comments on the Draft General Comment from interested parties, in particular States Parties to the *International Covenant on Civil and Political Rights* (**Covenant**), UN specialized agencies and non-governmental organizations.[1]

1.2 Overview of this Submission

3) The Human Rights Law Resource Centre (HRLRC) recognizes and affirms the importance of the individual communication process in ensuring effective protection for individuals who may have suffered a violation of rights afforded them under the Covenant.

4) This submission addresses the following areas considered in the General Comment:

   (a) the obligation of States Parties to cooperate with procedures (Section 2);

   (b) the force, nature and effect of the Committee's views (Section 3); and

   (c) interim measures (Section 4).

5) The HRLRC supports the position taken in the General Comment that the Committee's views are 'not merely recommendatory'.[2] Rather, the obligation to respect, reconsider and act in good faith in relation to Committee procedures and views forms an essential element of States Parties' legal obligations under both the

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♦ In response to the Committee's consultation on 'draft General Comment 33' upon conclusion of its second reading, seeking comments from interested parties (see, Office of the High Commissioner for Human Rights website, http://www2.ohchr.org/english/bodies/hrc/gc33.htm).
The submission is in response to the Draft General Comment No.33 – Advance Unedited Version available at http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.CRP.3.doc.

The Submission was tendered by the Human Rights Law Resource Centre Ltd (HRLRC), Level 1 - 550 Lonsdale Street, Melbourne, Victoria, Australia on 3 October 2008. Published in this issue of the *LST Review* with kind permission from the HRLRC.

1 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

2 General Comment [34].

Optional Protocol to the International Covenant on Civil and Political Rights (**Optional Protocol**) and the Covenant.[3]

6) The purpose of this submission is to consider in detail the nature of States Parties' obligations to co-operate with the Committee in good faith and to respect the Committee's views.

1.3 Recommendations

7) Consistent with our comments in this submission, we have prepared and set out in an Annexure a proposed revised draft of the General Comment for the Committee's consideration. The highlighted text contained in the proposed revised draft constitutes our recommendations as to changes which should be made to the General Comment.

2. Obligations of States Parties to cooperate with procedures

2.1 Reference to the General Comment

8) This section addresses paragraphs 3 to 11 of the General Comment. The HRLRC recommends that the General Comment be amended to:

(a) address the importance of States Parties providing adequate responses to communications including all relevant information and documentation; and

(b) give further guidance on the precise meaning of the requirement that domestic remedies be exhausted.

2.2 Timeliness of responses

(a) ***Written replies to individual communications***

9) The General Comment confirms that States Parties have an obligation to respond to claims made by individuals against that State Party within six months of the Committee notifying the State Party, as specified by Article 4(2) of the Optional Protocol.[4] The Committee's Rules of Procedure clarify the operation of time limits relating to State Party responses, depending upon which matters the State Party will address in its written response.[5]

10) The Committee's Rules of Procedure also provide that a State Party must observe specified time limits where:

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[3] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302 (entered into force 23 March 1976).

[4] General Comment [9].

[5] Rules 91(2) & (6) in relation to admissibility and merits of violations identified in a communication and Rules 93(2) & (3) in relation to additional information or observations in relation to the merits.

(a) the Committee has requested the State Party to submit additional written information or observations relevant to the question of admissibility of the communication or its merits; or

(b) the Committee has afforded the State Party the opportunity to comment on submissions made by the author of the communication.

The relevant time periods applicable in such cases are at the discretion of the Committee.

11) The General Comment appropriately identifies that the obligation of timeliness is not always respected by States Parties. For example, recently the HRLRC has acted as legal representative in Communication No.1557/2007 lodged with the Committee in April 2007. The State Party did not submit its response to the individual communication until February 2008. Similarly, an earlier communication (Communication No.1243/2004) was lodged by the Public Interest Law Clearing House ('PILCH') (one of the founding parties of the HRLRC) on behalf of an individual in January 2004, in which the State Party did not submit its response until October 2004.

12) These delays in submitting responses by the State Party, in this case Australia, are consistent with delays the Committee has observed in relation to other States Parties' responses to communications. A delayed response by the State Party may both undermine the efficacy of the complaints process and result in the continuing violation of Covenant rights.

(b) *Appropriateness of time frames*

13) We consider that these timeframes, and the discretion of the Committee in setting timeframes which are not fixed, are appropriate and adequate for the purposes of the communications procedure.

14) The obligation on States Parties to comply with the Committee's timeframes is consistent with generally accepted principles in respect of the procedural rules of tribunals issuing views of a legal character.

15) The obligation to comply with timeframes is also informed by Article 14 of the Covenant which provides for the right to be tried without undue delay. This right is intended, among other things, to ensure that individuals are not kept for too long in a state of uncertainty about their fate and to 'serve the interests of justice'.[6]

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[6] Human Rights Committee, *General Comment No.32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007 [35].

16) In its General Comment No.32 on article 14, the Committee states that the protection afforded by Article 14 extends to:[7]

> (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law... In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17) In addition, the time limits and procedures set out for the response of States Parties under the Committee's Rules of Procedure are consistent with those governing other treaty bodies which receive individual communications, including the Committee Against Torture (CAT), the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of persons with Disabilities.

18) The Committee on the Elimination of Racial Discrimination (CERD) requires States Parties to submit responses to individual communications within three months of notification by the Committee.[8] However, as a matter of process and procedure, this shorter time period may be considered appropriate given that CERD receives relatively fewer communications and, as such, claims are typically resolved more quickly by CERD than in the case of other treaty bodies.

19) If a State Party has a legitimate reason for not being able to comply with the Committee's set timeframes, then that State Party should formally request an extension of time from the Committee. The request should include a detailed justification for the need for an extension and should be forwarded to the Committee and the relevant author.

2.3 Adequacy of Responses

20) Article 4(2) of the Optional Protocol requires States Parties to submit 'written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State'. The Committee's Rules of Procedure provide that the substance of the State Party's submission may cover questions of admissibility, or merits, or both.[9]

(a) *Provision of Relevant Information*

21) States Parties are required to disclose to both the Committee and the author the information relied upon in a response to an individual communication. This requirement applies to information pertaining to admissibility and merits.

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[7] *Ibid* [16].
[8] Committee on the Elimination of Racial Discrimination, *Rules of Procedure*, Rule 94, UN Doc. CERD/C/35/Rev.3 (1989).
[9] Human Rights Committee, *Rules of Procedure*, Rule 91, UN Doc. CCPR/C/3/Rev.8 (2005).

22) In *Wolf* v. *Panama* the Committee stated that:[10]

> it is implicit in rule 91 of the Committee's rules of procedure and Article 4, paragraph 2, of the Optional Protocol, that a State Party to the Covenant should make available to the Committee all the information at its disposal....

23) The Committee went on to comment on the inadequacy of Panama's response, which 'confined itself to statements of a general nature by categorically dismissing the author's claims as baseless and asserting that the judicial procedures in the case complied with the requirements of Panamanian law'.[11]

24) The Committee has indicated that the burden of proof in relation to a communication cannot rest with the author alone, especially considering that 'the author and the State Party do not always have equal access to the evidence and that frequently the State Party alone has access to relevant information'.[12]

25) The importance of the disclosure of relevant information by a State Party is illustrated in *Taha* v. *Australia*.[13] In that communication (concerning the return of a failed asylum seeker to Syria), Australia asserted that it had acted on its understanding that asylum seekers returning to Syria were released when Syrian authorities established they were not wanted for previous criminal activities.[14] Australia did not provide the evidence upon which this assertion was based, making reference only to 'research' conducted by the Department of Immigration and Multicultural Affairs. This research was not provided to the author, despite its request of 23 December 2004, nor was it provided to the Committee. In the absence of the relevant evidence, both the Committee and the author are unable to assess its reliability.[15]

26) The Committee against Torture has similarly required that all relevant information and documentation be provided to it by the State Party. In *Sweden* v. *Agiza* the Committee against Torture noted in relation to Sweden's failure to co-operate fully with the individual communications procedure under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*:[16]

> by making the declaration provided for in Article 22 [equivalent of Articles 1-5 of the Optional Protocol]... a State Party assumes an obligation to co-operate fully with the Committee, through the procedures set forth in Article 22 and in the Committee's Rules of Procedure. In particular, Article 22, paragraph 4 [equivalent of

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[10] Human Rights Committee, *Wolf* v. *Panama*, Communication No.289/1988, 26 March 1992, [5.5].
[11] *Ibid*, [6.1].
[12] Human Rights Committee, *Larrosa* v. *Uruguay*, Communication No.88/1981, 29 March 1983.
[13] *Taha* v. *Australia*, Communication No.1243/2004.
[14] See, Response to the Australian Government's Submission on Admissibility and Merits, 10 February, [129].
[15] This Communication was withdrawn on 23 November 2006 after the author, Mr Taha, was granted a permanent protection visa.
[16] Committee against Torture, *Sweden* v. *Agizia* (333/2003).

> Article 5(1) of the Optional Protocol], requires a State Party to make available to the Committee all information relevant and necessary for the Committee appropriately to resolve the complaint presented to it.... It follows that the State Party committed a breach of its obligations under Article 22 of the Convention by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision.

27) This reasoning can be applied to the Human Rights Committee's procedures and supports the argument that failure to provide all relevant information constitutes a breach by a State Party's under the Optional Protocol.

(b) ***Ratione Temporis***

28) As part of a State Party's general obligation to provide an adequate response, the General Comment notes that States Parties have a particular obligation to invoke the *ratione temporis* rule, if the State Party wishes to rely on the rule.[17]

29) In addition, a State party invoking the *ratione temporis* rule should respond to any express or implied evidence that the violation continues or has effects that continue.[18]

(c) ***Inadequate Responses***

30) The General Comment notes that States Parties who respond inadequately to an individual communication put themselves at a disadvantage, as an inadequate response prevents the Committee from being able to consider the communication in light of the full information relevant to the substantive merits of the communication.[19]

31) In the case of *Wolf* v. *Panama*, referred to above, the State Party failed to provide information regarding the remedies pursued by and the remedies available to the author.[20] As a consequence the Committee found that there was no reason to revise their decision on admissibility.[21]

32) The Centre endorses this approach as being appropriate, given that the Committee's ability to properly consider the communication is wholly dependent on the quality of the information provided to it by the author and relevant State Party.

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[17] General Comment [10].
[18] See, for example, Human Rights Committee, *Konye and Konye* v. *Hungary* (520/1992); *Adam* v. *Czech Republic* (586/1994).
[19] General Comment [10].
[20] *Wolf* v. *Panama*, above n.10 at [5.5].
[21] *Ibid.*

2.4 Exhaustion of local remedies

33) The HRLRC supports the approach taken by the Committee towards Article 2 of the Optional Protocol. This admissibility issue is a common reason for the Committee to reject an individual communication. In light of the importance of this admissibility requirement to individual communications, we submit that the General Comment should further outline the Committee's position in relation to information or substantiation by an author necessary to satisfy this admissibility requirement.

34) The requirement to establish that all domestic remedies have been exhausted (or that they have not been exhausted as the case may be) can raise complex issues for both authors and States Parties. It has been noted that contentious issues can arise in relation to admissibility where:

(a) the domestic remedies which may be sought by the author may reasonably be viewed as futile;

(b) those remedies may be expensive to pursue; and

(c) the pursuit of domestic remedies is prolonged while the author continues to suffer from the alleged violation (this is included in the Convention Against Torture's Rules of Procedure in Rule 107).[22]

35) In paragraph 6 of the General Comment, reference is made to the burden of proof that is placed on the State Party to show the nature of the domestic remedies that the author has failed to exhaust. Indeed, in some cases, the relevant State Party has been subject to a substantial burden in proving the existence and efficacy of domestic remedies.[23]

36) We submit, in order to give guidance to prospective authors, that the General Comment should clarify the burden of proof that the author bears in order to establish that he or she has exhausted all available domestic remedies. The following principles emerge from Committee jurisprudence in relation to admissibility of individual communications and should be referred to in the General Comment:

(a) the remedies covered by Section 5(2)(b) are remedies which are both effective and available;[24]

(b) for a remedy to be effective, the remedy must have a binding effect, rather than being merely recommendatory;[25]

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[22] Sarah Joseph, Katie Mitchell, Linda Gyorki & Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, November 2006, pages 67-71. http://www.omct.org/pdf/UNTB/2006/handbook_series/vol4/eng/handbook4_eng_02_part2.pdf.

[23] *C.F.* v. *Canada* (118/1981).

[24] *Ominayak et al.* v. *Canada* (167/1984) at [13.2].

(c) judicial remedies are usually considered the most likely remedies to be effective and are therefore the most relevant remedies for the purposes of Section 5(2)(b).[26] Accordingly, domestic remedies are usually deemed to be exhausted when a final judicial decision, from which there is no available appeal, has been handed down.[27] However, in certain cases, exhaustion of non-judicial remedies (including administrative and disciplinary measures) may be required;[28]

(d) the Committee has traditionally taken a cautious approach to the effectiveness of executive or 'extraordinary' remedies;[29]

(e) the availability of administrative and disciplinary measures will not be sufficient where the alleged violation is particularly serious (for example, where there has been a violation of the right to life);[30]

(f) pursuit of judicial remedies may be considered futile if the author will not be accorded a 'fair and public hearing by a competent, independent and impartial tribunal';[31]

(g) the exhaustion of domestic remedies rule does not require an author to exhaust futile remedies (in other words, remedies that objectively have no prospect of success);[32]

(h) the financial means of the author may be relevant when determining which domestic remedies are available to an author. In particular, where legal aid is not available to indigent persons, a person may more readily be found to have exhausted all available remedies;[33] and

(i) the particular characteristics of an author may be considered by the Committee in determining whether effective judicial remedies were available to them. For example in *Brough* v. *Australia* the Committee considered that:[34]

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25 *C* v. *Australia* (900/1999) at [7.3].
26 *R.T.* v. *France* (262/1987); Joseph at 106.
27 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights* (2000), 14, 106.
28 *Patino* v. *Panama* (437/1990).
29 *Ellis* v. *Jamaica* (276/1988); *Muhonen* v. *Finland* (89/1981); Joseph, Shultz and Castan, above n.27 at 106; *cf. Jonassen et al.* v. *Norway* (942/2000) at [8.6] to [8.10].
30 *Vicente et al.* v. *Colombia* (612/1996).
31 *Arzuaga Gilboa* v. *Uruguay* (147/1983).
32 *Pratt and Morgan* v. *Jamaica* (210/1986, 225/1987).
33 *Henry* v. *Jamaica* (230/1987) and *Douglas et al.* v. *Jamaica* (352/1989).
34 See, *Brough* v. *Australia* (1184/2003), where the Committee considered that '[g]iven the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective', at [8.9].

> [g]iven the author's age, his intellectual disability and his particularly vulnerable position as an Aboriginal, the Committee concludes that he made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him and insofar as they can be considered to have been effective.
>
> (j) access to an effective remedy may also be frustrated—and rendered effectively futile—by barriers to access to justice such as burdensome court fees, lack of access to interpreters, disproportionate adverse costs risks and the like.[35]

37) These principles indicate that the Committee adopts an approach based on the reasonableness of the availability and the effectiveness of the remedies sought domestically by the author. As the Committee has consistently engaged this general approach in its consideration of the admissibility of individual communications, we submit that it is appropriate that further guidance as to this approach be included in the General Comment.

3. Force, nature and effect of Committee's views

3.1 Reference to the General Comment

38) This section on the force, nature and effect of the Committee's views addresses paragraphs 12 to 24 of the General Comment.

39) The HRLRC supports the Committee's position in relation to the force, nature and effect of the Committee's views. The remainder of this section provides further jurisprudential support for the Committee's position and expands upon the content of States Parties' obligation to 'reconsider' matters and to 'act in good faith' and 'respect' Committee views.

3.2 The Legal Status of views

40) Under Article 1 of the Optional Protocol to the Covenant each State Party:

> recognizes the competence of the Committee to receive and consider communications from individuals... who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

41) Unlike the European Convention on Human Rights, which specifically states that States Parties will 'abide by the final judgments of the Court in any case to which

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[35] Human Rights Committee, *General Comment No.32*, above n.6, [9]-[11].

they are parties'[36], the legal nature and status of the Committee's views are not expressly addressed in the Optional Protocol.

42) . Nevertheless, as pointed out by Hanski and Scheinin, the Committee's views are:[37]

> the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions... and monitoring compliance with them.

43) A body of jurisprudence has emerged as to the legal nature of the Committee's views. The jurisprudence demonstrates that, although the Committee is not a court, its views do have some legal force. Committee views are not binding in the way that decisions of domestic courts are binding; nor are States free to disregard them at will. The legal force of Committee views lies between these two extremes.

44) The General Comment states that:[38]

> respect is due to the views of the Committee by reason of the obligation of States Parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself.[39] A duty to cooperate with the Committee arises from an application of the principle of good faith to the discharge of treaty obligations, which leads to an obligation to respect the views of the Committee in the given case[40] [original footnotes].

45) The remainder of this section examines the jurisprudential support for this position under the Optional Protocol, Article 2 of the Covenant and general international law. The following section (3.2) aims to give content to the precise obligations of States Parties in relation to the Committee's views.

(a) ***Optional Protocol***

46) By recognizing that the Committee is competent to receive and hear communications and give its views on those communications, States Parties to the Optional Protocol

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[36] Article 46, paragraph 1, *European Convention on Human Rights* – see summary at http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/

[37] Hanski and Scheinin, *Leading Cases of the Human Rights Committee* (2003), 22.

[38] General Comment, [16].

[39] S. Joseph et al., 24; N. Ochoa Ruiz, 374; C. Tomuschat, "Human Rights, Petitions and Individual Complaints", in *United Nations: Law, Policies and Practice* (R. Wolfrum, ed.) (1995), 183; A. de Zayas, "The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", in *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (G. Alfredsson et al., eds) (2001), 117.

[40] E. Klein, "Fall Faurisson zur Holocaust-Lüge – Die Arbeit des Menschenrechtsausschusses zum Schutz bürgerlicher und politischer Rechte", in *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (G. Baum, E. Riedel and M. Schaefer, eds.) (1998), 121; S. Lewis-Anthony and M. Scheinin, "Treaty-Based Procedures for Making Human Rights Complaints Within the UN System", in *Guide to International Human Rights Practice* (H. Hannum, ed.) (2004), 51.

implicitly agree to cooperate with the Committee and to respect its views.[41] In practice, most States accept the Committee's decisions as 'an authoritative interpretation of their legal obligations under the Covenant in specific individual cases'.[42]

47) As expressed in the General Comment, the views of the Committee have been described as being issued 'in a judicial spirit'[43] and following a 'judicial pattern'.[44] Domestic Courts in some jurisdictions have gone further to describe the Committee as a 'judicial body of high standing'.[45]

48) The Committee considers a State Party's reply to its views to be 'satisfactory' only where the State is 'willing to implement' the views or 'to offer... an appropriate remedy',[46] further supporting the position that the views do have some legal force. There is an 'expectation' by the Committee that a State Party will give effect to the views of the Committee whether or not it agrees with them.[47]

49) While, States Parties generally have not sought to avoid compliance by arguing there is no legal obligation to provide a remedy or to change existing laws or practices in line with the Committee's views.[48]

(b) ***Article 2 of the Covenant***

50) The conclusion that States Parties have an obligation to respect the views of the Committee is supported by the interaction of the Optional Protocol with Article 2 of the Covenant. As discussed in paragraph 16 of the General Comment:

> Respect for the obligations voluntarily assumed by States Parties under the Covenant extends also to the respect owed to views expressed by the Human Rights Committee in individual cases under the Optional Protocol by reason of the integral role of the Committee under both instruments.

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41 See for example Elizabeth Evatt, "Reflecting on the role of international communications in implementing human rights", *Australian Journal of Human Rights* 5(2) (1999), 20-43.

42 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition (2005), 895.

43 Joseph, Schultz and Castan, above n.27, 14.

44 J.S. Davidson, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee", *New Zealand Law Review* 125 (2001), 129.

45 *Tavita* v. *Minister of Immigration* [1994] 2 NZLR 257.

46 Elizabeth Evatt, "Reflecting on the role of international communications in implementing human rights" *Australian Journal of Human Rights* 5(2) (1999), 20-43.

47 See for example, a discussion of the expectations of the Committee and Australian NGOs in Daryl Williams, "Reforming human rights treaty bodies", *Australian Journal of Human Rights* 5(2) (1999), 158-166.

48 J.S. Davidson, above n.44, 143. It should be noted, however, that some States Parties who strongly disagree with the Committee's views on a specific issue have chosen not to implement them on the basis that the Committee is not a Court.

51) This position is supported by Nowak, who argues that:[49]

> although the decision of the Committee and its holdings on appropriate remedies are not legally binding, the reference to Article 2(3) of the Covenant makes it clear that these are not merely recommendations but that States Parties to the Covenant have a legal obligation to provide every victim of a violation of the Covenant with an effective remedy and reparation.

52) States Parties have undertaken the obligation to ensure an adequate remedy by virtue of Article 2(3) of the Covenant. Article 2(2) requires States Parties to adopt such laws and other measures as may be necessary to give effect to Covenant rights.

53) It is recognized that the Committee is the:[50]

> pre-eminent interpreter of the ICCPR which is itself legally binding. The [Committee's] decisions are therefore, strong indicators of legal obligations, so rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations.

54) Article 2 of the Covenant requires a State to ensure individuals within its territory and jurisdiction enjoy the rights in the Covenant and to provide a remedy for any violation of a Covenant right. Where the Committee, as the authoritative interpreter of the Covenant, has found such a violation, Article 2 is engaged, obliging the State Party to reconsider the matter that is the subject of the communication.[51]

55) On this analysis, the Optional Protocol is seen to 'provide the machinery to establish whether such a violation has occurred'.[52] Accordingly, it is argued that, by signing the Optional Protocol, States express their acceptance of the Committee's views, as the Committee fulfils the role set out in Article 2(3)(b) as a 'competent authority provided for by the legal system of the State' which can determine whether a person claiming a remedy is in fact entitled to one.[53]

56) This approach draws support from General Comment 31 of the Committee, which states that reservations to Article 2 of the Covenant would be incompatible with the object and purpose of the Covenant, and that 'cessation of an ongoing violation is an essential element of the right to an effective remedy'. Thus, where a State Party does not implement the views of the Committee it is acting in a manner which is incompatible with the object and purpose of the Covenant by failing to provide a remedy and in some cases failing to stop an ongoing violation (for example, where the operation of a domestic law conflicts with Covenant rights).

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[49] Nowak, above n.42, 893.
[50] Joseph, Schultz and Castan, above n.27, 14.
[51] Evatt, above n.46, 20-43.
[52] Davidson, above n.44, 130.
[53] *Ibid.*

(c) ***Obligation to act in good faith***

57) Article 26 of the *Vienna Convention on the Law of Treaties* states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. This principle, sometimes referred to as *pacta sunt servanda*, is also part of customary international law.[54]

58) In the *Case concerning the Gabcikovo-Nagymaros Project* (*Hungary* v. *Slovakia*) [1997] ICJ Report 7, the ICJ considered Article 26 of the Vienna Convention and stated that 'the principle of good faith obliges the parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized'.

59) The obligation to act in good faith is attached to States Parties' obligations under the Optional Protocol and the Covenant and lends further weight and substance to the view that the Committee's views have legal force and cannot be legitimately dismissed by States Parties.

3.3 Obligations arising from views

60) The precise nature of States Parties' obligations to 'respect' and 'act in good faith' merit further consideration and explication. The HRLRC considers that a State may respond to Committee views through either:

(a) full implementation of the committee's views; or, alternatively

(b) independent, good faith reconsideration of the matter followed by the provision of an effective remedy in respect of the identified breach.

61) The fact that Committee views are not legally binding in a strict sense allows for a measure of flexibility in their implementation. However, rejection, including reasoned rejection, is not an open 'good faith' response and does not demonstrate 'respect' for the legal nature of the views as discussed above.

(a) ***The obligation to 'reconsider'***

62) Reconsideration should be a genuine and independent exercise performed in good faith and with a view to the full realization of a State Party's obligations under the Covenant, including the obligation to provide an effective remedy. In order to adequately reconsider a matter, States Parties may be required to compromise their previous position on the issue that is the subject of the Committee's views.

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[54] See, Hans Wehberg, "Pacta Sunt Servanda", *The American Journal of International Law*, Vol.53, No.4 (Oct. 1959), 782-784.

63) A State Party cannot claim to have 'reconsidered' a matter if it has merely outlined its reasons for failing to implement the Committee's views. Such a response undermines the legal nature of the Committee's views and is inconsistent with States Parties' voluntary submission to the procedure under the Optional Protocol.[55]

(b) ***The obligation to 'respect'***

64) Respect for Committee views requires that States Parties recognize the authoritative nature of the Committee's determination as to the existence of a violation and that they act to end the violation and provide an effective remedy.

65) It is recognized that the task of implementing Committee views may engage socially, politically and economically sensitive amendments to legislation, policy and practice. It is often the case that in formulating a response to Committee views 'a number of complex and difficult issues... will need to [be] consider[ed] carefully, in particular what measures may need to be taken to implement [the views]'.[56] For this reason a measure of flexibility is afforded to States in the implementation of Committee views.

66) However, minimum standards remain and should be informed by States Parties' obligations under Article 2 of the Covenant, which requires States Parties to:

(a) refrain from violation of rights;

(b) adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations; and

(c) provide an effective remedy where a violation has occurred.

67) The standards set out in General Comment 31 should also be born in mind. General Comment 31 states that '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'.[57]

68) This approach is consistent with Article 27 of the *Vienna Convention on the Law of Treaties* which provides that a State Party 'may not invoke the provisions of internal law as justification for its failure to perform a treaty' and with Article 50 of the Covenant which states that the provisions of the Covenant 'shall extend to all parts of federal States without any limitations or exceptions'.

69) A similar approach is taken by the European Court of Human Rights whose decisions must be implemented by all appropriate State authorities. That is, regardless of the

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[55] Hanski and Scheinin, above n.37, 11.
[56] UK State Report 2006, paragraph 69.
[57] Human Rights Committee, *General Comment No.31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, [4].

internal governance structure of a State, the State must identify the relevant domestic authorities that should be made aware of a judgment, particularly those responsible for implementing any execution measures required by the judgment.[58] This flexible, non-prescriptive approach to implementation focuses on ensuring the desired result is achieved and not on any particular method by which it is to be achieved.

4. Interim measures

4.1 Reference to the General Comment

70) This section addresses paragraphs 25 to 28 of the General Comment.

71) The HRLRC supports the Committee's position on the vital importance of States Parties' implementation of interim measures requested by the Committee. Further, the HRLRC recommends that matters in relation to which interim measures may be requested should be presented as non-exclusive and evolving category.

4.2 Basis for interim measures requests

72) The Committee's Rules of Procedure provide for the Committee to consider the need for interim measures where desirable 'to avoid irreparable damage to the victim of the alleged violation'.[59] Accordingly, an author may include in their communication a request that interim measures be sought by the Committee from the State Party who is the object of the communication. It is also possible that the Committee may seek the imposition of interim measures of its own volition.

73) This procedure is supported by General Comment 31 on the Covenant, which provides that 'the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations'.[60]

74) In *Piandiong et al.* v. *The Philippines* the Committee stated that:[61]

> By adhering to the Optional Protocol, a State Party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State Party and to

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[58] Council of Europe, Human Rights and Legal Affairs, Frequently Asked Questions, available at: http://www.coe.int/t/e/human_rights/execution/01_Introduction/02_FAQ.asp.

[59] Human Rights Committee, *Rules of Procedure*, rule 92, UN Doc CCPR/C/3/Rev.8 (2005).

[60] Human Rights Committee, General Comment No.31, above n.57, [19].

[61] *Piandiong et al.* v. *The Philippines*, Communication No.869/1999, 19 October 2000, [5.1]-[5.2].

> the individual (Article 5(1), (4)). It is incompatible with these obligations for a State Party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views.
>
> Quite apart, then, from any violation of the Covenant charged to a State Party in a communication, a State Party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile.

75) The International Law Commission has supported the view that the obligation of good faith requires that States refrain from acts calculated to frustrate the object of the treaty.[62]

4.3 Matters in respect of which interim measures may be requested

76) As stated above, an author may request interim measures in any instance where such measures are necessary to 'avoid irreparable damage to the victim of the alleged violation'. The Committee expanded upon the meaning of 'irreparable damage' in *Stewart* v. *Canada*:[63]

> The Committee observed that what may constitute 'irreparable damage' to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure their rights, should there later be a finding of a violation of the Covenant on the merits.

77) In the past, the Committee has requested by way of interim measures that a State Party not expel an author, nor carry out a death sentence and provide imprisoned authors with medical treatment.[64] However, these matters are by no means an exclusive list of issues in respect of which interim measures may be requested. In our view, the General Comment should recognise that this list is evolving and not exhaustive.

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[62] International Law Commission, *Yearbook of the International Law Commission*, 1966, Vol.2, 202.
[63] *Stewart* v. *Canada*, Communication No.538/1993, 1 November 1996.
[64] See, Manfred Nowak, above n.42, 849.

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