

THE RECEPTION OF INTERNATIONAL LAW IN THE DOMESTIC LAW OF SRI LANKA IN THE CONTEXT OF THE GLOBAL EXPERIENCE

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I thank the Vice Chancellor of the University of Colombo and the Dean of the Faculty of Law for the invitation to deliver the First RKW Goonesekere Lecture today. It was an emotional moment for me when Professor Savitri Goonesekere first suggested to me that I should deliver this lecture in memory of a teacher who has been the model for me throughout my career as an academic and practitioner.

Mr Goonesekere's career has spanned a range of roles that a lawyer can play, first as an academic, then as a practitioner in human rights law representing the oppressed and as an activist for liberal causes. The ideal lawyer's life must be spent in the service of the law to ensure that his fellow men and women in society live under the rule of law with their freedoms intact and their lives secure. In a generation of "lost lawyers"¹ whose preoccupation has been money and status, Mr Goonesekere performed the task of an ideal lawyer in the dark days of the public life of our country when others thought it wise to remain silent.² By so doing, he redeemed the honour of his profession. Mr Goonesekere's life will illumine the paths of many lawyers of the

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This lecture was delivered as the inaugural lecture in the R.K.W. Goonesekere Memorial Programme on Law and Justice, held on 29 July 2016 at Colombo, Sri Lanka. Prof. Sornarajah was a student of Mr. R.K.W. Goonesekere in the class of 1964 at the University of Ceylon (Peradeniya). Mr Goonesekere taught him in all three years of his undergraduate studies in law. Prof Sornarajah later went on to be a lecturer in the Faculty of Law, University of Ceylon from 1966 to 1973.

The R.K.W. Goonesekere Memorial Lecture Programme was funded by an endowment established at the University of Colombo by the family of Mr. R.K.W. Goonesekere. The Journal Editors are honoured that we have been given the opportunity to publish it in this volume of the Journal and are grateful for the consent granted by Prof. Sornarajah and Emeritus Prof. Savitri Goonesekere (on behalf of the family and the endowment). We also acknowledge that the right to republish this lecture in a later publication is retained by them.

¹ *The Lost Lawyer* is the title of a book by Arthur Kronman, the former Dean of Yale Law School at which I studied. It recounts the lofty ideals of an earlier generation of American lawyers and compares it with the mercenary objectives behind the modern practice of law.

² I remember, with fondness, the stress that Mr Goonesekere placed on teaching *Barendra Kumar Ghosh v King Emperor*, a 1925 Privy Council decision on common intention under the Penal Code, where Lord Sumner observed: "In crimes as in other things, they also serve who only stand and wait". Many of us, unlike Mr Goonesekere, stood and waited through the agonies of our fellow citizens. It has been said that "the world suffers a lot not because of the violence of bad people but because of the silence of good people".

future who will seek to follow his path of idealism in the law to the benefit of the people of our country. It is a life well documented in a publication edited by Justice Ranjith Amerasinghe,³ who was his student and colleague at the then Department of Law of the University of Ceylon, now the Faculty of Law of the University of Colombo.⁴ It is also documented in a special publication by the Law and Society Trust, in which Mr Goonesekere served as the Chairman of the Board of Trustees.⁵ I do not need to dwell at length on his career as a result of the complete statements in these two publications. I focus on the contribution of his career to the subject of my talk, the “Reception of the International Law on Human Rights in Sri Lankan Law”. I build this lecture on the basis of Mr Goonesekere’s contribution to the human rights law of Sri Lanka.

In the phase of his career as a practitioner, Mr Goonesekere argued many significant cases involving human rights and international law. He was unique in giving an international human rights perspective to the many constitutional law cases on civil liberties he argued. In these arguments there is a heavy slant towards international law, a singular characteristic as far as courts anywhere are concerned. This approach was by no means confined to constitutional law cases. In the bigamy case *Natalie Abeyesundere v Christopher Abeyesundere*, which he argued as an *amicus curiae* invited by the Supreme Court, he successfully took the view that the rights of the first wife must be taken into consideration and weighed against the right of the husband to convert to a religion that allowed multiple marriages.⁶ Others would have thought of the case merely in terms of the criminal law. The cases he argued indicate a profile of a lawyer who stood against power in the protection of the rights of the common man. The record of his cases, by no means complete,⁷ is stated here merely to make a setting for a discussion of the main topic of this lecture. The record has to be understood in the context of the fact that Sri Lanka was going through a period in which powerful elites were bent on oppressing the lives of the common people so that they could maintain their hold on power. During the JVP uprisings, a large number of young men and women simply disappeared. Almost simultaneously, Sri Lanka was

³ Amerasinghe Ranjith, *Human Rights: Theory to Practice* (a book marking the completion of 50 years at the Bar by Mr Goonesekere).

⁴ It is fitting that the RKW Goonesekere Lectures are to take place under the auspices of the Faculty of Law of the University of Colombo.

⁵ Law and Society Trust, (2015) 25 *LST Review* Issue 329,330.

⁶ *Natalie Abeyesundere v Christopher Abeyesundere* [1998] 1 Sri L. R. 185. Mr Goonesekere appeared as *amicus curiae*. The judgment, delivered by GPS de Silva CJ, overruled the long-standing Privy Council decision in *AG v Reid* (1964) 65 NLR 97. De Silva CJ held that the crucial question is whether by conversion to Islam, the legal rights of the accused’s wife to a monogamous marriage could be violated. The Chief Justice cited Savitri Goonesekere, *Sri Lanka Law on Parent and Child* at p. 56 as supporting the primacy of the rights of the wife to the monogamous union she had contracted. He also cited with approval the Indian case, *Smt Sarla Mudgal v Union of India* AIR 1995 SC 1531, a case cited by Dr Goonesekere in his argument, which arrived at the same conclusion.

⁷ A more complete summary is to find in *LST Review*, Volume 25, Issue 329 & 330, March and April 2015.

going through a civil war with the Tamil Tigers. While there was a genuine civil war that the government had to fight, the excuse it offered was used to cloak a multitude of abuses of power. The rights of ethnic and religious minorities as well as of journalists and activists who showed dissent against the government were discarded. Many innocents lost their lives. Many simply disappeared. Others were kept in detention without trial. During these times Mr Goonesekere boldly stood against such abuses and fought them through the use of the law. His life and work kept alive the possibility of the rule of law in the dark political climate of Sri Lanka. He ensured that in times of failing standards of governance and propriety, there was a glimmer of hope that the law provides for those affected.

He argued cases without regard to caste, creed, religion or race. In *Kudahetty v Rajapakse*, he appeared for the former President Mahinda Rajapakse in his previous incarnation as a human rights advocate for those who had disappeared in the South during the JVP uprisings. Mr Rajapakse was obviously then a believer in the Human Rights Council of the United Nations. Mr Rajapakse had been delayed at the airport by the police while taking documents to a side meeting of the Human Rights Council in Geneva. The disappearances and killings during the JVP uprisings were incidents that had troubled Mr Rajapakse greatly. Mr Goonesekere was also concerned with what had happened to these youths.

Equally, when Tamil youth were being taken into custody on the allegation that they were terrorists, Mr Goonesekere argued cases for them.⁸ Likewise, he appeared for trade unionists denied the right of demonstration and speech, for journalists asserting media rights,⁹ for editors against censorship by the army,¹⁰ for the citizen's right to protest against the government,¹¹ for a person's right to be free from illegal arrest,¹² etc. This is not an exhaustive list. The purpose is to give an idea of the intensity of his work against power, in favour of individual human rights. He was, without doubt, the leading human rights lawyer during this troubled period.

The main subject of today's lecture is the role of international law in the domestic law of Sri Lanka. I seek to use two cases, which Mr Goonesekere argued during his career as a practitioner – *Singarasa v The Attorney General of Sri Lanka*¹³ and *Tikiri Banda, Bulankulame Dissawa v Secretary, Ministry of Industry of Sri Lanka*¹⁴ as the

⁸ *Singarasa v Attorney General; Vinayagamoorthy v Army Commander* (1996) SC Application 26/94: 26 November 1996

⁹ *Gamini Athukorale v Attorney General* SD No 1/97-15/97 SC Minutes 5 May 1997

¹⁰ *The Editors' Guild Case* (Application No 367/2000)

¹¹ *Amaratunge v Sirimal* [1993] 1 SLR 264

¹² *Channa Pieris v AG* (1994) 1 SLR 1

¹³ *Singarasa v Attorney General* No 2 SC Spl (LA) No. 182/1999 (2006). The case is reported in several international law reports because of its international significance. Every international commentator has made adverse comments on the case.

¹⁴ *Tribute to RKW Goonesekere* in (2015) 25 *Law and Society Trust Review* (Issue 329&330)

bases of the second part of the lecture. He lost the first case as a result of a gross misapplication of the law and won the second case as a result of the triumphant vindication by the court of the need to protect the interests of the environment and the resources of village communities in Sri Lanka. The two cases demonstrate the significance of the subject of the reception of international law in Sri Lankan law, particularly at the present juncture when the country is engaged in the drafting of a new constitution. Its significance is enhanced in this lecture by the fact that in both these cases, Mr Goonesekere as the lead counsel took liberal stances which show him as the fighter for the cause of those in need of protection from power and oppression.

In the first section of this lecture new trends relating to the reception of international law in other common law jurisdictions are described. Such a comparative survey of the different theories of reception and the progressive movement towards a monist view in the major jurisdictions of the world including those of Asia and Africa is made so as to show that *Singarasa* was a singularly atrocious case in the context of the progressive developments taking place in such other common law jurisdictions. Most of these jurisdictions witnessed incidents of terrorism. In all of them, despite these threats, the courts uniformly used international law to protect the rights of the accused. It is important to show that this movement is universal lest it be thought that it is one that is confined to those hegemonic states that are accused of seeking to impose their will on other states. Being a life-long exponent of the Third World approach to international law,¹⁵ I am least susceptible to any attack on the basis that I participate in a hegemonic plot to impose international law on developing states. The *Singarasa Case* is judged in the context of these global developments. I deal in the second section with the manner in which Mr Goonesekere argued the case. I point out that the dismissal of the case was in error and state the reasons for it. The third part deals with the *Tikiri Banda Bulankulama Case*, which redeems the reputation of Sri Lankan law by affirming the reception of international law developments in Sri Lanka to the extent that a government contract is nullified on this basis. Mr Goonesekere's arguments in the case are detailed. The impact of the case on the reception of international law is considered. The impact of the case on possible future developments is assessed. The fourth part considers the role of international law in constitutionalization. It discusses the merits and demerits of the current arguments on the subject in the context of recent literature. It assesses the relevance of these discussions to Sri Lanka, which must necessarily function within the global context. Global movements will bring Sri Lanka into the inevitable vortex of modernity.

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¹⁵ TWAIL, the Third World Approach to International Law began as a movement of African and Asian lawyers against Eurocentric international law. In a keynote address to the Cairo Conference of TWAIL (2015), I have set out what I see as the agenda for the future of TWAIL work and scholarship. M. Sornarajah, "On Fighting for Global Justice: The Role of a Third World International Lawyer" (2016) 20 *Third World Quarterly* 1. Though human rights law can be subverted by hegemonic projects, its advancement is necessary for the good of humanity as its core objectives ensure the protection of the weak from power.

The ineluctable progress of international law will affect the lives of every person whether she likes it or not. The force of humanity's law is such that it will engulf all persons, willing and unwilling. A long list of persons who transgressed its provisions, from Pinochet to Milosovic to Hissan Habre, found out the truth that, as international law evolves, it will enfold transgressors in liability and give relief to the people they tormented. Unlike in the past when the position of international law in being regarded as law was described as "nonsense on stilts", modern international law is quickly developing notions of accountability for violations, particularly of human rights law. A deterrent would be built up against the violation of the human rights of people by states and their agencies. A meaningful international law with sufficient mechanism to deter violations of human rights is in the process of rapid evolution. In that law, national courts have a role to play. Domestic judges must regard themselves, first, no doubt, as owing a duty of justice to their people, but also as trustees of humanity's law, ever capable of enforcing international law through its reception into their national systems. A strong judiciary receiving these standards of governance in the field of human rights from international law is necessary to wipe out the brutalization and corruption that has entered the political life of Sri Lanka.

THE RECEPTION OF INTERNATIONAL LAW IN DOMESTIC SYSTEMS

Traditional textbooks on international law contain discussions of the increasing reception of international law in domestic systems. The story that they tell is that courts are veering increasingly towards the reception of international law through its incorporation into the domestic system, particularly in the case of human rights. Despite the unfortunate aberration in *Singarasa*, this should be the case in Sri Lanka as well.

The English Law

The story in the English common law is that, in the beginning, there was always a monist approach that customary international law must be received into English law. The monist approach views international law and domestic law as belonging to a single system, with international law seeping into domestic law through osmosis. Some would say that as international law had a higher status, there was a duty to ensure that domestic law conformed to international law. The view of the monist theory is that international law is incorporated into domestic law automatically. The contrary view is the dualist view that international law that develops in a distinct sphere of international relations has to be specifically transformed into domestic law by some appropriate act such as legislation. Many writers criticize this dichotomy between incorporation (monism) and transformation (dualism). But, it best describes the progressive changes that have taken place in the field. It also enables a meaningful discussion of the issues involved in the reception of international law in domestic law.

Clearly the roots of the monist view have moral foundations. Both the ethical and pragmatic foundations of this rule are evident in early rules of English law. In *Somerset's Case*, in response to the anti-slavery movement, a slave was ordered to be released on the assumed ground that “the air of England was too pure for slaves to breathe”, an idea that sits uneasily with later imperialism which made people all over the world breathe impure air of English subjugation.¹⁶ The other famous case was *Triquet v Bath*.¹⁷ It indicates a pragmatic reason for monism that unless common rules exist in areas like the receiving and protection of diplomats, there could be no meaningful basis for international intercourse. The case received the growing practice of diplomatic immunity into the common law by holding that a servant of a diplomat is entitled to immunity, (a situation no longer recognized in modern international law). Reciprocity demanded such a prudent course. In *Buvot v Barbut*,¹⁸ Lord Talbot made the bold statement that “that the law of nations in its full extent is a part of the law of England”. Blackstone, writing his Commentaries around the time stated: “The law of nations, wherever any question arises which the object of its jurisdiction is properly, is here adopted in its full extent by the common law and it is held to be part of the law of the land”.¹⁹

But, in 1876, with the decision in *R v Keyn*,²⁰ the English law took a different turn.²¹ It veered towards the dualist view that international law and domestic law are two different systems operating in distinct and unrelated fields. Under dualism, a rule of international law operated in the sphere of relations between states. It could become

¹⁶ Existing records of *Somerset* do not show that Lord Mansfield ever made the statement as to the purity of English air. The case is romanticized to put the anti-slavery movement in good light and sanitize the fact that the English profited hugely from slavery. The early prosperity of port city of Liverpool depended on slavery. It is recorded that slave traders set fire to the house of Lord Mansfield upon the delivery of the judgment. A like case, the *Zong Case*, decided by Mansfield, is the subject of a film, *Belle*, based on Dido Elizabeth Belle, the illegitimate daughter of the nephew of Lord Mansfield, whose mother was a black West Indian woman slave. She grew up in Lord Mansfield's household almost as an adopted daughter. The film suggests a bias in Lord Mansfield as a result of his affection for Belle.

¹⁷ (1764) 3 Burr. 1478.

¹⁸ (1737) Cas Temp Talbot 281.

¹⁹ *Commentaries*, Vol.4. Chapter 5 (1765).

²⁰ 1876) 2 Ex D 63

²¹ English lawyers who resist the idea of a change effected by *Keyn* seek to limit the effects of the decision so as to preserve the old monist rule. Thus, Brownlie suggested: “The elements of transformation in the judgment of Lord Cockburn are entirely compatible with the doctrine of incorporation if it is seen that he was concerned with the proof of the rules of international law: if the issue is inconclusive and the issue affects the liberty of persons, then assent by the legislature of the forum is needed to supplement the evidence. Yet, as a general condition he does not require express assent or a functional transformation by an Act of Parliament. In cases of first impression the courts are ready to apply international law without looking for evidence of assent”. Ian Brownlie, *Principles of Public International Law* (7th Ed. OUP, 2008) 43. Brownlie suggested that there was no unambiguous support for dualism in the cases after *Keyn*.

a rule of domestic law, if need arose, through specific legislation transforming the rule of law into domestic law. The transformation was effected by legislation. Under this view, i.e. the province of international law being relations between states, there was little scope or reason why a rule of international law needs to find its way into domestic law, unless there was a treaty that required a specific obligation to be converted into domestic law. When this situation arose, this was to be accomplished through legislation. I shall discuss these developments under English law and consider the developments in some other common law jurisdictions of the Commonwealth (principally, India and Australia) and the United States before dealing with *Singarasa* and the position in Sri Lankan law in the context of cases involving terrorism. *Singarasa* is in essence a case involving terrorism. Before that, it is necessary to explain the developments after *Keyn*.

As indicated, a clear departure in English law away from the monist view began with the decision in *R v Keyn*.²² The issue in that case was whether admiralty jurisdiction of the English courts was extended as a result of the growing customary practice of regarding the seas three miles from the coast as constituting territorial seas under the jurisdiction of the sovereign courts. All sixteen judges of the Queen's Bench Division sat to decide the case. The court was equally divided. The decision was made by the casting vote of the Chief Justice. From then on, a dualist theory became current in the common law. It was the product of the times. In the nineteenth century international law came to be downplayed. The rise of positivism in English law regarded English law as based on commands proceeding from the sovereign, enforced through sanctions. This meant that a system like international law, which lacked a sovereign in command issuing orders sanctioned by penalties for breach, could not be considered law. Bentham regarded it as "nonsense on stilts". Austin thought that it contained norms of morality and good conduct.²³ It simply did not fit in with his definition of law as a series of commands proceeding from a sovereign to whom the community owed habitual obedience. International law lacked a sovereign and enforcement mechanisms. Hence, it could not be considered law. Thus downgraded, dualism regarded international law as proceeding from the consent of sovereigns operating at a distinct international level. Such law, operating at the international level between sovereigns could become domestic law only where it was received into domestic law by legislation. The ethical foundations of international law of the

²² (1876) 2 Ex D 63; also see *West Rand Gold Mining Company v The King* [1905] 2 KB 395. The statement of Lord Atkin in *Chung Chi Cheung v The King* [1939] AC 160 is ambivalent. Writers like Lauterpacht, who favoured monism, sought to minimize the distinction between the two rules. Hersch Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *Transactions of the Grotius Society* 51. Lauterpacht took this view because of his belief in human rights as part of English law. Hersch Lauterpacht, *International Law and Human Rights* (London, 1950). But, a clear division did exist between the two rules.

²³ Positivism in English law begins with the lectures of John Austin at University College, later published as the *Province of Jurisprudence Determined* in 1832). One central feature of the theory is to exclude morality from the law. Together with the emphasis on law as a command of sovereign given to those who owe habitual obedience to the sovereign and obey the commands on the threat of sanctions, international law was denied the status of law.

previous age had to be forgotten. It was difficult to reconcile the moral foundations of international law, which would be no different from those of domestic law, with the increasing adventure of the English towards the subjugation of people of other lands, the creation of an empire and the falsehood of their altruistic justification for colonialism, that they were bringing civilization to the colonized people, through their mission of pillage and pilfering of the wealth and natural resources of the colonies.²⁴ The denial of personality to the colonies, the founding of states on the basis that lands occupied by aboriginal people were *terra nullius*, the opening of the seas to navigation through the doctrine of the freedom of the high seas and the notion of freedom of commerce imposed by force if necessary were hallmarks of a Eurocentric international law that moved away from morality. Dualism is connected with the empire. There was a need for duplicity as an empire can never be explained on moral or just grounds. In this context, the salutary device was to ensure that there were two different systems operating in different spheres. Though English international lawyers do not ascribe such improper motives to the espousal of dualism, the change that took place had much to do with the change in jurisprudential thinking about the law consequent on the rise of England as an imperial power. The change was consistent with the changes that were taking place in English society. Its industrialization, so dependent on the flow of natural resources from captive lands, its commerce also dependent on markets provided by the colonial peoples and its rising naval and military power which provided the control necessary to maintain empire required a change of emphasis which positivism and its counterpart the dualist theory provided. Thus, was destroyed the moral foundation of international law reflected in the monist tradition. It was replaced by dualism- hardly a theory that needs to be favoured in the former colonies like Sri Lanka or the rest of the Commonwealth. The change in *R v Keyn* was aimed against them. International law, thereafter, becomes an instrument through which colonial oppression could be used and justified.²⁵

Affirmations of dualism continued in England, the heart of Empire.²⁶ It was a convenient doctrine that divorced morality from the pursuit of foreign policy, gave courts a justification for keeping out ethical considerations that other nations and makers of international law may be swayed by and maintain the mirage that oppressive institutions like the British East India Company, were beyond control of the law as they lacked personality or presence within England for any accountability for their acquisitive adventures and atrocities. I want to repeat that this oppressive theory is not what any former colony that uses the common law should follow. It is a theory which deviates from the ideal element in international law. This ideal element permits the shaping of a truly universal law that serves the best interests of mankind. The liberal nations of the world have rightly deviated from aberration of dualism and

²⁴ Gerrit Gong, *The Standard of Civilization in International Law* (OUP, London, 1965).

²⁵ One problem with *Singarasa* is that it accepts this change, that makes the law devoid of morality and permits its instrumental use as a tool of persecution.

²⁶ Later cases affirmed dualism. *West Rand Gold Mining Co v The King* [1905] 2 KB 391; *Mortensen v Peters* [1906] 8 F J 93.

moved towards monism. English law now has too. But, the story of the heydays of dualism in English law and its subsequent demise must be told.

Dualism, as the decided cases after *Keyn* show, largely involved the issue of whether multilateral treaties formed part of English law. The view taken in the cases was that such treaties are formed and operate at the international level and should, if necessary, be transformed into national law through appropriate legislation. It is then alone that principles contained in these treaties became domestic law. It must be remembered that *Keyn* involved practice that was developing into custom. So, it is not open to say that the view applied only to treaties. But, this distinction between custom and treaties came to be made later because the distinction enabled the qualification that the dualist view requiring legislation applied only to multilateral treaties whereas customary international law was automatically incorporated into domestic law. *Keyn* itself did not make this distinction. It intended that any new custom also must be transformed into English law through legislation.

English courts first began by confining the rule in *Keyn* to treaties, despite the fact that the *Keyn* itself concerned a rule of customary international law that a state could claim a territorial sea on the basis of the “cannon shot principle”. The rule was then emerging on the basis the state could control the seas up to the range of its cannons on shore. The range of the shore batteries was three miles in those days. Once *Keyn* was confined to treaties, it was easy to argue that custom, which is formed by the state in participation with other states, should be incorporated into domestic law. But, it did take a long time for the rule to evolve. The distinction was probably based on the fact that the consent or assent of the state to the customary rule took a long period of practice to mature into a rule. This degree of assent made it safe to admit the rule into domestic law. Treaties were different. It should not be permitted that treaties made by the executive alone should be transferred into domestic law without the specific act of the legislature giving its approval. This had to do with the separation of powers. The executive should not be capable of making law simply by entering into treaties with other states. For that to happen Parliamentary approval of the rule in the treaty was required. There was also the belief that a treaty may affect the rights of the individual. Consequently, before it can become law, Parliament should have considered the rule and approved it. A distinction was to be made between a rule of customary international law and a rule in a treaty.

This development had to wait till the judgment of Lord Denning in *Trendtex v The Central Bank of Nigeria*.²⁷ The issue was whether the Central Bank of a foreign state, Nigeria, could be sued before the English courts on a guarantee it had given as to the price of purchase of cement by builders in Nigeria. There was a building boom in the country consequent to the dramatic rise in petroleum prices. Forward orders had been made for cement. The Central Bank had guaranteed payments for the cement from English and foreign sellers. The boom went bust. There was glut of cement with ships

²⁷ (1977) 1 QB 529. Also see *Maclaine Watson & Co Ltd v International Tin Council (No 2)*

lining up to deliver more. The builders did not pay. The sellers sued on the guarantees by the Bank. The guarantees had a choice of forum clause permitting suits before English courts. The rule hitherto in English law was that a foreign state or its sovereign entity could not be sued as they had absolute immunity from the jurisdiction of the English courts. In Europe, the courts had developed a doctrine of sovereign immunity which confined the rule to sovereign acts but permitted suits in respect of suits arising from commercial acts of states or their entities. It was clearly a rule of prudence as most States and their entities were making many international business transactions. The change that was made in Europe as to the position in international law had to be accepted in England. Lord Denning said : “Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law” and “we should give effect to those changes and not be bound by any idea of *stare decisis* in international law”. Lord Denning’s judgment was approved by the Privy Council in the *Phillippine Admiral*²⁸ and by the House of Lords in *Congresso del Partido*²⁹ now confirming not only that the restrictive theory of sovereign immunity was part of the common law, a fact confirmed later by the State Immunity Act, but also that customary law, once formed, becomes automatically incorporated into the law of England. These developments in sovereign immunity had a chain reaction in other common law jurisdictions. Many quickly adopted legislation to introduce the restrictive theory of sovereign immunity into their systems.³⁰ More significantly, the domestic courts have responded to important changes within international law by moving away from dualism to monism so as to accommodate these changes.

In England, it is said that a great change took place after the Human Rights Act, 1998. The Act was based on the European Convention on Human Rights. The Convention had begun to exert influence on English judges long before it became effective in 2000. Though the act is significant, the fact is that in the dictum of the English judges after the new millennium it is clear that they would have decided cases using a monist approach whether or not the Act existed. Certainly, the presence of the Act helped greatly but even in its absence, it was clear that the English courts had commenced veering back to a monist approach.

Once these developments had taken place, the rule settled in, not without difficulty,³¹ in the common law. But, the general outline of the rule was discernible. While treaties required to be transformed into law by legislation, a customary principle was incorporated automatically into English law. Since principles in multilateral treaties

²⁸ [1976] 2 WLR 214.

²⁹ [1983] AC 244.

³⁰ For Singapore, the State Immunity Act; for Australia, the Foreign Sovereign Immunities Act. For USA, the Sovereign Immunity Act. For Pakistan, the State Immunity Act. Generally, see, Fox, *Sovereign Immunity* (3rd Edition, OUP, 2015).

³¹ Wavering from blanket rules can be seen in *R v Jones* [2006] 2 WLR 772.

and similar instruments came to be considered as containing customary international law either because of practice based on them or as evidencing an *opinio juris* that they should be considered law, often, rules and principles contained in multilateral treaties became rules of the common law through incorporation. This would be so particularly in the case of human rights conventions and treaties. The two conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights, both made in 1966, had such constant assent and affirmation that their principles would now be considered part of customary international law. The later human rights conventions largely spell out the principles that are to be found in these two foundational documents on human rights. To that extent, it would be correct to say that much of human rights law, though initially articulated in conventions, is now a part of customary international law. This would be so as to international humanitarian law which is found in the Geneva Conventions. The distinction between multilateral instruments and custom gradually lost significance in this area so that any evidence of the formation of *opinio juris* among states was capable of constituting rules that could become incorporated in the common law.³² There may be objections to this process. One may argue that this is undemocratic law-making by the courts. They can latch on to a principle formed entirely outside the state and its legislative process and declare them to be law. But, the answer has been that if the executive wants to object, it can undo a judgment through legislation.³³ The Indian courts have taken the view that it is the executive, which assented to the treaty. It was incumbent on the executive, which controls parliament, to ensure that the treaty became law. It would not be undemocratic for a court to help the treaty becoming law where there is executive lethargy in passing legislation transforming the treaty into domestic law.³⁴

There has been a dramatic change in the attitudes of the domestic courts to the reception of international law in recent times. In the recent past, a judicial reticence existed that the executive function in the conduct of foreign affairs also entailed indication by the executive as to whether it desired certain rules that it had made through treaties be received into law. This, the executive did through legislation. The courts were comfortable with this view for a variety of reasons. Judges were not democratically elected. They should not be bold in adopting international law principles formulated outside the state into their domestic law. In some quarters, it was thought that to do so would subvert the original intentions of the founders of the state that only those within the state should decide on what the law is.³⁵ International

³² The International Court of Justice has explained the interplay between multilateral treaties and custom in the *Nicaragua Case* [1982] ICJ Rpts 294.

³³ Governments have indeed done this. In *Teo v Minister for Immigration*, the Australian High Court used the signing of the Convention on the Rights of Children to invalidate a deportation order against Teo made by the Minister on the basis of Teo's convictions. The Minister had a discretion to deport convicted migrants. The decision of the High Court was rescinded by legislation, making the exercise of the discretion by the Minister have priority over other considerations.

³⁴ *Vishaka v State of Rajasthan* [1997] 6 SCC 3011.

³⁵ This idea of the original intention of the drafters of the constitution has figured in the thinking of

law came from outside the state. This was a sovereignty related argument. All this has changed with the world drawing ever so closer into a well knit group of nations. They interacted closely in commerce. Events that took place within their borders became common knowledge within a matter of hours. Whether it be a calamity like a tsunami or a genocide like the one in Rwanda, the world came to know of it as soon as it occurred, and the world was concerned enough to ensure that relief was provided. In such a world of close interaction, there arose a variety of rules to regulate inter-state contacts. In trade and commerce, the World Trade Organization formulated common rules. The Montreal Convention on Civil Aviation created a regime of rules on international air-traffic. The World Maritime Organization controlled navigation of the seas. The control of a spread of communicable diseases was possible only because the World Health Organization moved in to establish common rules for control. States did not stand away from such international control because it was beneficial to them. The rules made by these different institutions were quickly made part of domestic law, often by legislation, because it was in the mutual interest of all states to do so. The integration of the world through a network of regulations issued by regimes governed by international organizations in the fields of civil aviation, maritime traffic, health, trade, climate control, human rights, and other areas ensures the penetration of international law into everyday human activity around the world.³⁶ All human beings are touched by international law every day of their lives.

The Human Rights Cascade:

It was in the field of human rights that movement was swift and impressive. A tipping point from the point of view of other common law jurisdictions was the declaration containing the *Bangalore Principles on the Domestic Application of Human Rights Norms* (1988). The Principles were the outcome of a meeting of the leading judges of the common law world from US, India, Australia, Zimbabwe and elsewhere.³⁷ With

US Supreme Court judges in excluding the use of international law or comparative law.

³⁶ Whether control over these regimes by the hegemonic states can be avoided is an issue.

³⁷ The meeting was chaired by Chief Justice Bhagwati of India and included Justice Kirby (Australia), Chief Justice Dambutshena of Zimbabwe and Justice Judith O'Connor of the US Supreme Court. "Human Rights Norms" (1988) 62 ALJ 514 at 531-2 where the Principles are reproduced. M.D. Kirby "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514. Kirby, 'The Growing Rapprochement between International Law and National Law' in Sturgess G and Anghie A (eds). *Visions of the Legal Order in the 21st Century: Essays to Honour His Excellency Judge C J Weeramantry*. Kirby there stated: "In the matter of fundamental human rights of universal application, it is inevitable, as Justice Brennan said in *Mabo*, that the influence of international law will grow and the *rapprochement* between the two systems will continue". *Mabo* was the case in which the Australian High Court held that Australia was conquered from the aboriginal people. The earlier view was that Australia was terra nullius and was settled as aboriginals had to personally occupy land. This view of international law had changed. The change was reflected in *Mabo*.

cautious beginnings that indicate the need to respect existing domestic legislation, the last of the Principle affirms a crucial stance:

“It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes -whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law”.

Unlike in other areas, where mutual benefit can be seen as inducing state behavior, in this area, the driving force was a humanitarian concern for the suffering of people caused by their own repressive governments. The rise of Hitler and the gassing of millions of Jewish people provided the immediate impetus. At the conclusion of the Second World War, six major ideas coalesced into a powerful movement for the protection of the human rights of people. They have taken time to reach fruition into fully developed norms with a modicum of enforcement machinery attached to them which makes the law under them meaningful, and not merely aspirational as they may have been at the time they were formulated. Each of these six areas have become independent disciplines of their own within international law.³⁸ The acceptance of the principles of these areas into domestic law by national courts will ensure that these principles have an enforcement mechanism. As a result, the reception of human rights law into domestic systems assumes great significance.

First, there was the birth of international humanitarian law which gave rise to the four Geneva Conventions on War detailing rules on how wars were to be conducted.³⁹ With the addition of the two Protocols to the Conventions in 1977, rules came to apply to the conduct of hostilities in civil wars. The protection of civilians in times of war was a major feature of these conventions. The violation of the provisions of the Conventions would amount to war crimes which were prosecutable under the different instruments of a body that came into existence, i.e. international criminal law. The establishment of accountability mechanisms in international criminal law moved international law away from the criticism that it was not an enforceable law and was therefore not entitled to the status of law. It is widely accepted that the principles of humanitarian law, originally created by treaties, have now become customary international law as a result of practice and wide acceptance.

The second was the idea that those who caused wars and atrocities during the wars would be guilty of crimes.⁴⁰ The Nuremberg Charter (1948) created procedure for the

³⁸ They are taught as distinct disciplines in many universities and have their own set of literature. I set out some of the major texts of the five fields in footnotes.

³⁹ The four Geneva Conventions and the Two Protocols are subjects of commentaries by the International Red Cross.

⁴⁰ This field has attracted much literature due to the many tribunals set up to try war crimes and other crimes after different incidents like those in Yugoslavia and Rwanda. The setting up of the International Criminal Court and the trials of dictators of various countries resulted in the creation of much law. See for a text-book on the subject, O’Keefe, R., *International Criminal Law* (OUP, London, 2015); Sikink K., *The Justice Cascade: How Human Rights Prosecutions are Changing*

trial of crimes of aggression, crimes against humanity and other war crimes. The Genocide Convention was made in 1948, which specifically prohibited efforts at the elimination of ethnic and religious groups. Machinery for implementation through punishment of offenders was progressively created for the punishment of these crimes. The International Criminal Court came into existence. But, domestic courts had jurisdiction on the basis of territoriality or on the basis of universality to try the offenders.⁴¹ International criminal law and accountability under it are modern day realities. Presidents of several countries have been held responsible for atrocities committed by them against their people. With the release of the Chilcott Report in the United Kingdom, the possible litigation against the former Prime Minister Blair becomes a reality.

The third was the principle of self-determination.⁴² It led to the independence of much of Africa and Asia from colonial rule. It was based on the idea that one people should not rule over another people to the disadvantage of the latter. The issue is whether self-determination is exhausted once colonialism ends. There is a strong argument afoot that when ethnic minorities are denied their rights by majorities, the principle of self-determination protects them. The resurgence of this idea has led to calls for accommodating the principle in the West, as regards Scotland in the UK, Catalonia in Spain, Quebec in Canada and elsewhere. In Africa and Asia where single states were formed for the convenience of colonial powers, the claim is stronger. In Kashmir in India, in Tibet and Xinjiang in China, in Mindanao in the Philippines, in Sabah and Sarawak in Malaysia, in Chechnya in Russia and in many other places these claims are heard. New states have been formed on the basis of this doctrine, like Bangladesh and South Sudan. But, an accommodative response to such claims has been to give greater autonomy to the affected people. An example of this having been done would be Aceh in Indonesia where the constitution was reformulated in order to devolve greater powers to the people of Aceh. The doctrine's power for violence is great but so is its internal capacity to achieve peaceful resolution of simmering problems.

The fourth is the vast profusion of what is described as humanity's law.⁴³ Starting with the Declaration of Human Rights in 1948 and then, the twin Covenants on Civil and Political Rights, and on Economic and Social Rights, further rights have been spelt out in a plethora of conventions, all carrying significant weight. The Convention on the Elimination of Discrimination against Women sought to end inequality

World Politics (WW Norton & Co., New York, 2011).

⁴¹ Universal jurisdiction exists in national courts in respect of piracy and slavery. In modern times, it has been extended to war crimes, torture and possibly other crimes such as hijacking.

⁴² Hannum H., *Authority, Sovereignty and Self-Determination* (University of Pennsylvania Press, Philadelphia, 1998)

⁴³ Teitel R., *Humanity's Law* (OUP, London, 2011). The premise in the work is that "whereas the old international legal order emphasized "state security," defined by borders, statehood, and territory, the emerging focus is on "human security": the protection of persons and peoples. The result is what Teitel calls "humanity's law," a new discourse on violence and world politics that brings together and crystallizes a multitude of small but important shifts in international human rights law, the law of war, and international criminal justice".

between the sexes. In India, it was received into domestic law in spectacular fashion by the Supreme Court reading the whole text into a judgment so that it would have precedential value.⁴⁴ In the absence of legislation, the Supreme Court felt this was an alternative way of making a Convention signed by the executive a part of the domestic law. Other areas of human rights have been covered in specific detail. These include the rights of children, the rights of indigenous people and the rights of workers. Domestic courts have responded to this vast output by using them to piece together other rights like the right to clean air, the right to housing and the right to a decent standard of living. This is a rich field to work on. The triumphant march of human rights and the response to it in domestic courts all around the world, particularly the developing world, has been dramatic. The argument of the detractors that the human rights movement is a Western idea is born of arrant ignorance.⁴⁵ No people have embraced the concepts and used them to their advantage as the people of Africa and Asia. It has provided them with comfort against aggressive, dictatorial regimes that oppress their rights. Often, litigation relating to the violations of these rights take place before the domestic courts of third states or international tribunals.

The rules of transitional justice constituted the fifth major area.⁴⁶ This body of law is recent. It seeks to tie together the existing international law that seeks to return normalcy to a state that has been setback as a result of internal strife or other calamities. It seeks to set out the norms that are relevant in restoring peace to states which had undergone dislocations due to civil strife and other calamities.

The sixth area consists of the international law establishing the right to development. Western international lawyers have sought to undermine the right to development on the ground that rights are individual and not collective. The right to development is central to the thrust of the Third World to create a new structure of international law in which structural inequities that exist in the Eurocentric international law are removed. The movement is embedded in human rights law from which it derives its strength. Beginning with the efforts to promote the New International Economic

⁴⁴ *Vishaka v The State of Rajasthan* (1997) 6 SCC 241. The Indian Supreme Court constructed guidelines on sexual harassment and read the Convention on the Elimination of Discrimination Against Women into the judgment, thereby making it law as precedent. The Court said: "International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein". They are now known as the Vishaka Guidelines. The work of the Indian Supreme Court on transferring international law norms into domestic law is widely admired.

⁴⁵ Those in the movement of Third World Scholars in International Law (TMAIL) embrace human rights law simply because it protects the people of the Third World from the elites that support dictators. See Tony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, London, 2004): "Human rights is the one area of international law that is explicitly committed to the furtherance of human dignity". Anghie is a fellow Sri Lankan international lawyer. Human rights was involved in the Asian values debate for some time. It was also diverted to serve the interests of neoliberal agendas promoting a distinct vision of markets and governance.

⁴⁶ McEvoy K. and McGregor L. (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart 2008).

Order (NIEO), the developing world has been campaigning for the creation of socio-economic rights, like the right to food, to a decent standard of living and to housing. The movement to ensure that natural resources belong to a people and cater to their needs is an aspect of this law.⁴⁷

The Reception of Human Rights Law

In recent times, English courts have asserted the incorporation of international law very vigorously in many fields. Shaheed Fatimah has exhaustively surveyed this development in her book.⁴⁸ From the point of view of human rights, the Hamlyn Lectures of Lord Bingham are a significant contribution to the subject. He later wrote a book on the Rule of Law which also contains a survey of trends in English law as far as human rights are concerned.⁴⁹ The English courts have done much in the recent terrorist cases where national security factors had to be pitted against the right to liberty of the suspected terrorist. It is interesting to note that the courts have always allowed the right to liberty to trump national security and put the state to a requirement of strict proof of national security. The view in favor of liberty has largely been possible because of the existence of international law on human rights. The fact that there is a European Convention on Human Rights under which cases could be taken to the European Court ensures that the rules of the Convention and their application by the European Court are taken seriously in England. The same could be said of the manner in which the American courts had decided terrorism cases. These trends in English and American law stand in marked contrast to the manner in which the *Sinharasa Case* was decided in Sri Lanka. Of this, more is said later. It is best to explore the English cases and the US cases on terrorism before looking at *Sinharasa*.

The first case in England is a case of state terrorism. It involved General Pinochet, the former head of state of Chile, who was visiting his friend, Margaret Thatcher in London. This case, which took place in England and had several phases, was a turning point in considering the interaction between international law and domestic law.⁵⁰ It involved many issues, such as when torture became prohibited in English law and whether a former head of state can plead sovereign immunity in respect of claims arising from illegalities committed while he was head of state. The significance of the

⁴⁷ Much of my own work has dealt with this area. See Sornarajah, M., *International Law on Foreign Investment* (4th Ed., CUP, London, 2017 forthcoming.); Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, London, 2015) and other writings.

⁴⁸ Shaheed Fatimah, *International Law and Foreign Affairs in English Courts* will be published in 2016 (Hart Publishing). The first edition of this work was published in 2005. There are books which preceded this study.

⁴⁹ Bingham, T., *The Rule of Law* (Penguin Books, London, 2011). The Bingham Centre on the Rule of Law has been established to study global rule of law.

⁵⁰ Woodhouse, D., *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing, London, 2000).

Pinochet Case was that it enabled the leading judges of England to consider the relationship between international law and domestic law before terrorism cases hit them. The case was in effect a long rehearsal for what was to come. Pinochet had unleashed a reign of terror in Chile. Though the issue turned on whether torture was a crime in England before the Criminal Justice Act of 1968, Lord Millett thought that this was irrelevant. His view was that the Torture Convention⁵¹ contained customary international law and that it was part of the law of England before the Criminal Justice Act (1968), which made torture criminal. Extradition required proof that the offence was criminal in both the country in which the offender was present and the country seeking extradition. The other judges held that Pinochet could be extradited in respect of torture committed after 1968. There was no practical significance. The extradition of Pinochet to Spain was permitted. The case is of significance in indicating the liability of a former head of state for torture and illegal killings committed during his tenure after he loses office upon the end of his tenure. But, more importantly, English courts were embroiled in an international event involving human rights. The courts had occasion to think about their reaction to such events. It is not that they were unaffected by terrorism for the troubles in Northern Ireland kept them constantly aware of the problems but terrorism linked to international movements were to arise only in the new millennium. The case indicates that dualism was still entrenched in the late nineties and that only Lord Millet was willing to move away from it towards monism.

The English courts have been strong in ensuring that the individual, even a foreigner and even in respect of acts on foreign soil committed by British troops, is protected from detention or torture. As long as British troops had control over suspected individuals taken into custody anywhere in the world, these individuals had to be treated in accordance with standards mandated in the Human Rights Act. It is true that much of this result flows from the fact that there is an interaction between the European Convention on Human Rights as interpreted by the European Court of Human Rights and the English courts. One may argue that it was mandatory for the English courts to receive the European Convention and the European precedents into English law.⁵² But, the English courts have maintained that they would have developed the same principles on their own without the guidance of the European Court. In any case, there are references to non-European documents like the International Covenant on Civil and Political Rights, which largely parallel the

⁵¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* Adopted for signature by General Assembly Resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

⁵² Ahila Sornarajah disagreed in a private communication. She observed: “The Human Rights Act 1998 came into force in 2000. So, it bound UK judges in the new millennium anyway as they were required to “take into account Strasbourg jurisprudence”. The European Convention on Human Rights was used well before the 1998 Act came into existence in immigration cases. *R v Secy. of State for Home Department, Ex parte Bhajan Singh* [1975] 2 All ER 1081; *Salamat Bibi* [1976] 3 All ER 843; *Phansopkar* [1976] QB 606; *Waddington v Miah*. See the suggestion in Malcolm Shaw, *International Law* (7th Ed. CUP, London, 2014) p. 110 that human rights treaties were considered part of public policy. Executive decisions had to be measured against public policy.

contents of the European Convention on Human Rights. The insistence of Lord Bingham that torture was prohibited by the common law and that its prohibition is not to be derived from international law alone is an instance of this belief.

Nevertheless, it is clear that the fact that there was a regional and international law added greatly to the view that the English courts took on the issue. The English cases and others around the world were contemporaneous with *Singarasa*. There was considerable accumulation of views that the English law and indeed the law in other parts of the common law world was moving towards a monistic vision particularly in the field of human rights. I demonstrate this in the next few paragraphs, as a prelude to the discussion of *Singarasa*. It indicates why *Singarasa* came as a major disappointment to international lawyers around the world. In the paragraphs that follow the discussion of terrorism cases, I show that a similar trend towards monism and the expansion of domestic law on the basis of the international law on the environment was at work throughout the domestic jurisdictions of the world so that the *Bulankulame Dissawe Case* that Mr Goonesekere argued could be looked at in its international context.

Monism in Terrorism Cases:

Without any reference to any theory, common law courts were quietly moving towards a monistic vision giving expression to the central tenets of international human rights law. The movement was away from the old cases that showed extreme deference to the executive on grounds of national security. The view that was taken in the older cases was that the issue of national security in times when the state was afflicted by terrorism was a political question that should not be pronounced upon by the courts. This deference to the executive was explained on the basis of separation of powers as well as on the need for the different bases of power within the state to take a common front on issues that posed a threat to society. Besides, the executive would have acted on the basis of secret information that could not be disclosed to the courts without prejudicing national security. There were reasons conjured up for maintaining the position that during wars or periods of terrorism when national security was threatened and those who threatened it were subjected to detention or other measures, courts should not review the measures taken by the executive.

The law was to change. It is interesting to look at the change in views in the judgments of Lord Hoffman, a major judicial figure of present times. In 2001, Lord Hoffman approved the old view that national security decisions made by the executive affecting the personal liberty of an individual should not be reviewed. In *Secretary of State for the Home Department v. Rehman*,⁵³ the Secretary of State had ordered the deportation of a Pakistani national suspected of terrorism in the Indian subcontinent. The issue was whether the courts could review the order. Lord Hoffman held that the order could not be reviewed. He said:

⁵³ [2001] UKHL 47, [2001] 3W.L.R. 877.

“The question whether something is ‘in the interests’ of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive”.

But, just three years later he was to change his views dramatically. In a leading case on terrorism, which has come to be known as the *Beltmarsh Case*,⁵⁴ nine foreigners suspected of terrorism were kept in Beltmarsh, a high security prison awaiting the execution of the deportation orders made by the Secretary of State. They sought a review of the orders. They succeeded before the House of Lords. The reasoning of the judges was that the order made on the basis of the provisions of the Antiterrorism, Crime and Security Act, 2001 was inconsistent with the European Convention on Human Rights. But, Lord Hoffman suggested a different explanation as to why he considered the legislation offensive. He said:

“This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community”.

There was obviously a change in the thinking of a distinguished judge, a change mirrored in the views of other judges. The other judges held that the detention as well the statutory provision on which it was based was contrary to the European Convention on Human Rights. The changes were by no means confined to England.

One may take the attack on the Twin Towers on 11 September 2001 as the beginning of the new approach. Clearly an international situation was presented as the attack involved transnational elements and was not internal terrorism that courts had dealt with in the past, except in the situation of wars. In the aftermath of the attack that set off global terrorism, governments around the world embarked on harsh legislative and executive measures that were ostensibly intended to curb the onset of terrorism. They involved restrictions on civil liberties and personal freedoms of suspected individuals, justified as counterterrorism measures. Proving the view that in a globalizing world there would be close interaction between executive and legislative agencies, the spate of new laws around the world showed a marked similarity in giving extensive powers to the executive.⁵⁵ Often, the powers were convenient as

⁵⁴ *A v The Secretary of State for the Home Department* [2004] UKHL 159; for Lord Steyn’s extra judicial views at the time of these changes, see Lord Steyn, 2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom (2005) 4 *European Human Rights Law Rev.* 349.

⁵⁵ This was an instance that proved Anne Marie Slaughter’s view that informal interaction between enforcement agencies and other actors around the world shape international norms. Her rightly work

many states had internal, homegrown insurgencies, for which such measures would be useful. The fact that the Security Council joined in to require that legislation be enacted to curb global terrorism greatly aided in these restrictive laws.⁵⁶

Given the fact that these trends increasing executive powers were eroding the traditional views on the protection of personal liberties, judges simply rebelled. Their much vaunted task as the bastion of the protection of the rights of citizens had to be abdicated if this expansion of executive rights were to be permitted. The *Beltmarsh Case* presents the beginning of the reaction. It was an assertion of the power of judicial review of executive interference with personal liberties justified on the basis of standards of international law.

The reaction takes place throughout the common law world. In the United States, where the Twin Towers Attack occurred and a war was initiated against on Afghanistan on the basis that Afghanistan harboured the perpetrators and the later war of Iraq occurred almost simultaneously, the Supreme Court which had hitherto recognized a wide deference to executive powers and avoided scrutiny on the basis of political question and non-justiciability doctrines, changed tack.⁵⁷ The suspected Taliban and Al Qaeda terrorists were held without trial at Guantanamo Bay in Cuba. They were transported there through rendition. They were kept in a prison that was technically outside the US territory.

There were four cases concerning such persons decided in succession. The issue arose in the first whether the American courts could deal with such detention through *habeas corpus* and other procedures despite the fact that the prison was not on US territory. *Rasul v Bush* and *Hamdi v Rumsfeld* were decided on the same day, 28 June 2004. The Supreme Court held in the first case that the writ of *habeas corpus* extended to foreign suspects held in custody by American troops outside the US. In the second, a narrow majority held that a US citizen could be treated as an enemy combatant and held in custody for suspected terrorism. International law was hardly discussed. But, in the 2006 case, *Hamdan v Rumsfeld*, the issue was whether a suspected terrorist in the custody of American troops could be tried before a military commission created by an executive order. The Supreme Court said no. Such a procedure, it pointed out, would be contrary to the Article 3 of the Geneva Conventions which applied to “conflicts not of an international character”. The Article required trial and punishment before a regular court affording all judicial guarantees. Though the rules of the Geneva Conventions are in treaties, they are widely considered as constituting customary international law.

takes emphasis away from consideration of official sources of law making. Anne Marie Slaughter, *A New World Order* (Princeton, 2004).

⁵⁶ The main UN body set up to curb terrorism is the UN Counterterrorism Committee (2007).

⁵⁷ An excellent source for discussion is Judge Stephen Breyer’s book, *The Court and the World: American Law and the New Global Realities* (Alfred Knopf, New York, 2015). Justice Breyer participated in the terrorism cases here discussed.

The fourth case, *Boumediene v Bush*⁵⁸ was more important. After *Rasul*, the US Congress had in response repealed the statute that permitted *habeas corpus* for detainees at Guantanamo Bay. The judges held by majority that the repeal was unconstitutional.

Justice Breyer assessed the effect of the four cases thus:⁵⁹

“In the context of earlier foreign affairs and war powers cases, the Guantanamo cases call for more general observations... they continue the shift further away from Cicero (“the laws fall silent”) and toward an attitude expressed during the Second World War by the British judge, Lord Atkin:

“In this country, amid the clash of arms, the laws are not silent, as in peace. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, on the principles of liberty for which we are now fighting, that the judges stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is prohibited in law”

Space does not permit an extensive examination of the other jurisdictions. Such an examination would be made when this lecture takes a longer form as a short book. It is sufficient to say that the same pattern is to be found in the contemporary case law in other jurisdictions. The same changes in view of regarding executive decision as non-justiciable can be traced in the decisions of the courts in India, New Zealand,⁶⁰ Canada⁶¹ and Australia. There is clear evidence that the courts of these jurisdictions were influenced by the decisions of each other and that they heeded the position in international law on human rights.⁶² The narrow judicial nationalism that one must stick to one’s own law gets a beating. Judicial xenophobia must be soundly rejected. As Lord Bingham put it in the Hamlyn Lectures:⁶³

⁵⁸ (2008) 553 US 723.

⁵⁹ Breyer, S., *The Court and the World: American Law and the New Global Realities* (Alfred Knopf, New York, 2015) at p.78

⁶⁰ *Zaoui v. Attorney-General (No. 2)* [2006] 1N.Z.L.R. 289 (Sup. Ct.)

⁶¹ *Charkaoui v. Canada* [2007] S.C.C. 9, 2007. The earlier Canadian case showing deference to executive decision is *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3

⁶² For a review of these decisions, see Eyal Benvenisti, “United We Stand: National Courts: Reviewing Counterterrorism Measures” in Andrea Bianchi & Alexis Keller Eds., *Counterterrorism: Democracy’s Challenge* (2008); Eyal Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts” (2008) 102 *American Journal of Intl Law* 241. Benvenisti’s writings on the subject also indicate a change. His earlier view on judicial timidity and restraint in approaching international law is contained in “Judicial Misgivings regarding the Application of International Law” (1998) 4 *European JI of Int’l L*

⁶³ Lord Bingham *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Hamlyn Lecture, CUP, 2010) at pp. 5-6.

“Those of us who see, and would wish to see, the law of England and Wales as “an island, entire of itself face two problems. The first is that, as much as we may care to think of our law as pure bred, home grown product of our national genius, the truth is otherwise. It is a mongrel, gaining in vigour and intelligence what it has lost in purity of pedigree...The second problem faced by those who regard any resort to foreign sources as at best irrelevant and at worst dangerous is of a more general nature. In no other field of endeavor ...would ideas or insights be rejected simply because they were of foreign origin”.

The new approach, which is an old one, is that the best approach to combatting terrorism is to maintain the rule of law so as to indicate the difference between the tolerance of society contrasted with the brutality of terrorism. In a tolerant society with the rule of law and equality between citizens, the need for terrorism will not arise. This view may be stated in terms of Lord Atkin’s view, later shared by Lord Hoffman and Justice Breyer, that there is ingrained in the common law the belief that the rule of law in a free and equal society, devoid of majoritarianism is the best antidote to terrorism.

It could equally well be stated as the basis of the structure of the modern international law mandates as the solution to the problem of terrorism. Dualism is an archaic doctrine that has no place in modern international law. The distinction between customary international law and treaty law is no longer of significance in international law as what begins as rules of a multilateral treaty is soon through acceptance and practice transformed into customary rules.⁶⁴ Many of the norms of human rights law are regarded as *jus cogens* principles constituting mandatory principles in international law. The prohibition of torture is certainly accepted as a *jus cogens* principle.⁶⁵ The right to liberty that involves notions of fair trial and lawfulness of detention is a candidate for such status. Given these developments, the notion of dualism has little significance in the sphere of human rights. The law has been led on a path towards integration of international human rights law into domestic law by judges in every common law jurisdiction apart from Sri Lanka. This is because of the presence of the pernicious decision in the *Singarasa Case*.

The Global Move Towards Monism.

Before dealing with *Singarasa*, it is necessary to note that around the time of that case (2006) the courts of most states, including South Asian states, were moving towards monism. There was a general belief that in the areas of the protection of human rights

⁶⁴ Roslyn Higgins, *The Relationship between International and Regional Human Rights Norms and Domestic Law: Developing Human Rights Jurisprudence* (1993) 5 p.16.; Kirby, ‘The Growing Rapprochement between International Law and National Law’ in Gary Sturgess and Anthony Anghe (Eds.) *Visions of the Legal Order in the 21st Century*

⁶⁵ Weatherall, T., *Ius Cogens: International Law and Social Contract* (Cambridge University Press, 2015) who argues that an individual-oriented normative framework has developed in international law that has to be accommodated within a state-centred system.

and the environment such a move by the national courts was necessary. I note but a few of the cases only to show that *Singarasa* was an aberration in the context of the developments taking place in other common law jurisdictions. Monism is the rule in many states. These include Benin, Cape Verde, China, Coted'Ivor, the Czeck Republic, the Dominican Republic, Egypt, Ethiopia, France Japan, the Netherlands, Portugal, the Russian Federation, Senegal, Switzerland, Turkey, and the United States.⁶⁶ That is a large geographical spread. The dualist view is taken in in Australia, Botswana, India, Israel, Italy, Kenya, Malawi, Nigeria, Norway, Sri Lanka, Uganda, the United Kingdom, and Zimbabwe. It is evident that the latter states are largely common law jurisdictions which probably take their cue from the *Keyn* decision. But, it is evident that they are moving away from this position towards monism.

The terrorism cases, where the movement towards monism is evident, have been detailed. The movement appears in other areas as well and in other common law jurisdictions. India is active in this movement towards monism, particularly in human rights and in environmental protection.⁶⁷ African states in the group also widely employ international law in justification of their decisions despite the fact that there is no legislation that incorporates such treaty based international law. In Australia, the High Court used the signed but yet unratified Convention on the Rights of the Child in order to prevent the deportation of a step-father on the ground that the rights of his children would be violated.⁶⁸ In Bangladesh, in *Nurul Islam v Bangladesh*⁶⁹, the Supreme Court recognized the need to make law on cigarette advertising following the WHO Convention on Tobacco Control. Clearly, there is a trend that had developed towards monism simply because of the fact that national courts believed that the use of international law was a means of controlling executive power, exercised by a handful of persons to the detriment of the citizens of the state.

Propriety of Judicial Activism

This movement towards monism involves judicial activism. The change is one from judicial timidity, deference or genuflection to the powerful executive to a position of activism embracing an external system to curb the powers of the executive and to protect the citizen or indeed, as in the terrorism cases, a total stranger suspected of being a threat to national security. The criticism of such activism is that by taking a monistic view and receiving international law into domestic law, the judiciary is trespassing into the legislative sphere. It is a criticism that has been powerfully made by many commentators. It lies also at the heart of the *Singarasa Case*. This theoretical objection must be confronted if the trend towards monism is to continue.

⁶⁶ The list is taken from Nollekaemper, *National Courts and the International Rule of Law* (OUP, London, 2011) p.78.

⁶⁷ *Narmada Bachao Aandolan v India* (2000) AIR 2000 SC 3751; ILDC 169 (IN 2000).

⁶⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995)183CLR273

⁶⁹ (2000) 52 DLR (2000) 413; ILDC 477 (BD 2000).

There are many arguments made in favour of the trend towards monism. In all states where the trend has appeared, the written constitutions contained a separation of powers, clearly demarcating the spheres in which the three organs of government are to function. If a strict interpretation is to be made of the constitution, clearly, the possibility of the trend towards monism is reduced. But, such an interpretation of the constitution is never made in modern constitutional systems as it is recognized that the functions of the three arms of government need to shade into each other for effective administration to be achieved.

The Indian Supreme Court justified its activism on the ground that it was merely ensuring that the advantage of a treaty reaches citizens and is not thwarted by executive lethargy in not incorporating it into domestic law. It also pointed out that by doing so it was avoiding the international responsibility of the state which had an obligation to incorporate the treaty into law. Public funds are invested into negotiating a treaty and the advantage of the treaty must be made available to the citizen.

In the field of human rights, the monist view that permits the taking into account of international treaties on human rights is justifiable on the basis that the constitution itself contains a statement of the rights of the citizen. All that the court does is to use the international treaties to ensure the content of the rights by reading the rights in a manner consistent with their statement in the international treaty. International treaties and conventions have progressively embellished the content of rights. By reading the national constitution recognizing fundamental rights in the context of these treaties, the court is merely ensuring that there is no clash between the constitution and international obligations that the state has assumed. In any event, it is a long-standing rule of the common law that statutes must be interpreted as consistent with the international obligations of the state. So, all that a court is doing when it uses monism, as far as human rights treaties are concerned, is interpreting the civil or fundamental rights in the constitution in accordance with the rights stated in the international treaties. The interpretation of constitutional rights is the proper function of the court.

The courts have also stated that the role of dualism has diminished in modern times. The rationale for dualism has become redundant. It was thought that international treaties could affect the rights of individuals adversely. As a result, it was necessary for Parliament to consider the situation before a treaty could be incorporated into domestic law. That situation no longer applies, not in case of human rights treaties in any event. They create rights directly in the individual against the executive. It would be ludicrous to expect the executive to be keen about restricting its powers by enacting the treaty into internal law. Hence, it is necessary for courts to act by receiving the international treaty, which the executive had assented to in any event, into domestic law.

Another argument made by commentators is that human rights treaties merely state preexisting customary international law or that the treaties themselves affirm existing customary principles which become further congealed as rights as a result of the treaty. In effect then courts by adopting a treaty, are in reality receiving existing customary international law. Dame Roslyn Higgins, later President of the

International Court of Justice, stated the view as follows:⁷⁰

" ... international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the States Parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such - and even were these rights not already secure through a separate domestic historic provenance - they would be part of the common law by virtue of being rules of general international law."

Citing this view, Lord Steyn elaborated further suggesting estoppel as a reason why an executive should not stand against the court's action. He said that "there is growing support for the view that human rights treaties enjoy a special status."⁷¹

It has already been pointed out that human rights treaties become customary international law. As such, they are received into the common law by courts without the need for incorporation. These justifications more than counter any constitutional argument that may hinder the adoption of the trend towards monism in the common law world.

The Singarasa Case: Justice Betrayed.

Deepika Udugama, the present Chair of the Sri Lankan Human Rights Commission, after observing that judges of the Supreme Court had begun to incorporate international human rights law into the 1978 Constitution,⁷² pointed out that "a major setback to the trend was experienced with the highly problematic judgment of the Supreme Court in *Singarasa v Attorney General*"⁷³ She concluded the discussion of the case with the statement that "*Singarasa* marked a setback of tremendous

⁷⁰ Higgins, R., "The Relationship between International and Regional Human Rights Norms and Domestic Law", in *Developing Human Rights Jurisprudence*, 1993, Vol. 5, 16-23.

⁷¹ Lord Steyn in *Re McKerr* [2004] UKHL 13. He further said, after citing Murray Hunt, *Using Human Rights Law in English Courts*, 1998, pp 26-28: "Commenting on *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 Mr Justice Collins commented that "it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases": *Foreign Relations and the Judiciary* 2002, 51" ICLQ 485, at 497.

⁷² She cited two cases: *Weerawansa v AG* SC Minute 3 08 2000 and *Bulankulame v Ministry for Interior Development* [2000] 3 Sri Lankan LR 243. The latter case is discussed below.

⁷³ Deepika Udugama, "Sri Lankan Legal Project and the Liberal Conscience: Thus Far and No More" in Terence Halliday and Lucien Karpik, (Eds.), *Fate of Liberalism in the British Post-Colony* (Cambridge University Press, London, 2012) 219 at p.233.

proportion”. The courts had willingly or unwillingly contributed to a nationalistic project that destroyed the liberal foundations of the country. There were equally signs of vigorous judicial efforts to cling onto those liberal foundations.⁷⁴

In the context of the developments that were taking place in the other common law jurisdictions where domestic courts were intent on protecting the individual from abuse- and that too every one of them a foreigner⁷⁵ – the decision in *Nallararatnam Singarasa v The Attorney General*⁷⁶ is widely regarded as a blot on the jurisprudence of Sri Lanka by commentators within Sri Lanka⁷⁷ and abroad.⁷⁸ The decision manifests the paradox of international human rights in Sri Lanka. It is a state which has ratified every major international document on human rights (except the Rome Statute on the International Criminal Court). It is also a state which is alleged to have disposed of several thousands of its citizens.

The facts of the case are clear. Singarasa was around 20 at the time he was arrested as a terrorist suspected of an attack on an army camp. He was held incommunicado for two and a half months. He alleged that he was tortured during this time and even later. A confession was obtained from him during his detention allegedly under torture. Signs of such torture were revealed on later medical examination. The confession was made in Tamil as Singarasa knew no other language. It was translated into Sinhala by a police officer who knew both Tamil and Sinhala. Under the Prevention of Terrorism Act, a confession made before a police officer above the rank of an Assistant Superintendent of Police (ASP) was admissible. The confession was

⁷⁴ Eg. The Supreme Court granted compensation to dispossessed villagers. *Ms. Susila Malani Dahanayake and 41 other Sri Lankan citizens v. Sri Lanka*, Communication No. 1331/2004, U.N. Doc. CCPR/C/87/D/1331/2004 (2006). The Supreme Court vacated the order to evict Tamils from Colombo in 2008.

⁷⁵ Often one hears the criticism in Sri Lanka that human rights law is a Western creation. Judges in the developed world are also part of humanity. With the exception of *Hamdi*, the other leading cases decided in the UK and the US involved foreign suspects as did the English cases. The judges were protecting the liberty of foreigners from their own executive branches.

⁷⁶ Application for Judicial Review, SC Spl (LA) No 182/99, ILDC 518 (LK 2006) 15 September 2006. Recoverable in *Oxford Reports in International Law*.

⁷⁷ Mr. Gooneskere, who was lead counsel, has explained his strategy in the case in “The Singarasa Case: A Brief Comment” *Sunday Times*, 22 October 2006; For other comments on the case in Sri Lanka, see Lakiri Mendis, “An Analysis of the Singarasa Case” in *The Island*, Online Edition. <http://www.island.lk/2006/10/27/features1.html>; Nihal Jayawickreme in his Dr. PR Anthonis Lecture made a scathing attack on the case. The lecture, entitled “Healing the Nation: A Question of Leadership” appeared at *Colombo Telegraph*, 13 May 2016. Jayawickrema referred to the judgment in the following terms: “In 2006, Chief Justice Sarath Silva suspended the application to Sri Lanka of international human rights treaties, holding that their ratification was an infringement of the Constitution. His judgment was described by a world renowned jurist as “an example of judicial waywardness” or “judicial eccentricity”. Another referred to it as “Alice in Wonderland reasoning”. Cerone, “Comment on the *Singarasa Case*” (2007) 227 *Law and Society Trust Review* No. 17. Pinto-Jayawardene, “Will International Treaties Protect Human Rights in Sri Lanka?” *Colombo Telegraph* 10 December 2013.

⁷⁸ Sir Nigel Rodley, “The Singarasa Case: Quis Custodiet...?” (2008) 41 *Israel Law Review* 500. There is an analysis of the case in the *Oxford Report of International Law* by John Cerone and Noel Dias.

recorded in Sinhala which Singarasa does not read or speak. His thumbprint was made on the document. An ASP was present during the recording of the confession but he could not speak Tamil. The Judicial Medical Officer who had examined Singarasa prior to trial had confirmed injuries consistent with torture. Any ground for the inadmissibility of the confession such as use of torture to extort the confession had to be proved by the accused. Singarasa did not produce such evidence. The High Court accepted the confession. It sentenced him to 50 years in prison. An appeal to the Court of Appeal led to the confirmation of the conviction but a reduction of sentence to 35 years. Singarasa was not happy with this indulgence of the Sri Lankan court.

Singarasa petitioned the Human Rights Committee, as Sri Lanka had dutifully signed the Optional Protocol to the International Covenant on Civil and Political Rights in keeping with its reputation for signing human rights treaties.⁷⁹ The Protocol created a right of individual petition against the state in the citizen for the violation of his rights. The Human Rights Committee ruled that the conviction of Singarasa violated his rights under the International Covenant on Civil and Political Rights. It found that there was a duty on the part of the courts to examine the allegation of torture. It also found that the burden of casting proof of involuntariness of the confession onto the accused was not consistent with the Covenant.

With this recommendation in hand, Singarasa, represented by Mr RKW Goonesekere, sought a revision of the case before the Supreme Court of Sri Lanka. Mr Goonesekere has explained the strategy behind the litigation.⁸⁰ There was no appeal. There was no challenge to the existing decisions of the Sri Lankan courts. The request was to review the previous decisions of the Sri Lankan courts in the light of the recommendations of the Human Rights Committee. The Sri Lankan Supreme Court had the power to review and correct an inherent injustice in a previous decision if such injustice were to come to its knowledge. This was the power that was being invoked. The recommendation of the Human Rights Committee revealed an injustice done to Singarasa and the Supreme Court was invited to correct that injustice.

Five judges heard the application. It was an application for revision, not an appeal. The theory was that with an injustice exposed by the Human Rights Committee, the Supreme Court should provide relief to the affected person by rescinding the earlier conviction. It was not an appeal on points of law. The five judges who heard the application for revision were the Chief Justice Sarath Silva, who had been Attorney General at the time Sri Lanka signed the Optional Protocol, and four other Justices: Justices Nihal Jayasinghe, NK Udalgama, NE Dissanaikie and Gamini Ameratunge. The Chief Justice wrote the judgment. Mr Goonesekere was later to complain that the judgment did not address his arguments. Neither was he asked to address the court on the points on which the judgment depended.⁸¹ Clearly, this alone makes the judgment

⁷⁹ *Singarasa v Sri Lanka*, Merits, Communication No 1033/2003, UN Doc CCPR/C/81/D/1033/2001, (2005).

⁸⁰ Goonesekere, "Singarasa: A Brief Comment" in *Sunday Times*, 22 October 2006.

⁸¹ "The Singarasa Case: A Brief Comment" *Sunday Times*, 22nd October 2006.

move out of the orbit of judicial ethics. The court was deciding an imaginary case which had not been submitted to it. It is best to look at the bases of the decisions and in the course of doing so, also set out criticisms of the reasoning in the judgment.

The judgment does not mention the earlier course of authority on the reception of international law. It ignores the fact that the earlier cases had set a path towards monism. It regards the issue as one that is to be decided afresh.

The first point made is that the International Covenant on Civil and Political Rights (1966) is dependent on its transformation into national law by legislation as Article 2 of the Covenant requires such transformation where there is no existing legislation. Article 2 imposes an obligation on a state to do so. The judgment found that this obligation had been satisfied. It stated:

In Sri Lanka fundamental rights have been guaranteed by the Constitution of 1972 and in the present Constitution and enforced by this Court, even prior to ratification of the Covenant in 1980. The Government has not considered it necessary to make any amendment to the provisions in the Constitution as to fundamental rights and the measures for their enforcement as contained in the Constitution, presumably on the basis that these provisions are an adequate compliance with the requirements of Article 2 of the Covenant referred to above.

This finding then is that even on the dualist view, the ICCPR is part of the law of Sri Lanka as the Constitutions of Sri Lanka contain its essential features. The practice of the Government of Sri Lanka has been to act consistently with the ICCPR. It has declared the emergency situation in Sri Lanka to ask for suspension of some provisions due to the emergency.

After this finding, the judgment discusses the distinction between monism and dualism. It points out that UK ceased to be a dualist state on its accession to the European Community and enacted legislation to receive EC law into UK law. I have shown that the process was different in human rights cases. The European Convention on Human Rights and other human rights treaties began to affect English law well before the Human Rights Act (1998) which became law in 2000. In any event, as *Trendtex* pointed out, customary international law was always a part of English law. The rights in the ICCPR constitute part of customary law and as such would have become part of English law.

Then comes the constitutional law argument. The Chief Justice stated:

“The Petitioner has been convicted with having conspired with others to overthrow the lawfully elected Government of Sri Lanka and for that purpose attacked several Army camps. The offences are directly linked to the Sovereignty of the People of Sri Lanka and the Committee at Geneva, not linked with the Sovereignty of the People has purported to set aside the orders made at all three levels of Courts that exercise the judicial power of the People of Sri Lanka”.

This upholds an argument that had been put to the Court by the Deputy Solicitor General that the judicial power of Sri Lanka must be exercised under Article 4 c and Article 105 (1) of the Constitution by a tribunal or court established under the Constitution. The Human Rights Committee was not such a tribunal. The Chief Justice ruled:

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

Nigel Rodley makes short shrift of this holding of the Chief Justice. He simply pointed out that the Human Rights Committee never purports to act as a judicial body. Its findings create no obligations. They are couched in the form of recommendations than as orders. Rodley, a longtime member of the Human Rights Committee, observed:⁸²

“The Human Rights Committee is not a court. Even when dealing with individual communications, its conclusions 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 that states party are required to give the views serious consideration in good faith. However, they no more create obligations under international law, to be recognized as justiciable in domestic law, than the accession to the ICCPR itself. 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”.

The specific findings of the Human Rights Committee were that the presumption of innocence, the freedom from self-incrimination and the freedom from ill-treatment were violated. These rights are to be found in the Constitution.

The Chief Justice’s final sally is into the Presidential rights of treaty making and their effect under the Constitution. He pointed out that the President may make treaties, but their internal effect depends on the Parliament passing legislation regarding them. The President has no power to create public rights. The President’s assent to the Optional Protocol created public law rights in a citizen. This could only be done by Parliament. The creation of such new public law rights would have required specific legislation. The reasoning is faulty. The public law rights of Singarasa already existed in the Constitution. They did not have to be newly created. In any event, this argument was not made either by counsel for Singarasa or by the Deputy Solicitor General. The judge was batting on his own in answering an issue he had created.

None of the grounds on which the Supreme Court based its decisions were put to

⁸² Rodley, “The Singarasa Case: Quis Custodiet...?” (2008) 41 *Israel Law Review* 500 at p.506.

counsel for Singarasa so that they could be discussed before the Court. The Court decided on its own assumptions. The assumptions are defective for several reasons besides the ones already stated. First, there was case law veering towards monism in Sri Lanka. The old case, *Leelawathie v Minister of Defence*,⁸³ decided by Sansoni CJ was ambivalent. It may have stated a dualist position. There was no consideration of the issue. But, as shown, the common law jurisdictions had veered off this approach, particularly in human rights cases. So had the Courts in Sri Lanka. This was reflected in three decisions decided by the Sri Lankan Courts showing an inclination towards monism.⁸⁴ The Supreme Court in *Singarasa* did not consider this course of precedent. Neither did it consider the rich precedent that existed in other common law jurisdictions which showed a distinct departure from older views of judicial deference towards the executive. These courts, as discussed above, have been particularly strong in making this departure in human rights cases, including those involving terrorism. These courts also worked in constitutional systems that recognized separation of powers, as Sri Lanka did. The Supreme Court denied such arguments being put to it for consideration.

The reliance on the dualist position is not only archaic in the context of legal developments but comes at a time when the rationale behind it has lapsed. The need for dualism was that the executive does not have a role in law-making simply by making treaties which would then be made part of domestic law. Hence the rule that there must be legislation based on the treaty. This would be an undemocratic situation as the legislature would be bypassed. This may have been a good rationale for dualism in the past. But, it does not provide a rationale for maintaining a buffer against human rights rules which have been designed to protect the individual from the might of the state. Human rights law seeks to advance the interests of people and seeks to protect them from the power of the state. Dualism is used only to keep such rights away from the people. It was so used by the Sri Lankan Supreme Court in the *Singarasa Case* where a young man was denied the protection from a state which was becoming progressively oppressive. The Supreme Court denied itself the power to act as a bulwark against the abuse of power by the state.

The need for preventing such a course being adopted in the future is clear. One way of accomplishing this is for the courts to announce clearly through a binding judgment that they will adopt international law, particularly in the human rights field, as part of

⁸³ (1965) 68 NLR 487; this case must not be taken as an approbation of the dualist theory. Sansoni CJ was disposing of a throwaway argument of counsel based on the Declaration of the Rights of Man (1948). The case involved a refusal of a visa for a foreign wife to join her husband in Sri Lanka. The court upheld the refusal. The relevant point is in these sentences: "Lastly, it was submitted that the refusal was in breach of the Universal Declaration of Human Rights. Even if the principles contained in the instrument have any relevance, it is sufficient to say that while it is of the highest moral authority, it has no binding force as it is not a legal instrument and forms no part of the law of this country. The predicament in which the petitioner and her husband find themselves is indeed a sad one, but they married at their risk and it is no argument to say that if the application fails they may have to live apart. In the result, the application of the petitioner must be refused".

⁸⁴ *Sepala Ekanayake v AG* (1988) 1 SLR 47; *Weerawansa v AG* SC Minute 3 08 2000 and *Tikiri Banda Bulankulame v Ministry for Interior Development* [2000] 3 Sri Lankan LR 243.

domestic law. As Mr Goonesekere pointed out, the Indian Supreme Court is a widely admired Court because it has adopted such an activist position. As he put it, the Supreme Court lost a “golden opportunity to have emerged as a guarantor of rights” If the executive accepts a human rights convention, the Indian Courts take it as given that there is support from the government for its adoption by the domestic courts. Mr Goonesekere also pointed out that in Sri Lanka it is the people who are Sovereign. A set of laws that protects people from the state should not be denied acceptance.

Another way of ending any move towards dualism is through a constitutional provision that ensures that human rights documents that are signed by the executive are accepted as law by the courts. Such provisions exist in many constitutions around the world. This possibility is examined in the last section of this lecture. Before then, I deal with another case that Mr Goonesekere argued which had a far happier ending from the point of view of international law. It was the case: *Tikiri Banda, Bulankulame v the Secretary, Ministry of Industrial Development*.⁸⁵ I shall not take too as much space on it. It was a celebrated instance when the court took a welcome stance to protect the rights of the indigenous people to their resources. Unlike Singarasa, it received positive commentary in Sri Lanka and elsewhere.

Environmental Rights and Domestic Law

International environmental law is newer in a sense than international human rights. It has special significance to developing countries. As Sumudu Atapattu has pointed out the emerging law on the environment has great significance for the people of developing countries as it enables them to preserve and protect their national wealth.⁸⁶ International environmental law created rights in people for the enjoyment and preservation of their environment and natural resources. The most active court by far in transferring such environmental rights into domestic law has been the Indian Supreme Court. It has vigorously policed river and atmospheric pollutions, prevented damage to cultural monuments like the Taj Mahal from industrial pollution and ensured that the buildings of dams are strictly controlled. The Sri Lankan Supreme Court’s decision in *Tikiri Banda Bulankulama* (popularly known as the Eppawela Case) matches this judicial activism.⁸⁷

Bulankulame involved phosphate mining in a remote area in Sri Lanka. A joint venture had been formed for this purpose between the government and Freeport-MacMoran, a giant foreign mining company. Though ostensibly in the form of a joint venture, the foreign company, no stranger to litigation involving allegations of

⁸⁵ [2000] 3 Sri LR 243.

⁸⁶ Sumudu Atapattu, “The Significance of International Environmental Law Principles in the North-South Divide” in Shawkat Alam, Sumudu Atapattu et al (Eds.) *International Environmental Law and Global South* (Cambridge University Press, London, 2015) 74.

⁸⁷ See further, Puvimanasinghe, “From a Divided Heritage to a Common Future?” in Alam, S., and Atapattu, S., et al (Eds.) *International Environmental Law and Global South* (Cambridge University Press, London, 2015)p. 252.

wasteful exploitation,⁸⁸ was given extensive powers to explore for and exploit the phosphate resources of the region. It was exempted from submitting environmental impact assessments of the project for approval. The project would have displaced 2600 families. The proposed rate of exploitation would have depleted the phosphate resources within 30 years when it could, left to normal use have satisfied the fertilizer needs of the community for a thousand years. A public interest litigation was brought to prevent the continuance of the project.

Justices Amerasinghe, Wadugodapitiya and Gunasekera⁸⁹ heard the case in the Supreme Court. They allowed the petitioners, who were from the village of Eppawala, directly affected by the proposed project standing. They held that the waiver of the need for an environmental assessment report was improper as it avoided the application of the law to a foreign company.⁹⁰ The foreigner was subject to the same laws as would apply to nationals. This equality of treatment would be stronger put in terms of international law which demands that there be the same treatment afforded to the foreign investor, but that treatment should not fall below certain thresholds. The most striking factor is that the judgment asserts that economic improvement is not the sole aim of foreign investment. It must be made having regard to the impact it would have on the cultural and archaeological sites in the area, Eppawala being situated in a region of Sri Lanka, the Anuradhapura district, which had monuments of historical significance.

The judgment used a concept which is only to be found in international environmental law, the notion of intergenerational equity.⁹¹ Clearly, the idea is not found in Sri Lankan law. It is borrowed from an idea that is relatively new in a new area of international law that requires resources be used by the present generation having regard to the fact that future generations will also have need for the resources. This

⁸⁸ The company had a record of litigation involving environmental mismanagement in Indonesia. It was also involved in an Alien Torts Act litigation in the United States where alleged environmental and human rights violations took place in Indonesia.

⁸⁹ All students of Mr Goonesekere.

⁹⁰ “What was being attempted by the proposed agreement was to substitute a procedure for the laid down by the law. It was assumed that by a contractual arrangement between the executive branch of the government and Company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of Government, no person whomsoever is above the law”.

⁹¹ Justice Amerasinghe said: “International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration) The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.”

notion animates international environmental law. In a path-breaking book, Edith Brown Weiss had argued that resources of the world must be used by the present generation having regard to the interests in their use by future generations. This principle of intergenerational equity has become a cardinal tenet of international environmental law. One of its expositions is to be found in the judgment of the Sri Lankan judge, Judge Weeramantry of the International Court of Justice. Judge Weeramantry in the case concerning *Hungary v Slovakia*⁹² made specific reference in the context of Sri Lankan philosophy. The Sri Lankans' have the unfortunate penchant for saying that they knew it all along after a concept is articulated. In any event, the *Eppawela* judgment adopts the concept of equity for future generations which it obviously obtained from international law. International law is fully embraced in the idea that natural resources of a state belong to its people and that the state acts only as a guardian of the people in the exploitation of the resources. The idea again can be traced to the efforts of developing countries to articulate the doctrine of permanent sovereignty over natural resources. The court also referred to the concept of sustainable development drawn from recent declaration on the environment such as the Stockholm Declaration and the Rio Declaration. After referring to these declarations, Amerasinghe J stated:

“In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as ‘soft law’ Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.”

The passage seems to suggest that courts could adopt international law and make it a part of domestic law. It seems to be similar to the views that have been stated in the Indian Supreme Court decisions.⁹³ The court ordered the respondents to desist from entering into any contract relating to the disposal of the phosphate deposits until environmental studies and other studies as to the effects of the project are done.

Comparing Bulankulama and Singarasa

The *Bulankulama* case was a triumph for monism. With all its tub-thumping about sustainable development and intergenerational equity being known in the ancient

⁹² *Case concerning the Gabčíkova Nagymaros Project* [1997] ICJ Rpts 228.

⁹³ For the Indian cases, see *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388; *Vellore Citizens Welfare Association v Union of India* (1996) 5 SCC 647; Shyami Puvimanasinghe, “Towards a Jurisprudence of Sustainable Development in South Asia” (2009) 10 Sustainable Development: Law and Policy 41 discusses cases from India, Nepal, Bangladesh and Sri Lanka where similar views had been expressed.

culture of Sri Lanka that evinces a nationalistic pride, there is little doubt that the court was drawing on newly articulated concepts of international law and assessing the situation in the light of those new concepts. A welcome relief resulted to the people of Eppawela as a result. The drawing of these new ideas into the law of Sri Lanka proved beneficial to its people. There was an articulation of what could be considered Third World international law as ideas such as permanent sovereignty over natural resources were articulated as a part of the New International Economic Order by developing countries, including Sri Lanka.⁹⁴ The Eppawela contract was clearly illegal under domestic law in any event. It bypassed the requirements of the law that any project for the exploitation of natural resources should be preceded by an environmental study. That would have been the simplest way of disposing with the case. Fortunately, the court did not seek the easy way out. It took the firm step of accepting the developments in international environmental law, making them a part of Sri Lankan law. The court affirmed that no legislation was necessary to do this. It could be done simply through the adoption of the principles by the court.

This was an existing precedent in Sri Lankan law at the time the Singarasa Case came to be decided. The Court in Singarasa did not consider it or two other earlier cases in which a monist view had been taken. The fault may lie in the fact that counsel was not asked to consider this factor and address the court on it. The court did what it did without regard to precedent, presumably without awareness of their existence. But, whatever the explanation, a gross error was committed in Singarasa. One can only speculate as to why such a decision, at odds with developments in Sri Lankan Law and completely without support in any jurisdiction of the common law world which is making great advances towards monism. It may be that the court was sharing in a hostile attitude towards the Tamil community and participating in the rhetoric of terrorism that had come to dominate the times. The case has no merit in it. It is one that must be taken as having been decided *per incuriam* and quietly dropped from the jurisprudence of the country.

THE FUTURE OF INTERNATIONAL LAW IN SRI LANKA

In the final part of my lecture, I contemplate the legacy of Mr Goonesekere to the law of Sri Lanka on its future course. His later career was devoted to the staunching of the severe blows that had been dealt on the human rights of many persons. The lasting legacy that the present generation of lawyers would give him would be to ensure that Sri Lanka has the best set of human rights law possible at any given time with an effective compliance mechanism attached. At a time when a new constitution is being made for Sri Lanka, with relative peace restored,⁹⁵ it is an opportune time to devise

⁹⁴ Puvimanasinghe, S., *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia* (Martinus Nijhoff, Leiden, 2007).

⁹⁵ Sadly though, the Human Rights Commission of Sri Lanka reported, as these words were being

laws and institutions that will ensure that there would be no repetition of the harrowing situations that the country has moved through. A repeat of that situation is always possible. A law that would deter the recurrence of these events is the answer to the past. Constant suppression of dissent is no answer for history demonstrates that a suppressed people will always break out of their repression. Stationing armies only creates a sense of oppression that will feed into dissent and later into struggle that will lead ineluctably to the repetition of what has happened in the past. It is the best time to ensure that this will not happen. International law has developed to provide solutions to these problems. The solutions it offers must be heeded.

It is now trite that international law is no longer the law between sovereign states. Rather the protection of the individual against the power of his state has become one of the most important functions of international law. The thrust of the law begins in 1948, well after European dominance of the world had begun to decline and the Third World was beginning to be liberated, with India achieving independence in 1947. Whereas much of international law is Eurocentric in origin, this cannot be said of the international law on human rights. The principle of self-determination, itself the result of the movement for the decolonization of the Third World, was due largely to the movements of the people of the Third World. Though the Declaration of Human Rights which began the human rights movement was widely thought to have been drafted by the United States, it was freely discussed by the states of the Third World which agreed to its precepts. The Latin American jurist, Cancado Trindade described this “humanization of international law” as the “gradual emancipation of the individual from his state to vindicate rights inherent to the human person”. It was a true “juridical revolution” that human beings had the right to be protected against their state. The Hegelian notion of the state as an absolute sovereign entity was a thing of the past.⁹⁶

I digress here to point out that all who have written on the subject regard the trends in human rights as reflecting the essence of Buddhism. This is important for Sri Lanka, which is a predominantly Buddhist country. Professor KN Jayatilleke, the Professor of Buddhist Civilization, at the University of Ceylon, Peradeniya was among the first to consider the relationship of Buddhism to international law. He categorises international law as Eurocentric but notes that there was an international law among Asian states. He notes that the Indian tradition was to extol power, as reflected in Kautilya’s *Arthashastra*. The Emperor Ashoka initially followed this tradition but gave it up on seeing the horrors of battle at the battlefield of Kalinga. He embraced Buddhism. Thereafter, moral foundations in Buddhism became the basis of his statecraft. Jayatilleke suggested that the basis of relations among Buddhist states was rooted in morality. Prof. Jayatilleke quotes a line from *Mahavastu* (A Mahayana Buddhist text): -

written, that in 2015 there were 413 complaints of torture to the Commission and that there were 53 so far in 2016. *Island*, 30 June 2016.

⁹⁶ Trindade, “The Human Person and International Justice” (2009) 47 *Columbia Journal of Transnational Law* 16.

“Bala Cakram hi nisraya Dharma Cakram pravartate”

“The Wheel of Power turns in dependence on the Wheel of Justice”.

Other scholars have later studied the specific relationship between modern human rights and Buddhism. They are in accord in the conclusion that, though the accommodation of a rights centred approach within Buddhism may be a problem, the principles behind modern human rights laws accord with the essence of Buddhism. The Dalai Lama is the leading supporter of human rights in modern times. As the distances diminish in the world, the problems of the suffering of people in faraway places become the problems of the rest of humanity. Buddhism was among the first of religions to require a duty of concern with the suffering of mankind and indeed of all living things. This is a concern now reflected in the writings of modern philosophers. A constitution of Sri Lanka must, leaving aside the question as to state religion, accord with Buddhism, the religion of the vast majority of its people. It must enshrine within it the primacy of the rights and welfare of its people against the state, imposing duties on the state and those who aspire to be politicians who run the state. It must accommodate what is regarded as humanity’s law today. This is relevant at the time a new constitution for Sri Lanka is being considered.

The 1978 Constitution of Sri Lanka considers international law as relevant in some instances. There is Article 156, which makes economic treaties, usually investment treaties, part of Sri Lankan Law. It is said that the Article was inserted in order to please the United States which had made an investment treaty with Sri Lanka. The hope was that such guarantees as contained in the treaty would be confirmed by domestic law so that the foreign investor would have a secure basis on which to get relief from the domestic courts. If the foreigner is to be so favoured, why not the local people? Why not have the rights guaranteed to them by international treaties and international customary law be protected by a constitutional provision?

When a new constitution is drafted it is necessary to ensure that the fundamental rights of the people of Sri Lanka are recognized by ensuring that there is an automatic reception of the international documents on human rights that Sri Lanka had acceded to. As the present constitution puts it, fundamental rights fall within the sovereignty of the people of Sri Lanka not the state. There is no reason why the broadening scope of what is described as “humanity’s law” does not benefit the people of Sri Lanka. One great problem of the developing States, including Sri Lanka, is the elite capture of the State and the persecution of its people. Elite capture depends on maximizing ethnicity and religions to maintain the capture. The breaking of this capture requires the linking of people at the bottom both within and in the different States to each other so that a movement for equality, both in opportunity, in access to State resources and in politics can be built up. Guidance for this can be found in International Human Rights Law with its specific recognition of rights in the political and economic spheres. The gearing of the fundamental rights of the people to the global movements in the field is necessary to ensure that the people of the Third World benefit from the progress that is made in the field of international human rights law, not forgetting the fact, that this branch of the law can, as with any law, domestic or international law,

be manipulated by agencies of elite power, both domestic and international, to benefit their own sectional interests.

It would be consistent with the modern international trends to ensure that there is a provision in the new constitution that requires the courts to adopt the international law in multilateral conventions that Sri Lanka enters into especially in the human rights. The rapidity with which these rights are being spelt out in the international sphere cannot be matched in the domestic sphere. Constitutions once drafted are not changed. The fundamental rights provisions of constitutions cannot ever hope to be as exhaustive as the international human rights documents in stating human rights.

There are sufficient precedents in constitutions around the world for adopting such a course, both in developed and developing countries.

Article 25 of the Basic Law of Germany is an example of this. It reads:

Article 25[Primacy of international law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

The existence of this provision enabled the German courts to deal with the situation that arose in the German Border Guard Cases. These involved East German guards shooting to kill those who sought to escape to West Germany prior to unification. After unification, the liability of the guards arose. The courts held that they were liable, largely on the basis of international law principles that the orders to shoot, though superior orders then ostensibly valid under East German laws, were nevertheless illegal under international law.

Post-independence constitutions in African states also contain similar provisions. Thus, the constitution of Namibia recognized the direct applicability of international law. It contains a provision which makes both customary international law as well as international agreements entered into by Namibia directly applicable in the domestic legal system.⁹⁷ The provision reads:

Article 144 International Law

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

This provision ensures that international law can be changed if the legislature sees the need for such a change. It starts with the assumption that it applies in domestic law unless Parliament changes it rather than adopt the dualist position that it does not

⁹⁷ Tshosa, O., *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Ashgate, Aldershot, 2001).

apply unless Parliament passes legislation making it part of domestic law. Such provisions will ensure that cases like *Singarasa* do not occur again. It will also ensure that developments in international commercial law are kept up to date. The Indian Supreme Court has used new international documents when the internal law is archaic in fields like shipping. The increasing globalisation of commerce is aided by ensuring that the courts can link with new advances that are represented in international legal developments which the executive in Sri Lanka has signed up to but has not enacted legislation on. In the human rights sphere it is vital that there be such a provision so that the advances that are made in these fields are brought into the domestic law to the benefit of the people.

The Ethnic Problem

The solving of the ethnic problem in Sri Lanka is the most important factor for peace within the country without which there cannot be any progress. It has festered on for sixty years. It has not ended as a result of the ending of the civil war. There is still the issue of justice, reconciliation, accountability, reparation, of disappeared persons and freeing of occupied land. There are international law documents that provide guidance on every one of these outstanding issues. These issues have to be ended. But, the most important is to bring about a constitutional solution to the whole ethnic problem.

The problem of is not unique to Sri Lanka. Around the world, the issue of ethnicity and religion befuddle many states, both in the developed and the developing world. In the developed world, they are left over of past conquests. In the developing world, they are the result of states carved up for the convenience of the imperial powers without concern for the people who have been caught up within them. In the developed world, many instances of claims for redress exist. Scotland in the UK, Catalan in Spain, Chechnya in Russia and Quebec in Canada are examples. In Asia and Africa, there are numerous examples of violence generated by ethnicity and identity.

International law has solutions to offer which must be heeded. They are addressed through the principles of equality and self-determination. The best modern exposition of these views come from the decision of the Canadian Supreme Court in the Quebec Reference. The Supreme Court asserts the primacy of equality of all citizens within a state, meaning in the Canadian context, the equality of the French and English Canadians. Where that norm is not observed by the majority community, a right of self-determination arises in the other which could be exercised through a variety of means including secession but also through a wide variety of techniques of devolution depending on the extent and the duration of the violation of the right to equality. The Court ruled that in the Canadian context, as the norm of equality was observed fully with French Canadian Prime Ministers in succession and full rights being given without hesitation to all French Canadians, the need for recourse to self-determination simply did not arise. There has been a general affirmation of this position in many of the international law studies on the issue of self-determination.

Transferred to the situation in Sri Lanka, the situation is unlike that of Canada. There has been prolonged discrimination practised against the minorities. The situation must be addressed through the principle of self-determination. It seems an opportune time to do so. It appears that all Tamil parties within Sri Lanka would be satisfied with wide devolution of powers in provincial governments. Prudence dictates that this solution is accepted after discussion. The use of terminology should not be the determinant of the solution. The restoration of confidence in the state of large sections of the community is through the device of the constitutional recognition of equality and a wide devolution of powers to provincial governments. This would, as time goes, be regarded as the solution that international law favours and the international community will mandate as the solution to situations that bring so much of disorder in the world. Generations to come will suffer as my generation did if a solution is not found at the present moment.

Accountability for State Crimes:

In Sri Lanka, there have been bouts of intense violence when innocent lives were taken by the State. This happened during the JVP uprising and then, during successive instances of violence against Tamils. Accountability mechanisms which ensure punishment so that a deterrence to future instances is created are totally absent. It is evident that Sri Lanka has an international obligation to establish such mechanisms in respect of the incidents that led to the ending of the civil war in 2009 which allegedly involved thousands of civilian casualties. In the light of the past, the constitution should contain provisions that detail mechanisms that provide accountability in the event that the State acts in a similar fashion in the future.

The Role of the Judges.

Every international lawyer supports monism. He or she may have reservations in certain areas but not when it comes to international human rights law. Monism enhances the value of international law particularly in the human rights field. By espousing monism, national courts would give powerful impetus to the enforcement of the prescriptions of international human rights law. Through this means, the law will acquire enforcement machinery. The movement towards monism that has taken place in the different states of the world is an opportunity not to be missed.

The evolution of humanity's law will see national court judges as the trustees of humanity. They no doubt are trustees of the rights of their own people. Their duty is to stand in the face of any oppression practised against them. But, in an increasingly globalized world, national court judges are becoming trustees for the whole of humanity. The terrorism cases in the UK and the US show that the courts were concerned with rights of foreigners. They acted to protect the rights of foreigners from the misconduct of their own states. The situation may not arise in Sri Lanka. But, the onus that the international community increasingly creates through this network of rights in all human beings is to create a duty on national court judges to

act as the trustees of all humanity. This enhances their duty to act as the trustees of the rights of their own people.

As my teacher Mr Goonesekere put it, the People are Sovereign. It is not the Judge, it is not the State, it is not the Parliament, but the People who are Sovereign. “Nowhere in our Constitution is it said that the Supreme Court is Supreme; it is but another court exercising the judicial power of the People who are Sovereign”. It is this people-centred vision that Mr Goonesekere sought to enhance. Working towards the enhancement of their liberties and their right to live in peace and harmony are the highest aims of a lawyer. Mr Goonesekere lived in accordance with these aims of an ideal lawyer. We must remain committed to his vision. We must ensure that the people of Sri Lanka are entitled to the best human rights that international law has to offer.