Chapter - V

The Question of *Locus Standi*

The judiciary in any democratic state constitutes an important organ of the Government established for the promotion and protection of basic human rights, and it plays a pivotal role in translating the human rights and other fundamental rights into reality. This ensures that justice will prevail in the respective countries. The other national human rights mechanisms, no matter how extensive the powers or efficient their operation may be, can never adequately prove a substitute for a properly functioning judiciary. The Constitution of the Republic of Sri Lanka, the supreme law of the land, contains an extensive and impressive array of fundamental rights. Apart from prohibiting torture or cruel, inhuman treatment and degrading punishment, it enshrines the basic fundamental right such as freedom of thought, conscience, religion and freedom from discrimination on grounds of race, religion, caste, language, sex or political opinion. It also spells out the right of an arrested person or detained person, or an accused, including, above all, the right to a fair trial. Constitutional provisions have also been made in respect of ensuring freedom for peaceful assembly, freedom of association, freedom to form and join a trade union, freedom of movement and similar freedoms.

The individual's protection against the violation of the corpus of fundamental rights guaranteed under the Constitution could be guaranteed by making the acts of violation amenable to the jurisdiction of an independent judiciary and also by securing dire accountability for those acts from those who committed them. Therefore the ability to secure prompt judicial intervention not only leads to the detection of violations, but also acts as a proactive deterrent to would be violators. Therefore, it behoves the judiciary to approach the constitutional provisions in a flexible manner, so that they can be adapted to changing conditions. To fulfill these objectives the judiciary should

constantly evolve and initiate new and realistic innovative methods of interpretation of constitutional provisions and devise appropriate techniques for this purpose.

One impediment against access to justice and redress is the concept of locus standi which requires that only the person who has suffered the legal wrong could approach a court for justice. This is a threshold issue which has to be resolved before the merits of an application are determined, as it looks for an effective nexus between the petitioner and the injury suffered. The Judiciary is by this principle, only a dispute resolving machinery. But access to justice is a value of fundamental importance recognized by the Universal Declaration of Human Rights, 1948.[1] Similarly, the International Covenant on Civil and Political Rights 1966 provides for access to justice in an unequivocal manner, through many of its Articles.[2] Besides, numerous other international and regional human rights instruments provide for uninhibited access to justice to citizens regardless of their race, caste, creed, gender or any other like distinction.

Under Article 126(2) of the Sri Lanka Constitution only the person whose fundamental or language right has been infringed, or is about to be infringed by executive or administrative action, who could seek relief or redress. This imperative constitutional requirement not only shuts the door of access to justice in many deserving cases, but also has led to some anomalous situations. In the event of the death of a person caused by torture or cruel, inhuman or degrading treatment or punishment the dependents or heirs stand precluded from seeking redress. This anomalous situation has denied the legitimate claims of dependents and other heirs of torture victims, although the legal system provides for remedies through the payment of compensation to victims of torture, in compliance with Article 14 of the U.N. Convention on Torture.

This anomalous situation is clearly exemplified by the case of ***Somawathie v Weerasinghe***.[3] In this case the wife of a person whose rights were alleged to have been infringed applied for relief on the person's behalf. When objection was taken that the wife had no standing to maintain the application, the majority of the judges held that the wife had no right to apply for relief. The majority decision in this case, it should be observed, was based on the literal interpretation of the Constitutional provision, and they had taken a very circumscribed view of the norms and the fundamental spirit of the Constitution. It was possible for the court to perceive that the wife underwent mental torture perhaps more intensely than the physical torture suffered by her husband.

The majority decision in ***Somawathie v Weerasinghe*** could be contrasted with the case of ***Ansalin Fernando v Sarath Perera and others***.[4] In this case the mother of the victim alleged that her son was subjected to inhuman and degrading treatment in violation of Article 11 of the Constitution. Also his right against arbitrary arrest and detention was affected in violation of Article 13 of the Constitution. The Court found for the petitioner who was the mother of the victim and awarded compensation in a sum of Rs 25,000/-. It was implicit in the judgment that it was possible for the mother to seek relief on behalf of her son who had sustained injuries as a result of torture, in violation of Article 11 of the Constitution. It was unfortunate that the principle encapsulated in the case of ***Ansalin Fernando v Sarath Perera and others***[5] was lost sight of in the subsequent case of ***Somawathie v Weerasinghe*** although (Justice A.R.B. Amerasinghe) who had participated in the earlier case had permitted the mother to claim relief on her son's behalf. When his attention was drawn to his own decision in ***Ansalin Fernando v Sarath Perera and others***,[6] it was his position that unlike in the case of ***Somawathie v Weerasinghe***,[7] *locus standi* was not an issue in the case of ***Ansalin Fernando v Sarath Perera***. It was also his view that had the issue of *locus standi* been taken up in the Ansalin Fernando case, the conclusion would have been different. His Lordship Justice Amerasinghe who delivered the majority judgment

in the ***Somawathie*** case was of the view that the Constitution should be interpreted according to the intent of the makers of the Constitution and where the words are clear and precise then the words do the best to declare that intention. In a rigid and inflexible approach to the interpretation of the Constitution, it should be observed, rights ensured by constitutional guarantees would be reduced to mere illusion.

The change of attitude to the whole question of *locus standi* in fundamental rights applications came about with the ruling given in the case of K***.D. Sriyani Silva v Chanaka Iddamalgoda and others***[8] when two preliminary objections were taken to the hearing of the application. It was contended, that the petitioner, who was the wife of the victim who had succumbed to the injuries inflicted by the police, had no *locus standi* to maintain the application. It was also contended that the application was filed out of time, over a month later. The Court (Her Ladyship Shirani Bandaranayake and His Lordship Chief Justice Sarath N. Silva agreeing, and with His Lordship Edussuriya disagreeing) determined that the petitioner, as the wife of the victim, was entitled to claim relief by way of fundamental rights application. The Court also held that the petitioner's application was within the prescribed time and that the petitioner was entitled to proceed with the matter. Subsequently, His Lordship Fernando (with Justices Yapa and J.A.N. de Silva agreeing) after going into the merits of the application awarded a sum of Rs 700,000/= by way of compensation to the wife and the minor child of the deceased for the violation of the fundamental rights guaranteed under Articles 11, 13 and 17 of the Constitution. The minority view (Justice Edussuriya) in the case of ***K.D. Sriyani Silva v Chanaka Iddamalgoda and others***[9] represents this thinking His Lordship (disagreeing with the majority view) gave a very restrictive interpretation to Article 126(2) and upheld the preliminary objection taken to the maintenance of the application because the wife of the victim of torture who succumbed to the injuries had no *locus standi* to maintain the application.

It is important for the Court when interpreting the constitutional provisions to adopt an innovative and dynamic rather than a static and conservative approach. The object and purpose of the Constitution as providing an instrument for the protection of basic fundamental rights requires that its constitutional provisions need to be interpreted and applied so as to make its safeguards practical and effective and not to remain theoretical and illusory. It is not always necessary for the Court to adhere to a formal doctrine of precedent in interpreting constitutionally guaranteed fundamental rights. The Court wherever possible could follow its previous decisions, if they meet the needs of contemporary society. But previous decisions should not deter a Court from reviewing and reconsidering its own decisions and principles in the light of new developments since they had been first articulated.

The imperative constitutional requirement contemplated in Article 126(2) which inhibited and impeded access to justice to many legitimate petitioners was also substantially whittled down with the promulgation of a new set of Supreme Court Rules relating to Court procedures framed under Art 136 which came into effect from January 1992 of the Constitution empowering the Court to promulgate rules. The new set of rules which it framed radically altered the attitude of the Court to the question of access to justice and brought a great measure of relief as it opened the door to the vast majority of the illiterate and underprivileged segment of the population to seek relief and redress.

Rule 44 (7) of the Supreme Court Rules of 1990 provides as follows:

> "(a) Where any alleged infringement, or imminent infringement, of any fundamental right or language right by executive or administrative action is brought to the notice of the Supreme Court, or any judge thereof, in writing, such matter may be referred to the Chief Justice, and in accordance with such directions as may be given by him from time to time, to a single judge sitting in Chambers.

(b) If it appears to such Judge that such complaint discloses, prima facie, an infringement or imminent infringement of a fundamental right or language right of any person whether such person be the complainant (sic.? person aggrieved) or not, he may in his discretion direct that such complaint be treated as a petition, in writing under and in terms of Article 126(2), notwithstanding non-compliance with any of the foregoing provisions of this rule if he is satisfied that

(i) such person does not have the means to pursue such complaint in accordance with the foregoing provisions of this rule, and

(ii) such person has suffered, or may suffer, substantial prejudice by reason of such infringement or imminent infringement,

and may further direct the Registrar to refer such complaint to the Legal Aid Commission, or to any Attorney-at-Law who is a member of any panel or organization established for such purpose, for the purpose of enabling the preparation and submission of an amended petition, affidavits, documents, written submissions, and other material in the clarification and support of such complaint. Such complaint shall thereupon be deemed to be a petition filed in the Supreme Court on the date on which such complaint was received, and shall be dealt with under and in terms of rule 45, in like manner as other applications under and in terms of Article 126(2) of the Constitution.

Provided that where the complainant is not himself the person aggrieved, the court may direct the Registrar to ascertain from the person to whom such complaint relates whether he desires that action be taken in respect of such complaint. If such

person notifies the Court at any time that he does not desire that any action be taken in respect of such complaint, all proceedings in respect thereof shall forthwith stand terminated.

(c) The provisions of this sub-rule shall come into operation on such day as the Chief Justice shall direct".

By notifications dated 16 December 1991, both the main rules (Supreme Court Rules 1990) and sub-rule 7 of Rule 44 were brought into operation on 27 April 1992.

Under these rules, the Court was able to entertain applications from numerous persons who initiated applications for redress by simply addressing an informal letter addressed to the Chief Justice. They came to be known as "Boosa Cases" because most of the early petitions came from persons who had been held in custody at the Boosa Detention Camp for alleged participation in insurgent activities. The petitioners usually prayed that they be either indicted or released. Their applications were referred to the Bar Association of Sri Lanka. Attorneys-at-Law deputed by the Bar Association then went to the places of detention, took instructions from the complainants, filed petitions and affidavits on their behalf, and appeared for them at the hearing. As a result of these procedures, the authorities were stimulated into considering the evidence and deciding whether persons should continue to be detained. Many of them were released, either immediately or after a period of rehabilitation. Others were indicted on or before a date notified to Court.[10]

Jurisprudence from other jurisdictions

The Indian Supreme Court has made a remarkable contribution to the development of fundamental rights by widening the access to justice and evolving the strategy of public interest litigation. The focus of the Indian Judiciary has been to provide redress for violation of

fundamental rights rather than to focus on the methods by which such violations can be placed on the agenda of the Court.

With its preoccupation with social action litigation the judiciary has been constantly seeking new methods to bring justice to a larger number of people who were deprived of access to justice by reason of their poverty, illiteracy and ignorance. This has been made possible by the presence of more flexible constitutional provisions than are found in the case of Sri Lanka.

Article 32(1) of the Indian Constitution provides:

"The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed".

Similarly Article 32(2) provides that the Supreme Court shall have the power to issue directions or orders or writs, whichever may be more appropriate for the enforcement of any fundamental right conferred by Part III. These pivotal Articles have provided the judiciary a lever to bring justice to many who were originally denied relief. The basic concepts and doctrines which have hitherto impeded access to justice, has come in for attack and reappraisal by the judiciary through the strategy of employing public litigation interest, and one of the main concepts which has come under review is the *locus standi*. There appears to be almost complete jettisoning of the requirement of *locus standi* in many cases, as the Court does not look for a nexus between the petitioner and the complainant when adjudicating fundamental rights issues.

The observations made by Justice Bhagwati in ***Gupta v Union of India***[11] would be pertinent in this connection. Where a legal wrong or legal injury is caused to a person or to a determinate class of persons ... and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically

disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ. In the case of ***People's Union for Democratic Rights v Union of India***[12] Justice Bhagwati observed that the public interest litigation is intended to promote and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed or unredressed.

The Sri Lankan Court has consistently looked to the jurisprudence of other countries for guidance in the construction and application of fundamental rights and fundamental freedoms, particularly concerning the violations of Articles of the Constitution relating to personal security and liberties. This is exemplified by the case of ***Velmurugu v AG***[13] wherein his Lordship Justice Wanasundera quoted with approval the observations of the European Commission on the question of proof of torture or cruel, inhuman, degrading treatment or punishment. Similarly in ***Wijenayake v Chandrasiri and others***[14] His Lordship Justice Kulatunga relied on ***Thomas v Jamaica***[15] to support the contention that the failure to give medical treatment for injuries sustained as a result of a brutal assault by police officers was cruel and constituted a violation of Article 11 of the Constitution.

In this connection, Justice Bhagwati's formulation at the Commonwealth Jurists decided on 26 February 1988, in Bangalore, would be pertinent.

"1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.

5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognized and applied by national courts, this process must take into full account local laws, traditions, circumstances and needs.

7. 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.

8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practicing lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms".[16]

In the past two or three decades several states have committed themselves to the norms and principles enshrined in many major human rights instruments. Thereby they have taken upon themselves the obligation of implementing in their countries the human rights standards to which they have subscribed, at their national level, at all times.

These basic human rights to which nations have subscribed could be promoted and protected at national level, through such media as adequate legislation, strengthening of democratic institutions and establishing an efficient and vibrant judiciary and other mechanisms.

Problems in Universal Jurisdiction over violation of Rights and Offences of Torture

When a State acts in breach of its obligations undertaken under international law it incurs a liability for the commission of those acts. When the liability of the State is incurred by an act committed by its agencies it is often referred to as "State responsibility", although there is no certainty in regard to the juridical basis on which the offence is attached to the State. While some have attempted to describe it on an analogy based on English Law of tort others have based it on similarities found in the law of contract, particularly where an infraction of treaty provision has taken place. But the International Law Commission, following a dual approach, has categorized certain acts as "international delicts" and violation of international obligations of great magnitude on a large scale such as slavery, genocide and apartheid as international crimes[17]. Just as much as the State incurs liability for acts committed in breach of international obligations, individuals in certain circumstances may be held personally liable for acts committed in breach of International Law. An act of piracy committed on high seas would exemplify an instance of this when any State could assume jurisdiction in respect of such an act committed, on the basis of universality of jurisdiction.

International law has made many more similar acts criminal by conferring authority on any state to assume jurisdiction in regard to those acts. The distinctive feature in the authority thus conferred on the state is that the assumption of universal jurisdiction in those instances does not depend on the nationality of the person who committed the act or on the place where it was committed. The exercise of universal jurisdiction in this manner can either take a form of permissive or compulsory character. In the case where a state is permitted to assert jurisdiction, a state may or may not assert its jurisdiction, but in the case of compulsory jurisdiction a state is obliged to do so. The Convention on the Prevention and Punishment of the Crime of Genocide (1948)[18] which deals with serious crimes against humanity during the World War attracts universal jurisdiction for the crimes committed within the territory of a state in the absence of international armed conflict. The Convention does not specifically cast an obligation on states to assume universal jurisdiction in respect of crimes committed under International Law, but it only requires trial by a competent tribunal of the state in the territory in which the act was committed or by such international penal tribunal as may have jurisdiction over offences. Yet it can be safely assumed that universal jurisdiction nevertheless was intended by it. A survey of developments which led to the assertion of universal jurisdiction demonstrates that in certain circumstances international law has permitted states to assume universal permissive jurisdiction in regard to certain criminal acts and compulsory or obligatory jurisdiction in regard to others.

A state which is called upon to assert universal adjudicative jurisdiction in respect of fundamental human rights such as against the practice of torture, may be forced to contend with the problem of reconciling the competing imperatives of a fundamental premise of international law referring to the sovereignty of states and the universal character of human rights norms which states are required to observe by international obligation, whether those obligations be derived from treaties, customary laws, or other recognized sources such as general

principles of law. As states are considered equals juridically in general international law, assertion of universal jurisdiction over another sovereign state would be likely to be viewed with disfavour by members of the international community. A state may be obliged to adhere to general international law without specific ex ante consent, but to expect it to submit to judicial or adjudicative authority is something different. Still, development of international human rights law along with international criminal law, particularly in the aftermath of Nuremburg and Tokyo trials has had an immense impact on the traditional concept of sovereign equality of states, fundamentally altering prevailing positivist conceptions of international law. With the revival of the natural law concept during the 20th century, human rights came to be regarded universal in scope accruing to individuals by reason of their humanity; and practice of torture, particularly systematically by states, is now generally treated as violation of jus cogens and as a crime against humanity in respect of which states could assume universal criminal jurisdiction under customary international law although exercise of such jurisdiction has been few and far between. The assumption and exercise of universal criminal jurisdiction in respect of extraterritorial acts of torture has also been provided for by treaty provisions such as the Geneva Convention[19] and the Convention Against Torture (CAT)[20]. The Geneva Convention, 1949, which addresses the problems of torture through a number of provisions in explicit terms, has cast an express obligation on state parties to assume universal jurisdiction in respect of grave breaches of its provisions. Similarly, CAT too has by certain provisions recognized universal criminal jurisdiction in respect of acts of torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is a recent international treaty which recognizes that universal jurisdiction cast an obligation on state parties to ensure that torturers who have committed acts of torture be dealt with as criminals. In addition, to imposing a prohibition against torture in absolute terms within a context of domestic criminal law, states are obliged to extend their co-operation in international criminal

enforcement endeavours by taking measures either by prosecuting any who are accused of having committed torture within their own criminal justice system or extradite the offender to a foreign country which has assumed criminal jurisdiction in respect of the act of torture committed by that person. Therefore CAT recognizes and establishes a form of universal criminal jurisdiction against torture even in respect of acts of torture committed abroad so that torturers would not enjoy safe haven from investigations, prosecution and punishment. Although universal criminal jurisdiction has been recognized by CAT only in a few cases universal criminal jurisdiction nevertheless has been exercised.

The prohibition of torture as a peremptory or as a jus cogens has been affirmed in international tribunal for the former Yugoslavia in the case of ***Prosecutor v Anto Furundrija***. The Tribunal stated: "Because of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

> Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.[21]"

This is all the more important in the light of massive violation of basic human rights taking place in the world today.

Despite the fact that many states have now been vested with authority to launch a prosecution against crimes of torture, war crimes and crimes against humanity committed abroad, only very few states have exercised such universal criminal jurisdiction. The exercise of universal criminal jurisdiction has been limited to a few cases such as that of Auguste Pinochet, and those accused of having committed war crimes against humanity in the aftermath of the situations that arose in countries like former Yugoslavia and Rwanda.

As most acts of torture defined by the CAT would constitute a civil wrong of some sort practically under every legal system the question what prevents a person from successfully pursuing an action for tort against a person who has committed an act of torture abroad in a domestic forum assuming universal jurisdiction needs to be examined. The question whether the assumption of criminal jurisdiction in respect of acts of torture committed abroad can be extended to civil proceedings instituted for the purpose of seeking civil remedies against those who have committed acts of torture outside the forum of a state also needs to be scrutinized in the light of massive violations of basic human rights taking place in the world today. Unlike the universal criminal jurisdiction assumed by states in respect of acts of torture committed on a foreign land, the question of universal civil jurisdiction in respect of acts of torture committed abroad remains relatively unexplored, and has not received due attention from the international community.

Seeking redress for tort by way of civil action in respect of torture committed abroad has certain advantages which the criminal prosecution for torture committed abroad does not offer. Even though the practice of torture is treated as a violation of a peremptory norm and crime against humanity in respect of which states could assume universal criminal jurisdiction under customary international law, enforcement against those violations also have been mainly dependent upon the willingness of the state to institute proceedings against those

responsible for violence in their domestic courts, and in most cases they have confined themselves to the establishment of ad hoc international criminal jurisdiction to deal with the particular situations. As long as international law continues to be state based, domestic enforcement of violation of fundamental human rights would turn out to be a difficult task. In spite of the fact that an express obligation has been cast on states to assert jurisdiction in respect of crimes of torture, and certain other crimes involving violation of fundamental human rights under international law, the assertion of universal jurisdiction has been seen only in a limited number of cases such as in prosecuting Adolf Eichmann in 1961[22] and John Damjanjk in 1933[23]. The Pinochet case[24] already referred to provides a recent example.

Therefore bestowing a right on a victim of torture to pursue a civil remedy for tort in a domestic forum in respect of acts of torture committed abroad would be an important complement and adjunct to criminal law remedy and has many advantages over it.

It is true that victims of torture are constrained by lack of financial and other institutional resources to institute civil proceedings in regard to torture than when states undertake prosecution. But states have little incentive and interest to launch investigations and prosecution in respect of acts of torture committed in another territory as it may be accused of unwarranted interference in internal affairs of the country. The Spanish Magistrate, Baltsar Garza for acting in nine situations as spoken of above, incurred strong displeasure and opposition from the Government of Spain and its prosecuting authorities. Perhaps the victims may have to overcome problems inherent in the conduct of universal civil proceedings. First of all, the act of torture would have occurred in a place inaccessible for the judicial body which seeks to asserte civil jurisdiction. Evidence to establish the act of torture may not be immediately and readily available. If the act of torture involves many perpetrators it would cause additional and immense problems to the victim to trace the perpetrators. There may be little or no forensic

evidence to establish the extent of injury. As for witnesses, their whereabouts may not be known and they can be scattered in other countries: the victims will have difficulty in tracing them and they may be fearful and traumatized to volunteer as witnesses. There will also be language problems if the witnesses were to testify in a different language, other than the one used by the judicial body. There will be problems of interpretation. But with difficulty this hurdle can be overcome, but it is indeed formidable.

Since each state has its own laws there may be other jurisdictional problems and the applicable international law may be unclear. Even this obstacle can be sorted out. The procedural and legal problems standing in the way of assertion of universal jurisdiction in respect of civil remedies are heavily outweighed by the great merits it offers to victims in cases of gross and large scale violation of international law. Assertion of such universal jurisdiction can guarantee absolute independence and objectivity as the courts of the state in which the act of torture occurred may not be in a position to dispense justice in an impartial manner free from political overtones and biases as any other state may be.

Human rights regimes are now based on a weak structure of moral rather than material independence. In such a normative environment of human rights violations occurring abroad seldom have an impact on another state that is direct enough to justify retaliation or any other serious action. Although some states have been vested with the right and authority to assert universal jurisdiction in respect of human rights violations committed on foreign territory, such assertion has been made dependent on the sanction of the highest level of officials in the administration of justice such as the Attorney General. Canada provides an example for a situation where initiation and prosecution of offenders for war crimes against humanity can be undertaken only by the Attorney General, according to the practice of the Commission of Inquiry on War Criminals. Therefore launching of

criminal prosecution for violation of fundamental human rights poses a grave problem to a victim of torture. As far as United States is concerned, assumption of civil jurisdiction over civil actions in respect of torture committed on foreign lands, can be justified by reference to treaty obligations and domestic legislation in the form of Alien Tort Claims Act (ATCA)[25] and Tort Viction Protection Act (TVPA)[26], but can any other state which has not subscribed to treaty obligations of CAT and not put in place domestic legislation comparable to the ATCA, TVPA assume civil jurisdiction in respect of acts of torture committed abroad? Availability of such an action in tort would prove to be of immense benefit to the would be plaintiffs who have suffered an act of torture at the hand of a foreign perpetrator. This would be all the more important in the absence of an effective institutional mechanism of enforcement for egregious violations of basic human rights norm. It has been suggested, that even in the absence of either a treaty or enabling domestic legislation in the form of CAT it may be possible for a state to assume universal civil jurisdiction in respect of acts of torture committed abroad by the preeminent status, the prohibition against torture enjoys as a jus cogens and ergaomus obligation under general international law.

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1 Article 8, Universal Declaration of Human Rights.

2 See Article 3, (a), (b), (c)

3 Somawathie v Weerasinghe and others SC Application 227/88 SCM 20 November 1990 (1990) 2 SLR 121

4 Ansalin Fernando v Sarath Perera and others SC Application No. 18/87 decided on 21st May 1990

5 See Note 5

6 Ansalin Fernando, see Note 5

7 See Note 4

8 K.D. Sriyani Silva v Chanaka Iddamalgoda and others SC No. 471/2000 FR

9 See Note 9

10 Rules of the Supreme Court

11 Gupta v Union of India AIR 1982 February SC 149. See also Mario Gomez' article on Locus Standi and Access to Justice.

12 People's Union for Democratic Rights v Union of India (The Asian Games Case) AIR 1982 SC 1473

13 Velmurugu v Attorney General (1981) 1FRD 180, (1981) 1 SLR 406 (SC)

14 Wijenayake v Chandrasiri and others SC Application 180/935 SCM 22 March 1955

15 Thomas v Jamaica No. 321/1988 Views of UNHRC 19 October 1993 (1994) 8 41B 91:

16 The Colloquium Domestic Application of International Human Rights norms held in Bangalore on 26 February 1988. See also Amarasinghe A.R.B. "Our Fundamental Rights of personal security and physical liberty" Sarvodaya Book Publishing Services.

17 International Law Commission Yearbook of the International Law Commission (1976) Vol ii, part 2 (N/CN 4 SER A/1976) Add.1 (art 2) Chapter III B: Draft Articles on state responsibility Article 9. See Nigel Rodley The Treatment of Prisoners under International Law. Clarendon Press Oxford 1987.

18 Convention on the Prevention and Punishment of the Crime of Genocide (1948) For Example Article 147 of the Convention IV on the treatment of civilian population provides: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present convention, willful killing, torture or inhuman treatment including biological experiments willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the force of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present convention taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" See Nigel Rodley Note 1.

19 Geneva Convention 1 Article 49; Geneva Convention 11, Article 50; Geneva Convention 111 Article 129; Geneva Convention IV, Article 146. See Nigel Rodley Note 1

20 International Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984. Sri Lanka acceded to this international convention on 3rd January 1994.

21 Prosecutor v Auto Furundzija case No. IT-95- 17/1T 10 December 1998, International Criminal Tribunal for the former Yugoslavia.

22 AG of Israel v Eichman (1961) 361LR5

23 Demjanjuh v Petrovsk (1985) 776 F 2d 571

24 Regina v Bartle and the Commissioner of Police for the Metropolis and other exparte Pinochet 38 1LM (581) (1999)

25 Alien Tort Claims Act

26 Torture Victim Protection Act