Vol. 4, No. 4 August 2005 ISSN 1811 7023

article 2

2(3). Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

A sister publication of Human Rights SOLIDARITY

About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

Contents

The Optional Protocol to the ICCPR as a means to address degenerating law & institutions in Sri Lanka

Basil Fernando, Executive Director,
Asian Legal Resource Centre, Hong Kong

In ancient times, when Sinhala kings and monks perceived that the local practice of Buddhism was degenerating they sought to reinvigorate it with input from Buddhist centres abroad. Perhaps a parallel may be drawn between the needs of Sri Lanka's religious institutions in the past and those of its legal institutions today. It is an undisputed fact that the country's legal institutions are in a state of disarray and debasement. Under the circumstances, seeking help from outside to revive and strengthen them is not shameful.

One place from which outside assistance may already be obtained is the United Nations Human Rights Committee. This has been possible since Sri Lanka became a state party to the first Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) in 1998.

The ICCPR & its first Optional Protocol

By ratifying the Covenant itself in 1980 Sri Lanka agreed to bring the principles it embodies into the domestic code of basic civil and political rights. The state committed itself to affording its citizens an objective body of standards upon which to establish their rights. This means that when citizens have difficulty realising their rights they can refer to the norms laid out in the Covenant and make demands for the necessary institutional or other changes. In this way the Covenant provides a set of benchmarks against which the growth or degeneration of domestic law and practices may be measured. Sri Lanka is also obliged to report periodically to the UN Human Rights Committee on its progress towards compliance with the Covenant.

The first Optional Protocol follows logically from article 2 of the Covenant, which obliges state parties to put in place measures that will give effect to the rights it guarantees and afford remedies where they are violated. To ensure this, article 2 stipulates that

persons who believe their rights have been violated should be able to lay claims before competent judicial, administrative and legal authorities, and that where remedies are granted they should be enforced.

By becoming a state party to the first Optional Protocol, Sri Lanka has given its citizens the opportunity to appeal directly to the UN Human Rights Committee where their rights under the Covenant are violated and when they have taken all possible steps to obtain a remedy through domestic law and institutions. The Committee assesses grievances in accordance with the standards laid out in the Covenant, giving citizens the chance to test whether these are well-founded and whether their rights could be better safeguarded.

"In becoming a party to the first Optional Protocol, Sri Lanka opened a new avenue through which to address the chaos in the country's faltering legal institutions"

Significance of the first Optional Protocol for Sri Lanka

In becoming a party to the first Optional Protocol, Sri Lanka also opened a new avenue through which it may be possible to address the prevailing chaos in the country's faltering legal institutions. Constitutional remedies for rights violations in Sri Lanka are extremely limited and hard to obtain. The legislative process is slow and defective; unable to take the necessary steps to strengthen constitutional law and its agents. Hardly any laws have been developed in recent years to revitalize institutions dealing with the rule of law in the country. The only important provision of recent times was the 17th Amendment to the Constitution, which was passed during parliamentary upheaval. However, even this amendment has not been worked out in the detail needed to realise its potential.

The average victim of a rights violation in Sri Lanka is now in an extremely weak position. Under the pretext of emergency and anti-terrorism laws, security forces have in recent decades been given virtually unlimited powers to arrest, detain, torture, kill and disappear persons of their choice. Paramilitary units have been formed outside of the established agencies and have been used to commit extremely cruel and violent acts by proxy. In some parts of the country the state is still without any practical role; people in those areas are entirely without safeguards of their rights. Meanwhile, extrajudicial killings of recognised criminals are openly advocated and there is diminishing overall control of the police. All faith is lost in the courts due to the extraordinary delays in hearing cases and popular perception that they have little power to carry out their decisions.

The situation in Sri Lanka is not merely far removed from the promise of the ICCPR, it is in contradiction to the ICCPR. Widespread torture, extrajudicial killings, disappearances and the manifest lack of effective remedies through courts stand in stark contrast to the state's obligations under the Covenant.

One government after another has been questioned about this contradiction, and each has had various excuses. One often repeated excuse is that the violent conflicts in the country over

recent decades have affected its ability to realise human rights. In international gatherings the country has sought sympathy and understanding by implying that under the circumstances it could not have done any better.

"The administration of justice in Sri Lanka today is a tragicomedy"

Another often heard excuse, particularly from certain government agencies, is that there are not enough resources to go around. The judiciary has claimed that its limited budget impairs its ability to give proper training to practitioners. There is also a complaint that there are not enough court houses. The Attorney General's department, which also functions as the main prosecuting agency, has similarly claimed that it does not have the money to hire enough lawyers with which to deal with its workload. For their part, the police claim that they have not been given money with which to establish a modern forensic facility; it was once revealed that even fingerprinting is not being done to a minimum standard. The police also complain that they lack funds for training, vehicles and communications. Due to poor training, they apologise unofficially, torture continues to be used routinely in criminal investigations. Institutions created through the 17th Amendment to the constitution to exercise a corrective function on justice institutions also complain about inadequate resources.

In short, the administration of justice in Sri Lanka today is a tragicomedy. The problems faced are vast; the manner of dealing with them is ridiculous. As a result, the situation gets worse each day. Reading newspaper editorials, one finds only desperation and subdued resentment expressed by way of exhortations to leaders for change. Everywhere in the country there is a hidden cry for the loss of justice. This cry is accompanied by a hidden anger over deep injustice and the lack of remedies for victims. Unrecognised and unaddressed, this anger is liable to explode with shattering effects in all areas of Sri Lanka's social and political life.

The Sri Lankan judiciary and international law

Sri Lanka's higher judiciary has generally taken a very conservative view of the country's obligations under international laws such as the ICCPR. While other countries have assimilated such covenants into domestic law, the Sri Lankan judiciary has shown little enthusiasm for the same. The body of domestic case law, particularly on the interpretation of fundamental rights, has not expanded to include the riches of the international jurisprudence that has developed rapidly during the last 60 years.

At one time it was thought that Sri Lanka had all the legal luminaries it needed to be capable of developing strong domestic jurisprudence. However, no such belief exists anymore. Even within the legal community there are deep expressions of anger at the dismal state of the profession. Not a single voice can now be heard praising the country's great legal traditions, while a huge chorus sings a requiem to justice. The resistance that once

existed to "external interference" in the development of law is all but gone. It is time to admit a new role for international agencies in the development of new and enlightened jurisprudence in Sri Lanka.

> "Sri Lankans who have taken complaints of rights violations by the state to the UN Human Rights Committee should be regarded as pioneers of a new era of human rights in their country"

Pioneers of a new era in human rights

The status of people in Sri Lanka will be equal to others elsewhere in the world only if their rights are respected to the highest degree. Unfortunately, Sri Lanka has a poor record in this regard, as does all South Asia. Despite being called a 'religious' continent, most occupants of the region have historically been treated as of very little importance. People have over the centuries learnt to respect the state and its rulers, rather than vice versa. Domestic jurisprudence has not broken this mentality.

So it is that those Sri Lankans who have taken complaints of rights violations by the state to the UN Human Rights Committee under the first Optional Protocol of the ICCPR should be regarded as pioneers of a new era for the application of more developed human rights norms in their country.

Each of these persons has challenged some very important aspects of prevailing jurisprudence and legal practice in Sri Lanka. One questioned the manner in which the contempt of court law is applied and obtained an historic order for the development of new law and human rights principles in the country (the Tony Fernando Case). Another proved to the Committee that inordinate delays in hearing his court case amounted to a violation of the ICCPR (the Lalilth Rajapakse Case). A father complained of the disappearance of his son and succeeded in getting an order for the state to provide him with an effective remedy, including a thorough and effective investigation, and the son's immediate release if he was still alive (the Sarma Case). Yet another applicant challenged the prevailing jurisprudence on the use of confessions in cases coming under anti-terrorist legislation, and the Committee held that a trial conducted in a Sri Lankan court was not a fair trial under the Covenant (the Nallaratnam Singarasa Case). One litigant successfully claimed that he was being prosecuted by the state without any cause but to violate his rights, including freedom of expression (the Victor Ivan Case). And a member of parliament convinced the Committee that his life had been put at risk, in violation of the Covenant, by a speech of the president (the Jayalath Jayawardena Case).

Every one of these cases has profound implications for criminal justice and human rights in Sri Lanka. In some instances the UN Human Rights Committee found that the violations of rights guaranteed by the ICCPR arose from orders made by Sri Lankan courts, including the Supreme Court itself. One judgment challenges the role of the Attorney General in conducting prosecutions. Another takes issue with the delays undermining

the work of the country's courts. The executive president's own powers have also been challenged regarding the public statement she made against a member of parliament.

"The decisions of the UN Human Rights Committee can serve as guiding lights for a new generation of Sri Lankan lawyers"

Prospects to revitalise constitutionalism in Sri Lanka

All these cases open doors for further questions about Sri Lanka's human rights obligations with reference to the existing structures for administration of justice and governance. And these further questions are desperately needed. Since the 1978 Constitution was promulgated, debate on matters of national importance has been diminished to the point that it is now all but non-existent. In fact this is a direct consequence of the 1978 Constitution, the very purpose of which was to displace liberal democracy while retaining its terminology on the separation of power. It was tailor-made to legitimise the arbitrary misuse of power by a single person. Ironically, the 1978 Constitution itself spelled the death of constitutionalism in the country.

To revitalize debate on constitutionalism and reconstruct the foundations of liberal democracy requires broad discussion of democracy and human rights. Some try to confine this discussion to narrow points about whether or not Sri Lanka should be a unitary or federal state. Under the present constitution such talk is meaningless. Another amendment pushed through for political convenience will amount to more constitutional mockery. It is not possible to turn a constitution that was written to defeat liberal democracy into one that will make sense in terms of liberal democracy.

The decisions of the UN Human Rights Committee can serve as guiding lights for a new generation of Sri Lankan lawyers and others concerned with application of the law in the country. The legal education they get is an artifact, consisting of mindless references to certain legislation and case law. It follows that the country's laws and legal practices are primitive by comparison to those of other jurisdictions, and its legal intellects are completely unprepared to deal with the extremely complex and sophisticated problems facing the country now and in the future. If young minds are opened to modern ways of interpreting and developing law they may be in a position to develop the more dynamic and hopeful jurisprudence that the country needs. Careful attention to the decisions of the UN Human Rights Committee in cases from Sri Lanka will contribute much towards this end.

A note on the contents of this publication

The contents of this publication (released simultaneously as a special edition of *article 2*, vol. 4, no. 4, August 2005, and a special publication for use by legal professionals in Sri Lanka) are the UN Human Rights Committee decisions in the six cases mentioned above. The text of each decision is unedited, and as given in full by the Committee. The full texts of all six decisions are preceded by a set of synopses written by Shyamalie Puvimanasinghe for the Asian Legal Resource Centre, Hong Kong. Regular readers of *article 2* may find that some of the publication's layout has been altered to accommodate the dual publication.

Synopses of UN Human Rights Committee Decisions on communications from Sri Lanka

Tony Fernando Case

Jailed for raising voice in court: The Tony Fernando Case

Articles 7, 9, 10(1) 14(1), (2), (3)(a), (b), (c), (d), (e) and (5) and 2(3) of the International Covenant on Civil and Political Rights (the Covenant) — Articles 5(1), 5(2)(b), 5(4) of the Optional Protocol to the Covenant — contempt of court — incompatibility of Article 105(3) of the Constitution with articles 14 and 19 of the Covenant — exhausting domestic remedies — interim measures — Rule 86 of the rules of procedure.

Synopsis

Tony Fernando came before the UN Human Rights Committee (the Committee) claiming that his rights under the Covenant were violated when he was summarily convicted of contempt of court by the Supreme Court of Sri Lanka on 6 February 2003 and sentenced to one year's rigorous imprisonment. According to him, approximately two weeks later, a second contempt order was issued by the Chief Justice, the operative part of which stated that:

> The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one-year rigorous imprisonment…

The author was imprisoned immediately and claimed that while in prison he was severely assaulted by prison guards. During this time he was also visited by the UN Special Rapporteur on the independence of judges and lawyers, who expressed concern about the case.

In March 2003 the author filed a fundamental rights petition to the Supreme Court, which remains pending before court. He also submitted an appeal against his conviction for contempt on the grounds that no charge was read out to him before conviction, that the sentence was disproportionate, and that the matter

should not be heard by the same judges, since they were biased. Nonetheless the same three judges who convicted him heard the appeal, which was dismissed.

The author claimed violations of his rights under several articles of the Covenant including article 14 (right to fair trial) article 9 (arbitrary detention), and article 19 (freedom of expression).

The author was released from jail in October 2003 and on 5 December 2003, following death threats, the author requested interim measures of protection. On 9 January 2004, pursuant to rule 86 of the rules of procedure the Special Rapporteur on new communications requested the State party on behalf of the Committee to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them.

Decision

On the violation of articles 7 and 10(1) of the Covenant, regarding the author's alleged torture and conditions of detention, the Committee noted that these issues were pending before both the Magistrate's Court and the Supreme Court. A delay of 18 months did not amount to an unreasonably prolonged delay within the meaning of article 5(2)(b) of the Optional Protocol. The claim was thus considered inadmissible for non-exhaustion of domestic remedies.

On the author's claim that his detention was arbitrary under article 9 as it was ordered after an allegedly unfair trial, the Committee was of the view that this claim is more appropriately dealt together with article 14 as it relates to post-conviction detention. As to the alleged violation of article 14(3)(c), the Committee found that this claim had not been substantiated for the purpose of admissibility and therefore was also inadmissible under article 2 of the Optional Protocol.

As to the remaining claims of violations of articles 9(1), 14(1), (2), (3)(a), (b), (d), (e), 14(5), and article 19, the Committee considered these claims sufficiently substantiated with no other bar to their admissibility.

On the merits of these claims, the Committee noted that courts in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for contempt of court. But here, the only disruption indicated by the State party was the repetitious filing of motions by the author, for which an imposition of financial penalties would have been sufficient, and one instance of raising the voice in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of rigorous imprisonment. No reasoned explanation had been provided by the court or the State party as to why such a severe and summary penalty was warranted in the exercise of a court's power to maintain orderly proceedings. Article 9(1), of

the Covenant forbids arbitrary deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9(1) is committed by the judicial branch of government cannot exclude the responsibility of the State party as a whole.

The Committee concluded that the author's detention was arbitrary, in violation of article 9(1). In the light of this finding, the Committee did not see the need to consider the question of whether the provisions of article 14 may have any application to the exercise of the power of criminal contempt. Neither did it consider whether or not there was a violation of article 19.

In accordance with article 2(3)(a) of the Covenant, the State party was obliged to provide the author with an adequate remedy, including compensation, and to make such legislative changes as necessary to avoid similar violations in the future. The State party was also requested to avoid similar violations in the future.

Lalith Rajapakse Case

Justice delayed, human rights denied: The Lalith Rajapakse Case

Articles 2(3), 7, and 9 of the Covenant — rule 87 of the Rules of Procedure — admissibility — exhausting of domestic remedies — Article 5(2)(b) of the Optional Protocol to the Covenant — freedom from torture or cruel, inhuman or degrading treatment or punishment — right to liberty and security of person — right to an effective remedy.

Synopsis

Lalith Rajapakse came before the Committee claiming that treatment inflicted upon him by the police for purposes of obtaining a confession—as a result of which he was hospitalised and also rendered unconscious for two weeks—amounted to a violation of article 7 of the Covenant, while his arrest was in violation of article 9. He also claimed that the State party had failed to take adequate action to ensure that he was protected from threats issued by police officers, which violated article 9(1), and that the State party's failure to ensure that competent authorities investigated his allegations of torture promptly and impartially violated his right to an effective remedy under article 2(3) of the Covenant.

On 20 May 2002 the author had filed a petition for violation of his fundamental rights in the Supreme Court of Sri Lanka and on 13 June 2002 had been granted leave to proceed but to date the court hearings had been constantly postponed. Meanwhile, he claimed that he was subjected to constant pressure to withdraw his complaint and had been living under extreme psychological stress. This had prevented him from working and supporting his family, whose members had been obliged to live on charity. On 24 July 2002, the Attorney General initiated an investigation into the torture allegedly suffered by the author and consequently filed a criminal action in the Negombo

Magistrate's Court under the Convention against Torture Act (No. 22 of 1994) against certain police officers. This case remained pending and no date had been fixed for the trial. The alleged perpetrators had neither been taken into custody nor suspended from their duties. On 29 September 2003 the author was acquitted of two charges of robbery that had been filed against him as the alleged victims had not made a complaint.

The State party submitted that the communication was inadmissible due to failure to exhaust domestic remedies.

Decision

The Committee noted that the issues raised by the author had continued to remain before the High Court and the Supreme Court despite nearly three years having passed. The State party had not provided any reasons as to why both the fundamental rights case and the indictment in the High Court could not have been considered more expeditiously, nor had it claimed the existence of any elements of the case that should have complicated the investigations and judicial determination of the case for nearly three years. Therefore this delay amounted to an unreasonable prolonged delay within the meaning of article 5(2)(b) and the communication was found to be admissible with reference to articles 7 and 10.

The State party was required to submit written explanations or statements within six months clarifying the matter in accordance with article 99(2) of the Optional Protocol.

The long search for a son: The Sarma Case

Sarma Case

Articles 2(3)(a), 6, 7, 9, 10 of the Covenant — articles 5(1) & 5(4) of the Optional Protocol to the Covenant — Committee's competence to hear the case— exhausting domestic remedies — violation of freedom from torture of victim and his family — enforced disappearance, a violation of article 9 in its entirety — effective remedy including effective investigation, immediate release (if alive), adequate information and compensation — State's obligation to expedite current criminal proceedings against those responsible.

Synopsis

Jegatheeswara Sarma came before the Committee claiming that the State party had violated his son's rights under articles 6, 7, 9, and 10 of the Covenant and that he and his family were victims of a violation of article 7. He alleged that on 23 June 1990 his son (together with himself and others) was abducted by the State army in a cordon and search operation on suspicion of being a Liberation Tigers of Tamil Eelam member, tortured while in custody and then disappeared. About one year later a high-ranking army officer told his wife that her son was dead, but about six months later he saw his son in an army vehicle. He gave evidence before the Presidential Commission of Inquiry into

Involuntary Removals and Disappearances in the Northern and Eastern Provinces and complained to the President. However, the army denied any knowledge of the abduction.

The State party maintained that the Committee was not competent to judge the case as the alleged violation occurred prior to the entry into force of the Optional Protocol and also that the author had not demonstrated the exhaustion of domestic remedies. In reply the author claimed that the suffering of himself and his family was continuing to date. He also listed 39 letters and requests to various authorities regarding the disappearance without any tangible outcome to date. Thus he argued that he had exhausted all available and domestic remedies.

On the merits of the case, the State party submitted that it did not, either directly or through the relevant field commanders of its army, cause the disappearance of the author's son. Instead, criminal investigations had revealed that one Corporal Sarath was responsible for his abduction, without the knowledge of responsible officers and independent of the cordon and search operation.

The author indicated that enforced disappearances are a clear breach of various provisions of the Covenant, including article 7. There was little doubt that his son's disappearance was imputable to the State party because the Sri Lankan army is indisputably an organ of that State. Where the violation of rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, even where the soldier or other official is acting beyond his authority. The author, relying on the judgment of the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case* and that of the European Court of Human Rights concluded that even where an official is acting outside of authority, the State party finds itself in a position of responsibility if it provided the means or facilities to accomplish the act.

Decision

On the admissibility of the communication, the Committee's view was that although the disappearance took place before the entry into force of the Optional Protocol for Sri Lanka, its effects may have occurred or continued thereafter. Also, the author had exhausted the remedies that were reasonably available and effective in Sri Lanka.

On the merits of the communication, it was noted that the State party had not denied that the author's son had been abducted by an officer of the Sri Lankan army and had been unaccounted for since. Also, the Committee held that for purposes of establishing State responsibility it was irrelevant that the officer to whom the disappearance was attributed had acted outside authority or that his superior officers were unaware of his actions. Therefore the State was responsible for the disappearance of the author's son and the violation of article 9

in its entirety. The facts also revealed a violation of article 7 both with regard to the author's son and the author's family. On article 6, it was noted that the author had not asked the Committee to conclude that his son was dead and he had indicated that he had not abandoned hope for his son's reappearance. Therefore the son's death had not been presumed.

The Committee held that the State party was under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation, the son's immediate release if he was still alive, and adequate information resulting from its investigation as well as adequate compensation for the violations suffered.

A confession under duress: The Nallaratnam Singarasa Case

Nallaratnam Singarasa Case

Articles 14(1), (2), (3)(c), 3(f), 3(g), (5), 7, 26, 2(1), 2(3) of the Covenant — articles 5(2)(a), 5(2)(b), 5(4) of the Optional Protocol to the Covenant — right to fair trial — right to be presumed innocent until proven guilty — right to be tried without undue delay — to have the free assistance of an interpreter if one cannot understand or speak the language used in court — not to be compelled to testify against oneself or to confess guilt — freedom from torture or cruel, inhuman or degrading treatment or punishment — Rule 90(b) of the Rules of Procedure, author's right to be represented — Committee's competence to hear the case — exhausting domestic remedies — effective remedy including release or retrial and compensation — ensuring sections of the Prevention of Terrorism Act are compatible with Covenant provisions.

Synopsis

Nallaratnam Singarasa, a member of the Tamil community currently serving a 35-year prison sentence claimed violation of articles 14(1), (2), (3)(c), 3(f), 3(g), (5) as well as 7, 26 and 2(1), 2(3) of the Covenant. He claimed that on 16 July 1993 he was arrested by State security forces on suspicion of supporting the Liberation Tigers of Tamil Eelam and detained under the Prevention of Terrorism Act (PTA), which provided for detention without charge up to 18 months (renewable every three months). He further alleged that while in detention, he was not afforded legal representation or external interpretation, but was interrogated and subjected to torture and ill-treatment before his statement was recorded and his thumbprint forcibly placed on it. This statement was later produced as his alleged confession. After 14 months of detention he was indicted in the High Court in three separate cases under the PTA.

In Case 6895/94, despite the High Court being informed that the victim had been tortured and the Judicial Medical Officer stating that he displayed scars and a serious eye injury that permanently impaired his vision, the High Court accepted his alleged confession. On allegations of torture, the court held that his failure to inform the magistrate of the assault amounted to him not behaving as a 'normal human being'. The author's testimony that he had not reported the assault to the magistrate

for fear of reprisals on his return to police custody was not considered. Accordingly, he was convicted and sentenced to 50 years' imprisonment based solely on the alleged confession. The Court of Appeal affirmed his conviction but reduced the sentence to 35 years, while his petition for special leave to appeal to the Supreme Court was refused.

The author opined that among other things article 14(1) was violated when he was convicted by the High Court based solely on an alleged confession extracted under circumstances that violated his right to fair trial.

The delay of four years between his conviction and the denial of leave to appeal to the Supreme Court was a violation of article 14(3)(c), while not being provided with a qualified external interpreter when interrogated by the police (he could not read or speak Sinhalese) violated his rights under article 14(3)(f). In addition, the reliance on his alleged confession and shifting the burden on him to prove the confession was not made voluntarily violated article 14(3)(g), section 16(2) of the PTA violated article 14(2) (presumption of innocence), and the decision of the Court of Appeal to uphold his conviction despite 'irregularities' violated article 14(5). Articles 7 and 2(1) were violated because among other things there was a continuing violation of his rights as Sri Lankan law did not provide any effective remedy for his torture and ill treatment. Finally, the constitutional bar to challenge section 16(1) of the PTA violated article 2(3) when read with article 7 of the Covenant.

The State party argued that the communication was inadmissible as the author was required to personally submit a communication or prove that he was unable to do so. The State party also asserted that he had not exhausted domestic remedies, such as requesting for a presidential pardon; applying to the Supreme Court under article 11 of the Constitution for a declaration of rights violation, compensation and if warranted an order of release; complaining to the police of his alleged torture and ill-treatment; or instituting criminal proceedings against the perpetrators in the Magistrates Court.

On the merits of the communication, the State party denied that the author's rights under the Covenant were violated or that either the State of Emergency or PTA violated the Covenant.

Decision

On the admissibility of the communication, the Committee found that the author had exhausted domestic remedies in that a presidential pardon did not constitute an effective remedy for the purposes of article 5(2)(b) of the Optional Protocol, and also on article 7 the Court of Appeal had already dismissed his appeal for lack of merit and refused leave to appeal to the Supreme Court.

On the merits of the communication, the Committee's views were that the author had been denied a fair trial as guaranteed under article 14(1) when the courts relied solely on a confession obtained under the aforementioned circumstances. Article 14(3)(c) conferred a right to review of a decision at trial without delay.

Thus a delay of more than two years (as in the present case) violated the author's rights under articles 14(3)(c) and 5 of the Covenant.

Also, the wording in article 14(3)(g) that no one shall "be compelled to testify against himself or confess guilt" must be understood as the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused when obtaining a confession. It is implicit in this principle that the prosecution prove that the confession was made without duress. Even if the State argues that the threshold of proof is "placed very low" and "a mere possibility of involuntariness would suffice..." the willingness of the courts at all stages to dismiss the complaints of torture and ill treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after) suggests that this threshold was not complied with. Hence by placing the burden of proof regarding the confession on the author, the State party violated article 14(2) and 14(3)(g), read together with articles 2(3) and 7 of the Covenant. Therefore the facts disclosed violations of article 14(1), (2), (3)(c) and 14(g) read together with articles 2(3) and 7.

The Committee held that the State party was under obligation to provide the author with an effective and appropriate remedy including release or retrial and compensation as well as to avoid similar violations in the future. The State should also ensure that the impugned sections of the PTA be made compatible with the provisions of the Covenant. The State party was requested to inform the Committee within 90 days of the measures taken to give effect to the Committee's views.

Muzzling the freedom of expression: The Victor Ivan Case

Victor Ivan Case

Articles 2(3), 14(3)(c), 19, 26 of the Covenant — article 5(1), 5(2)(b), 5(4) of the Optional Protocol to the Covenant — right to fair trial — freedom of expression — equality and equal protection of the law — effective remedy — Committee's competence ratione temporis — exhausting domestic remedies — violation of articles 14(3)(c), and 19 read together with article 2(3) of the Covenant.

Synopsis

Victor Ivan Majuwana Kankanamge, the editor of *Ravaya* newspaper, came before the Committee claiming violation of his rights, among other things, under articles 2(3), 19 and 26 of the Covenant. He claimed that the Attorney General indicted him thrice before Sri Lanka's High Court for criminal defamation without proper assessment of the facts as required under Sri Lankan legislation, and this was designed to harass him. As a result, he had been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed. Though not specifically raised, the Committee also considered violation of article14(3)(c).

Earlier, the author's petition to the Supreme Court for a violation of his fundamental rights guaranteed under the Sri Lankan Constitution had been refused leave to proceed.

The State party argued that the communication was inadmissible as the alleged violation occurred prior to the Optional Protocol entered into force for Sri Lanka and thus it was covered by the reservation made by the State. Also, it argued that the author did not exhaust available domestic remedies viz. making representations to the Attorney General, complaining to the Ombudsman or the National Human Rights Commission (NHRC). The State contended that section 393(7) of the Criminal Procedure Code afforded the Attorney General a discretionary power to file indictments in the High Court and in the present case, the Attorney General acted in accordance with the law, impartially and in the best interest of justice.

Decision

On the admissibility of the communication, the Committee found that the alleged violations had occurred not only at the time of filing the indictment, but were continuing and constituted new alleged violations as long as the indictments remained in effect. It also held that the State party had failed to demonstrate that—in the light of the contrary ruling by the Supreme Court—making representations to the Attorney General, complaining to the Ombudsman or the NHRC constituted an effective remedy. Thus the communication was declared admissible.

On the merits of the communication, the Committee found that as the three indictments against the author had not been adjudicated and had been pending for several years, the proceedings have been unreasonably prolonged and thus they violated article 14(3)(c) of the Covenant. Regarding the nature of the author's profession and other circumstances, the indictments for criminal defamation for several years left the author in a situation of uncertainty and intimidation and had a chilling effect, which duly restricted the author's exercise of his rights to freedom of expression. Thus the facts also revealed a violation of article 19 read with article 2(3). The Committee held that the State party was under an obligation to provide the author with an effective remedy including appropriate compensation, and under an obligation to prevent similar violations in the future.

Accordingly the State party was directed within 90 days to provide information about the measures taken to give effect to the Committee's views.

President puts a life at risk: The Jayalath Jayawardena Case

Articles 2(3)(a) and 9(1) of the Covenant — article 5(2)(a) and 5(2)(b) of the Optional Protocol to the Covenant — violation of the right to security of person — legal immunity of the Head of State — State's failure to investigate death threats — exhausting domestic remedies — appropriate remedy.

Synopsis

Jayalath Jayawardena, a medical doctor and politician, came before the Committee claiming that (a) the public allegations made by the President of Sri Lanka of the author's alleged involvement with the Liberation Tigers of Tamil Eelam put his life at risk, but he had no remedy against the President as she was immune from legal suits; (b) that the State failed to protect his life when it refused to grant him sufficient security; and (c) the State failed to investigate his complaints regarding death threats against him. Although not specifically invoked, the Committee considered the communication under article 9(1) of the Covenant.

The State party maintained that the communication was inadmissible, as the author had not availed himself of any domestic remedies under the Constitution and the Penal Code. It also contested the fact that the author had received death threats. Instead,+ it alleged that rather than vindicating human rights violations, the author was engaged in a political exercise to bring discredit to the government internationally.

Decision

The Committee found that while the State party did not contest that due to her immunity the President could not have been the subject of a legal action, it did not indicate whether the author had any effective remedies to obtain reparation for the harm allegedly caused by the President. Also the State party had failed to investigate the author's claims of death threats. Thus the author had exhausted domestic remedies regarding these issues.

The State party did not contest the allegation that the President had put the life of the complainant at risk, nor the fact that the statements were made. Also, because the Head of State acting under immunity enacted by the State party made these statements, the Committee concluded that the State party was responsible for the violation of the author's rights under article 9(1).

Accordingly, the author was entitled to an appropriate remedy. The State party was directed within 90 days to provide information about the measures taken to give effect to the Committee's views.

Dissenting view

The communication was not admissible as the author had not exhausted domestic remedies. The fact that the President enjoyed immunity from suits did not mean that there was no procedure for redress against other state organs.

Jailed for raising voice in court: The Tony Fernando Case

Communication No. 1189/2003

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No. 1189/2003: Sri Lanka 10.06.2003. CCPR/C/83/D/1189/2003. (Jurisprudence)]

Submitted by: Anthony Michael Emmanuel Fernando (represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne)

Alleged victim: The author

State party: Sri Lanka

Date of communication: 10 June 2003 (initial submission)

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

Meeting on 31 March 2005,

Having concluded its consideration of communication No. 1189/2003, submitted to the Human Rights Committee on behalf of Mr. Anthony Michael Emmanuel Fernando under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication is Mr. Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong. He claims to be a victim of violations by Sri Lanka of his rights under articles 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), 5, and articles 19, and 2, paragraph 3, of the Covenant on Civil on Civil and Political Rights. He is represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne.

1.2 A request for interim measures to release the author from prison in Sri Lanka, submitted at the same time as the

communication, was denied by the Special Rapporteur on New Communications.

Factual background

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Mens' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them. Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed

in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit.....". (1) According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

2.3 Following his imprisonment, the author developed a serious asthmatic condition, which required his hospitalization in an intensive care unit. On 8 February 2003, he was transferred to a prison ward of the General Hospital, where he was made to sleep on the floor with his leg chained, and only permitted to move to go to the toilet. He developed a chill from lying on the floor, which worsened his asthmatic condition. Neither the author's wife nor his father was informed that he had been transferred to hospital; they had to make their own enquiries.

2.4 On 10 February 2003, the author experienced severe pain all over his body but was not given medical attention. On the same day, he was returned to prison and was assaulted several times by prison guards during his transfer. In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on Independence of the Judges and Lawyers, who expressed concern about the case. After 11 February 2003, the author was allegedly unable to rise from his bed. On 17 October 2003, he was released from prison, after completing ten months of his sentence. The Sri Lankan authorities brought criminal charges against the prison guards accusing them of having been involved in the assault of the author. They have since been released on bail, pending trial.

2.5 On 14 March 2003, the author filed a fundamental rights petition under article 126 of the Constitution with respect to his alleged torture, which is currently pending in the Supreme Court. He also submitted an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction and that the sentence was disproportionate. He also submitted that the matter should not be heard by the same judges, since they were biased. The appeal was heard by the same three judges who had convicted him and was dismissed on 17 July 2003.

The complaint

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions (2); he had not been informed of the charges against

him, nor given adequate time for the preparation of his defence (3); the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that "a deliberate intention" to commit contempt, required under domestic law, had been established; the term of one years imprisonment was grossly disproportionate to the offence which he was found to have committed.

3.2 The author claims that the fact that the same judges heard all his motions was contrary to domestic law. According to the author, Section 49 (1) of the Judicature Act No. 2 of 1978 (as amended) stipulates that no judge shall be competent, and in no case shall any judge be compelled to exercise jurisdiction in any action, prosecution, proceedings or matter in which he is a party or is personally interested. Sub-section (2) of the section provides that no judge shall hear an appeal from, or review, any judgment, sentence or order passed by himself. Sub-section (3) provides that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action, prosecution or matter to or in which he is a party or is interested, or in which an appeal from his judgment shall be preferred, shall be heard or determined by another judge or judges of the court. In support of the author's view that the trial was unfair he refers to international and national concern regarding the conduct of the Chief Justice. (4)

3.3 The author argues that his imprisonment without a fair trial amounts to arbitrary detention, in violation of article 9 of the Covenant. He refers to the criteria under which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary.

3.4 The author claims that his freedom of expression under article 19 was infringed by the imposition of a disproportionate prison sentence, given that the exercise of contempt powers was neither "prescribed by law", (given the insufficient precision of the relevant provisions), nor "necessary to protect the administration of justice" or "public order" (article 19(3)(b)), in the absence of an abusive behaviour on his part that could be considered as "scandalizing the court". He argues that his treatment and the consequent restrictions of his freedom of expression did not meet the three pre-conditions for a limitation (5): it must be provided by law; it must address one of the aims set out in paragraphs 3(a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.

3.5 On the first condition, the author argues that the restriction is not provided by law, as the measures in question are not clearly delineated and so wide in their ambit that they do not meet the test of certainty required for any law. He invokes the case law of the European Court on Human Rights for the proposition that the legal norm in question must be accessible to individuals, in that they must be able to identify it and must have a reasonable prospect of anticipating the consequences of a particular action.

(6) The State party's laws on contempt are opaque, inaccessible and the discretion for the Supreme Court to exercise its own powers of contempt is so wide and unfettered that it fails the test of accessibility and predictability.

3.6 On the second condition, it is argued that the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in article 19, namely the protection of "public order" and "the rights and reputation of others". On the third condition, while the right to freedom of expression may be restricted, "to protect the rights and reputations of others", and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for under Sri Lankan law for contempt of court, including the power to impose prison sentences, are wholly disproportionate and cannot be justified as being "necessary" for this end. Even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the author was in fact in contempt, one year of imprisonment - with hard labour - is in no way a proportionate or necessary response. (7)

3.7 The author claims that article 105(3) of the Sri Lankan Constitution is in itself incompatible with articles 14 and 19 of the Covenant. He claims violations of articles 7 and 10, paragraph 1, in relation to his assault and his conditions of his detention (paras 2.3 and 2.4 above). He also claims that in having submitted his appeal against his conviction for contempt, he has exhausted all available domestic remedies.

The State party's admissibility submission

4.1 On 27 August 2003, the State party provided its comments on the admissibility of the communication. It submits that the appeal judgment, of 17 July 2003, of the Supreme Court on the author's conviction for contempt, deals with the entirety of the case; it is significant that the author failed to express regret for this "contemptuous behavior", though given an opportunity to do so by Court, and thereby exhibiting his contempt of justice and the judiciary.

4.2 With regard to the alleged torture by the Prison Authorities, the State party confirms that it had taken measures to charge the persons held responsible, that the case is still pending and that the accused are currently on bail, pending trial. There are two cases pending before the courts. If the accused are convicted they will be sentenced. Further, it is confirmed that the author has filed a fundamental rights petition in the Supreme Court against the alleged torture, which remains pending. In the event that the Supreme Court decides the fundamental rights application in the author's favour he will be entitled to compensation. As such, the allegation of torture is inadmissible for failure to exhaust domestic remedies. Further, since the State took all possible steps to prosecute the alleged offenders there can be no cause for further complaint against the State in this

regard.

4.3 The State party adds that the Sri Lankan Constitution provides for an independent judiciary. The judiciary is not under the State's control and as such the State cannot influence nor give any undertaking or assurances on behalf of the judiciary on the conduct of any judicial officer. If the State attempts to influence or interfere with the judicial proceedings, this would be tantamount to an interference with the judiciary and would lead to any officer responsible facing charges of contempt himself.

4.4 Although the State party requested the Committee to consider the admissibility separately from the merits of the communication, the Committee advised, through its Special Rapporteur on New Communications, that it would consider the admissibility and merits of the communication together, on the basis that the State party's future submissions on the merits would provide greater clarity on the issues of admissibility and that the information provided was too scarce for any final determination on these issues at that point.

Interim measures request

5.1 On 15 December 2003, following the receipt of death threats, the author requested interim measures of protection, requesting the State party to adopt all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. He submits that on 24 November 2003, at about 9.35 a.m., an unknown person called his mother and asked her whether he was at home. When she answered in the negative, this person made death threats against the author and demanded that he withdraw his three complaints: The communication to the Human Rights Committee; the fundamental rights case in the Supreme Court regarding alleged torture; and the complaint filed in the Colombo Magistrate's Court against the two Welikada prison guards. The caller did not reveal his identity.

5.2 On 28 November 2003, the author's complaint against the two prison guards was taken up in the Colombo Chief Magistrate's court, and the author was present. The Magistrate directed the police to charge the accused on 6 February 2004, as they had failed on three occasions to present themselves before the Maligakanda Mediation Board, as directed by the court. Later that day on 28 November 2003, his mother told him that an unidentified person had come to the house at about 11.30 a.m. and, while standing outside the locked gate, had called out for the author. When the author's mother told him that he was not in, he went away threatening to kill him. Once again, on 30 November 2003, at about 3.30 p.m., the same person returned, behaved in the same threatening manner and demanded that the author's mother and father send their son out of the house. The author's parents did not respond and called the police. Before the police arrived, the person uttered threats against the author's

parents and after once again threatening to kill the author left the premises. The author's mother filed a complaint at the police station on the same day.

5.3 On 24 November 2003, at 10.27 a.m., an unidentified person called at the office of a Sri Lankan newspaper, Ravaya, which had supported the author throughout his ordeal. The caller spoke to a reporter and leveled death threats against him and the editor of Ravaya, demanding that they cease publishing further news concerning the author. This newspaper had published interviews of the author on 16 and 23 February and 2 November 2003 regarding the alleged miscarriage of justice suffered by him. The threats were reported in the weekend edition of the Ravaya newspaper.

5.4 The author adds that, on 4 December 2003, he received information to the effect that the two prison guards who had been cited in the fundamental rights petition filed by the author as well as in the case filed in the Colombo Magistrate's court, had been reinstated: one of them was transferred to the New Magazine prison and the other remains at the Welikada prison. As a result, the author lives in daily fear for his life as well as for the life and safety of his wife, his son and his parents. In spite of his complaint to the authorities, he has not, to date, received any protection from the police and is unaware of what action has been taken to investigate the threats against himself and his family. He recalls that he had received death threats in prison as well; he invokes the Committee's Concluding Observations, of November 2003, which stated that, "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." He also refers to the Committee's Views in *Delgado Paez v. Colombia* on the State party's obligation to investigate and protect subjects of death threats. (8)

5.5 On 9 January 2004, pursuant to Rule 86 of the rules of procedure and, on the behalf of the Committee, the Special Rapporteur on New Communications requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken by the State party in compliance with this decision within 30 days from the date of the Note Verbale, i.e. not later than by 9 February 2004.

5.6 On 3 February 2004, the author submitted that on the morning of 2 February 2004, he had been subjected to an attack by an unknown assailant who sprayed chloroform in his face. A van pulled up close by during the attack, and the author believes that it was going to be used to kidnap him. He managed to escape and was taken to hospital. Had he not escaped, he would have been the victim of an assassination or disappearance. On 13 February 2004, the Committee, through its Special Rapporteur on New Communications, reiterated his previous request to the

State party under Rule 86 of the Committee's rules of procedure in his note of 9 January 2004.

5.7 On 19 March 2004, the State party commented on the attack against the author of 2 February 2004. It submits that the Attorney General's Department directed the police to investigate the alleged attack and to take measures necessary to ensure his safety. The police recorded his statement in which he was unable to either name the suspects or to provide the police with the number of the vehicle that the alleged assailants had traveled in. The investigations remain in progress and steps will be taken to inform the author of the outcome. If the investigations reveal credible evidence that the threats were caused by any person with a view to subverting the course of justice, the State party will take appropriate action.

5.8 With regard to the author's security, a police patrol book has been placed at his residence and police patrol have been directed to visit his residence day and night and to record their visits in the police patrol book. In addition to this, his residence is kept under surveillance by plain-cloth policemen. There is no evidence to conclude that the author received threats to his life because of his communication to the Human Rights Committee.

The State party's merits submission

6.1 On 16 March 2004, the State party provided its submissions on the merits. On the alleged violations of articles 9, 14 and 19 of the Covenant, it concedes that the author has exhausted domestic remedies. It refers to the judgment of the Supreme Court of 17 July 2003, on appeal against the contempt order, and submits that it cannot comment on the merits of any judgment given by a competent Sri Lankan Court. The State party relies on the arguments set out in the judgment for its proposition that the author's rights were not violated. It submits that the manner in which the author behaved from the time he walked out on a settlement reached between himself and the Y.M.C.A, where both parties were legally represented, before the Deputy Commissioner General of Workman's Compensation, to the point of his refusal to express any regret for his behaviour, when his case for contempt was reviewed by the Supreme Court, demonstrates the author's lack of respect for upholding the dignity and decorum of a judicial tribunal. It refers to the judges' consideration of the powers vested in such Courts to deal with cases of contempt, noting that in such cases committed in the face of the Court punishment may be imposed summarily. While the author was given an opportunity to mitigate the sentence by way of apology, he failed to do so.

6.2 Freedom of speech and expression, including publication, are guaranteed under article 14, paragraph 1 (a), of the Sri Lankan Constitution. Under article 15, paragraph 2, it is permissible to place restrictions on rights under article 14; these may be prescribed by law in relation to contempt of court. The State party denies that the power of the Supreme Court under article 105,

paragraph 3 of the Constitution is inconsistent with either the fundamental right guaranteed by Article 14, paragraph 1 (a) of the Sri Lankan Constitution or with articles 19 or 14 of the Covenant.

6.3 The State party reiterates that the author did not exhaust domestic remedies with respect to the claim relating to torture and ill-treatment as the case is still pending. Since the State cannot make submissions on behalf of the accused, it would be tantamount to a breach of rules of natural justice for the Committee to express its views on the alleged violation, as there is no opportunity for the persons accused of the assault to give their version of the incident. A determination of the case by the Committee at this stage would be prejudicial to the accused and/or the prosecution. It observes that the author has not submitted that such remedies are ineffective or that such remedies would be unreasonably prolonged.

6.4 The State party notes that the fundamental rights case filed by the author in the Supreme Court remains pending, and that a violation of the same rights as those protected under articles 7 and 10, paragraph 1, of the Covenant will be considered in these proceedings. It further submits that it has declined to appear for the individuals against whom allegations of torture are made. The Attorney General who represents the State refrains, as a matter of policy, from appearing for public officers against whom allegations of torture are pending, since the Attorney General could consider filing criminal charges against the perpetrators even after such a case is concluded. In the present case such action (criminal prosecution) is pending.

The author's comments on admissibility and the merits

7.1 On 6 August 2004, the author commented on the State party's submission and reiterated his earlier claims. Following the attack on him of 2 February 2004, he lived in hiding. Despite having made complaints to the police, no investigations were made, and no one was prosecuted or arrested. Although the author concedes that police patrols did pass by his house he argues that this is insufficient protection from an attempted kidnapping and possibly attempted murder. He was diagnosed with post-traumatic stress disorder and his mental health deteriorated. Because of these events, he left Sri Lanka on 16 July 2004 and applied for asylum in Hong Kong, where he continues to receive treatment for his mental difficulties. His application has not yet been considered. He contests the State party's view that it has no role to play with regard to a judgment pronounced by a local court of law.

7.2 Contrary to his initial submission, the author now contends that no charges have been filed against the suspects of the alleged assault to date. According to him, preliminary reports called "B reports" have been before the Magistrate's Court in Colombo, but these are merely reports relating to the progress of the inquiries. The last time this report was heard by the Court was

on 23 July 2004. Thus, even after one and a half years after the incident, the inquiry is supposed to be continuing. In the author's view, this failure by the State party promptly to investigate complaints of torture violates article 2, and the lack of witness protection makes it impossible to participate in any trial that may eventually take place.

7.3 The author also claims that the State party has failed to contribute to his rehabilitation. He states that four doctors have diagnosed him with psychological trauma caused by the above events, but that his fundamental rights and request for compensation application filed on 13 March 2003 has been postponed constantly. According to article 126 (5) of the Constitution "[t]he Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference". The author's petition remains pending. The State party's failure to consider these applications are also said to demonstrate that exhaustion of domestic remedies with respect to the alleged violations of articles 7 and 10, paragraph 1 has been unduly prolonged, and that the remedies are ineffective.

7.4 The author adds a new claim relating to his conviction for contempt, that he was not given an opportunity to be tried and defend himself in person, or through legal assistance of his own choosing and he was not informed of the right to have legal assistance, nor was legal assistance assigned to him. In this regard he claims a violation of article 14, paragraph 3 (d).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the alleged violation of articles 7 and 10, paragraph 1, with respect to the author's alleged torture and his conditions of detention, the Committee notes that these issues are currently pending before both the Magistrate Court and the Supreme Court. Although it is unclear whether the individuals allegedly responsible for the assault have been formally charged, it is uncontested that this matter is under review by the Magistrates Court. The Committee is of the view that a delay of 18 months from the date of the incident in question does not amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds these claims inadmissible for non-exhaustion of domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.3 As to the claim that the author's detention was arbitrary under article 9, since it was ordered after an allegedly unfair trial, the Committee finds that this claim is more appropriately

dealt together with article 14 of the Covenant as it relates to post-conviction detention.

8.4 As to the alleged violation of article 14, paragraph 3 (c), the Committee finds that this claim has not been substantiated for the purpose of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the remaining claims of violations of articles 9, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (d), (e), and 5, and article 19, the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph l, of the Optional Protocol.

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. The fact that an act constituting a violation of article 9, paragraph 1 is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with

an adequate remedy, including compensation, and to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glele Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Ratfael Rivas Posada, Mr. Ivan Shearer, Mr. Hipolito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Notes

1. Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

2. The author refers to *Karttunen v. Finland*, Case No. 387/1989 and *Gonzalez del Rio v. Peru*, Case No. 263/1987. He also distinguishes the current case from that of *Rogerson v. Australia*, Case No. 802/1998 and *Collins v. Jamaica*, Case No. 240/1987.

3. He refers to a press release of 17 February 2003, in which it is stated that the UN Special Rapporteur on the Independence of the Judges and Lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.

4. Report of the United Nations Special Rapporteur on

Independence of Judges and Lawyers to the United Nations Commission in April 2003, in which it states that "the Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges..." He also refers to the Report of the International Bar Association, 2001, Sri Lanka on failing to protect the rule of law and the independence of the judiciary.

5. *Fuarisson v. France*, Case No. 550/93

6. *Grigoriades v. Greece* (24348/94) and *Sunday Times v. the United Kingdom* (6538/74) 1979.

7. The author refers to the European Court of Human Right's case of *De Haes & Gijsels v. Belgium*.

8. *Delgado Paez v. Colombia*, Case No. J93/l985 – "States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them..."

Justice delayed, human rights denied: The Lalith Rajapakse Case

---

Communication No. 1250/2004

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No. 1250/2004: Sri Lanka. CCPR/C/83/D/1250/2004. (Jurisprudence)]

Submitted by: Sundara Aratchchige Lalith Rajapakse (represented jointly by The Asian Human Rights Commission and the World Organisation against Torture)

Alleged victim: The author

State party: Sri Lanka

Date of communication: 28 January 2003 (initial submission)

Document references: Special Rapporteur rule 97 (old rule 91) decision, transmitted to the State party on 26 January 2004 (not issued in document form)

Date of decision: 8 March 2005

Subject matter: Unlawful arrest; ill-treatment and torture in detention; threats from public authorities; failure to investigate

Procedural issues: None

Substantive issues: Unlawful and arbitrary detention; torture in custody; liberty and security of the person

Articles of the Covenant: 7, 9 and 2, paragraph 3

Article of the Optional Protocol: 5, paragraph 2 (b)

The Human Rights Committee, acting through its Working Group pursuant to rule 93, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

[ANNEX]

1. The author is Mr. Sundara Aratchchige Lalith Rajapakse, a Sri Lankan citizen. He claims to be a victim of violations by Sri Lanka of articles 2, paragraph 3, 7 and 9 of the International Covenant on Civil and Political Rights. He is represented by counsel, the Asian Human Rights Commission and the World

Organisation against Torture. The Optional Protocol entered into force for Sri Lanka on 3 January 1998.

Factual background

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

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

2.3 On 16 May, the Special Rapporteur on Torture of the United Nations Office of the High Commissioner for Human Rights sent an urgent appeal to the State party, on behalf of the author. On the same day, an application for the author's release was made to the Wattala Magistrate's Court. The author was produced before the Magistrate on 17 May 2002, along with the medical report issued by the National Hospital. He was granted bail and subsequently taken back to the National Hospital by his mother and grandfather. He remained there for treatment until June 2002.

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

2.5 The author was subjected to constant pressure to withdraw his complaint and has been living under extreme psychological stress, which has prevented him from working and supporting his family, whose members are now obliged to live on charity. His family fears for his life. He has been repeatedly called to testify alone at a police station, even though he has already made a statement. Threats were also made against his grandfather,

to force him to withdraw the complaint he had made to the Human Rights Commission of Sri Lanka. Both the author and his family have made several complaints about the threats to the National Human Rights Commission Hotline, and the National Human Rights Commission. The author does not mention the outcome of these complaints.

2.6 On 24 July 2002, the Attorney General initiated an investigation into the torture allegedly suffered by the author, on the basis of which he filed a criminal action under the Torture Act against certain police officers in the Negombo Magistrate's Court. This case remains pending and, no date has been fixed for the trial, and the alleged perpetrators have neither been taken into custody nor suspended from their duties. A statement made by the Judicial Medical Officer, which was recorded on 11 October 2002, confirmed the many injuries suffered by the author, including a cerebral contusion, which is described as an injury that "endangers life".

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

The complaint

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

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

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

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

3.5 On exhaustion of domestic remedies, the author notes that he sought to obtain redress both through criminal procedures, and through a fundamental rights petition in order to obtain compensation. As a result, the author claims, he and his family have been threatened and intimidated. An assessment of the effectiveness and the reasonableness of the length of the proceedings should take into account the circumstances of his case and the general effectiveness of the proposed remedy in Sri Lanka. In this context, he notes that: no criminal investigation was initiated for over three months after the torture in spite of the severity of his injuries and the necessity to hospitalise him

for over one month; the alleged perpetrators were neither suspended from their duties not taken into custody, enabling them to place pressure on and threaten the author; and the investigations are currently at a standstill. Moreover, considering that the criminal procedures for dealing with torture allegations in Sri Lanka have generally been demonstrated to be ineffective, and that the authorities have shown a lack of diligence in the present case, the pending criminal or civil procedures cannot be considered to constitute an effective remedy for the alleged violations.

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

4.1 On 15 April 2004, the State party provided its submission on admissibility. It stated that the Criminal Investigation Department (CID) of the Police commenced their investigation on 1 August 2002, upon a direction of the Attorney General. Having concluded its investigations, the CID forwarded its report to the Attorney General who advised it to record further statements of witnesses and to organize an identification parade. Subsequently, the Attorney General indicted the Sub-Inspector of Police under the Convention against Torture Act and forwarded the indictment to the High Court of Negombo on 24 July 2003. If convicted, this police officer will be sentenced to a mandatory jail term of not less that 7 years, and a fine. The State party submitted that the Attorney General would take steps to direct the State Counsel conducting the prosecution to inform the trial judge of the need to expedite the proceedings in this case.

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

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

Authors' comments on State party's submissions

5.1 On 5 July 2004, the author comments on the State party's submission. He reiterates his initial argument on admissibility and informs the Committee that there have been no developments in the criminal proceeding since the communication was registered. Despite the State party's submission that it would ensure an expeditious hearing of the criminal case, it does not indicate a date for the hearing, nor

does it explain why the matter has been delayed for two years: this constitutes in his view an unreasonable delay. He adds that his case will probably not be heard for some time, that there has been only one conviction in a case of torture in Sri Lanka and that case was not heard until eight years after the torture took place.

5.2 As to the fundamental rights case pending before the Supreme Court, he observes that this case was adjourned for the third time on 26 April 2004 and was rescheduled for hearing on 12 July 2004. This delay is said to be unreasonable and in contravention of Sri Lankan law, under which the Supreme Court should hear and dispose of any fundamental rights applications within two months of filing. As to the State party's remark that the author may request the Supreme Court to expedite his case, the author is unaware of any such special procedure for making applications and the hearing of cases is a matter entirely at the discretion of the courts. The author notes that the State makes no comment on the efficiency of criminal procedures in Sri Lanka in cases or torture generally. He explains that due to his extreme poverty an indefinite delay before he receives compensation will have serious consequences both for him and his family, as he is unable to afford proper medical and psychological treatment.

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

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

5.5 On 10 December 2004, the author provides an update on the proceedings to date. He submits that his hearing before the Supreme Court was again postponed and given a new hearing date for 11 March 2005. This is the fourth time the case has been rescheduled. According to the author, whether the case will be heard on that day will depend on how busy the Court is, and the case may very well be postponed again. The hearing in the High Court is scheduled to take place on 2 February 2005, the purpose of which is to serve the indictment upon the police

officer accused of torture. After the indictment is served, the actual trail could, in the author's view, take several years to determine. He states that these prolonged delays have exacerbated his exposure to threats and serious risk of harm at the hands of those that do not wish him to pursue judicial remedies. He refers to the recent murder of a torture victim, Mr. Gerald Perera, in mysterious circumstances just a few days before a hearing in the High Court of Negombo, where he was to provide testimonial evidence against 7 police officers accused of torturing him, and fears the same fate. Threats to the author have continued and he has recently been forced to go into hiding to protect himself against harm.

5.6 On 10 March 2005, the author explains that the 2 February 2005 hearing in the criminal case was postponed again until 26 May 2005. Local counsel assisting the author filed a motion with the court on 2 February 2005 to expedite the case. The motion was denied on the grounds that a new judge has been assigned to the case and that it will be up to the new judge to schedule the case according to his priorities. On 14 March 2005, the author states that the 11 March 2005 hearing before the Supreme Court was not heard on the merits but postponed until 26 June 2005.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the issues raised by the author still continue to remain pending before the High Court as well as the Supreme Court, despite nearly three years having passed since their institution and the police officer alleged to have participated in the torture of the author still continues under indictment in the criminal case. It is significant to note that the State party has not provided any reasons why either the fundamental rights case or the indictment against the police officer could not have been considered more expeditiously, not has it claimed the existence of any elements of the case which should have complicated the investigations and judicial determination of the case preventing its determination for nearly three years. For these reasons, the Committee finds that the delay in the disposal of the Supreme Court case and the criminal case amounts to an unreasonable prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds this communication admissible with respect to the alleged violations of articles 7 and 10 of the Covenant.

7. Accordingly, the Human Rights Committee decides:

a) That the communication is admissible;

b) Pursuant to article 99, paragraph 2, of the Optional Protocol, the Committee invite the State party to submit, within six months of the date of transmittal of the present decision,

written explanations or statements clarifying the matter and indicating what measures it has taken, if any;

c) That in accordance to article 99, paragraph 3 of the of the Committee's rules of procedure any explanations or statements received from the State party shall be communicated to the author with a request that any comments he wishes to make by submitted to the Human Rights Committee, through the United Nations Commissioner for Human Rights within six weeks of the date of transmission; and

d) That the present decision be communicated to the State party and to the author of the communication.

Note

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

The long search for a son: The Sarma Case

Communication No. 950/2000

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No. 950/2000: Sri Lanka. 31/07/2003. CCPR/C/78/D/950/2000. (Jurisprudence)]

Submitted by: Mr. S. Jegatheeswara Sarma

Alleged victim: The author, his family and his son, Mr. J. Thevaraja Sarma

State party: Sri Lanka

Date of communication: 25 October 1999 (initial submission)

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

Meeting on 16 July 2003,

Having concluded its consideration of communication No. 950/2000, submitted to the Human Rights Committee by Mr. S. Jegatheeswara Sarma under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication, dated 25 October 1999, is Mr. S. Jegatheeswara Sarma, a Sri Lankan citizen who claims that his son is a victim of a violation by the State party of articles 6, 7, 9 and 10 of the International Covenant on Civil and Political Rights (the Covenant) and that he and his family are victims of a violation by the State party of article 7 of the Covenant.(1) He is not represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 11 June 1980 and 3 October 1997. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional

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

1.3 On 23 March 2001, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as submitted by the author

2.1 The author alleges that, on 23 June 1990, at about 8.30 am, during a military operation, his son, himself and three others were removed by army members from their family residence in Anpuvalipuram, in the presence of the author's wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author's son was apparently suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 pm, the author's son was taken to Plantain Point Army Camp, while the author and others were released. The author informed the Police, the International Committee of the Red Cross (ICRC) and human rights groups of what had happened.

2.3 Arrangements were later made for relatives of missing persons to meet, by groups of 50, with Brigadier Pieris, to learn about the situation of the missing ones. During one of these meetings, in May 1991, the author's wife was told that her son was dead.

2.4 The author however claims that, on 9 October 1991 between 1.30 and 2 pm, while he was working at "City Medicals Pharmacy", a yellow military van with license plate Nr. 35 Sri 1919 stopped in front of the pharmacy. An army officer entered and asked to make some photocopies. At this moment, the author saw his son in the van looking at him. As the author tried to talk to him, his son signaled with his head to prevent his father from

approaching.

2.5 As the same army officer returned several times to the pharmacy, the author identified him as star class officer Amarasekara. In January 1993, as the "Presidential Mobile Service" was held in Trincomalee (2), the author met the then Prime Minister, Mr. D. B. Wijetunge and complained about the disappearance of his son. The Prime Minister ordered the release of the author's son, wherever he was found. In March 1993, the military advised that the author's son had never been taken into custody.

2.6 In July 1995, the author gave evidence before the "Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces" (The Presidential Commission of Inquiry), without any result. In July 1998, the author again wrote to the President, and was advised in February 1999 by the Army that no such person had been taken into military custody. On 30 March 1999, the author petitioned to the President, seeking a full inquiry and the release of his son.

The complaint

3. The author contends that the above facts constitute violations by the State party of articles 6, 7, 9, and 10 of the Covenant.

The State party's observations on the admissibility of the communication

4.1 By submission of 26 February 2001, the State party argues that the Optional Protocol does not apply *ratione temporis* to the present case. It considers that the alleged incident involving the involuntary removal of the author's son took place on 23 June 1990 and his subsequent disappearance in May 1991, and these events occurred before the entry into force of the Optional Protocol for Sri Lanka.

4.2 The State party argues that the author has not demonstrated that he has exhausted domestic remedies. It is submitted that the author has failed to resort to the following remedies:

-A writ of habeas corpus to the Court of Appeal, which gives the possibility for the Court to force the detaining authority to present the alleged victim before it.

-In cases where the Police refuse or fail to conduct an investigation, article 140 of the State party's Constitution provides for the possibility of applying to the Court of Appeal to obtain a writ of mandamus in cases where a public authority fails or refuses to respect a statutory duty.

-In the absence of an investigation led by the police or if the complainant does not wish to rely on the findings of the police, such complainant is entitled directly to institute criminal proceedings in the Magistrate's Court, pursuant to section 136 (1) (a) of the Code of Criminal Procedure.

4.3 The State party argues that the author has failed to demonstrate that these remedies are or would be ineffective, or would extend over an unreasonable period of time.

4.4 The State party therefore considers that the communication is inadmissible.

Comments by the author

5.1 On 25 May 2001, the author responded to the State party's observations.

5.2 With regard to the competence of the Committee *ratione temporis*, the author considers that he and his family are suffering from a continuing violation of article 7 as, at least to the present date. He has had no information about his son's whereabouts. The author refers to the jurisprudence of the Committee in *Quinteros v. Uruguay* (3) and *El Megreisi v. Libyan Arab Jamahiriya* (4) and maintains that this psychological torture is aggravated by the contradictory replies received from the authorities.

5.3 To demonstrate his continued efforts, the author lists the 39 letters and other requests filed in respect of the disappearance of his son. These requests were sent to numerous Sri Lankan authorities, including the Police, the Army, the National Human Rights Commission, several ministries, the President of Sri Lanka and the Presidential Commission of Inquiry. Despite all these steps, the author has not been given any further information as to the whereabouts of his son. Moreover, following the submission of the present communication to the Committee, the Criminal Investigations Department was ordered to record the statements, in Sinhala, of the author and 9 other witnesses whom the author had cited in previous complaints, without any tangible outcome to date.

5.4 The author emphasizes that such inaction is unjustifiable in a situation where he had provided the authorities with the names of the persons responsible for the disappearance, as well as the names of other witnesses. He submitted the following details to the State party's authorities:

> "1. On 23.06.1990 my son was removed by Army soldier Corporal Sarath in my presence at Anpuvalipuram. He hails from Girithale, Polonnaruwa. He is married to a midwife at 93rd Mile Post, Kantale. She is working at Kantale Hospital.
>
> 2. On 09.10.1991 Mr. Amarasekera (Star Badge) from the Army brought my son to City Medicals Pharmacy by van Nr. 35 Sri 1919.
>
> 3. On 23.06.1990 Army personnel who were on duty during the roundup at Anpuvalipuram:
>
> a) Major Patrick
>
> b) Suresh Cassim [lieutenant]
>
> c) Jayasekara [...]
>
> d) Ramesh (Abeypura)

4. During this period officers on duty at Plantain Point Army Camp — in addition to names mentioned in para. 3:

a) Sunil Tennakoon (at present gone on transfer from here)

b) Tikiri Banda (presently working here)

c) Captain Gunawardena

d) Kundas (European)

5. Witnesses

a) My wife

b) Mr. S. Alagiah, 330, Anpuvalipuram, Trincomalee.

c) Mr. P. Markandu, 442, Kanniya Veethi, Barathipuram, Trincomalee.

d) Mr. P. Nemithasan, 314, Anpuvalipuram, Trincomalee.

e) Mr. S. Mathavan (Maniam Shop) Anpuvalipuram, Trincomalee.

f) Janab. A.L. Majeed, City Medical, Dockyard Road, Trincomalee.

g) Mrs. Malkanthi Yatawara, 80A, Walpolla, Rukkuwila, Nittambuwa.

h) Mr. P. S. Ramiah, Pillaiyar Kovilady, Selvanayagapuram, Trincomalee."

5.5 The author also testified before the Presidential Commission of Inquiry on 29 July 1995 and refers to the following statement of the Commission:

> Regarding [...] the evidence available to establish such alleged removals or disappearances, [...] there had been large scale corroborative evidence by relatives, neighbours and fellow human beings [sic], as most of these arrests were done in full public view, often from Refugee Camps and during cordon and search operations where large numbers of people witnessed the incidents.
>
> Regarding [...] the present whereabouts of the persons alleged to have been so removed or to have so disappeared; the Commission faced a blank wall in this investigation. On the one hand the security service personnel denied any involvement in arrests in spite of large-scale corroborative evidence of their culpability. [...]

5.6 The author maintains that these facts reveal a violation of article 6, 7, 9 and 10 of the Covenant. (5)

5.7 The author argues that he has exhausted all effective, available and not unduly prolonged domestic remedies. Referring to reports of international human rights organizations, the author submits that the remedy of *habeas corpus* is ineffective in Sri Lanka and unnecessarily prolonged. The author also refers to the report of the Working Group on Enforced or Involuntary

Disappearances of 28 December 1998, which confirms that even if ordered by courts, investigations are not carried out.

5.8 The author submits that, during the period 1989-1990, in Trincomalee, the law was non-existent, the courts were not functioning, people were shot at sight and many were arrested. Police stations in the "Northern and Eastern Province" were headed by Sinhalese who arrested and caused the disappearance of hundreds of Tamils. As a result, the author could not report to the police about the disappearance of his son, for fear of reprisals or for being suspected of terrorist activities.

Decision on admissibility

6.1 At its 74th session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it and considered that the communication raised issues under article 7 of the Covenant with regard to the author and his family and under articles 6, paragraph 1; 7, 9, paragraph 1 and 10 of the Covenant with regard to the author's son.

6.2 With respect to the application *ratione temporis* of the Optional Protocol to the State party, the Committee noted that, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. However, the Committee considered that although the alleged removal and subsequent disappearance of the author's son had taken place before the entry into force of the Optional Protocol for the State party, the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol.

6.3 The Committee also examined the question of exhaustion of domestic remedies and considered that in the circumstances of the case, the author had used the remedies that were reasonably available and effective in Sri Lanka. The Committee noted that, in 1995, the author had instituted a procedure with an *ad hoc* body (the Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces) that had been especially created for cases like this one. Bearing in mind that this Commission had not, after 7 years, reached a final conclusion about the disappearance of the author's son, the Committee was of the view that this remedy was unreasonably prolonged. Accordingly, it declared the communication admissible on 14 March 2002.

State party's submission on the merits

7.1 On 22 April 2002, the State party commented on the merits of the communication.

7.2 On the facts of the case and the steps that have been taken after the alleged disappearance of the author's son, the State

party submits that, on 24 July and 30 October 2000, the Attorney General of Sri Lanka received two letters from the author seeking "inquiry and release" of his son from the Army. Further to these requests, the Attorney General's Department inquired with the Sri Lankan Army as to whether the author's son had been arrested and whether he was still being detained. Inquiries revealed that neither the Sri Lanka Navy, nor the Sri Lanka Air Force, nor the Sri Lanka Police had arrested or detained the author's son. The author's requests were transmitted to the Missing Persons Commission (MPC) Unit of the Attorney General's Department. On 12 December 2000, the coordinator of the MPC informed the author that suitable action would be taken and advised the Inspector General of Police (IGP) to conduct criminal investigation into the alleged disappearance.

7.3 On 24 January 2001, detectives of the Disappearance Investigations Unit (DIU) met with a number of persons, including the author and his wife, interviewed them and recorded their statements. On 25 January 2001, the DIU visited Plantain Point Army Camp. On the same day and between 8 and 27 February 2001, a number of other witnesses were interviewed by the DIU. (6) Between 3 April and 26 June 2001, the DIU proceeded to the interview of 10 Army personnel, including the Officer commanding the Security Forces of the Trincomalee Division in 1990/91. The DIU completed its investigation on 26 June 2001 and transmitted its report to the MPC, which, on 22 August 2001, requested further investigation on particular points. The results of this additional investigation were transmitted to the MPC on 24 October 2001.

7.4 The State party submits that the results of the criminal investigation have revealed that, on 23 June 1990, Corporal Ratnamala Mudiyanselage Sarath Jayasinghe Perera (hereafter Corporal Sarath) of the Sri Lankan Army and two other unidentified persons had "involuntarily removed (abducted)" (7) the author's son. This abduction was independent of the "cordon and search operation" carried out by the Sri Lankan Army in the village of Anpuvalipuram in the District of Trincomalee, in order to identify and apprehend terrorist suspects. During this operation, arrests and detention for investigation did indeed take place in accordance with the law but the responsible officers were unaware of Corporal Sarath's conduct and of the author's son's abduction. The investigation failed to prove that the author's son had been detained at Plantain Point Army Camp or in any other place of detention, and the whereabouts of the author's son could not be ascertained.

7.5 Corporal Sarath denied any involvement in the incident and did not provide information on the author's son, nor any acceptable reasons why witnesses would have falsely implicated him. The MPC thus decided to proceed on the assumption that he and two unidentified persons were responsible for the "involuntary removal" of the author's son.

7.6 With regard to the events of 9 October 1991, when the author

allegedly saw his son in company of Lieutenant Amarasekera, the investigation revealed that, during the relevant period, there was no officer of such name in the District of Trincomalee. The person on duty in the relevant area in 1990/91 was officer Amarasinghe who died soon thereafter as a result of a terrorist attack.

7.7 On 18 February 2002, the author sent another letter to the Attorney General stating that his son had been "removed" by Corporal Sarath, requesting that the matter be expedited and that his son be handed over without delay. On 28 February 2002, the Attorney General informed the author that his son had disappeared after his abduction on 23 June 1990, and that his whereabouts were unknown.

7.8 On 5 March 2002, Corporal Sarath was indicted of having "abducted" the author's son on 23 June 1990 and along with two other unknown perpetrators, an offence punishable under section 365 of the Sri Lankan Penal Code. The indictment was forwarded to the High Court of Trincomalee and the author was so informed on 6 March 2002. The State party submits that Corporal Sarath was indicted for "abduction" because its domestic legislation does not provide for a distinct criminal offence of "involuntary removal". Moreover, the results of the investigation did not justify the assumption that Corporal Sarath was responsible for the murder of the victim, as the latter was seen alive on 9 October 1991. The trial of Corporal Sarath will commence in late 2002.

7.9 The State party submits that it did not, either directly or through the relevant field commanders of its Army, cause the disappearance of the author's son. Until the completion of the investigation referred to above, the conduct of Corporal Sarath was unknown to the State party and constituted illegal and prohibited activity, as shown by his recent indictment. In the circumstances, the State party considers that the "disappearance" or the deprivation of liberty of the author's son cannot be seen as a violation of his human rights.

7.10 The State party reiterates that the alleged "involuntary removal" or the "deprivation of liberty" of the author's son on 23 June 1990 and his subsequent alleged disappearance on or about 9 October 1991 occurred prior to the ratification of the Optional Protocol by Sri Lanka, and that there is no material in the communication that would demonstrate a "continuing violation".

7.11 The State party therefore contends that the communication is without merits and that it should, in any event, be declared inadmissible due to the reasons developed in paragraph 7.10.

Author's comments

8.1 On 2 August 2002, the author commented on the State party's observations on the merits. (8)

8.2 The author submits that the disappearance of his son took place in a context where disappearances were systemic. He refers to the "Final Report of the Commission of Inquiry into Involuntary

Removal or Disappearance of Persons in the Northern and Eastern Provinces" of 1997, according to which:

"[Y]outh in the North and East disappeared in droves in the latter part of 1989 and during the latter part of 1990. This large-scale disappearances of youth is connected with the military operations started against the JVP in the latter part of 1989 and against the LTTE during Eelam War II beginning in June 1990 [...] It was obvious that a section of the Army was carrying out the instructions of its Political Superiors with a zeal worthy of a better cause. Broad power was given to the Army under the Emergency Regulations, which included the power to dispose of the bodies without post-mortem or inquests, and this encouraged a section of the Army to cross the invisible line between the legitimate Security Operation and large-scale senseless arrests and killings."

8.3 The author emphasizes that one aspect of disappearances in Sri Lanka is the absolute impunity that officers and other agents of the State enjoy, as illustrated in the Report of the Working Group on Enforced or Involuntary Disappearances after its third visit to Sri Lanka in 1999. (9) The author argues that the disappearance of his son is an act committed by State agents as part of a pattern and policy of enforced disappearances in which all levels of the State apparatus are implicated.

8.4 The author draws attention to the fact that the State party does not contest that the author's son has disappeared, even if it claims not to be responsible; that it confirms that the author's son was abducted on 23 June 1990 by Corporal Sarath and two other unidentified officers, although in a manner which was "distinctly separate and independent" from the cordon and search operation that was carried out by the Army in this location at the same time; and that it submits that officers of the Army had been unaware of Corporal Sarath's conduct and the author's son abduction.

8.5 The author indicates that enforced disappearances represent a clear breach of various provisions of the Covenant, including its article 7, (10) and, emphasizing that one of the main issues of this case is that of imputability, considers that there is little doubt that his son's disappearance is imputable to the State party because the Sri Lankan Army is indisputably an organ of that State. (11) Where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, (12) even where the soldier or the other official is acting beyond his authority. The author, relying on the judgment of the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case* (13) and that of the European Court of Human Rights, concludes that, even where an official is acting ultra vires, the State will find itself in a position of responsibility if it provided the means or facilities to accomplish the act. Even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible. (14)

8.6 The author maintains that his son was arrested and detained by members of the Army, including Corporal Sarath and others unidentified, in the course of a military search operation and that these acts resulted in the disappearance of his son. Pointing to the overwhelming evidence before the Presidential Committee of Inquiry indicating that many of those in Trincomalee who were arrested and taken to Plantain Point Army Camp were not seen again, the assertion that this disappearance was an isolated act initiated solely by Corporal Sarath, without the knowledge or complicity of other levels within the military chain of command, defies credibility.

8.7 The author contends that the State party is responsible for the acts of Corporal Sarath even if, as it is suggested by the State party, his acts were not part of a broader military operation because it is undisputed that the acts were carried out by Army personnel. Corporal Sarath was a in uniform at the relevant time and it is not disputed that he was under the orders of an officer to conduct a search operation in that area during the period in question. The State party thus provided the means and facilities to accomplish the imputed act. That Corporal Sarath was a low ranking officer acting with a wide margin of autonomy and without orders from superiors does not exempt the State party from its responsibility.

8.8 The author further suggests that even if the acts were not directly attributable to the State party, its responsibility can arise due to its failure to meet the positive obligations to prevent and punish certain serious violations such as arbitrary violations of the right to life. This may arise whether or not the acts are carried out by non-state actors.

8.9 The author argues in this respect that the circumstances of this case must establish, at a minimum, a presumption of responsibility that the State party has not rebutted. In this case, referring to the jurisprudence of the Committee, (15) it is indeed the State party, not the author, that is in a position to access relevant information and therefore the onus must be on the State to refute the presumption of responsibility. The State party has failed to initiate a thorough inquiry into the author's allegations in areas within which it alone has access to the relevant information, and to provide the Committee with relevant information.

8.10 The author argues that according to the jurisprudence of the Committee (16) and that of the Inter-American Court of Human Rights, the State party had a responsibility to investigate the disappearance of the author's son in a thorough and effective manner, to bring to justice those responsible for disappearances, and to provide compensation for the victims' families. (17)

8.11 In the present case, the State party has failed to investigate effectively its responsibility and the individual responsibility of those suspected of the direct commission of the offences and gave no explanation as to why an investigation was commenced

some 10 years after the disappearance was first brought to the attention of the relevant authorities. The investigation did not provide information on orders that may have been given to Corporal Sarath and others regarding their role in search operations, nor has it considered the chain of command. It has not provided information about the systems in place within the military concerning orders, training, reporting procedures or other process to monitor the activity of soldiers which may support or undermine the claim that his superiors did not order and were not aware of the activities of the said Corporal. It did not provide evidence that Corporal Sarath or his colleagues were acting in a personal capacity without the knowledge of other officers.

8.12 There are also striking omissions in the evidence gathered by the State party. The records of the ongoing military operations in this area in 1990 have indeed not been accessed or produced and no detention records or information relating to the cordon and search operation have been adduced. It also does not appear that the State party has made investigations into the vehicle bearing registration number 35 SRI 1919 in which the author's son was last seen. The Attorney General who filed the indictment against Corporal Sarath has not included key individuals as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and may provide crucial testimony material to this case. These include Poopalapillai Neminathan, who was arrested along with the author's son and was detained with him at the Plantain Point Army Camp, Santhiya Croose, who was also arrested along with the author's son but was released en route to the Plantain Point Army Camp, S.P. Ramiah, who witnessed the arrest of the author's son and Shammugam Algiah from whose house the author's son was arrested. Moreover, there is no indication of any evidence having been gathered as to the role of those in the higher echelons of the Army as such officers may themselves be criminally responsible either directly for what they ordered or instigated or indirectly by dint of their failure to prevent or punish their subordinates.

8.13 On the admissibility of the communication, the author emphasizes that the Committee already declared the case admissible on 14 March 2002 and maintains that the events complained of have continued after the ratification of the Optional Protocol by the State party to the day of his submission. The author also cites article 17 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance. (18)

8.14 The author asks the Committee to hold the State party responsible for the disappearance of his son and declare that it has violated Articles 2, 6, 7, 9, 10 and 17 of the Covenant. He further asks that the State party undertake a thorough and effective investigation, along the lines suggested above; provide him with adequate information resulting from its investigation; release his son; and pay adequate compensation.

Examination of the merits

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

9.2 With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by an officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer. (19) The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

9.3 The Committee notes the definition of enforced disappearance contained in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court (20): *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time*. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10). It also violates or constitutes a grave threat to the right to life (article 6). (21)

9.4 The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author's son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee's opinion, the facts before it reveal a violation of article 9 in its entirety.

9.5 As to the alleged violation of article 7, the Committee recognizes the degree of suffering involved in being held indefinitely without any contact with the outside world, (22) and observes that, in the present case, the author appears to have accidentally seen his son some 15 months after the initial detention. He must, accordingly, be considered a victim of a violation of article 7. Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son

and by the continuing uncertainty concerning his fate and whereabouts, (23) the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant. (24) The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant both with regard to the author's son and with regard to the author's family.

9.6 As to the possible violation of article 6 of the Covenant, the Committee notes that the author has not asked the Committee to conclude that his son is dead. Moreover, while invoking article 6, the author also asks for the release of his son, indicating that he has not abandoned hope for his son's reappearance. The Committee considers that, in such circumstances, it is not for it to appear to presume the death of the author's son. Insofar as the State party's obligations under paragraph 11 below would be the same with or without such a finding, the Committee considers it appropriate in the present case not to make any finding in respect of article 6.

9.7 In the light of the above findings, the Committee does not consider it necessary to address the author's claims under articles 10 and 17 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 9 of the International Covenant on Civil and Political Rights with regard to the author's son and article 7 of the International Covenant on Civil and Political Rights with regard to the author and his wife.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within

ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Notes

1. Although the author did not invoke any specific provision of the Covenant in his initial communication, he did so in his comments of 25 May 2001 on the State party's observations on admissibility.

2. The author does not explain what this means.

3. Case No. 107/1981, Views adopted on 21 July 1983.

4. Case No. 440/1990, Views adopted on 24 March 1994.

5. The author does not specify who is the alleged victim of each of these alleged violations.

6. The State party mentions the names of the following persons: Alagiah Rajeswari, Sanmugan Alagiah, Ponnam Marakandu, Puwalupullai Nemidasan, Senarajasingham Muralidaran, Ratnam Arukwachelwam, Nagalingam Jayakanthan, Allapitchchei Abidulamjeed, Sakkaya Crush Prinsh Rajasekeran, Segarajasingham Muralidaran, Periyasim Selvaray Raamiah, Ajith Rasakin and Madawanpullai Krishnapillai.

7. Note to the members of the WG: The State party does not explain what it means by "involuntary removal".

8. For the purpose of these comments, the author was assisted by Mr. Velupillai Sittampalam Ganesalingam, Legal Director of Home for Human Rights, and Interights.

9. E/CN.4/2000/64/Add.1, paras 34 & 35.

10. *Celis Laureano v. Peru*, Case No. 540/1993, Views adopted on 25 March 1996.

11. *Velasquez Rodriguez Case* (1989), Inter-American Court of Human Rights, Judgment of 29 July 1998, (Ser. C) No. 4 (1988).

12. See *Caballero Delgado and Santana Case*, Inter-American Court of Human Rights, Judgment of 8 December 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser.L/V III.33 Doc.4); *Garrido and Baigorria Case*, Judgment on the merits, 2 February 1996, Inter-American Court of Human Rights)

13. *Velasquez Rodriguez Case* (1989), Judgment of 29 July 1998, Inter-American Court of Human Rights, (Ser. C) No. 4 (1988), para. 169 - 170.

14. *Timurtas v. Turkey*, European Court of Human Rights, Application no. 23531/94, Judgment of 13 June 2000; *Ertak v. Turkey*, European Court of Human Rights, Application no. 20764/92, Judgment of 9 May 2000.

15. *See Bleier v. Uruguay*, Case No. 30/1978, adopted on 24 March 1980, para 13.3 ("With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities [...]")

16. *Sanjuan Arevalo v. Colombia*, Case No. 181/1984, Views adopted on 3 November 1989; *Avellanal v. Peru*, Case No. 202/1986, Views adopted on 28 October 1988; *Mabaka Nsusu v. Congo*, Case No. 157/1983, Views adopted on 26 March 1986; and *Vicente et al. v. Colombia*, Case No. 612/1995, Views adopted on 29 July 1997; see also General Comment No. 6, HRI/GEN/1/Rev.1 (1994), para. 6.

17. Concluding observations of the Human Rights Committee on the third periodic report of Senegal, 28 December 1992, CCPR/C/79/Add.10; see also *Baboeram v. Surinam*, Case No. 146/1983, Views adopted on 4 April 1985 and *Hugo Dermit v. Uruguay*, Case No. 84/1981, Views adopted on 21 October 1982.

18. Enforced disappearances "shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified". Similarly, article 3 of the Inter-American Convention on the Forced Disappearance of Persons states that the offence of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined".

19. See article 7 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session 2001) and article 2, paragraph 3 of the Covenant.

20. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

21. See article 1, paragraph 2 of the Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992.

22. See *El Megreisi v. Libyan Arab Jamahiriya*, Case No. 440/1990, Views adopted on 23 March 1994.

23. Quinteros v. Uruguay, Case No. 107/1981, Views adopted on 21 July 1983.

24. Note to the WG : In *Quinteros*, the Committee considered that the family of the disappeared was also victims of all the violations suffered by the disappeared, including articles 9 and 10 (1).

A confession under duress: The Nallaratnam Singarasa Case

Communication No. 1033/2001

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No. 1033/2001: Sri Lanka. 23/08/2004. CCPR/C/81/D/1033/2001. (Jurisprudence)]

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

Alleged victim: The author

State party: Sri Lanka

Date of communication: 19 June 2001 (initial submission)

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

Meeting on 21 July 2004,

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

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

Adopts the following:

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

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

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

Facts as submitted by the author

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

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

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

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

2.5 On 11 December 1993, the author was produced before the Assistant Superintendent of Police (hereinafter "the ASP") of the CID and the same PC who had previously interrogated him. He was asked numerous personal questions about his education, employment and family. As the author could not speak Sinhalese, the PC interpreted between Tamil and Sinhalese. The author

was then requested to sign a statement, which had been translated and typed in Sinhalese by the PC. The author refused to sign, as he could not understand it. He alleges that the ASP then forcibly put his thumbprint on the typed statement. The prosecution later produced this statement as evidence of the author's alleged confession. The author had neither external interpretation nor legal representation at this time.

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

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

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

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

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

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

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

the lower part of the left back of the chest and eye were caused by a blunt weapon while that to the mid back of the chest was probably due to application of sharp force".

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

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

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

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

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as he was convicted by the High Court on the sole basis of his alleged confession, which is alleged to have been made in circumstances amounting to a violation of his right to a fair trial. Basic procedural guarantees that safeguard the reliability of a confession and its voluntariness were omitted in this case. In particular, the author submits that his right to a fair trial was breached by the domestic courts' failure to take into consideration the absence of counsel and the lack of

interpretation while making the alleged confession, and the failure to record the confession or to employ any other safeguards to ensure that it was given voluntarily. The author submits that the appellate courts' failure to consider these issues is inconsistent with the right to a fair trial and argues that the trial court's failure to consider other exculpatory evidence, in preference to reliance on the confession, is indicative of its lack of impartiality and the manifestly arbitrary nature of the decision. He adds that it was incumbent upon the appellate courts to intervene in this situation where evidence was simply disregarded.

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

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

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

uphold the conviction despite the abovementioned "irregularities".

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

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

3.7 The author claims a violation of article 2, paragraph 3, read together with articles 7 and 14, as the constitutional bar to challenging sections 16 (1) and (2) of the PTA effectively denies the author an effective remedy for the torture to which he was subjected and his unfair trial. The PTA provides for the admissibility of extra-judicial confessions obtained in police custody and in the absence of counsel, and places the burden of proving that such a confession was made "under threat" on the accused. (8) In this way, the law itself has created a situation where rights under article 7 may be violated without any remedy available. The State must enforce the prohibition on torture and ill-treatment, which includes taking "effective legislative, administrative, judicial and other measures to prevent torture in any territory under its jurisdiction". (9) Thus, if in practice legislation encourages or facilitates violations, then at a minimum this falls foul of the positive duty to take all necessary measures to prevent torture and inhuman punishment. The author claims a separate violation of article 2, paragraph 3, alone, as the explicit ban under Sri Lankan law on constitutional challenges to enacted legislation prevented the author from challenging the operation of the PTA.

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

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

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

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

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

The State party's submissions on admissibility and merits

4.1 By submission of 4 April 2002, the State party argues that the communication is inadmissible *ratione personae*. It submits

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

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

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

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

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

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

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

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

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

4.9 On the claim of alleged discrimination with regard to the manner in which the confession made by the author was recorded and considered by the Court, the State party reiterates its

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

The author's comments

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

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

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

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

5.5 On the issue of exhaustion of domestic remedies, in relation to the author's detention pending trial and the delay in trial, the author submits that only "available remedies" must be exhausted.

There is no specific right to a speedy trial under the Constitution, and, to date, the courts have not interpreted the right to a fair trial as including the right to an expeditious trial. Furthermore, the Constitution explicitly provides for the possibility of detention pending trial and, in any event, stipulates that constitutional remedies are not applicable to judicial decisions, for example when a court decides to grant frequent adjournments at the request of the prosecution, leading to trial delays.

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

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 Although the State party has not argued that the communication is inadmissible *ratione temporis*, the Committee notes that the violations alleged by the author occurred prior to the entry into force of the Optional Protocol. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the Covenant. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations of the State party. (14) The Committee observes that although the author was convicted at first instance on 29 September 1995, i.e. before the entry into force of the

Optional Protocol for the State party, the judgement of the Court of Appeal upholding the author's conviction, and the Supreme Court's order refusing leave to appeal were both rendered on 6 July 1999 and 28 January 2000, respectively, after the Optional Protocol came into force. The Committee considers the appeal courts decision, which confirmed the trial courts conviction, as an affirmation of the conduct of the trial. In the circumstances, the Committee concludes that it is not precluded *ratione temporis* from considering this communication. However, as to the author's claims under article 26, article 2, paragraph 1 alone and read together with article 14, and his claim under article 9, paragraph 3, relating to his automatic remand in detention without bail, the Committee finds these claims inadmissible *ratione temporis*.

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

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

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

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

Consideration of the merits

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

7.2 As to the claim of a violation of article 14, paragraph 3(f), due to the absence of an external interpreter during the author's alleged confession, the Committee notes that this provision provides for the right to an interpreter during the court hearing

only, a right which was granted to the author. (15) However, as clearly appears from the court proceedings, the confession took place in the sole presence of the two investigating officers – the Assistant Superintendent of Police and the Police Constable; the latter typed the statement and provided interpretation between Tamil and Sinhalese. The Committee concludes that the author was denied a fair trial in accordance with article 14, paragraph 1, of the Covenant by solely relying on a confession obtained in such circumstances.

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

7.4 On the claim of a violation of the author's rights under article 14, paragraph 3(g), in that he was forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary, the Committee must consider the principles underlying the right protected in this provision. It refers to its previous jurisprudence that the wording, in article 14, paragraph 3(g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt. (17) The Committee considers that it is implicit in this principle that *the prosecution* prove that the confession was made without duress. It further notes that pursuant to section 24 of the Sri Lankan Evidence Ordinance, confessions extracted by "inducement, threat or promise" are inadmissible and that in the instant case both the High Court and the Court of Appeal considered evidence that the author had been assaulted several days prior to the alleged confession. However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one

obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant.

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

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

7.7 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

Notes

1. Section 9(1) of the PTA provides as follows: "Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may

order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time."

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

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

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

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

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

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

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

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

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

10. Article 126(1), Constitution of Sri Lanka provides as follows: "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right." (emphasis added). Article 16 (1) of the Constitution provides: "All existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter [Chapter III on Fundamental Rights]." Further, Article 80(3) Constitution of Sri Lanka provides: "No court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of [any Act of Parliament] on any ground whatsoever." As a former Chief Justice of Sri Lanka, Justice S. Sharvananda, has commented (see Justice S. Sharvananda, Fundamental Rights in Sri Lanka, (Sri Lanka: 1993) at p. 140): "Article 80(3) vests enacted law with finality in the sense that the validity of an Act of Parliament cannot be called in question in any court or tribunal. In this Constitutional scheme, there is no room for the introduction of the concept of 'due process of law' or notions of reasonableness of the law and natural justice as has been done by the Supreme Court of India in *Maneka Gandhi's case* A.I.R. (1978) SC 597 at 691-692. As stated earlier, in Sri Lanka, it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his liberty contrary to the court's notions of justice or due process."

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

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

relating to the infringement or imminent infringement by the executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."

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

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

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

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

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

Muzzling the freedom of expression: The Victor Ivan Case

Communication No. 909/2000

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No. 909/2000: Sri Lanka. 26/08/2004. CCPR/C/81/D/909/2000. (Jurisprudence)]

Submitted by: Victor Ivan Majuwana Kankanamge (represented by counsel, Mr. Suranjith Richardson Kariyawasam Hewamanna)

Alleged victim: The author

State party: Sri Lanka

Date of initial communication: 17 December 1999 (initial submission)

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

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 909/2000, submitted to the Human Rights Committee by Victor Ivan Majuwana Kankanamge, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication, dated 17 December 1999, is Mr. Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, born on 26 June 1949, who claims to be a victim of a violation by Sri Lanka of articles 2 (3), 3, 19 and 26 of the Covenant. The communication also appears to raise issues under article 14(3)(c). The author is represented by counsel.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 11 June 1980 and 3 January 1998 respectively. Sri Lanka also made a declaration according to which "[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional

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

1.3 On 17 April 2000, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as presented by the author

2.1 The author is a journalist and editor of the newspaper "Ravaya". Since 1993, he has been indicted several times for allegedly having defamed ministers and high level officials of the police and other departments, in articles and reports published in his newspaper. He claims that these indictments were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, three indictments against the author, dated 26 June 1996 (Case Nr. 7962/96), 31 March 1997 (Case Nr. 8650/97), and 30 September 1997 (Case Nr. 9128/97), were pending before the High Court.

2.3 On 16 February 1998, the author applied to the Supreme Court for an order invalidating these indictments, on the ground that they breached articles 12(1) and 14(1)(a) of the Sri Lankan Constitution, guaranteeing equality before the law and equal protection of the law, and the right to freedom of expression. In the same application, the author sought an interim order from the Supreme Court to suspend the indictments, pending the final determination of his application. On 3 April 1998, the Supreme Court decided that the author had not presented a prima facie case that the indictments were discriminatory, arbitrary or unreasonable, and refused him leave to proceed with the application.

The complaint

3.1 The author claims that by transmitting to the High Court indictments charging him with defamation, the Attorney-General failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and therefore exercised his power arbitrarily. By doing so, the Attorney-General violated the author's freedom of expression under article 19 of the Covenant, as well as his right to equality and equal protection of the law guaranteed by article 26.

3.2 The author also claims that his rights under article 2, paragraph 3, of the Covenant were violated because the Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

3.3 Finally, the author claims a violation of article 3, but offers no explanation of that claim.

State party's observations on admissibility

4.1 On 17 March 2000, the State party provided observations only on the admissibility of the communication, as authorized by the Committee's Special Rapporteur on Communications pursuant to rule 91 (3) of the Committee's Rules of Procedure.

4.2 The State party considers the communication inadmissible because it relates to facts that occurred before the Optional Protocol entered into force for Sri Lanka, that is 3 January 1998. Moreover, upon ratification of the Protocol, Sri Lanka entered a reservation by which the State party recognized the competence of the Committee to consider communications from authors who claim to be victims of a violation of the Covenant only as a consequence of acts, omissions, developments or events that occurred after 3 January 1998. The State party submits that, since the alleged violations of the Covenant were related to indictments that were issued by the Attorney-General prior to that date, the claims are covered by the reservation and therefore inadmissible.

4.3 The State party contends that article 19(3) of the Covenant does not support the author's claim of a violation, because under that provision the exercise of the rights protected carries with it special duties and responsibilities and may be subject to restrictions provided by law which are necessary for the respect of the rights or reputations of others.

4.4 The State party argues that the author has not exhausted all available domestic remedies, which would have included representations to the Attorney-General regarding the indictments, or complaining to the Parliamentary Commissioner for Administration (the Ombudsman) or the National Human Rights Commission.

4.5 Finally, the State party considers that the author cannot invoke the jurisdiction of the Committee under article 2 (3) of the Covenant, because he has not established a violation of any of the rights under the Covenant for which remedies are not available under the Sri Lankan Constitution.

Comments by the author

5.1 On 16 June 2000, the author responded to the State party's observations. On the competence of the Committee *ratione temporis*, and the State party's reservation on the entry into force of the Optional Protocol, he recalls the Human Rights Committee's General Comment No. 24, according to which "the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date". He affirms that the violations he has alleged are continuing violations, so that the Committee has competence *ratione temporis*.

5.2 By reference to paragraph 13 of General Comment No. 24, the author argues that even acts or events that occurred prior to the entry into force of the Optional Protocol for the State party should be admitted as long as they occurred after the entry into force of the Covenant for the State party.

5.3 On the State party's argument that the complaint should be rejected as inadmissible because the restrictions under article 19 (3) of the Covenant are attracted, the author replies that this is not an objection to admissibility but addresses the merits of the communication.

5.4 On the issue of exhaustion of domestic remedies, the author affirms that the Supreme Court is the only authority with jurisdiction to hear and make a finding on infringements of fundamental rights by executive or administrative action. As to representations to the Attorney-General, the author notes that there is no legal provision for making such representation once indictments have been filed, and in any case such representations would not have been effective since the Attorney-General was himself behind the prosecutions. As regards a complaint to the Ombudsman or the National Human Rights Commission, the author stresses that these bodies are appointed by the President of Sri Lanka, and that they are vested only with powers of mediation, conciliation and recommendations but have no powers to enforce their recommendations. Only the Supreme Court is vested with the power to act on his complaint and to grant effective redress.

5.5 In relation to the State party's argument on article 2, paragraph 3, of the Covenant the author argues that a State party cannot invoke its internal laws as a reason for non-compliance with obligations under the Covenant.

Decision on admissibility

6.1 At its 72nd session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it.

6.2 The Committee noted that the State party contested the Committee's competence *ratione temporis* because, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of the Optional Protocol. In this respect, the Committee considered that the alleged violations had continued. The alleged violations had occurred not only at the time when the indictments were issued, but were continuing violations as long as there had not been a decision by a Court acting on the indictments. The consequences of the indictments for the author continued, and indeed constituted new alleged violations so long as the indictments remained in effect.

6.3 As regards the State party's claim that the communication was inadmissible because the author had failed to exhaust domestic remedies, the Committee recalled that the Supreme Court is the highest court of the land and that an application before it constituted the final domestic judicial remedy. The State party had not demonstrated that, in the light of a contrary ruling by the Supreme Court, making representations to the Attorney-General or complaining to the Ombudsman or to the National Human Rights Commission would constitute an effective remedy. The Committee therefore found that the author had satisfied the requirement of article 5, paragraph 2 (b) of the Optional Protocol and declared the communication admissible on 6 July 2001.

6.4 On 6 July 2001, the Committee declared the communication admissible. Whilst it specifically determined that the author's claims under articles 2(3) and 19 should be considered on the merits, it left open the possibility of considering the author's other claims under articles 3, 14(3)(c) and 26.

State party's observations on the merits

7.1 On 4 April 2002, the State party commented on the merits of the communication.

7.2 The State party draws attention to the fact that the indictments challenged by the author in his application to the Supreme Court were served during the term of office of two former Attorneys-General. It makes the following observations on certain aspects of the indictments in question:

-Regarding indictment Nr. 6774/94 of 26 July 1994, further to an article written about the Chief of the Sri Lankan Railway, the State party notes that this indictment was withdrawn and could not be challenged before the Supreme Court, because it

had been issued by a different Attorney-General than the one in office at the time of the application to the Supreme Court.

-Regarding indictment Nr. 7962/96 of 26 June 1996, which related to an article about the Minister of Fisheries, the State party notes that the information on which the article was based was subject to an official investigation, which allegedly confirmed the veracity of the information in question. This was never presented to the Attorney-General and could still be transmitted with a view to securing a withdrawal of the indictment.

-Regarding indictment Nr. 9128/97 of 30 September 1997, which related to an article about the Inspector General of Police (IGP) and to the alleged shortcomings of a criminal investigation in a particular case, the State party contends that the prosecution acted properly, in the best interest of justice, and in accordance with the relevant legal procedures.

7.3 The State party notes that, in addition to those complaints which led to criminal proceedings, there were 9 defamation complaints filed against the author between 1992 and 1997 in relation to which the Attorney-General decided not to issue criminal proceedings.

7.4 The State party underlines that the offence of criminal defamation, defined in section 479 of the Penal Code, may be tried summarily before the Magistrate's Court or the High Court, but no prosecution for this offence may be instituted by the victim or any other person, except with the approval of the Attorney-General. Moreover, for such an offence, the Attorney-General has the right, in accordance with section 393 (7) of the Code of Criminal Procedure, to file an indictment in the High Court or to decide that non-summary proceedings will be held before the Magistrate's Court, "having regard to the nature of the offence or any other circumstances". The Attorney-General thus has a discretionary power under this provision.

7.5 The State party considers that, in the present case, the Attorney-General acted in accordance with the law and his duty was exercised "without any fear or favour", impartially and in the best interest of justice.

7.6 Regarding the Supreme Court's jurisdiction, the State party recalls that leave to proceed for an alleged breach of fundamental rights is granted by at least two judges and that the author was given an opportunity to present a prima facie case of the alleged violations complained about. The Supreme Court, after exhaustively analyzing the discretionary power of the Attorney-General and examining the material submitted to it in respect of the numerous complaints against the author, was of the opinion that the indictments served on the author were not arbitrary and did not constitute a continued harassment or an intention to interfere with his right to freedom of expression. In this connection, it took into account four previous indictments against the author, and concluded that they did not amount to

harassment, because three were withdrawn or discontinued, and there was nothing to suggest any impropriety on the part of the prosecution. Moreover, during the same period, the Attorney-General had refused to take action on nine other complaints referred to in 7.3 above.

Author's comments

8.1 By submission of 17 June 2002, the author contended that the State party avoided the main issue of his complaint, failing to explain why the Attorney-General decided to file direct indictments in the High Court. In his opinion, the essence of the complaint is that, from 1980, the State party's government favoured important officials by prosecuting those critical of their actions for defamation – a minor offence otherwise triable by a magistrate – directly in the High Court. In the author's case, while conceding that the Attorney-General's discretion was not absolute or unfettered, the Supreme Court did not call the Attorney-General to explain why he sent these indictments to the High Court. The Supreme Court carefully examined the three contested indictments and summarily refused leave to proceed to his application, which deprived him of the opportunity to establish a breach of the rights to equality and freedom of expression. The author considers that the Supreme Court overlooked that the media exercise their freedom of expression in trust for the public, and that heads of government and public officials are liable to greater scrutiny.

8.2 The author considers that, in its comments on the merits, the State party failed to explain why it believed that the Attorney-General acted "without fear or favour", in the best interest of justice and why a direct indictment was preferred to a non summary inquiry.

8.3 The author considers that in examining defamation charges, the following elements are relevant:

-The offence is normally tried in the Magistrate Court;

-The Attorney-General's approval is required for filing defamation proceedings in the Magistrate Court;

-The offence is amenable for settlement when tried before the Magistrate Courts but not before the High Court;

-Finger printing is only done after conviction in the Magistrate Court while it is done in the High Court when the indictment is served—the author was finger printed in the course of each of the proceedings against him.

8.4 The author finally submits that the 9 cases referred to by the State party in which the Attorney-General declined prosecution is no argument in support of the impartiality of the Attorney-General, since the complainants in these other cases were either not influential, or were opponents to the government.

8.5 On 25 June 2004, the author's counsel advised that the outstanding indictments had been withdrawn.

Reconsideration of admissibility and examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol. It considers that no information has been offered by the author in support of his claim of a violation of article 3, and accordingly declares this part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997, and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

9.3 Regarding the author's claim that the indictments pending against him in the High Court constitute a violation of article 19 of the Covenant, the Committee has noted the State party's arguments that, when issuing these indictments, the Attorney-General exercised his power under section 393 (7) of the Code of Criminal Procedure "without any fear or favour", impartially and in the best interest of justice.

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3(c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2(3).

9.5 In light of the Committee's conclusions above, it is unnecessary to consider the author's remaining claims.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2(3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

President puts a life at risk: The Jayalath Jayawardena Case

Communication No. 916/2000

[Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights in Communication No 916/2000: Sri Lanka. 26/07/2002. CCPR/C/75/D/916/2000. (Jurisprudence)]

Submitted by: Mr. Jayalath Jayawardena

Alleged victim: The author

State party: Sri Lanka

Date of communication: 23 February 2000 (initial submission)

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

Meeting on 22 July 2002,

Having concluded its consideration of communication No. 916/2000, submitted to the Human Rights Committee by Mr. Jayalath Jayawardena under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication is Mr. Jayalath Jayawardena, a Sri Lankan citizen, residing in Colombo, Sri Lanka. He claims to be a victim of violations by Sri Lanka of the International Covenant on Civil and Political Rights. The author does not invoke any specific provision of the Covenant, however, the communication appears to raise issues under article 9, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as submitted by the author

2.1 The author is a medical doctor and a member of the United National Party ("UNP") in Sri Lanka. At the time of his initial communication, he was an opposition Member of Parliament but in December 2001 his party obtained a majority in Parliament

and he was appointed Minister of Rehabilitation, Resettlement and Refugees. From 1998, Mrs. Chandrika Bandaranaike Kumaratunga, the President of Sri Lanka, made public accusations, during interviews with the media, that the author was involved with the Liberation Tigers of Tamil Elam ("LTTE") and such allegations were given wide publicity by the "government-controlled" radio and television corporations. In addition, the same allegations appeared on the Daily News newspaper on 9 and 10 September 1998, and 5 January 2000, respectively.

2.2 On 3 January 2000, and during an interview broadcast over the state-owned television station, the President again accused the author of involvement with the LTTE. Two days later, a lawyer and leader of the All Ceylon Tamil Congress, who openly supported the LTTE, was assassinated by an unidentified gunman in Colombo. The author feared that he too would be murdered and that the President's accusations exposed him to many death threats by unidentified callers and to being followed by unidentified persons.

2.3 On 2 March 2000, the Secretary General of Parliament requested the Ministry of Defence to provide the author with the same security afforded to the Members of Parliament in the North-East of the country, as his work was concentrated in those provinces. He also stated that the author was in receipt of certain threats to his life and requested that he receive additional personal security. The Secretary General of Parliament confirmed in two letters to the author that he did not receive a response from the Ministry of Defence to his request. On 13 March 2000, the President accused the UNP of complicity with the LTTE in an interview published by the Far Eastern Economic Review.

2.4 On or around 15 March 2000, the author received two extra security guards, however they were not provided with "emergency communication sets" and the author was not provided with dark tinted glass in his vehicle. Such security devices are made available to all government Members of Parliament whose security is threatened, as well as providing them with more than 8 security guards.

2.5 In several faxes submitted by the author, he provides the following supplementary information. On 8 June 2001, a state-owned newspaper published an article in which it stated that the author's name had appeared in a magazine as an LTTE spy. After this incident, the author alleges to have received around 100 death threats over the telephone and was followed by several unidentified persons in unmarked vehicles. As a result of these calls, the author's family was in a state of "severe psychological shock." On 13 June 2001, the author made a complaint to the police and requested extra security, but this was not granted.

2.6 On 18 June 2001, the author made a statement to Parliament revealing the fact that his life and that of his family were in danger. He also requested the Speaker of the Parliament to refer his complaint to the "privileges committee."(1) Pursuant to his

complaint to the Speaker a "select committee"(2) was set up to look into his complaint, however because of the "undemocratic prorogation to the parliament", this matter was not considered. (3)

2.7 In addition, the author made a complaint to the police against a Deputy Minister of the government who threatened to kill him. On 3 April 2001, the Attorney General instructed the "Director of Crimes of Police" to prosecute this Minister. However, on 21 June 2001, the Attorney General informed the Director of Crimes that he (the Attorney General) would have to re-examine this case again following representations made by the Deputy Minister's lawyer. The author believes that this is due to political pressure. On 19 June 2001, the author wrote to the Speaker of Parliament requesting him to advise the Secretary of the Ministry of Defence to provide him with additional security as previously requested by the Secretary General of Parliament.

2.8 On the following dates the President and the state-owned media made allegations about the author's involvement with the LTTE: 25 June 2001; 29 July 2001; 5 August 2001; 7 August 2001; and 12 August 2001. These allegations are said to have further endangered the author's life.

2.9 Furthermore, on 18 July 2001, the author alleges to have been followed by an unidentified gunman close to his constituency office. The author lodged a complaint with the police on the same day but no action was taken in this regard. On 31 August 2001, a live hand grenade was found at a junction near his residence. (4) During the parliamentary election campaign which ended on 5 December 2001, the author alleges that the President made similar remarks about the connection between the UNP and the LTTE.

The complaint

3.1 The author complains that allegations made by the President of Sri Lanka on the state-owned media, about his alleged involvement with the LTTE, put his life at risk. He claims that such allegations are tantamount to harassment and resulted from his efforts to draw attention to human rights issues in Sri Lanka. He claims that he has no opportunity to sue the President, as she is immune from suit.

3.2 The author claims that the State party did not protect his life by refusing to grant him sufficient security despite the fact that he was receiving death threats.

3.3 The author further claims that the State party failed to investigate any of the complaints he made to the police on the issue of the death threats received against him.

State party's submission on the admissibility and merits of the communication

4.1 By letter of 6 September 2000, the State party made its submission on the admissibility of the communication and by letter of 3 July 2001, its submission on the merits. According to

the State party, the author has not availed himself of any domestic remedies as required under article 2 of the Optional Protocol. It states that if the author believed that the President's allegations infringed his civil and political rights, there are domestic remedies available to him under the Constitution and the Penal Code of Sri Lanka, against the media, restraining it from publishing or broadcasting such information, or instituting proceedings against it. It also submits that, apart from the author's statement that the President is immune from suit, he has not claimed that he has no faith in the judicial system in Sri Lanka for the purposes of pursuing his rights and claiming relief in respect of the publication or broadcasting of the material.

4.2 The State party contests that the author has been receiving death threats from unidentified callers and has been followed by unidentified persons, as there is no mention of him making such complaints to the domestic authorities. In this context, it also states that the author's failure to report such threats is an important factor in assessing his credibility.

4.3 On the merits, the State party submits that as a Member of Parliament and a medical practitioner, the author led a very open life, participating in television programmes relating both to the political as well as the medical field. He actively took part in political debates both in the television and the print media, without any indication of restraint, which would normally have been shown by a person whose life is alleged to be "under serious threat." In this regard, the State party submits that in response to the allegations made by the President, the author issued a denial, which was given an equivalent amount of television, radio and press coverage in both the government and private sectors.

4.4 The State party also submits that the fact that the author made no complaint to the domestic authorities about receiving death threats and did not pursue available legal remedies against the media restraining them from publication of material considered to be prejudicial to him, indicates that the author is engaged in a political exercise in international fora, to bring discredit to the Government of Sri Lanka rather than vindicating any human right which has been violated. According to the State party, the fact that the author failed to refer to the violation of any particular right under the Covenant would also confirm the above hypothesis.

4.5 Furthermore, it is submitted that there is no link between the assassination of the leader of the All Ceylon Tamil Congress, who was a lawyer, and the President's allegations about the author. It states that the President did not refer to the leader of this party in the interview in question and states that he had been openly supporting the LTTE for a long period of time. According to the State party, there are many lawyers who appear for LTTE suspects in Sri Lankan courts but who have never been subjected to any form of harassment or threat, and there have been no complaints of such a nature to the authorities.

4.6 Finally, the State party submits that the President of Sri Lanka, as a citizen of this country, is entitled to express her views on matters of political importance, as any other person exercising the fundamental rights of freedom of expression and opinion.

Comments by the author

5.1 On the issue of admissibility, the author submits that his complaint does not relate to the Sri Lankan press nor the Sri Lankan police but to the President's allegations about his involvement with the LTTE. He submits that the President herself should be accountable for the statements made against him by her. However, as the President has legal immunity no domestic remedy exists that can be exhausted. The author quotes from the Sri Lankan Constitution,

> 30-(1) "There shall be a President of the Republic of Sri Lanka who is the head of the State, the head of the executive and of the Government and the Commander-in-Chief of the Armed Forces.
>
> 35-(1) While any person holds office as President no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."

5.2 With respect to the State party's submission that the author made no official complaint about the death threats and necessity for increased security, the author reiterates what attempts he made in this regard, stating that he made many complaints to the police and submits a copy of one such complaint, dated 11 January 2000.

5.3 The author adds that on 18 July 2001 the Speaker of the Parliament requested the Secretary of the Ministry of Defence to provide the author with increased security. Similarly, on 23 July 2001, the Leader of the Opposition also wrote to the Secretary with the same request. (5) In a letter, dated 27 July 2001, the Secretary informed the Leader of the Opposition that both of these letters were forwarded to the President for consideration. The author states that he does not expect to receive such increased security as the President is also the Commander-in-Chief of the Police and Armed Forces.

5.4 The author refers to observations by international organisations on this issue who referred to the allegations made by the President and requested her to take steps to protect the author's life, including the investigation of threats to his life. According to the author, the President did not respond to these requests.

5.5 Finally, the author states that, the President did openly and publicly label the leader of the All Ceylon Tamil Congress a supporter of the LTTE but in any event he does not intend the Committee to investigate the circumstances of his death.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 The Committee notes the author's claim that his rights were violated, as he received death threats following allegations made by the President on his involvement with the LTTE, and his claim that he has no remedy against the President herself, as she is immune from suit. The State party insists that the author could have taken a legal action against the media, which broadcast or published the President's allegations. While the State party does not contest that, due to her immunity, the President could not have been the subject of a legal action, it doesn't indicate whether the author had any effective remedies to obtain reparation for the eventual harm to his personnel security, which the President's allegations may have caused. For these reasons the Committee finds that the author has exhausted domestic remedies, and this part of the communication is admissible. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant.

6.4 In relation to the issue of the State party's failure to investigate his claims of death threats, the Committee notes the State party's argument that the author did not exhaust domestic remedies as he failed to report these complaints to the appropriate domestic authorities. From the information provided, the Committee observes that the author made at least two complaints to the police. For this reason, and because the State party has not explained what other measures the author could have taken to seek domestic redress, the Committee is of the view that the author has exhausted domestic remedies in this regard. The Committee notes that this claim may raise issues under article 9, paragraph 1, of the Covenant. The Committee finds no other reason to question the admissibility of this aspect of the communication.

6.5 In relation to the issue of the State party's failure to protect the author by granting him increased security the Committee notes the author's argument that the level of security afforded to him was inadequate and not at the level afforded to other Members of Parliament, in particular to Members of Parliament working in the North-East of the country. The Committee notes, that although the State party did not specifically respond on this issue, the author does affirm that he received "two extra security guards" but provides no further elaboration on the exact level of security afforded to him as against other Members of Parliament.

The Committee, therefore, finds that the author has failed to substantiate this claim for the purposes of admissibility.

6.6 The Committee therefore decides that the parts of the communication, which relate to the claim in respect of the President's allegations against the author, and the State party's failure to investigate the death threats against the author, are admissible.

Consideration of the merits

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

7.2 In respect of the author's claim that the allegations made publicly by the President of Sri Lanka put his life at risk, the Committee notes that the State party has not contested the fact that these statements were in fact made. It does contest that the author was the recipient of death threats subsequent to the President's allegations but, on the basis of the detailed information provided by the author, the Committee is of the view that due weight must be given to the author's allegations that such threats were received after the statements and the author feared for his life. For these reasons, and because the statements in question were made by the Head of State acting under immunity enacted by the State party, the Committee takes the view that the State party is responsible for a violation of the author's right to security of person under article 9, paragraph 1, of the Covenant.

7.3 With regard to the author's claim that the State party violated his rights under the Covenant by failing to investigate the complaints made by the author to the police in respect of death threats he had received, the Committee notes the State party's contention that the author did not receive any death threats and that no complaints or reports of such threats were received. However, the State party has not provided any specific arguments or materials to refute the author's detailed account of at least two complaints made by him to the police. In the circumstances, the Committee concludes that the failure of the State party to investigate these threats to the life of the author violated his right to security of person under article 9, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Sri Lanka of article 9, paragraph 1, of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

Individual opinion, partially dissenting, by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, and Mr. Maxwell Yalden

We share the Committee's view regarding the State party's failure to investigate the death threats against the author.

We disagree, however, on the Committee's decision that the author's claim of a violation of his right under article 9, paragraph 1, of the Covenant by the allegations by the President through the State owned media against him (see above paragraph 3.1), is admissible under the Optional Protocol. In our view the author has not exhausted domestic remedies.

As stated above, the author's allegations related to the allegations by the President through the State owned media, but the author has not explained why he failed to take legal action against the media or to go to the courts to stop any of those allegations made against him. The fact that the President as head of State enjoys personal immunity from suit does not mean that there was no procedure of redress against other state or state controlled organs. Therefore, in our view, this part of the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol and should not have been dealt with in the merits.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

The text of a partially dissenting opinion co-signed by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, and Mr. Maxwell Yalden is appended to the present document.

Notes

1. No further information is provided on this committee.

2. No further information is provided on this committee.

3. No further information has been provided by the author on this matter.

4. According to a newspaper article, provided by the author on this matter, an investigation was carried out and the officer-in-charge stated that the incident had nothing to do with the author.

5. The author draws the Committee's attention to the following paragraph of this letter, "Mr. Jayawardena has made several complaints to the local police and the IGP himself all of which have been to no avail. So much so that as recently as the 18th of July 2001 an unidentified gunman was found loitering outside his home. It is regrettable to note that in spite of all this no action has been taken by your Ministry to accede to the request of the Speaker."

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4.a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4.c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4.d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

Special edition: UN Human Rights Committee decisions on communications from Sri Lanka

Basil Fernando, Executive Director,
Asian Legal Resource Centre, Hong Kong

- The Optional Protocol to the ICCPR as a means to address degenerating law & institutions in Sri Lanka

The decisions

- Jailed for raising voice in court:
  The Tony Fernando Case
- Justice delayed, human rights denied:
  The Lalith Rajapakse Case
- The long search for a son:
  The Sarma Case
- A confession under duress:
  The Nallaratnam Singarasa Case
- Muzzling the freedom of expression:
  The Victor Ivan Case
- President puts a life at risk:
  The Jayalath Jayawardena Case

And

- Synopses of UN Human Rights Committee decisions on communications from Sri Lanka

ISSN 1811702-3

Printed on recycled paper

article 2 is published by the Asian Legal Resource Centre (ALRC) in conjuction with *Human Rights SOLIDARITY*, published by the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

ALRC invites submissions to ***article 2*** by interested persons and organisations concerned with implementation of human rights standards in the region.

For further details, email the editor: editor@article2.org

Back issues of *article 2* available online:

www.article2.org

Annual Subscription Fee*

Hong Kong HK$250
Asian Countries US$35
Outside Asia US$50

*Subscription fee includes 6 issues of *article 2* and 6 issues of *Human Rights SOLIDARITY*

Asian Legal Resource Centre
Floor 19 , Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong SAR, China
Tel: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: editor@article2.org
Website: www.article2.org