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HUMAN RIGHTS COMMITTEE  
Eighty-first session  
5 - 30 July 2004

**VIEWS**

**Communication No. 1033/2001**

<u>Submitted by:</u>	Mr. Nallaratnam Singarasa (represented by counsel, Mr. V. S. Ganesalingam of Home for Human Rights as well as Interights)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Sri Lanka
<u>Date of communication:</u>	19 June 2001 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 11 December 2001 (not issued in document form)
<u>Date of adoption of Views:</u>	21 July 2004

On 21 July 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1033/2001. The text of the Views is appended to the present document.

[ANNEX]

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\* Made public by decision of the Human Rights Committee.

**ANNEX**

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

Eighty-first session

concerning

**Communication No. 1033/2001\*\***

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:

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\*\* 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.

### **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 5a.m, 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 were 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”.<sup>1</sup> 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

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<sup>1</sup> 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."

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<sup>2</sup>. 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.<sup>3</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> 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."

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<sup>4</sup>. 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.

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<sup>4</sup> 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)."(emphasis added)

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.<sup>5</sup> 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

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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."

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

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.<sup>6</sup> 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<sup>7</sup>.

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.

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<sup>6</sup> 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.

<sup>7</sup> CCPR General Comment No. 20, of 10 March 1992.

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.<sup>8</sup> 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”.<sup>9</sup> 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))<sup>10</sup>. The courts have similarly held that judicial review of judicial action

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<sup>8</sup> 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.

<sup>9</sup> Article 2, paragraph 1, of the Convention against Torture.

<sup>10</sup> 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



is not permissible<sup>11</sup>. 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 Case 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.

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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."

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

**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<sup>12</sup>. 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.

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<sup>12</sup> 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."

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<sup>13</sup>. 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.

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<sup>13</sup> Section 28 provides that, "The provisions of this Act (Prevention of Terrorism Act) shall have effect notwithstanding 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".

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 that 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<sup>14</sup>. 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

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<sup>14</sup> 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.

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.<sup>15</sup> 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

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<sup>15</sup> 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.

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.<sup>16</sup> 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.<sup>17</sup> 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

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<sup>16</sup> 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.

<sup>17</sup> Berry v. Jamaica, Case no. 330/1988, Views adopted on 4 July 1994.

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.

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

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