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on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-third session  
14 March to 1 April 2005

**VIEWS**

**Communication No. 1189/2003**

<u>Submitted by:</u>	Anthony Michael Emmanuel Fernando (represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Sri Lanka
<u>Date of communication:</u>	10 June 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 (old rule 91) decision, transmitted to the State party on 26 June 2003 (not issued in document form)
<u>Date of adoption of Views:</u>	31 March 2005

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

*Subject matter:* Fair trial in criminal contempt case, torture, death threats and personal security.

*Procedural issues:* Non-exhaustion of domestic remedies; lack of substantiation

*Substantive issues:* Fair trial procedures in criminal contempt case; extent of State party's responsibility for investigating death threats and protecting the subject of such threats.

*Articles of the Covenant:* 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), and 5, and articles 19, and 2, paragraph 3

*Articles of the Optional Protocol:* 2, 3, 5 paragraph 2 (b)

On 31 March 2005, 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. 1189/2003. The text of the Views is appended to the present document.

[ANNEX]

**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-third session

concerning

**Communication No. 1189/2003\*\***

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:

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\*\* 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 Ahanhazo, Mr. Edwin Johnson,  
Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas  
Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman  
Wieruszewski.

### **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 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 Men's' 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.....".<sup>1</sup> 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.

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<sup>1</sup> "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."

## 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<sup>2</sup>; he had not been informed of the charges against him, nor given adequate time for the preparation of his defence<sup>3</sup>; 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.<sup>4</sup>

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

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<sup>2</sup> 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*.

<sup>3</sup> 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.

<sup>4</sup> 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.

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<sup>5</sup>: 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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>5</sup> *Faurisson v. France, Case No. 550/93.*

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

<sup>7</sup> The author refers to the European Court of Human Rights case of *De Haes & Gijssels v. Belgium.*

author failed to express regret for this “contemptuous behaviour”, 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 Welikade 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 Welikade 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.<sup>8</sup>

5.5 On 9 January 2004, pursuant to rule 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.

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<sup>8</sup> *Delgado Paez v. Colombia, Case no. 195/1985* - "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....."

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 1, 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.

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