

## HUMAN RIGHTS COMMITTEE

### Sarma v. Sri Lanka

Communication No. 950/2000

16 July 2003

CCPR/C/78/D/950/2000

### VIEWS

*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 Plaintain 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 2:00 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 signalled 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 to 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 Girithala, Polanaruwa. He is married to a midwife at 93rd Mile Post, Kantale. She is working at Kantala Hospital.

2. On 09.10.1991 Mr. Amerasekera (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 (Abeyapura)

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, Trinco.
- 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, Trinco."

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 Plainain 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 Mudiyansele 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 Anpuwalipuram 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 Plaintain 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 Elean 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 Plaintain 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 Plaintain Point Army Camp, Santhiya Croose, who was also arrested along with the author's son but was released en route to the Plaintain 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.

[Adopted 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.]

\*\*/ 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: Alagaiyah Rajeswari, Sanmugan Alagaijah, Ponnamm Marakandu, Puwalupullai Nemidasan, Senarajasingham Muralidaran, Ratnam Arukwachelwam, Nagalingam Jayakanthan, Allapitchchei Abidulamjeed, Sakkaya Crush Prinsh Rajasekeran, Segarajasingham Muralidaran, Periyasim Selvaray Raamaiah, 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 1988, (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 were also victims of all the violations suffered by the disappeared, including articles 9 and 10 (1).