LST REVIEW

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PROTECTING THE RIGHTS OF LIFE AND LIBERTY OF SRI LANKAN CITIZENS

LAW & SOCIETY TRUST

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Editor's Note .....

This month's issue of the Review focuses on crucial developments, relating to the protection of the rights of life and liberty of Sri Lankan citizens.

In *Kottabadu Durage Sriyani Silva* vs *OIC, Paiyagala Police and Others*,(SC(FR) 471/2000, SCM 8/8/2003), the Supreme Court re-evaluates what had hitherto amounted to one of the most startlingly illogical propositions in relation to the manner in which an ordinary citizen in this country could exercise his or her rights under the Constitution.

If Citizen Perera is taken into a police station, for example, and severely tortured, he would have immediate recourse to Article 11 of the Constitution and would, in all probability, be granted substantial compensation.

However, if this same Citizen Perera had been so badly tortured that he died in the course of such treatment, this same Constitution, on the face of it, washed its hands of the affair with great – if not highly problematic- promptitude.

This was due to the fact that the Constitution gives the right to relief only to a person alleging the infringement of any right 'relating to such person', with only that person or an attorney at law on his behalf being able to petition court (Article 126(2)).

In addition, its provisions do not specify a right to life, unlike for instance, the far older comparable provisions of the Indian Constitution, thus shutting out, to all intents and purposes, rights applications by individuals on behalf of those who die in the custody of the State.

The August 2003 judgement of the Supreme Court recognises the right to life as implicit in specific rights provisions in the Constitution. In so doing, the Court infers necessarily a positive right from the negative, as contained particularly in the constitutional right not to be punished with death or imprisonment except by court order (Article 13(4)).

In other words, and put very simply, this constitutional article means that a person has a right to live unless a court orders otherwise. The Court reasoned that, in turn, a person has a right to life - at least in the sense of mere existence as distinct from the quality of life - which he can be deprived of only under court order.

Similarly, Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Consequently, to unlawfully deprive a person of life, without his consent or against his will would certainly be inhuman treatment for life is an essential pre-condition for being human. The Court uses these two articles to recognise a right not to be deprived of life - by way of punishment or otherwise- and by necessary implication, a right to life.

From this reasoning, the Court proceeds to hold that the next-of-kin, intestate heirs or dependants would be able to sue the wrongdoers for the unlawful death so caused. In this sense, the court recognises the evident anomaly in the alternative that gives redress for the lesser infringement (imprisonment) but not for the greater (death).

The word 'person' in Article 126(2) is interpreted broadly in the context of the express duty imposed on it by Article 4(d) of the Constitution to respect, secure and advance fundamental rights as well as Article 118(b) conferring exclusive jurisdiction upon the Supreme Court to protect fundamental rights.

In addition, Article 17, (entitling a person to make an application to court regarding an infringement), is reiterated to be an independent right. Consequently, as much as any person would be entitled to relief for being temporarily prevented from exercising this right, similar redress would be given if he was permanently so prevented.

Judicial interpretation in this regard, is buttressed by international obligations and standards, particularly under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, to which Convention, Sri Lanka is a party.

The Court accordingly granted relief to the wife of an army deserter, (claiming compensation on behalf of herself and her minor child), who had been lawfully arrested by the police but severely tortured thereafter, as a result of which he died eight days later.

The OIC of the police station was made liable, not for direct involvement in the acts of torture but for breach of his duty to take all reasonable steps to ensure that the victim was treated humanely and in accordance with the law.

The Review publishes also the Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) in regard to a case brought by a Sri Lankan father following the torture and disappearance of his son and supplementary documents relating to the application.

The Committee finds the Sri Lankan State responsible for *J. Thevaraja Sarma's* disappearance and to have violated his right (under ICCPR Article 7) not to be subjected to torture or ill treatment and his right (under ICCPR Article 9) to liberty and security. The Committee also finds a violation of Article 7 in respect of the pain and anguish undergone by the victim's family.

The State is meanwhile called upon to carry out an effective and through investigation into the victim's disappearance and ultimate fate, to bring to justice the perpetrators and to provide adequate compensation to his family.

Kishali Pinto-Jayawardena

The Supreme Court of the Democratic Socialist Republic of Sri Lanka

In the matter of an application under
Article 126 of the Constitution

Kottabadu Durage Sriyani Silva
Pettawatta, Gomarankanda
Paiyagala

Petitioner

SC No 471/2000 (FR)

vs

1. Chanaka Iddamalgoda
   Officer-in-Charge
   Police Station
   Paiyagala

2. Prasanna Wickramaratne
   Officer-in-Charge (Crimes)
   Police Station
   Paiyagala

3. Ananda
   Police Station
   Paiyagala

4. Chandrasiri
   Police Constable (21568)
   Police Station
   Paiyagala

5. Commissioner-General of Prisons
   Department of Prisons
   Baseline Road
   Colomobo 8

6. Inspector-General of Police
   Police Headquarters
   Colombo 1

7. The Attorney-General
   Attorney-General's Department
   Hulftsdorp
   Colombo 12

Respondents

BEFORE	:	Fernando, J. Yapa J, and de Silva, J.
COUNSEL	:	J.C. Weliamuna with Shantha Jayawardana and Charuka Samarasekera for the Petitioner; Manohara de Silva with W.D. Weeraratne for the 1st Respondent; Saliya Peiris with Upul Kumarapperuma for the 2nd and 4th Respondents; K.A.P. Ranasinghe, SC, for the 5th to 7th Respondents
ARGUED ON	:	13th June 2003 and 14th July 2003
DECIDED ON	:	8th August 2003

FERNANDO, J:

The Petitioner in this case is the widow of M.K. Lasantha Jagath Kumara ("the deceased"). Admittedly, he was arrested by the 2nd Respondent, the Officer-in-Charge (Crimes) of the Paiyagala Police, in June 2000, and died on 20/06/2000 whilst in remand custody at the Magazine Prison, Welikada. The Petitioner alleges that the deceased died in consequence of torture by the Paiyagala Police during an excessive period of detention and was thereby prevented from filing a fundamental rights application under Article 126, in violation of his fundamental rights under Articles 11, 13(2) and 17. In this application under Article 126 filed by her, she claims – for herself and for their minor child – the compensation which the deceased would have received but for his untimely death.

THE PETITIONER'S VERSION

According to the Petitioner's affidavit, she married the deceased in June 1997; in September he joined the Army and served at the Puttur Army camp, Jaffna; their child was born in 1998; and after 22/01/1999, he did not report back for service.

It is admitted that an open warrant had been issued against the deceased by the Magistrate's Court of Kalutara, in case No 4097/99 relating to the possession of illicit liquor and distilling equipment.

The deceased was arrested at about 7.00 a.m. on 12/06/2000 at the Petitioner's family home at Weragala, Paiyagala, by the 2nd Respondent (who was accompanied by a sergeant and a constable) as being an Army deserter. They tied his hands with a rope. The deceased asked the Petitioner to send a message to his family home, whereupon the 2nd Respondent slapped him three or four times and put him into the Police jeep. Thereafter the Petitioner and her mother went to the Paiyagala Police. At first she was not allowed to see the deceased, but later he was brought and shown to her, given three or four slaps, and put back in the cell. Later still, she was allowed to go near the cell and to speak to him for five minutes. When asked whether the Police had assaulted him, he replied in the affirmative.

On the 13th, the Petitioner went to the Police station at 8.30 a.m., mid-day, and 4.00 p.m., bringing his meals, but it was only on the third occasion that she was allowed to see him. He said that he was in pain, and could not eat as he was feeling nauseous. He asked her to request the Police to hand him over to the Military Police.

On the 14th, in the morning and again in the afternoon, the Petitioner went to the Police station. In the afternoon she was told that the deceased had been taken to the Head of the Crimes section for questioning, and that she too could go there. She saw him there, and noticed that his right arm was terribly swollen, the part above the elbow being quite black; that he was finding it difficult to talk, and to get up from his chair; and that both legs were swollen below the knee. He was feeling nauseous, and the 2nd Respondent said that he had been vomiting frequently for two days, and asked her to get a polythene bag for him to vomit as well as some medicine from a pharmacy to stop him vomiting. On that occasion he vomited blood, and was given a king coconut to drink. That fell to the ground because he could not hold it as all his fingers were swollen. The 2nd Respondent ordered that he be taken back to the cell, but he could not stand up. When she tried to help him, he shouted out not to touch him in the abdominal region. Back in the cell, when he had the chance to speak to her privately, he said that he had been severely assaulted by Police officers.

The mother and the sister of the deceased also submitted affidavits, giving details of their visits to the Police, substantially corroborating the Petitioner's narrative, especially as to the pitiful condition in which he was. Certain other facts emerged from their affidavits. On the 13th, Police officers told them that the Petitioner would not be produced in Court, but handed to the Military Police.

The sister further stated that on the 15th she and her sister complained to the Assistant Superintendent of Police, Kalutara. He did not record their complaint but telephoned the Paiyagala Police and ordered that the deceased be handed over to the Military Police. That evening when she went to the Paiyagala Police she was told that the deceased had been taken out of the station. Some time later she saw the deceased being brought back in a Police jeep unable to walk, and bent in two. The 4th Respondent, a constable, pushed him into the cell. She then asked the 2nd Respondent why the deceased was being assaulted in that way without being produced in Court. He replied that the deceased would be produced on the 16th. Later she asked him for permission to take the deceased to a doctor. He refused, and asked her to meet Dr A who lived nearby and to obtain some medicine from him. Dr A refused to prescribe for a patient whom he had not seen, particularly one who had been assaulted by the Police.

On the 16th, the sister went to the Magistrate's Court, where she was told that since the 16th was a public holiday, suspects would only be produced at the Magistrate's residence.

The 2nd Respondent later informed her that the deceased would be produced on the 17th. On the 17th, she went to the Police station and shouted out, threatening to complain to the Human Rights Commission if the deceased was not produced in Court that day. The 2nd Respondent then had the deceased brought out and stated that he was being taken to Court, and that it was unnecessary for her

to go to Court as bail could be obtained on the 29th. When she asked him why the deceased was not being given some medical treatment, he replied that he would get treatment at the prison. After the deceased was handed over to the Prison authorities, he stated that he had not complained to the Magistrate about his injuries through fear of Police assault, then and later. He also said that the 4th Respondent and six other Police officers had assaulted him. On the 18th, the Military Police told the sister that the Paiyagala Police had not yet informed them of the arrest and detention of the deceased.

It is not disputed that the deceased was produced before the acting Magistrate, Kalutara, by the 4th Respondent, sometime before noon on the 17th (Saturday), upon a typed report relating to case No. 4097/99, signed by the 1st Respondent and dated **17**/06/2000. However, in the body of the report, he referred to production on Court "on 2000/06/**16 today**", showing that production on the **16**th had been in contemplation when that report was typed. Further, according to the journal entry of the 17th, the 4th Respondent had informed the acting Magistrate that there were several pending cases against the deceased, and had objected to bail; and he had added that the deceased was due to be handed over to the Army, and that notice had been given. The deceased was remanded till the 29th. The 4th Respondent handed over the deceased to the Kalutara remand prison on the 17th. On the 18th, the deceased was transferred to Welikada, where he died on the 20th.

The Judicial Medical Officer, Colombo, submitted his post-mortem report, which revealed that the deceased had twenty injuries (contusions and abrasions) on all parts of the body: on his head, chest and abdomen, and on every section of every limb – upper arm, fore arm, hand, thigh, knee joint, leg and foot. His upper right arm was swollen and black in colour. The cause of death according to the Coroner was "acute renal failure due to muscule cutaneous injuries following blunt trauma."

On 18/07/2000, an Attorney-at-Law filed an application under Article 126, which was described, both in the caption and in the body of the petition, as being on behalf of the deceased. Among the reliefs sought was compensation in a sum of one million rupees for the dependents of the deceased. The Attorney-at-Law had no contact with the deceased before his death, and therefore could not have obtained instructions from the deceased to file that application, and I pointed this out to learned Counsel when he first supported the application on 23/08/2000. He then stated that instructions had in fact been given by the widow, the present Petitioner, and that the relief she sought was compensation for the dependants. He was given permission to amend. Accordingly the present amended petition was filed by the widow, as Petitioner, and was supported on 03/10/2000 when the following order was made:

> *"The petitioner's complaint is that her husband was subject to such extreme torture that he died soon after. Mr. Weliamuna submits that in these circumstances the necessary implication of Article 11 is that any dependant of the deceased should be entitled to relief, particularly in the context of Article 14.1 of the Convention against Torture to which, he says, Sri Lanka is a party. The fact that a person other than the victim may in some circumstances be able to invoke the jurisdiction of this Court is implicit in Article 13(4). In these circumstances, as an important question of jurisdiction arises, we grant leave to proceed in respect of the alleged infringement of Articles 11, 13(2) and 17."*

At first sight, viewed from the perspective of the Civil Procedure Code, it might appear that this Court had permitted an application filed on behalf of a deceased person – a nullity in law – to be replaced, under the guise of amendment, by an entirely distinct application by a purported successor in interest, after the lapse of the period of limitation. However, the rules applicable to fundamental rights applications are much less strict. Rule 44(4) of the Supreme Court Rules, 1990, provides:

> *"No application shall be dismissed on account of any omission or defect in regard to the name of the petitioner, the signing of the petition, or the proxy, if the Court is satisfied that the person whose fundamental right ... is alleged in such petition to have been ... infringed expressly or impliedly authorised or approved, or ratified the filing of such application."*

Despite the defect in the name of the petitioner – i.e. that it was filed on behalf of the deceased – it was clear that it was the widow who had authorised the filing of the petition, and that defect was capable of being cured. That was what this Court permitted, in keeping with the spirit of that Rule. Whether the widow had enforceable rights accruing upon or flowing from the death of her husband was a question of law, to be determined at the hearing.

THE RESPONDENTS' VERSION

The three affidavits relied on by the Petitioner did not implicate the 3rd Respondent, who is therefore discharged. Affidavits were filed by the 1st, 2nd and 4th Respondents, who denied or pleaded unawareness of most of the averments in the petition and affidavit of the Petitioner. They did not specifically respond to the affidavits of the mother and the sister, but I will take them as denied by implication.

While stating that he had not ordered the arrest of the deceased, the 1st Respondent stated in his affidavit that according to the Police records, the deceased had been arrested on the 16th and not on the 12th, and had been produced in Court on the 17th. He pleaded that there were "no marks or any indication that he had been assaulted", that "he did not appear to be suffering from any ailment"; that the deceased had not seen assaulted or tortured, and that he did not witness any assault or torture; and that neither the deceased nor any one else complained of torture or assault, or of any need for medical treatment. He did not say anything about his movements and conduct between the 12th and the 17th.

In his affidavit the 2nd Respondent claimed that he arrested the deceased on the 16th, but did not explain the circumstances in which he had set out from the Police station. As for the arrest, he claimed that he deceased brandished a knife and tried to stab "us", and attempted to escape, whereupon he had to strike the deceased several times on his ***right*** arm to make him drop the knife, using minimum force. The deceased then surrendered. He gave no explanation for the other injuries which the deceased had. Soon after arrest he recorded the deceased's statement at 10.45 a.m., on the basis of which the deceased was taken at 11.25 a.m. to various places from which stolen property had been recovered. He annexed and pleaded as part and parcel of his affidavit his notes of arrest

recorded (in the grave crime information book) at 9.45 a.m., but not his second set of notes recorded at 9.50 a.m. and pasted in the minor offences information book at 4.00 p.m. on the 17th.

Both Respondents annexed, in bulk, a host of IB extracts, consisting of statements, complaints and notes.

The 4th Respondent's affidavit was similar to the 2nd Respondent's and contained details relating to the deceased being produced in Court and handed over to the prison authorities. He stated that the deceased made no complaint of ill-treatment to the Magistrate.

The 6th Respondent, the Inspector-General of Police, failed to file an affidavit, either his own or that of any responsible officer aware of the facts. It must be assumed that he found himself unable to deny the allegations made in the petition (a) that the C.I.D. had informed the Magistrate's Court that they were unable to investigate the death as they were busy with other matters, and (b) that it was very likely that the Police would not investigate a killing in Police custody. The Petitioner has not alleged any infringement by him, and accordingly it is unnecessary to consider his liability on the basis of inaction.

CREDIBILITY OF THE TWO VERSIONS

The 1st and 2nd Respondents failed to respond specifically to the affidavit of the sister of the deceased, which referred to several significant matters calling for some explanation from them. Firstly, the sister stated that on the 15th she had complained to the A.S.P., Kalutara, who had telephoned and ordered the Paiyagala Police to hand the deceased to the Military Police. She also stated that on the 18th the Military Police had told her that they had not been informed of the arrest. The journal entry of the 17th proves that there was in fact either an order or a decision to hand the deceased to the Military Police. The 1st and 2nd Respondents failed to produce any document or entry pertaining to that matter, probably for the reason that question arose before the 16th, showing that the deceased had been arrested before the 16th, and that in fact the Military Police had not been informed. Secondly, the sister claimed that on the 15th the 2nd Respondent's had told her that the deceased would be produced in Court on the 16th. The 1st Respondent's report to Court showed that production had been contemplated on "2000/06/**16** today." Finally, she asserted that on the 15th, on the 2nd Respondent's directions, she did ask Dr A for medicine. The 1st and 2nd Respondents should have been more forthcoming on these matters, perhaps even to the extent of obtaining affidavits from the A.S.P. and Dr A.

There are other contradictions and shortcomings in the Respondent's version. In an endeavour to make up for the omissions in their affidavits they have tendered IB extracts in bulk. Those cannot be treated as primary evidence. Apart from that infirmity, those extracts reveal further shortcomings. The 2nd Respondent's "Out" entry at 7.00 a.m. on the 16th recorded that he was leaving, with an armed Police party, in a private vehicle, with no mention of make, registration number, ownership, or driver's name, and without any reference to mileage. Subsequent entries showed that the Paiyagala

Police had at least two jeeps, and that whenever they were used the registration number, mileage and driver's name were recorded. It is difficult to believe that at 7.00 a.m. in the morning both jeeps were unavailable, and that a convenient private vehicle was available. The Respondents could easily have produced the records pertaining to he jeeps to show what they were used for, first, on the 12th at 7.00 a.m. (when the deceased was arrested according to the Petitioner), and second, on the 16th at 7.00 a.m.

That "Out" entry did not indicate, directly or indirectly, that the journey was to search for or arrest the deceased, but rather, to investigate information received about a suspect wanted for serious offences. The 2nd Respondent's "In" entry at 9.45 a.m. expressly stated that investigation was **unsuccessful**, and that thereafter while patrolling the area, he had seen the deceased whom he had recognised as an Army deserter, for whom an open warrant had been issued in case No 4097/99, and who was wanted for serious offences. Those notes did not even suggest that in giving the deceased reasons for arrest the contents of that warrant had been read out – naturally, because the journey was not in connection with the deceased, and hence there was no reason to take the warrant with him. However, in the second set of notes, purportedly written five minutes later, at 9.50 a.m., (and pasted in a different IB the next day at 4.00 p.m.), it was stated that before they set out on the 12th, the 2nd Respondent had explained to the others that they were seeking an Army deserter against whom there was an open warrant, etc, and that immediately after subduing the deceased, he had read out the open warrant, etc, and that immediately after subduing the deceased, he had read out the open warrant to the deceased.

Another shortcoming related to the most serious complaint against the deceased – of attempted rape and other offences – allegedly recorded at 5.00 p.m. on the 12th. No reference was made to the complaint in the 2nd Respondent's notes, or in the deceased's statement purportedly recorded by the 2nd Respondent at 10.45 a.m. on the 16th – although that statement went into great detail in respect of every other complaint. That suggest that at whatever time the deceased was questioned, that complaint had not yet been recorded – and that tends to confirm the petitioner's version that the arrest was at 7.00 a.m. on the 12th.

According to the Petitioner, the deceased did not resist arrest, and sustained no injury at the time of arrest, although he did receive a few slaps. The Respondents claimed that the deceased sustained some injuries because the Police had to use minimum force to subdue him. There are serious inconsistencies in the Police versions. Going in chronological order, the 2nd Respondent stated in his 9.45 a.m. notes that he had dealt the deceased some blows with his baton; and that he had carefully examined the deceased and found contusions on his body which were the result of the deceased having fallen to the ground while grappling with them, as well as signs of contusion resulting from blows on his right arm, abrasions as a result of falling to the ground, and chicken pox and other old scars. According to the notes made at 9.50 a.m. by the sergeant who accompanied the 2nd Respondent, he too had dealt the deceased a few blows with a stick, and on examining him found that there were abrasions on both arms above the elbow, and scars of blows received some days previously. However, the constable who took him into custody soon after all those notes were made noted the fact that he had examined the deceased – but apparently found none, because he made no record of any injuries. The deceased was taken out at 11.25 a.m. and brought back to the station at 4.10 p.m., when he was

handed over to a different constable, who had examined him and found contusions on the upper left arm but no other visible injuries. It is highly probable that the deceased did have several visible injuries. In any event, the 1st Respondent's claim that there were "no marks or any indication that he had been assaulted' is quite unacceptable.

The Respondents attempted to suggest that most of the injuries had been sustained in prison custody. They relied heavily on the deceased's statements recorded on the 17th at the Kalutara prison in the presence of the 4th Respondent, and on the 18th at Welikada. In the former the deceased was recorded as having stated that the swelling of his arm was due to blows by the Police and not by any others, without mentioning any other injury. In the latter, he had stated that he had been arrested by the Paiyagala police on the 12th and had been kept in custody till the 17th, and that he had been assaulted by about ten officers – he named the 2nd Respondent and "Sergeant Ananda" (who has not been identified); that his arms and legs were paining; and that he wished medical treatment. It is probable that the former statement, made in the presence of the 4th Respondent, was incomplete due to the fear of further Police assaults, which he had already expressed to his sister.

I have no hesitation in accepting the Petitioner's version, which is consistent, and even finds corroboration in important respects from the material produced by the Respondents – whose version is teeming with contradictions and inconsistencies. I hold that the deceased was arrested on the 12th, and unlawfully kept in custody until the 17th; and that during that period he was subjected to repeated brutal assaults by Police officers – who ignored the pleas of family members, manifested callous indifference to his pain and suffering, and denied him even minimal medical treatment – which resulted in his death, thereby preventing him applying to his Court for relief. Even a sentence of death, imposed after trial and conviction by a competent Court, must be carried out with a minimum of pain and suffering. The deceased was denied even that right.

RIGHT TO SUE IN RESPECT OF DECEASED'S RIGHTS

The deceased's fundamental rights under Articles 11, 13(2) and 17 had been seriously infringed, entitling him to obtain substantial compensation had he been able to make an application under Article 126. However, the infringement was so serious that he did not live long enough even to give instructions to file such an application. Article 126(2) gives a person, who alleges that a fundamental right "relating to such person" has been infringed, the right (by himself or by an Attorney-at-Law) to apply to this Court. Several questions arise: does Article 11 include, by implication, a right to life? If the right to life is infringed, are the dependents of the deceased entitled to claim compensation for that infringement? In respect of the infringement of fundamental rights, particularly Article 11, 13 (2) and 17, if the victim dies before making an application, does the right to sue accrue to or devolve on his heirs?

Although the right to life is not *expressly* recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter 111 of the Constitution. In particular, Article 1394) provides that no person shall be punished **with death** or imprisonment except by order of a competent

court. That is to say, a person has a right not to be put to death because of wrongdoing on his part, except upon a court order. (There are other exceptions as well, such as the exercise of the right of private defence.) Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise. Thus Article 13(40, by necessary implication, recognises that a person has a right to life – at least in the sense of mere *existence*, as distinct from the *quality* of life – which he can be deprived of only under a court order. If, therefore, without his consent or against his will, a person is put to death, unlawfully and otherwise that under a court order, clearly his right under Article 13(4) has been infringed. In regard to every such instance, upon the infringement taking place, the victim will cease to be alive, and therefore unable to bring an action. If I were to hold that no one else – next-of-kin, intestate heir, or dependent – is entitled to sue the wrongdoers, that would mean that there is no remedy for causing death in violation of Article 13(4); and that the right to life impliedly recognised by that Article is illusory, as there is no sanction for its infringement. That would also create anomalies: that there is sanction for the lesser infringement, i.e. of imprisonment contrary to Article 13(4), but none for the much graver infringement, of causing death; and that in regard to causing death, there is a remedy for an imminent infringement, but not for an actual infringement. The choice, therefore, is either to interpret Article 13(4) narrowly, as if the words "death or" were not there, or to interpret "person" in Article 126(2) broadly, as including the lawful heirs and/or dependants of such person – either to interpret the fundamental right restrictively, or the Constitutional remedy expansively. Article 4(d) requires this Court to respect, secure and advance fundamental rights, and that requires me to reject the former course, and to adopt the latter. Where there is an infringement of the rights to life implied in Article 13(4), Article 126(2) must be interpreted – in order to avoid anomaly, inconsistency and injustice – as permitting the lawful heirs and/or dependants to institute proceedings.

Likewise, Article 17 recognises that every person is entitle to make an application under Article 126 in respect of the infringement of a fundamental right. That is an independent fundamental right, for the infringement of which relief will be granted: *Porage Lakshman* v. *Fernando*, SC 24/90 SCM 29/09/95. If a person is temporarily prevented form making, or pursuing, such an application, he will certainly be entitled to complain that his fundamental right under Article 17 has been infringed. But if he is put to death in order to prevent him – totally and permanently – from complaining, can it be that no one else can complain? For the reasons already stated, here, too, Article 126(2) must be interpreted expansively.

Article 11 guarantees freedom from torture and from cruel and inhuman treatment or punishment. Unlawfully to deprive a person of life, without his consent or against his will, would certainly be *inhuman* treatment, for life is an essential pre-condition for being human. In any event, if torture or cruel treatment or punishment is so extreme that death results, to hold that no one other than the victim can complain will result in the same anomalies, inconsistencies and injustice as in the case of Articles 13(4) and 17. Here, too, Article 126(2) must be interpreted expansively.

I hold that Article 11 (read with Article 13(4) recognises a right not to deprived of life – whether by way of punishment or otherwise – and, by necessary implication, a right to life. That right must be

interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect those rights effectively (cf. Article 118(b)).

There is yet another reason which compels that conclusion. Article 14.1 of the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* provides:

> *"Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."*

The interpretation that the right to compensation accrues to or devolves on the deceased's lawful heir and/or dependants brings our law into conformity with international obligations and standards, and must be preferred.

PERSONAL RESPONSIBILITY OF RESPONDENTS

I am satisfied on the evidence that the 2nd Respondent lawfully arrested the deceased on the 12th, but made false entries to cover up the fact that he was in unlawful custody thereafter, till the 17th; that he thereby facilitated the torture and the cruel treatment to which the deceased was subjected; and that he was a willing participant in the events which led to the death of the deceased.

As for the 1st Respondent, learned Counsel on his behalf urged that he had not participated in or authorised, and had no knowledge of any act of torture or cruelty, and that no one had complained to him about any such act. However, his assertions that the deceased had "no marks or any indication that he had been assaulted", and that "he did not appear to be suffering from any ailment", cast serious doubts on his credibility. Those assertions imply that he did see the deceased, in which event he could no have helped noticing the injuries which the deceased had. Further, the deceased was being held in custody subject to the 1st Respondent's orders, and it was his duty to consider the need for further detention as well as to check on the deceased's condition. The 1st Respondent gave no reason why the deceased continued to be kept in custody after 4.10 p.m. on the 16th although no further investigation was needed. The 1st Respondent had knowledge of the deceased's condition, neglected to provide him medical treatment, and failed to have him produced in Court at least on the 16th.

In any event, the 1st Respondent's responsibility and liability was not restricted to participation, authorisation, complicity and/or knowledge. As the Officer-in-charge, he was under a duty to take all reasonable steps to ensure that persons held in custody (like the deceased) were treated humanely and in accordance with the law. That included monitoring the activities of his subordinates. He did not claim to have taken any steps to ensure that the Petitioner was being treated as the law required. Such action would not only have prevented further ill-treatment, but would have ensured a speedy

investigation of any misconduct as well as medical treatment for the Petitioner. The 1st Respondent is, therefore, in any event liable for his culpable inaction.

ORDER

Counsel for the Respondents submitted that only reduced compensation, if any, should be awarded because of the deceased's "criminal record." They sought to distinguish *Sanjeewa* v. *Suraweera*, SC 328/2002 (FR) SCM 4.4.2003, where Rs 800,000 was awarded as compensation and costs to a petitioner who was similarly treated but who had the good fortune to survive his ordeal, on the basis that that petitioner did not have a "bad record." The 1st and 2nd Respondents should have concentrated their efforts to have the allegations against the deceased determined by a competent Court, after a fair trial. Until then the deceased was entitled to the benefit of the presumption of innocence. But even assuming that the deceased had a bad record, the present case is more serious because the deceased lost his life, and, indeed, the opportunity to redeem his bad record.

I hold that the deceased's fundamental rights under Articles 11, 13(2) and 17 have been infringed by the 1st and 2nd Respondents, and other Police officers, and that his rights have accrued to or devolved on the Petitioner and their minor child (M.K. Lakshitha Madusankha). I ward them a sum of Rs. 800,000 in equal shares, as compensation and cost, of which a sum of Rs 700,000 shall be paid by the State and Rs. 50,000 each by the 1st and 2nd Respondents personally, before 31.12.2003. The sum of Rs. 400,000 to which the minor child is entitled shall be invested in the name of the minor child on the terms that the interest shall be paid monthly to the Petitioner for the maintenance of the child and that the principal sum shall be paid to the child on majority. I direct the Registrar to forward a copy of this judgment to the National Police Commission for necessary action, particularly in the light of Article 4(d) of the Constitution.

JUDGE OF THE SUPREME COURT

YAPA, J:

I agree

JUDGE OF THE SUPREME COURT

DE SILVA, J:

I agree

JUDGE OF THE SUPREME COURT

Distr.

GENERAL
CCPR/C/78/D/950/2000
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Human Rights Committee
Seventy-eighth session
14 July - 8 August 2003

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*

- Seventy-eighth session -

Communication No. 950/2000

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:

1. 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.

2. 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 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. Wijetunghe 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.

3. The Complaint

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

4. 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.

5. 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 (Abeypura)
>
> 4. During this period officers on duty at Plantain Point Army Camp. In addition to names mentioned in para 3:
>
> a) Sunil Tennakoon (at present gone on transfer from here)
> b) Tikiri Banda (presently working here)
> c) Captain Gunawardena
> d) Kundas (European)

5. Witnesses

a) My wife
b) Mr. S. Alagiah, 330, Anpuvalipuram, Trincomalee.
c) Mr. P. Markandu, 442, Kanniya Veethi, Barathipuram, 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 thatthe 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.

6. 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.

7. 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 Plaintain Point Army Camp. On the same day and between 8 and 27 February 2001, a number of other witnesses were interviewed by the DIU.(6) Between 3 April and 26 June 2001, the DIU proceeded to the interview of 10 Army personnel, including the Officer commanding the Security Forces of the Trincomalee Division in 1990/91. The DIU completed its investigation on 26 June 2001 and transmitted its report to the MPC, which, on 22 August 2001, requested further investigation on particular points. The results of this additional investigation were transmitted to the MPC on 24 October 2001.

7.4 The State party submits that the results of the criminal investigation have revealed that, on 23 June 1990, Corporal Ratnamala Mudiyanselage Sarath Jayasinghe Perera (hereafter Corporal Sarath) of the Sri Lankan Army and two other unidentified persons had "involuntarily removed (abducted)" (7) the author's son. This abduction was independent of the "cordon and search operation" carried out by the Sri Lankan Army in the village of 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.

8. 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 Eleam 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 of 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.

9. 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 autho'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, Ponnam 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 explains what it means by "involuntary removal."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United Nations Human Rights Committee Communication Number 950/2000

In the matter of:

Jegatheeswara Sarma (Applicant)

- and -

The Government of the Democratic Socialist Republic of Sri Lanka (Respondent State)

Additional Written Comments by the Applicant under Rule 93(3) in Response to the Respondent State's Submissions on Merits

I. Introductory Information

1. The Applicant, Jegatheeswara Sarma is assisted in this communication by Mr. Velupillai Sittampalam Ganesalingam, Legal Director of Home or Human Rights, 14 Pentreve Gardens, Colombo, Sri Lanka and INTERIGHTS, Lancaster House, 33 Islington High Street, London NL 9LH. All communications should be directed to the Applicant at 1036, Selvanayagapuram, Trincomalee, Sri Lanka.

2. These comments are submitted pursuant to Rule 93 (3) of the UN Human Rights Committee's Rules of Procedure and are written in response to the Respondent State's submissions regarding the merits of the communication of 22 April 2002.

II. Comments on the Respondent State's Submissions on Merits

A. Summary of Facts

1. As set out more fully in the original Petition, submitted on 25 October 1999, the Applicant's case can be summarised as follows.

2. On 13 June 1990, the Applicant's son, Jegadeeshwara Sharma Thevaraja Sarma, who was twenty years of age at the time, left his residence at Selvanayagapuram, Trincomalee, for the neighbouring village of Ambawalipuram to visit a friend. Due to ongoing fighting in the Trincomalee and Uppuveli areas, it was not possible for him to return home on that day.

3. On 15 June 1990, the Trincomalee area was surrounded by the Sri Lankan Army ('the Army') who conducted a 'cordon and search' operation. Similarly, on 23 June 1990, the Army surrounded Ambavalipuram and again began a cordon and search operation of that

area. In the course of this operation, Corporal Ratnamala Mudiyanselage Sarath Jayasinghe Perera ('Corporal Sarath') and one other unidentified soldier, armed with rifles and in uniform, arrested the Applicant's son and three others. The four detainees were taken behind a shop, at the Anuradhapura Junction near Ambawalipuram, where Corporal Sarath assaulted the Applicant's son with his rifle. He was then taken, on foot, to a temporary military camp at Ambalveedi. The Applicant himself witnessed the abduction of his son, and identified Corporal Sarath and one of the other individuals abducted, Krishnapulle.

4. The individuals who had been detained along with the Applicant's son, informed the Applicant that his son had been taken subsequently to the 22nd Battalion Camp Headquarters ('Plaintain Point Camp'). The Applicant and his wife attempted to visit their son at that camp, but were not allowed to do so.

5. In the following months, the Applicant notified the relevant authorities of his son's abduction, specifically the Trincomalee Police, the Coordinating Officer of the Army, and the National Investigative Committee to Process, Clarify and Recommend Rehabilitation and Release of Suspects chaired by Justice Jayalath. At this time, he also notified the International Committee of the Red Cross, the Peace Committees, and various Human Rights Organisations that his son had been detained by the Army. On 10 August 1990, the Presidential Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces was also informed. The Applicant had submitted copies of all these notifications to the Human Rights Committee along with his comments on the State party's submission on 25 May 2001.

6. Over a year later, on 9 October 1991, the Applicant saw his son for the first time since 23 June 1990. His son was in a van (registration 35 SRI 1919) – of a type often co-opted for Army use in the area – and he was accompanied by Army personnel. The van had stopped outside the Pharmacy in Trincomalee where the Applicant was working. This was the last time that the Applicant's son was seen by the Applicant. On 24 July 2000, the Applicant applied to the Attorney General for an enquiry into his son's disappearance to be initiated and for his son to be released from Army detention.

7. The enforced disappearance of the Applicant's son took place in a context where such disappearances were not anomalous but a matter of systematic practice. A pattern of abduction was coupled with a system designed to preclude relatives from ascertaining information as to the whereabouts of disappeared persons or those responsible. The *'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces' (The Department of Government Printing September 1997)* concludes that:

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

A feature of the systemic practice of disappearances in Sri Lanka is the absolute impunity that officers and other agents of the state enjoy. In this respect, the **Report of the Working Group on Enforced or Involuntary Disappearances** (E/CN.4/2000/64/Add.1), reporting on its third visit to Sri Lanka in 1999 found that:

'with respect to criminal action against perpetrators of enforced disappearances, the three Presidential Commissions of Inquiry ... played a crucial role. They established evidence concerning 16,742 cases of disappearance and identified, in their final reports of September 1997, suspected perpetrators in relation to 3,861 cases of disappearance, police investigations against 1,560 suspected perpetrators members of the police and the armed forces were initiated. On 14 July 1998, the former Attorney-General (the present Chief Justice) established a Missing Persons Commissions Unit which as of 1 October 1999, had received from the police Disappearance Investigation Unit a dossier relating to 890 cases of disappearance. According to information provided by the Attorney-General, criminal proceedings were initiated against 486 persons in relation to 270 cases of disappearance. In 73 cases, non-summary procedures before magistrates were started, while in 197 cases indictments were issued. Since the act of enforced disappearance is not a criminal offence per se under Sri Lankan criminal law, these indictments and non-summary proceedings relate to various offences, such as abduction with intention to murder, wrongful confinement, torture, rape or murder. The mission was informed by the Attorney-General and the Inspector General of Police that on 14 September 1999 the first of the accused, a police officer, was convicted for the crime of abduction and sentenced to five years of imprisonment.' (paras 34 and 35).

8. In the present case, there had been no meaningful investigation into the enforced disappearance despite the fact that the Applicant has repeatedly drawn it to the attention

of the relevant authorities. The State commenced an investigation in 2000 which was characterised by excessive delay and inadequacy in that it failed to investigate seriously either the state responsibility or the individual responsibility of those who committed these acts. It has not provided background information concerning any orders that may have been given to Corporal Sarath and others responsible regarding their role in search operations. Nor has it considered the chain of command under which he and others were operating. 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 Corporal Sarath. It has provided no witness evidence to support their assertion that Corporal Sarath or the other individuals involved were acting in a personal capacity without the knowledge of other officers.

9. In sum, the facts as outlined above demonstrate that the Applicant's son was disappeared by agents of the state and that this formed part of a pattern and policy of enforced disappearances, with which all levels of the state apparatus are implicated. Furthermore, there has been no meaningful investigation into the responsibility of state authorities, nor into the individual responsibility of those directly and indirectly responsible for carrying out, ordering or other otherwise participating in the commission of these crimes. The limited investigative steps taken have been characterised by excessive delay and woeful inadequacy. In each of these respects, it is submitted that the State Party's response dated 22 April 2002, far from refuting the Applicant's case, serve to support it.

Summary of the Respondent State's Case

1. The Respondent State does not appear to contest that the Applicant's son has disappeared. However, it asserts that it is not responsible for this disappearance. It asserts that on 23 June 1990, Corporal Sarath and two other unidentified persons abducted the Applicant's son in a manner which was 'distinctly separate and independent' from the cordon and search operation which the Respondent State concedes was carried out by the Army in the village of Anpuwalipuram at this time Futhermore, it asserts that officers of the Army who carried out the operation had been 'unaware' of the conduct of Corporal Sarath and of the abduction of the Applicant's son (paragraph 16). They deny that the Applicant's son had been detained at the 22nd Battalion Camp HQ. It concludes from the foregoing that there is no state responsibility for the enforced disappearance.

2. They detail the steps undertaken to investigate the disappearance and bring to justice those believed to be responsible: Corporal Sarath was indicted for the abduction of the Applicant's son under section 356 of the Sri Lankan Penal Code on 5 March 2002.

B. The Law

a. State Responsibility for the Enforced Disappearance

1. Enforced disappearance represent a clear breach of the various provisions of the Covenant, including those that prohibit torture and cruel, inhuman and degrading treatment. The Human Rights Committee has held, in an enforced disappearance case involving Peru, that:

> *"In the circumstances, the Committee concludes that the abduction and disappearance of the victim and the prevention on contact with his family and the outside world constitute cruel and inhuman treatment in violation of article 7, ... of the Covenant"*
> *(See **Celis Laureano** v. **Peru**, Communication No. 540/1993, 25 March 1996 para 8.5)*

2. The question of primary importance in this case is that of imputability of the act of enforced disappearance of the Applicant's son to the State – which includes all organs of the state as well as entities empowered to exercise 'elements of governmental authority.' There can be little doubt that the actions of the Sri Lankan Army would be imputable to the State as it is unambiguously an organ of the state. An act is imputable to the state when a given conduct can be attributed to it; in this instance such given conduct is the arrest, detention and ultimate disappearance of the Applicant's son.

> *See **Velasques Rodrigues Case** (1989) Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)*

3. It is instructive to consider the circumstances in which an act of enforced disappearance may be imputable to a state according to the case-law of the Inter-American Court of Human Rights and the European Court of Human Rights.

> *See **Caballero Delgado and Santana Case**, Inter-American Court of Human Rights, Judgment of December 8, 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser. L/V III.33 Doc. 4), where the Court noted that acts of public authority or acts performed by individuals using their position of authority are imputable to the State (para. 56). See also **Garrido and Baigorria Case**, Judgement on the Merits of February 2, 1996 Inter-Am. Ct. H.R. 25. During the hearing of February 1, 1996, the Alternate Agent of Argentina, Ambassador Humberto Toledo, stated that the Government "totally accept[ed] its international responsibility" and reiterated "the acceptance of international responsibility of the Argentine State in a case of this kind." This was in response to allegations of State*

responsibility (police officers were involved) by the Inter-American Human Rights Commission regarding the disappearance of Garrido and Baigorria.

Where the violation of rights recognized by the Covenant is carried out by a soldier or other official who uses his or her position of authority to execute the wrongful act, the violation is imputable to the State. This is so even where the soldier or other official is acting beyond the scope of his authority.

*In the **Velasquez Rodriguez Case** the Court held that "according to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law." (para. 169, 170). This Court concluded that ... "in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State." (para. 172) See also **Godinez Cruz v. Honduras** Inter-Am. Ct. HR (Ser. C) no. 5 (1989). The European Court of Human Rights has found a violation of the Convention and held the state responsible under circumstances similar to the case before the Committee. See Case of **Timurtas v. Turkey**, Application no. 23531/94, Judgment 13 June 2000. See also Case **Ertak v. Turkey**, Application no. 20764/92, Judgment 9 May 2000. In both cases Turkey was found to be responsible for the disappearances of the Applicant's sons, taken by state agents.*

Thus, even where an official is acting *ultra vires*, the state will find itself in a position of responsibility if the State provided the means or facilities to accomplish the act. Indeed even if, and this is not known in this instance, the officials acted in direct contravention of the orders given to them, the State may still be responsible.

*See **Youman, US v. Mexico** where there was a riot against a group of foreigners and the authorities sent a lieutenant with troops to break the riot up. Rather than disbursing the crowd, the troops opened fire on the foreigners. Even though their actions were unauthorized and*

contrary to express orders, the Commission did not consider them to be private acts, but acts for which the state must assume responsibility. This decision was made in light of the fact that the soldiers were properly armed, uniformed and under the orders of an officer [emphasis added].

b. <u>Application of Legal Standards to Facts of the Case</u>

1. It is the Applicant's submission that the State is responsible for his son's disappearance, on the basis of the legal standards set out above.

2. Firstly, it is his submission that his son was in fact arrested and detained by members of the Army, including Corporal Sarath and others unnamed, in the course of a military search operation and that these acts resulted in the disappearance of the Applicant's son. The weight of evidence available - from witness statements, including that of the suspect - suggests that the Applicant's son was arrested and detained (and subsequently disappeared) in the course of a military operation. In his submission, this conclusion is also consistent with the pattern of such atrocities prevalent in the area at the relevant time. There is overwhelming evidence before the Presidential Committee of Inquiry that many of those in Trincomalee who were arrested and taken to the Plaintain Point camp were not seen again. In these circumstances the assertion that the disappearance was an isolated act initiated entirely by Corporal Sarath, without the knowledge or complicity of other levels within the military chain of command, defies credibility.

3. Secondly, without prejudice to the foregoing, the State is responsible for the acts carried out by Corporal Sarath even if, as the State suggests, his acts were not part of a broader military operation. It is undisputed by the State that the imputed acts were carried out by member of Army personnel. The suspect was a soldier and was armed and in uniform at the relevant time. The State similarly does not dispute that Corporal Sarath was under orders of an officer to conduct a search operation, in that area during the period in question, nor that he was armed and in uniform at the time of the arrest and detention. The State thus provided the means and facilities to accomplish the imputed act even if, which is unknown, it did not directly sanction such an act. In accordance with the legal standards of state responsibility, outlined above, this is sufficient to render the State responsible for the acts of the suspect and others acting in concert with him.

4. The State argues in response that Corporal Sarath was a lower ranking officer acting with a wide margin of autonomy and without orders from superiors. Even if the facts as to the rank and autonomy of Corporal Sarath were to be established, they do not exempt the State from responsibility. On the basis of the legal standards surrounding state responsibility set out above the State's assertion that Corporal Sarath was acting out side its authority and that the State therefore has no responsibility, is unfounded.

5. Thirdly, it is noted that even where the acts are not directly attributable to the state, 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. The striking lack of due diligence in preventing violations, and in investigating and punishing those responsible after the fact, would in itself be sufficient to attract responsibility, even absent the more direct forms of responsibility alleged above. The failure to investigate is set out in more detail below.

6. Finally, the circumstances of this case must establish, at a minimum, a presumption of responsibility, which the State has produced no evidence to rebut. It is the State, and not the Applicant, that is in a position to access relevant information concerning this case. It is submitted that, in the light of the facts as set out above, the onus must be on the State to refute the presumptive responsibility.

> *In **Bleir** v. **Uruguay** (Doc. A/37/40, p.130), the Committee held that '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 the 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.'*

In this instance the State has failed to initiate a thorough inquiry into the Applicant's allegations of enforced disappearance in areas within which it alone has access to the relevant information, and to furnish relevant information to the Committee. It has not provided background information concerning any orders that may have been given to Corporal Sarath and others responsible regarding their role in search operations, nor of the chain of command under which he had others was operating. 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 Corporal Sarath. It has provided no witness evidence to support its assertion that Corporal Sarath or the other individuals involved were acting in a personal capacity without the knowledge of other officers. It has not provided any records of detention during the period of disappearance either from Plantain Point camp or any other detention centre to refute the Applicant's contention that his son was detained by the State.

7. In sum, there is strong evidence to suggest that the Applicant's son was disappeared in the course of a military search operation and that responsibility for this disappearance rests unequivocally with the State. The assertion that the disappearance was an isolated act initiated entirely by Corporal Sarath, beyond the scope of a broader military operation

defies credibility and the State has produced no evidence to support this assertion nor to rebut the presumption that the Applicant's son was disappeared. However, even if it were established that the State did not sanction such an act, it would remain responsible for Corporal Sarath's acts since it was responsible for providing the means and facilities to accomplish the imputed act. The striking lack of due diligence in preventing violations, and in investigating and punishing those responsible after the fact, would in itself be sufficient to attract responsibility, even absent the more direct forms of responsibility alleged above.

c. **State Responsibility for Investigation of the Enforced Disappearance**

1. The State has a responsibility to investigate the enforced disappearance of the Applicant's son in a thorough and effective manner.

> *See **Velasquez Rodriguez Case** (1988) where it was held that the State must "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."*
>
> *Similarly, in a number of other cases, the Human Rights Committee has emphasised the duty of the state to investigate in the context of disappearances (**Sanjuan Arevalo** v. **Colombia**, Communication 181/1984), as well as the general 'duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities' (**Avellanal** v. **Peru**, Communication 02/1986; **Mbaka Nsusu** v. **Congo**, Communication 157/1983; **Vicente et al.** v. **Colombia**, Communication 612/1995). In its General Comment 6, the Committee declared that '... States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.' (UN Doc HRI/GEN/1/Rev. 1 at 6 (1994)*

2. The State is also under a responsibility upon completion of an investigation to bring to justice those responsible for disappearances and to provide compensation for the victims' families.

> *The Human Rights Committee has, on several occasions, found that "... violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished." (1203rd meeting held on 5 November 1992, the Human Rights Committee, in its Concluding Observations on Senegal (CCPR/C/79/Add.10).*

In ***Baboeram*** **v.** ***Suriname*** *(Communication no 146/1983), a case concerning the arrest and killing of some 15 persons by the military police - the Human Rights Committee found a violation of Article 6 and urged the authorities in Suriname 'to take effective steps (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families ...' See also* ***Hugo Dermit*** **v.** ***Uruguay*** *(Communication no 84/1981) where the Committee again invokes the 'bring to justice' language.*

d. <u>Application of Legal Standards to Facts of the Case</u>

1. The State has failed to meet its obligations to investigate the disappearance of the Applicant's son in a thorough and effective manner. Furthermore, it has failed to meaningfully investigate either State responsibility or individual responsibility, whether direct or indirect, of those responsible for the disappearance. The limited investigative steps which have been taken have been woefully inadequate and excessively delayed.

2. The State has failed to investigate effectively the individual responsibility of those suspected of the direct commission of the offences in question. The steps which have been taken have been characterised by delay and inadequacy. It is admitted in paragraph 1 of the State's response that the State made no response to earlier appeals to investigate this disappearance. The response fails to explain why an investigation was commenced some 10 years after the disappearance was first brought to the attention of the relevant state authorities.

3. There are striking omissions in the evidence gathering process that the State claims constitute an adequate, if delayed, investigation: the records of the ongoing military operations in this area in 1990 have not been accessed or produced and no detention records or information relating to the cordon and search operations in question have been adduced. There is no evidence to suggest that the State has made investigations into the vehicle bearing registration number 35 SRI 1919 in which the Applicant's son was last seen. The Honourable Attorney General who filed the indictment against Corporal Sarath has not included key individuals as witnesses for the prosecution, despite the fact that they have already provided statements to the State and may provide crucial testimony material to this case. These include:

   (a) Poopalapillai Neminathan, who was arrested along with the Applicant's son and was detained along with him at the 22nd Battalion Headquarters (known as 'Plantain Point Camp').
   (b) Santhiya Croose, who was arrested along with the Applicant's son but was released *en route* to the Plantain Point Army camp.
   (c) S.P. Ramiah who witnessed the arrest of the Applicant's son during the operation.
   (d) Shammugam Algiah from whose house the applicant's son was arrested during the operation.

4. Moreover, there is no indication of any evidence having been gathered as to the role of those in the higher echelons of the Army. Such officers or others may themselves be criminally responsible either directly for what they ordered or instigated, or indirectly or indirectly by dint of their failure to prevent or punish their subordinates' illegal acts at the time the violation took place. Such an investigation is essential where the offences are so numerous or notorious that there is no other reasonable conclusion except that those in positions of authority would have had knowledge of their commission.

5. The Applicant informed the authorities shortly after the event of his son's disappearance in the course of a military operation and yet the State has failed to ensure that this chain of superior responsibility was properly investigated despite evidence of a pattern and policy of disappearance at the relevant time.

e. **Issues relating to admissibility**

1. In paragraphs 21 and 22 of their submissions, the State argues that the case is not admissible because the 'involuntary removal' of the Applicant's son took place before Sri Lanka had ratified the First Optional Protocol to the ICCPR on 3 October 1997. It is respectfully submitted that the Committee has already heard the respective arguments of the Applicant and State regarding admissibility and has by its decision dated 14 March 2002 held that the case is admissible. *A copy of the said decision – CCPR/C/74/D/950/2000 of 19 March 2002 is annexed X.*

2. Moreover and in any event, the violation of the Applicant's rights under the Covenant, although initiated prior to ratification, have continued after ratification to the present day. The Committee has previously considered similar challenges to its jurisdiction and has found them to be without merit and it is respectfully submitted by the Applicant that the Committee has jurisdiction to examine both the state's responsibility for the initial events which resulted in the enforced disappearance and the state's subsequent failure to effectively investigate the enforced disappearance.

> *See for example* ***Sandra Lovelace*** **v.** ***Canada*** *(Communication no 6/1977) where the Human Rights Committee held that it "is empowered to consider a communication when the measures complained of, although they occurred before the entry into force of the Covenant, continued to have effects which themselves constitute a violation of the Covenant after that date." (para 7.3)*
>
> *See also* ***Luciano Weinberger Weisz*** *(alleged victim's brother) on behalf of* ***Ismael Weinberger*** **v.** ***Uruguay*** *(29 October 1980) where the State raised the objection that the date of the alleged violation of human rights (Ismael Weinberger was arrested on 18 January 1976)*

preceded the date of the entry into force for Uruguay of the Covenant and the Optional Protocol (23 March 1976). The Human Rights Committee concluded that it was not barred from considering the case because, although the arrest of the alleged victim preceded the date of the entry into fro Uruguay of the Covenant and the Optional Protocol, the alleged violation continued after that date. The communication was deemed admissible.

Article 17 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance states that 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 III 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."

3. The Applicant has had no information about the whereabouts of his son provided to him despite repeated attempts to make requests of the relevant authorities since the first date of the disappearance to the present day. It is submitted therefore that the Committee does have jurisdiction over events which occurred prior to the State having ratified the first Optional Protocol since they represent a continuing violation from his first arrest to date.

III. RELIEF SOUGHT

The Respondent State has significantly failed to address the violations raised in the original communication of 25 October 1999. The Applicant hereby requests that the Committee:

Declare that the Government of Sri Lanka has violated Articles 2, 6, 7, 9, 10 and 17 of the ICCPR;

Hold that the Government of Sri Lanka is responsible for the disappearance of the Applicant's son Thevaraja Sarma;

Recommend that the State undertake a thorough and effective investigation, including specifically:

Investigating all those responsible, including at the higher echelons of the Army;
Investigating salient records including those relating to the military operation at that time and detention records from Plantain Point camp and other relevant detention centres;
The tracing and interviewing of all potential witnesses and other sources of evidence.

Recommend that the State provide the Applicant with adequate information resulting from its investigation;

Recommend that the State release the Applicant's son Thevaraja Sarma;

Recommend payment of adequate compensation for the multiple violations of the rights of the Applicant,, his son and family members.

2 August 2002 **S.J. Sarma**