



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 614/2014\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Subakaran R. Thirugnanasampanthar (represented by counsel, Robert James de Vere McCaw)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	24 June 2014 (initial submission)
<i>Date of the present decision:</i>	9 August 2017
<i>Subject matter:</i>	Deportation of complainant from Australia to Sri Lanka
<i>Procedural issue:</i>	Admissibility — manifestly ill-founded
<i>Substantive issue:</i>	Risk of torture in the event of deportation to country of origin (non-refoulement)
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is Subakaran R. Thirugnanasampanthar, a national of Sri Lanka born on 28 November 1990. He sought asylum in Australia, his application was rejected and he risked forcible removal to Sri Lanka. He claims that in case of his forcible removal he would face a risk of torture, in violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia made the declaration under article 22 of the Convention on 28 January 1993. The complainant is represented by counsel, Robert James de Vere McCaw.

1.2 On 24 June 2014, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainant to Sri Lanka while his complaint was being considered by the Committee. On 26 June 2014, the State party advised the Committee that, as a result of the timing of the Committee's request for interim measures, the communication was not brought to the attention of the relevant authorities of the Government of Australia in sufficient time to prevent the complainant's departure, which had been scheduled for 25 June 2014. While the complainant was in transit, his submission to the Committee was assessed and it was

\* Adopted by the Committee at its sixty-first session (24 July-11 August 2017).

\*\* The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Kening Zhang.

\*\*\* An individual opinion by Committee member Alessio Bruni (dissenting) is annexed to the present decision.

GE.17-16783(E)



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concluded<sup>1</sup> that there was no new information in the communication that had not been thoroughly considered through domestic processes.<sup>2</sup> The complainant was removed to Sri Lanka on 25 June 2014.

### **The facts as submitted by the complainant**

2.1 The complainant is a Sri Lankan national of Tamil ethnicity. In 2005, he was filmed and photographed as the lead actor in a play performed at his school, which was organized by the Liberation Tigers of Tamil Eelam (LTTE). The complainant had no other involvement with LTTE.

2.2 Early in 2008, an unidentified armed gang came to his house and questioned him about LTTE. There were four armed men and they questioned him at the gate to his house. In June 2008, two men attempted to abduct the complainant by pretending to take him to see his injured father at the hospital. Parents and schoolchildren surrounded him, which saved him. After that incident, the complainant stopped attending school and began living with a relative, but does not specify where.<sup>3</sup> As of October 2009, after armed gangs had regularly visited his family, he went into hiding at St. Mary's Cathedral in Jaffna. During that period, both the Sri Lanka Army and paramilitary gangs visited his family. As the visits had become less frequent and he missed his family, he returned home around 5 January 2011.

2.3 In May 2011, the Sri Lanka Army came into the complainant's house to make a house check and attempted to take his 16-year-old sister to another room against her wishes. The complainant attempted to intervene with an air pump, as he suspected that the soldier would rape his sister. The other soldiers attacked the complainant, kicking him and hitting him with the air pump and with their rifle butts.

2.4 In June 2011, the complainant was abducted on his way to a local temple by a large group of men in a white van. He was blindfolded and taken to a room where he was tied up. Again, he was stomped on and beaten, including on his genitals. He was detained for six days until his father paid a bribe for his release. During that period, he was sexually assaulted for three days. The gang member who released him told him that he would tell the others that the complainant had escaped. The complainant explains that this meant that the gang would attempt to recapture him. The gang member also told him that he would be killed if he were recaptured. Therefore, the complainant decided to return to St. Mary's Cathedral. Between 15 and 19 July 2011, he fled from Sri Lanka to Malaysia by aeroplane. While he was there, the Sri Lanka Army and armed gangs went to his home in Sri Lanka and interrogated his brother.

2.5 On 1 December 2011, the complainant arrived in Australia. On 21 January 2012, he made a request for a Protection Obligations Evaluation. A delegate of the Minister for Immigration and Citizenship refused the complainant's asylum application on 6 March 2012. On 14 March 2012, the complainant was referred for an Independent Protection Assessment; that application was rejected on 27 September 2012 on the ground that Australia did not owe him protection obligations. The Independent Protection Assessment Office found that the complainant did not meet the criteria for a protection visa (class XA) set out in section 36 (2) of the Migration Act 1958, upholding the finding of the primary decision maker that the complainant did not have a well-founded fear of persecution for the purpose of the Convention relating to the Status of Refugees, of 1951,<sup>4</sup> and therefore he did not have a refugee status, and he did not enjoy complementary protection either.

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<sup>1</sup> No further information was provided as to which authorities of the State party had carried out the assessment.

<sup>2</sup> The State party's authorities have consistently determined that the non-refoulement obligations of Australia, including under article 3 of the Convention, were not engaged in relation to the complainant.

<sup>3</sup> The documents on file indicate that the complainant lived in his aunt's home in Thevadi, and that no one came to look for him in Thevadi, according to his accounts.

<sup>4</sup> As amended by the Protocol relating to the Status of Refugees, of 1967.

2.6 On 20 February 2013, the complainant sought a review of the Independent Protection Assessment Office's decision before the Federal Magistrates Court of Australia (now known as the Federal Circuit Court of Australia), which dismissed his appeal on 23 April 2014. On 22 May 2014, the complainant lodged an appeal to the Federal Court of Australia, which was anticipated to be heard between 4 and 26 August 2014.<sup>5</sup> However on 9 June 2014, the Department of Immigration and Border Protection informed the complainant, despite the pending appeal, that his forcible removal would take place on 25 June 2014.

2.7 The complainant implies that he has exhausted all available and effective domestic remedies capable of halting his removal, and that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

### **The complaint**

3.1 The complainant claims that if he is returned to Sri Lanka, he will be abducted, tortured and probably killed by the Sri Lanka Army or by paramilitary groups, such as the Karuna faction, acting in conjunction with the Sri Lanka Army to persecute suspected LTTE collaborators. He also indicates that four other participants in the school play have also suffered: two of them were kidnapped and killed, one fled to France, and one was kidnapped, tortured and forced to inform on LTTE activities. The complainant submits that about half of the people involved in the theatre performances at the school during the ceasefire fled Sri Lanka, and those who remained were killed.

3.2 The complainant recalls that his appeal to the Federal Court of Australia is still pending and that, should it be unsuccessful, he will still be able to appeal to the High Court of Australia to seek ministerial intervention. He claims that if deported before the conclusion of the legal proceedings and if tortured in Sri Lanka, the State party's non-refoulement obligations under article 3 (1) of the Convention would be violated.<sup>6</sup>

### **State party's observations on admissibility and the merits**

4.1 On 22 December 2014, the State party submitted its observations on the admissibility and merits of the complaint. It argues that the complainant's allegations are inadmissible as manifestly unfounded, since the complainant did not establish a prima facie case. If the Committee considers the complainant's claims to be admissible, the allegations should be dismissed for lack of merit. The complainant has not submitted any new evidence to the Committee that there are substantial grounds for believing that he is in danger of being tortured. All the claims presented by the complainant to the Committee were already assessed in the State party's refugee status determination and complementary protection processes between March 2012 and April 2014.

4.2 The State party submits that the obligation of non-refoulement is confined to torture<sup>7</sup> and does not extend to cruel, inhuman or degrading treatment or punishment.<sup>8</sup> It recalls the Committee's jurisprudence that additional grounds must be adduced by the complainant to show that he would be personally at risk.<sup>9</sup> The onus of proving that there is a foreseeable, real and personal risk of being subjected to torture upon extradition or deportation rests on

<sup>5</sup> The complainant attached the notice of appeal before the Federal Court of Australia to his initial complaint, and the letter from the Federal Court of Australia dated 10 June 2014 indicating the period during which his appeal would be heard.

<sup>6</sup> With regard to exhaustion of domestic remedies, according to the Committee's case law the principle of exhaustion of domestic remedies requires the complainant to use remedies that are directly related to the risk of torture in the country to which he would be sent. The complainant has therefore exhausted all available and effective domestic remedies necessary to satisfy the admissibility criteria in the present case.

<sup>7</sup> See communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

<sup>8</sup> See the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention, para. 1.

<sup>9</sup> See communication No. 177/2001, *H.M.H.I. v. Australia*, decision adopted on 1 May 2002, para. 6.5.

the complainant.<sup>10</sup> The risk must be “assessed on grounds that go beyond mere theory and suspicion”.<sup>11</sup>

4.3 The State party asserts that the complainant’s claims have been thoroughly considered through a series of robust domestic processes that considered and determined that his claims were not credible and did not engage the State party’s non-refoulement obligations. In particular, the complainant’s claims have been assessed under the complementary protection provisions contained in section 36 (2) (aa) of the Migration Act 1958, which reflect non-refoulement obligations as enshrined in article 3 of the Convention.

4.4 The State party recalls that the complainant lodged an application for a protection visa following his unlawful arrival by boat in Australia on 1 December 2011. On 6 March 2012, the Department of Immigration and Citizenship refused the complainant’s application, following assessment of all the complainant’s protection claims, on the basis that he was not a person to whom Australia owed protection obligations. During a Protection Obligations Evaluation, he was interviewed with the assistance of an interpreter, while all relevant country information was considered.<sup>12</sup> The primary decision maker concluded that the complainant’s claims about harassment in 2008 and 2011, some three and six years after his participation in the play in 2005, and about his abduction in June 2011, were not credible. The decision maker accepted that the complainant participated in the play in 2005, which was sponsored and organized by LTTE, but did not accept that he was consequently suspected of being a supporter of LTTE and of interest to paramilitary groups of the Sri Lanka Army. The State party submitted that this conclusion was supported by the fact that he had been able to depart from Sri Lanka using a genuine passport without incident. The decision maker also relied on country information that indicated that the security situation in Sri Lanka had improved since the cessation of hostilities in 2009, and that the complainant would not be targeted for reasons of his Tamil ethnicity. Accordingly, the complainant was found not to have a well-founded fear of persecution. The complainant’s claims were not assessed under the complementary protection provisions of the Migration Act during the Protection Obligations Evaluation, as those provisions were not in effect on 6 March 2012 when the determination was made.<sup>13</sup> However, the complainant’s claims were subsequently assessed under the complementary protection provisions in further domestic processes, including the Independent Protection Assessment.

4.5 On 27 September 2012, the Independent Protection Assessment was undertaken with regard to the decision to refuse the complainant’s application for a protection visa, and confirmed that he did not meet either of the criteria for a protection visa under the Convention relating to the Status of Refugees, of 1951, or under the complementary protection provisions of the Migration Act. The complainant was interviewed by the assessor on 11 July 2012, with the assistance of a Tamil interpreter and in the presence of a migration agent. The assessor considered background documents, as well as additional claims made in the complaint to the Committee, concerning the alleged targeting of other participants in the school play in 2005 and the interrogation of his brother by the Sri Lanka Army and armed gangs while he was in Malaysia in 2011. The assessor concluded that the complainant did not meet the criteria for a protection visa as he would not face a real risk of persecution if returned to Sri Lanka. There were no substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Sri Lanka, he would face a real risk of suffering significant harm, including arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. The assessor did not consider the complainant to be a credible witness in relation to a large proportion of his claims. According to the Independent Protection Assessment Office’s decision on file, the inconsistencies in the complainant’s account concerned, for example, his story about seeking sanctuary in the local Roman Catholic church, and the fact that the complainant had

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<sup>10</sup> See communication No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003, para. 7.3.

<sup>11</sup> *Ibid.*

<sup>12</sup> The complainant did not claim at the Protection Obligations Evaluation stage that the Sri Lanka Army and armed gangs had interrogated his brother while the complainant was in Malaysia from 15 to 19 July 2011.

<sup>13</sup> The provisions of the Migration Act became effective on 24 March 2012.

not been able to obtain any confirmation from the priest involved. Instead, the complainant produced a statutory declaration from a justice of the peace, whose evidence seemed to indicate that he had only remained in the church for approximately a year, whereas he had previously indicated that he had gone into hiding for over two years. Moreover, the complainant did not leave the church in which he had sought refuge because of the Sri Lanka Army, which would look for him, but because he missed his family. Therefore, the letter of attestation in that regard was perceived as untrue. Furthermore, the Independent Protection Assessment Office's decision raised concerns about the applicant's academic history, as during the period of alleged hiding at the church, he was sitting for examinations at school. There was also a considerable shift in the complainant's account of being abducted. His abduction was perceived as troubling, since the school never reported the matter or spoke to the complainant or his parents about it. Despite the alleged violence and rape, he had no injuries and did not seek medical treatment upon his release. Consequently, the assessor did not accept his claims about being harassed between 2008 and 2011 and being abducted in 2011. In that regard, the Independent Protection Assessment Office's decision also stated that the reviewer had not been presented with any evidence of the alleged persecution of those who had participated in LTTE cultural activities. Hence, the reviewer did not find it credible that the complainant did not mention in the first interview the severe punishments that other participants had experienced, which appeared to be inconsistent with what he claimed had happened to him. Given the number of people involved, the reviewer did not accept that the complainant's participation in the play three years earlier would lead to an interest in him by the Sri Lanka Army. As regards the complementary protection findings, the assessor concluded, relying on relevant country information, that the complainant would not face persecution or irreparable harm on the basis of his Tamil ethnicity, of being a member of a particular social group of young men in Sri Lanka, or of imputed political opinions as a supporter of LTTE. The complainant has not substantiated the idea that he would face economic marginalization or that the alleged political marginalization would amount to significant harm.

4.6 On 20 February 2013, the complainant sought judicial review of the Independent Protection Assessment Office's decision by the Federal Circuit Court, claiming legal error. On 23 April 2014, the Federal Circuit Court dismissed his application for judicial review as it did not find any legal error in the Independent Protection Assessment Office's determination and he had been accorded procedural fairness. The complainant was physically present at the Federal Circuit Court hearing and made oral submissions. He told the court that he was unable to provide evidence of the many problems he had had in Sri Lanka because his abductor was not going to admit them. However, the Federal Circuit Court held that the Independent Protection Assessment Office's conclusions that the story of abduction was unlikely were not based on the failure to produce evidence but on the set of circumstances, including the inconsistencies as to when exactly the complainant learned of his brother's problems, and why that issue had not been raised during the first interviews.

4.7 Following the decision of the Federal Circuit Court, the complainant was informed that he was scheduled for removal to Sri Lanka. On 13 June 2014, a final pre-removal assessment was undertaken by the Department of Immigration and Border Protection, confirming that the complainant's removal would not engage the non-refoulement obligations of Australia. The State party refers to the Committee's jurisprudence to the effect that, as it is not an appellate or judicial body, it gives considerable weight to findings made by organs of a State party.<sup>14</sup> All relevant evidence was thoroughly evaluated during a robust merits and judicial review.

4.8 In parallel, on 3 June 2014, the complainant lodged an application for an extension of time in order to file a notice of appeal with the Full Federal Court of Australia to review the Federal Circuit Court judgment. Nonetheless, the Full Federal Court did not order an urgent hearing of the matter, or issue an injunction to prevent the complainant's removal. The complainant's removal could be effected on 25 June 2014 despite the application for an extension of time, as the Full Federal Court had not ordered an urgent hearing of the matter or issued an injunction preventing his removal. On 28 October 2014, in the absence of the

<sup>14</sup> See the Committee's general comment No. 1, para. 9 (a).

complainant and of any response by him or on his behalf, the Full Federal Court issued a judgment considering whether he had been removed in accordance with the Migration Act 1958, and in particular whether he had been provided with a reasonable length of time and with reasonable access to legal advice for the purposes of bringing legal proceedings for injunctive relief to prevent his removal, as required under section 256 of that Act. The Full Federal Court held — while having some doubts as to whether the complainant had had a reasonable opportunity, due to a shortage of time, to bring legal proceedings to prevent his removal — that it was not possible to conclude that the complainant did not have a reasonable opportunity to obtain legal advice, in light of the apparent availability of a migration agent. Therefore, the Full Federal Court dismissed the application. Accordingly, the State party requests the Committee to accept that Australia has thoroughly assessed the complainant's claims through domestic processes and has found that it does not owe the complainant protection obligations under the Convention.

4.9 As regards the assessment of a personal risk of torture, the State party submits that the existence of a general risk of violence does not constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon return to that country, and that the complainant did not establish the existence of additional grounds to show that he was at a foreseeable, real and personal risk of torture if returned to Sri Lanka. The State party reiterates that the issues raised by the complainant, through domestic processes, relating to human rights violations in Sri Lanka and to the return of asylum seekers there, have been specifically and carefully considered by all domestic processes, including against the background of information provided by the Office of the United Nations High Commissioner for Refugees, by non-governmental organizations and by foreign affairs ministries of other governments.<sup>15</sup>

4.10 Finally, the State party contends that during his removal, the complainant was accompanied by two officials from the Department of Immigration and Border Protection from his departure from Australia to the time he left the airport upon arrival in Colombo. Upon his arrival, he was interviewed by the Criminal Investigation Department of the Sri Lanka Police at the airport. However, he was not detained or charged by the police on his immediate return to Sri Lanka, despite being a Tamil who had failed to attain protection in Australia, and he was allowed to leave freely. The complainant left the airport through a regular exit, where he met with his brother.

4.11 The State party concludes that the complainant did not provide sufficient evidence indicating that he would be personally at risk of torture, or that his removal could amount to treatment that would be considered as amounting to torture under article 1 of the Convention.

#### **Complainant's comments on the State party's observations**

5. On 15 September 2014, the complainant was invited to submit comments by 15 October 2014. No response was received. On 16 and 21 June 2017, two additional reminders were addressed to the complainant's counsel, to no avail.<sup>16</sup>

#### **Issues and proceedings before the Committee**

*The State party's failure to cooperate and to respect the Committee's request for interim measures pursuant to rule 114 of its rules of procedure*

6.1 The Committee notes that the adoption of interim measures pursuant to rule 114 of its rules of procedure, in accordance with article 22 of the Convention, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measure

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<sup>15</sup> Including the Department of Foreign Affairs and Trade, of Australia; the Home Office, of the United Kingdom of Great Britain and Northern Ireland; and the Department of State, of the United States of America.

<sup>16</sup> There is no further information from the complainant on file beyond his initial complaint.

requested by the Committee, in particular by forcibly removing an alleged victim, undermines the protection of the rights enshrined in the Convention.<sup>17</sup>

6.2 The Committee notes the State party's argument that the Committee's request for interim measures could not be brought to the attention of the relevant authorities in sufficient time to prevent the complainant's scheduled departure on 25 June 2014. In that regard, the State party argued that while the complainant was in transit, his submission to the Committee was assessed and it was concluded that there was no new information in the communication that had not already been thoroughly considered through domestic processes. The Committee notes the absence of information as to which authorities of the State party carried out such an expeditious assessment, and notes that following his removal to Sri Lanka, the Committee lost contact with the complainant, who did not submit any further information to the Committee. The Committee recalls that the principle of non-refoulement as contained in article 3 of the Convention is absolute.<sup>18</sup>

6.3 The Committee observes that any State party that has made a declaration under article 22 (1) of the Convention recognizes the competence of the Committee to receive and consider complaints from individuals who claim to be victims of violations of the provisions of the Convention. By making such a declaration, States parties implicitly undertake to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. By failing to respect the request for interim measures transmitted to the State party on 24 June 2015, the State party seriously failed in its obligations under article 22 of the Convention, in particular as the removal of the complainant to Sri Lanka hindered an effective examination of his complaint by the Committee.

#### *Consideration of admissibility*

7.1 Before considering any complaint submitted in a communication, the Committee must decide whether the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.2 The Committee recalls that in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint unless it has ascertained that all available domestic remedies have been exhausted. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint on this ground.

7.3 The Committee notes the State party's argument that the communication is manifestly ill-founded, as the complainant has not substantiated the existence of a personal risk of torture if returned to Sri Lanka, and should therefore be held inadmissible pursuant to rule 113 (b) of the Committee's rules of procedure. The Committee recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility.<sup>19</sup> The Committee considers that the complainant has sufficiently detailed the facts and the basis of his claims under article 3 of the Convention to enable the Committee to make a decision, and therefore considers that his claims are sufficiently substantiated for the purpose of admissibility.

<sup>17</sup> See communications No. 444/2010, *Abdussamatov and others v. Kazakhstan*, decision adopted on 1 June 2012, paras. 10.1 and 10.2; No. 538/2013, *Tursunov v. Kazakhstan*, decision adopted on 8 May 2015, paras. 7.1 and 7.2; No. 542/2013, *X v. Russian Federation*, decision adopted on 8 May 2015, paras. 9.1 and 9.2; No. 554/2013, *X v. Kazakhstan*, decision adopted on 3 August 2015, para. 10.1, and No. 671/2015, *D.I.S. v. Hungary*, decision adopted on 8 December 2015, paras. 9.1-9.3.

<sup>18</sup> See *Abdussamatov and others v. Kazakhstan*, para. 13.7; *X v. Kazakhstan*, para. 10.3; and communication No. 39/1996, *Tapia Paez v. Sweden*, Views adopted on 28 April 1997, para. 14.5.

<sup>19</sup> See, inter alia, communication No. 308/2006, *K.A. v. Sweden*, decision of inadmissibility adopted on 16 November 2007, para. 7.2.

7.4 There being no other obstacles to admissibility, the Committee finds the communication admissible and shall proceed to consider it on its merits.

*Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

8.2 In the present case, the issue before the Committee is whether the removal of the complainant to Sri Lanka constituted a violation of the State party's obligation under article 3 of the Convention not to expel or return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

8.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant was personally in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In this context, the Committee refers to its consideration of the fifth periodic report of Sri Lanka,<sup>20</sup> during which it voiced serious concerns about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including by the police, had continued in many parts of the country after the conflict with LTTE had ended in May 2009.<sup>21</sup> The Committee also expressed concern regarding the reprisals against victims and witnesses of acts of torture and at the acts of abduction and of torture in unacknowledged detention facilities, and enquired whether a prompt, impartial and effective investigation of any such acts had been undertaken.<sup>22</sup> However, the Committee recalls that the aim of the evaluation undertaken in the context of individual complaints is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.<sup>23</sup>

8.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable (para. 6), it must be personal and present. The Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.<sup>24</sup> The Committee also recalls that, as set forth in its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned (para. 9),<sup>25</sup> while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, to freely assess the facts on the basis of the full set of circumstances in every case.

<sup>20</sup> See CAT/C/SR.1472 and 1475; and CAT/C/LKA/CO/5, paras. 9-12.

<sup>21</sup> See also CAT/C/LKA/CO/3-4, para. 6.

<sup>22</sup> See CAT/C/SR.1472, paras. 36 and 42; and CAT/C/SR.1475, paras. 10 and 27. See also CAT/C/LKA/CO/5, paras. 17 and 18.

<sup>23</sup> See communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

<sup>24</sup> See communications No. 298/2006, *C.A.R.M. et al. v. Canada*, decision adopted on 18 May 2007, para. 8.10; No. 256/2004, *M.Z. v. Sweden*, decision adopted on 12 May 2006, para. 9.3; No. 214/2002, *M.A.K. v. Germany*, decision adopted on 12 May 2004, para. 13.5; No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2011, para. 6.3; and No. 347/2008, *N.B-M. v. Switzerland*, decision adopted on 14 November 2011, para. 9.9. See also the Committee's general comment No. 1.

<sup>25</sup> See, for example, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.



8.5 In the present case, the complainant claims that he would be detained, tortured and probably killed upon his return to Sri Lanka by the Sri Lanka Army or affiliated paramilitary groups for his participation in 2005 in the school play that was organized by LTTE, due to which he is suspected of being an LTTE supporter. The Committee notes the complainant's claims that in 2008, an unidentified armed gang came to his house and questioned him about LTTE; that in June 2008 two men attempted to abduct him from school; that between October 2009 and January 2011 he was hiding at St. Mary's Cathedral in Jaffna, since armed gangs regularly visited his family to look for him; and that in May 2011, the Sri Lanka Army made a house check during which the complainant was attacked and beaten. The Committee also notes the complainant's claims that in June 2011 he was abducted by a large group of men in a white van and was beaten and sexually assaulted; and that one of the gang members let him escape subsequent to the payment of a bribe by his father. The Committee further notes the complainant's allegations that when he escaped to Malaysia to avoid further persecution, the Sri Lanka Army and armed gangs went to his home in Sri Lanka and interrogated his brother, and that he would be persecuted again by paramilitary groups affiliated with the Sri Lanka Army upon his return to the country.

8.6 The Committee notes the State party's submission that the complainant failed to provide credible evidence and to substantiate his allegations that there was a foreseeable, real and personal risk that he would be subjected to torture by the authorities if returned to Sri Lanka, and that his claims have been thoroughly reviewed as part of refugee status determination and complementary protection processes, in accordance with domestic legislation and taking into account the current human rights situation in Sri Lanka. The Committee notes that the authorities of the State party concluded that his claims about harassment during 2008 and 2011 and about his alleged abduction in June 2011 were not credible. The Committee also notes that the State party did not accept that the complainant was suspected of being a supporter of LTTE and was of interest to paramilitary groups of the Sri Lanka Army as a consequence of his participation in the school play in 2005. Rather, it considered that the fact that the complainant was able to depart from Sri Lanka, using his own passport without incident, demonstrated the contrary. The decision makers relied on country information according to which the security situation in Sri Lanka had improved since the cessation of hostilities in 2009 and the complainant would not be targeted for reasons of his Tamil ethnicity, membership of a particular social group of young men or imputed political opinions as a supporter of LTTE. Concerning the alleged targeting of other participants in the school play in 2005, and the alleged interrogation of his brother by the Sri Lanka Army and armed gangs while he was in Malaysia in 2011, the State party's authorities did not consider the complainant to be a credible witness in relation to a large portion of his claims. Further, the State party considered that he had not provided corroborating evidence in support of his claims or to demonstrate that the authorities in Sri Lanka had been looking for him in the recent past or were otherwise interested in him. Finally, the Committee notes the information provided by the State party according to which the complainant was not detained or charged by the Sri Lankan police upon his return to Sri Lanka and was allowed to freely leave the airport.

8.7 The Committee observes that the complainant has not submitted his comments in response to the observations by the State party, and has not replied to any of the reminders sent by the Committee, which may be a consequence of his removal to Sri Lanka. Regarding the complainant's claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a young Tamil with real or perceived links with LTTE, and as a failed asylum seeker, the Committee agrees that Sri Lankans of Tamil ethnicity with a real or perceived prior personal or familial connection to LTTE, facing forcible return to Sri Lanka, may face a risk of torture. In this connection, the Committee notes the current human rights situation in Sri Lanka and refers to its concluding observations on the fifth periodic report of Sri Lanka, in which it expressed concern, *inter alia*, about reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the military and the police, which had continued in many parts of the country after the conflict with LTTE had ended in May 2009,<sup>26</sup> and to

<sup>26</sup> See CAT/C/LKA/CO/5, paras. 9-12.

credible reports by non-governmental organizations<sup>27</sup> concerning the treatment by the Sri Lankan authorities of individuals returned to Sri Lanka.<sup>28</sup> However, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that a complainant runs a personal risk of torture.<sup>29</sup> The Committee also recalls that although past events may be of relevance, the principal question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.<sup>30</sup> In addition, the Committee notes that, in the State party's assessment of the complainant's asylum application, the State party's authorities also considered the possible risk of ill-treatment of failed asylum seekers upon return to Sri Lanka, but did not accept that the authorities in Sri Lanka had been looking for the complainant in the recent past or were otherwise interested in him. The Committee is of the view that, in the present case, the State party's authorities gave appropriate consideration to the complainant's claim.

8.8 In the light of the considerations above, and on the basis of all the information submitted by the complainant and the State party, including on the general situation of human rights in Sri Lanka, the Committee considers that, in the present case, the complainant has not discharged the burden of proof,<sup>31</sup> as he has not adequately demonstrated the existence of substantial grounds for believing that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. Although the complainant disagrees with the assessment of his accounts by the State party's authorities, he has failed to demonstrate that the decision to refuse him a protection visa was clearly arbitrary or amounted to a denial of justice.

9. The Committee, acting under article 22 (7) of the Convention, is of the view that the complainant's removal to Sri Lanka by the State party did not constitute a violation of article 3 of the Convention. Regarding the State party's lack of compliance with the Committee's request of 24 June 2014 for interim measures for the complainant not to be deported, and his forcible removal to Sri Lanka on 25 June 2014, the Committee, acting under article 22 (7) of the Convention, decides that the facts before it constitute a violation by the State party of article 22 of the Convention due to a lack of cooperation with the Committee in good faith, which prevented the Committee from considering the present communication effectively.<sup>32</sup>

10. Pursuant to rule 118 (5) of its rules of procedure, the Committee urges the State party to take steps to prevent similar violations of article 22 in the future and to ensure that, in cases where the Committee has requested interim measures, the complainants are not deported until the Committee has decided on the merits.

<sup>27</sup> Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009* (August 2015), available from [www.freedomfromtorture.org/sites/default/files/documents/sl\\_report\\_a4\\_-\\_final-f-b-web.pdf](http://www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf).

<sup>28</sup> See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

<sup>29</sup> See, for example, communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

<sup>30</sup> See, for example, communications No. 61/1996, *X, Y and Z v. Sweden*, Views adopted on 6 May 1998, para. 11.2; No. 435/2010, *G.B.M. v. Sweden*, decision adopted on 14 November 2012, para. 7.7; or No. 458/2011, *X v. Denmark*, decision adopted on 28 November 2014, para. 9.5.

<sup>31</sup> See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.

<sup>32</sup> See communication No. 428/2010, *Kalinichenko v. Morocco*, decision adopted on 25 November 2011, para. 16. See also *Tursunov v. Kazakhstan*, para. 10; and *D.I.S. v. Hungary*, para. 11.

## Annex

### **Individual opinion of Committee member Alessio Bruni (dissenting)**

1. It is my opinion that any reference, in the Committee's decision on communication 614/2014, to violation by the State party of article 22 of the Convention against Torture because it has not complied with the Committee's request for interim measures of protection of the complainant is inappropriate.
2. Interim measures are contained in rule 114 of the rules of procedure of the Committee which have not been subscribed by the State party, and they are not contained in article 22 of the Convention, which, on the contrary, has been voluntarily subscribed by the State party. The breach, therefore, concerns that rule, which is not legally binding, and not article 22 of the Convention.
3. It is stated in paragraph 6.3 of the Committee's decision that "by making such a declaration" under article 22 of the Convention "States parties implicitly undertake to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it ..." etc.
4. I agree that a State party should cooperate with the Committee in good faith, but there is no implicit or secret or unilateral clause with regard to interim measures in the Convention. Every treaty provision should be explicit, transparent and accepted by the States parties to enable the Committee to assess a violation of the treaty.
5. This is why interim measures of protection are legally binding in treaties and protocols which provide for them and are freely adhered to by States parties to those treaties or protocols. This is the case of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (art. 5), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (art. 4), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 31) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (art. 5).
6. Treaties such as the Convention against Torture, which do not contain such a provision, should be either amended in accordance with their amending mechanisms or provided with an additional optional protocol to explicitly include the notion of legally binding interim measures of protection.

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