



## International Covenant on Civil and Political Rights

Distr.: General  
9 July 2013

Original: English

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### Human Rights Committee

#### Communication No. 1912/2009

##### Views adopted by the Committee at its 106th session (15 October-2 November 2012)

<i>Submitted by:</i>	Ganesaratnam Thuraisamy (represented by counsel, Kathleen Hadekel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	28 October 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 November 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	31 October 2012
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Substantive issues:</i>	Right to liberty and security; torture and cruel and inhuman treatment, right to life
<i>Procedural issues:</i>	Non-substantiation; incompatibility with the Covenant; and non-exhaustion of domestic remedies and non-substantiation
<i>Articles of the Covenant:</i>	6, paragraph 1, 7, 9, paragraph 1
<i>Articles of the Optional Protocol:</i>	2, 3 and 5, paragraph 2 (b)

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\* Reissued for technical reasons on 29 July 20013.

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (one hundred and sixth session)**

concerning

#### **Communication No. 1912/2009\*\***

*Submitted by:* Ganesaratnam Thuraisamy (represented by counsel, Kathleen Hadekel)

*Alleged victim:* The author

*State party:* Canada

*Date of communication:* 28 October 2009 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on 31 October 2012,*

*Having concluded* its consideration of communication No. 1912/2009, submitted to the Human Rights Committee by Ganesaratnam Thuraisamy under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Ganesaratnam Thuraisamy, a Tamil of Sri Lankan citizenship, who was born in 1949 in Sri Lanka (Northern Province). He claims that his deportation from Canada to Sri Lanka would amount to a violation of articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant. The author is represented by counsel, Kathleen Hadekel.<sup>1</sup>

1.2 On 4 November 2009, pursuant to rule 92 of its Rules of Procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures,

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Ladhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. The text of an individual (dissenting) opinion by Mr. Krister Thelin is attached to these views.

<sup>1</sup> The Optional Protocol entered into force for Canada on 19 May 1976.

requested the State party not to remove the author to Sri Lanka while the communication was under consideration by the Committee.

### **Facts as presented by the author**

2.1 The author is an ethnic Tamil born in the village of Valvettithurai, the village in which the Liberation Tigers of Tamil Eelam (LTTE) have their origins (Jaffna area). In July 1983, during a business trip to Colombo, the author was arrested by the police on suspicion of membership of the LTTE. During the interrogation, he was ill-treated and was only released with the help of a Sinhala fish merchant. From 1984 to 1987, the author ran a fishing business in his village. On 23 June 1987, the author's father was killed and when claiming his body, the author was detained and beaten by the army for six days. He was again arrested and detained by the army in 1989. The detentions of 1987 and 1989 as well as the torture he underwent are attested by a certificate of the Sri Lankan Red Cross Society dated 17 December 2004.<sup>2</sup> In 1990, when the LTTE took control of the Jaffna Peninsula, the author was approached by them to support the LTTE, which he refused. Nevertheless, he was forced to help them construct bunkers.

2.2 In 1994, while on his way to Valalai on business, the author was arrested by the army, hit with a gun butt, kicked and then intimidated to refrain from reporting the incident. In October 1995, as the LTTE had ordered all civilians to leave Jaffna, the author and his family fled to Mannar and stayed there in a refugee shelter. In July 1997, during crossfire between the LTTE and the regular army, the author was arrested in Mannar and kept for nine days in detention.<sup>3</sup> In August 1999, the army arrested more than 1,000 persons, including the author, who was threatened to be killed if he did not disclose the location of LTTE camps. In May 2000, the author was imprisoned again by the army in Mannar for 10 days. He was beaten with plastic pipes, barbed wire and boots, which injured him on the chest (attested by a medical certificate).<sup>4</sup> In October 2001, the author returned to his village with his wife and son. As the army suspected that the family had accommodated the LTTE, they detained them for five days for further investigation. On 23 September 2002, the author was detained by the LTTE for five days and was accused of being unpatriotic. He was released under the condition that he supported their endeavour; otherwise his son would be taken away.

2.3 Following this incident, the author had sleeping problems and suffered from depression. The author started to hide from the LTTE, but he was also sought after by the army. With the help of his wife's brother, the author and his family moved to Colombo, where an agent helped the author to flee the country. He left Sri Lanka on 14 November 2002 and arrived in Canada on 30 November 2002.

2.4 On 22 June 2004, the author's claim for asylum was rejected by the Refugee Protection Division of the Immigration and Refugee Board (IRB). The IRB based its decision on the official version of events in Sri Lanka and therefore rejected his version as lacking credibility. On 29 October 2004, his application for leave to seek judicial review of this decision was rejected without reasons by the Federal Court. On 14 September 2007, the

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<sup>2</sup> During the domestic proceedings in Canada, while contesting the credibility of some of the author's allegations, the State party authorities accepted the veracity of the report provided by the Sri Lankan Red Cross Society dated 17 December 2004.

<sup>3</sup> The author does not specify whether he was arrested by the army or the LTTE.

<sup>4</sup> The author has provided a medical report established by the "Centre de santé et de services sociaux de la Montagne" in Montreal dated 26 June 2009, which states that the author alleged having been beaten on his chest with barbed wire; and that he has physical signs of ill-treatment which seem compatible with the author's story.

author's application for permanent residence on humanitarian and compassionate grounds (H&C) was rejected. Due to limited financial means, the author did not appeal against this decision. On 17 September 2007, his pre-removal risk assessment (PRRA) application was also rejected. While taking into account human rights problems in Sri Lanka with regard to Tamil civilians, the PRRA officer noted that the author did not fit the profile of a young Tamil male likely to be targeted by the LTTE or the authorities. On 31 October 2007, the Federal Court rejected the author's motion for stay of his deportation and ordered his removal for 1 November 2007.

2.5 On 22 and 29 October 2007, upon the advice of a new lawyer who told him that the first PRRA and H&C applications had not been filed in a manner that would guarantee a positive outcome, the author filed a second PRRA and H&C application, submitting new evidence. The author submitted a letter from a Justice of the Peace in Sri Lanka, which details the suffering of his wife and son since his departure and specifically mentions that his son had been arrested and asked by the authorities about the whereabouts of the author.

2.6 In the hope that these procedures would be successful, the author did not appear for his deportation on 1 November 2007. He acted in good faith, believing that a decision should be rendered on a properly prepared application prior to his removal from Canada. The author did not try to hide from the authorities. He continued to live in the same apartment as prior to the removal order. While the second procedure was ongoing, the author received notification that on 5 February 2008 the Federal Court had rejected without reasons the author's application to seek judicial review of the first negative PRRA decision.

2.7 On 21 May 2009, the author was convoked to an interview, during which he received the two negative decisions on his second H&C and PRRA applications. The decisions found that the alleged persecutions of his wife and son were not sufficient to establish a personalized risk of persecution or torture for the author. Following this interview, he was detained by the Border Services Agency. On 25 May 2009, the author was granted conditional release. On 4 September 2009, the Federal Court rejected without reasons the author's applications for judicial review of the second H&C and PRRA decisions.

### **The complaint**

3.1 The author submits that his deportation from Canada to Sri Lanka exposes him to a real risk of arbitrary detention, torture, cruel and inhuman treatment, including death. In the past, he had been detained and questioned on several occasions by the army and bears scars from the torture to which he had been subjected by the authorities. In this regard, the State party, in the first H&C decision, has accepted the 1987 and 1989 detentions as proven, on the basis of confirmation from the Sri Lankan Red Cross Society.

3.2 The author further submits that the risk of being arbitrarily detained upon arrival at the airport in Sri Lanka has been documented in the media and by the European Court of Human Rights (ECHR) in similar cases,<sup>5</sup> in particular as the author has been arrested in the past for suspicion of being an LTTE member and also as he is a rejected asylum seeker coming from abroad. He also underlines that the request for travel documents presented by the Canadian authorities to the Sri Lankan authorities would alert the Sri Lankan authorities of his return and would enhance his risk of being arbitrarily detained, tortured and mistreated upon his arrival. Even if he was able to pass through the airport checks without being arrested, he would be at risk in Colombo, as he is a Tamil from the North, which is

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<sup>5</sup> The author refers to ECHR, *NA v. The United Kingdom*, Judgment of 6 August 2008 (Appl. No. 25904/07), paras. 145-147.

mentioned on his identity card. He also notes that he would not be able to travel to the North, due to travel restrictions for Tamils and even if he were to travel to his village of origin, he may face arbitrary detention and torture, as displaced persons continue to be interned in the North. He therefore submits that his deportation by the State party to Sri Lanka would constitute a violation of his rights under articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant.

3.3 The author underlines that the situation in Sri Lanka has evolved significantly since April 2009, when the State party made its most recent substantive decisions concerning the author. In the interim, the Sri Lankan authorities declared a military victory over the LTTE, and the open warfare between the LTTE and the government forces has therefore not subsided. However, in the aftermath of the military victory by the government forces, repression and mistreatment of Tamil civilians have not subsided. They continue to be subject to ongoing arrest, harassment and persecution in Colombo, as well as internment in the North and East. With regard to internal flight alternatives for Tamils from the North, the author cites the Office of the United Nations High Commissioner for Refugees (UNHCR) Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, which highlight that Tamils from the Northern area are at heightened risk of human rights violations in the whole Sri Lankan territory.<sup>6</sup> Those guidelines further establish that it is not possible to identify particular categories of Tamils at risk and that in asylum claims by Tamils from the North of Sri Lanka, well-founded fear of persecution should be presumed.

3.4 The author further cites reports by the International Crisis Group and Human Rights Watch on the conditions in detention camps of internally displaced persons in Vavuniya district. He also cites an assessment by Amnesty International Canada on his specific case, stating that he is at serious risk of facing grave human rights violations should he be returned to Colombo. Indeed, the opinion letter dated 1 June 2009 states that Amnesty International is of the view that, as an ethnic Tamil male and failed asylum seeker, who is originally from Valvettithurai in Jaffna, and must, upon return reside in Colombo, the author is at serious risk of facing grave human rights violations.

3.5 In his communication, the author challenges the refugee determination and asylum procedures. He considers that the IRB decision questions his credibility on minor discrepancies, based on the divergence between the information provided by the author on the conflict and the official information received from the Sri Lankan authorities. In the author's opinion one should never expect the agent of persecution to offer a transparent account of the facts and therefore the official account of the events is biased. The IRB did not at all consider the outstanding issue of persecution of the Tamil civilian population by the Sri Lankan authorities. The author also criticizes the fact that Canadian legislation does not offer any possibility to appeal the merits of an IRB decision. In this regard, as only new evidence can then be presented in the framework of the PRRA application, the latter was never meant to be an appeal against the IRB procedure, which the author deplors.

3.6 While the PRRA officer in the first PRRA application procedure did take note of numerous human rights violations against the Tamil population and the fact that the entire Tamil population, and particularly those who, like the author, hail from the North or East of the country are at risk of persecution or mistreatment, the officer concluded that the author would not face such treatment because he is not a young Tamil male. The only evidence related to that profile was related to the risk of forced recruitment of young Tamils by the LTTE or the Karuna faction. As for the H&C application, the assessment was also done by

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<sup>6</sup> See *UNHCR Eligibility Guidelines for Assessing the Internal Protection Needs of Asylum-Seekers from Sri Lanka* (April 2009).

a PRRA officer using the same reasoning. It therefore led to the same conclusion as the PRRA.

3.7 As for the second PRRA application procedure, the assessment made by the officer who was the same as in the first procedure is essentially cut and paste from the first decision despite the new developments in Sri Lanka and the voluminous new evidence submitted. While acknowledging that the Sri Lankan authorities maintain checkpoints to try to intercept LTTE sympathizers, and human rights abuses such as arbitrary arrest and detention, torture and discrimination against Tamils especially from the East and North continue to occur, the PRRA officer concluded that the author who is a Tamil would not face such treatment. The author therefore considers that the PRRA assessment was biased and unfair.

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

4.1 In its submission on the admissibility and merits of the communication transmitted on 4 May 2010, the State party notes that the author based his communication on precisely the same story, evidence and facts that a competent domestic tribunal and expert risk assessment officer have determined not to be credible, and not supporting a finding of a substantial personal risk of torture or cruel or inhuman treatment in the future.

4.2 The State party contends that the author's allegations with respect to articles 6, paragraph 1, and 7 are inadmissible on the ground of non-exhaustion of domestic remedies since the author has submitted to the Committee two pieces of evidence (a medical report and a letter from Amnesty International) that could have been submitted to domestic authorities. The documents could still be the basis of renewed PRRA or H&C applications. The author has also failed to exhaust domestic remedies by not applying for judicial review of the negative decision in his first H&C application. In the alternative, the author's communication with respect to article 6, paragraph 1, and 7 should be declared inadmissible pursuant to article 2 of the Optional Protocol on the grounds of non-substantiation. The author's assertions are not credible and there is no objective evidence to support a finding that the author is at personal risk if he returns to Sri Lanka.

4.3 As for the author's allegations in relation to article 9 of the Covenant, the State party submits that they are incompatible with the provisions of the Covenant pursuant to article 3 of the Optional Protocol or, in the alternative, that they are inadmissible on the ground of non-substantiation under article 2 of the Protocol. The State party is of the view that article 9 of the Covenant has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. In the event that the Committee would declare part or all of the allegations admissible, the State party requests that the Committee finds them without merits.

4.4 The State party observes that in support of his refugee claim dated 5 December 2002, the author alleged that between 1983 and 2002 when he left Sri Lanka, he was targeted by the LTTE for support and for money. In turn, the Sri Lankan security forces suspected him of being a member of the LTTE and detained, interrogated, beat and harassed him. His troubles allegedly began in 1983 when he was arrested by the police in Colombo and was ill-treated during his questioning. In 1987, his father was killed in crossfire in a fight between the LTTE and the army. When the author went to claim the dead body, the army arrested and beat him, and detained him for six days. In June 1990, the LTTE approached him for his support, and when he refused, forced him to dig bunkers. In August 1991, the LTTE demanded money from him. In March 1994, he was allegedly arrested by the army, hit by a gun butt and kicked, and had his gold chain, ring, watch and money taken from him. In July 1997, he was allegedly arrested in a round-up, and was interrogated for nine days, and not given adequate food and water. He was rounded up again by the army in November 1998 and insulted.

4.5 The State party adds that, according to the author, he was arrested in August 1999 as part of a round-up of 1,000 persons from his area, questioned and threatened until released the same day. In May 2000, the author was allegedly arrested by the army following a grenade-throwing incident. He was allegedly beaten with plastic pipes, barbed wire and boots. In October 2001, when he, his wife and their teenage son were on their way to Valvettithurai, they were arrested by the army and detained for five days. They moved to Valvettithurai where in September 2002, the LTTE allegedly detained him for five days, accusing and assaulting him. He was released after his wife paid the LTTE the money they wanted. He was asked to report back in December 2002. The LTTE told him that if he did not support them regularly, they would take his only son with them. He went into hiding and heard that the army had come looking for him. He and his family went to Colombo where he was introduced to an agent who offered to help him flee the country. The agent said he would help the author's wife and son in due course. The author therefore fled to Canada while his wife and son stayed in Colombo.

4.6 On 11-12 May 2004, the Refugee Protection Division of Canada's Immigration and Refugee Board heard the author's claim. The author was assisted by counsel and provided documentary evidence and oral testimonies. He had the possibility to explain any ambiguities or inconsistencies. On 18 June 2004, the IRB which is an independent and specialized tribunal found that the author was not a Convention refugee and not a person in need of protection. The IRB considered that the author's lack of credibility was determinative of his claim. For instance, the author claimed in his Personal Information Form (PIF) that he did not know where his wife was when he had told the IRB that he telephoned her every month. Moreover, he claimed in his PIF that he and his wife moved to Colombo in November 2001 when he had later told the IRB that he had learned in December 2002 that his wife and son lived in Colombo. When asked about these inconsistencies, he replied that the PIF had been filled in in English which he did not master. However, at the start of the hearing, he affirmed that he fully understood the entire contents of the PIF. The IRB considered that this undermined his credibility.

4.7 The author submitted a letter from a Sri Lankan lawyer in an attempt to corroborate his story. However, the information provided in the letter contradicts statements made earlier by the author such as the fact that contrary to what he had stated, the author had been in Valvettithurai several times between 1995 and 2002. The author submitted a letter from another Sri Lankan lawyer stating that his son had been arrested on 9 February 2002 under the Internal Security Act on suspicion of belonging to a terrorist movement, when the police report that the author also mentioned that he had been arrested for not having a National Identity Card, and that the son was found to have no connection with a terrorist movement. The IRB also rejected the fact that during the hearing the author referred to important elements such as his son's repeated arrests which he had not mentioned in the PIF. The IRB could not understand why the author would return to Valvettithurai in 2002, which is the place where the LTTE have their origin, if he feared the LTTE. The author's return there was inconsistent with his alleged fear. Finally, the IRB considered it was inconsistent for the author to have stayed in Sri Lanka for almost 20 years since he first started having problems. In particular, the author stated that his detention in 2000 was the worst he had experienced. Still, he waited another two years before he fled to Canada. On 29 October 2004, the Federal Court denied the author's application for leave to apply for judicial review of the IRB decision on the ground that there was no fairly arguable case or a serious question to be determined.

4.8 On 11 February 2005, the author applied for permanent residence in Canada based on humanitarian and compassionate grounds. In support of his application, he claimed that both sides, the army and the LTTE, were looking for him, and that his wife and son were hiding. He also stated that his land and house had been washed away by the tsunami. The State party submits that the assessment of an H&C application consists of a broad,

discretionary review by an officer to determine whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. When allegations of risk upon return are made, as in the author's case, the officer assesses the risk a person may face in the country to which he would be returned. In cases such as the author's where the application is based on risk in the country of origin, a specifically trained PRRA officer assesses the H&C application.

4.9 On 17 September 2007, the author's application was rejected. The PRRA officer assessing the H&C application accepted that the author's house and land had been destroyed by the 2004 tsunami, but considered that the tsunami was a natural disaster that affected the entire coastal population of Sri Lanka. The officer did not believe the author's allegation that his house had been destroyed in a bombing, since it was contradicted by his allegation that it was destroyed by the tsunami, and since the photos of the destroyed house had only been submitted to Canadian authorities after the time of the tsunami. As for the evidence submitted such as a letter from the Sri Lankan Red Cross Society dated 2004 and a letter from his Sri Lankan lawyer dated 2003, they mentioned the author's arrests and torture of 1987 and 1989 only and did not refer to more recent arrests. The officer considered the human rights situation in Sri Lanka prevailing at the time of his decision and admitted that it was marked by extrajudicial murder by both the Government and the LTTE and other serious human rights violations. However, even accepting that the author had been arrested in 1987 and 1989, he had not established that he had had problems with either side since then. Therefore, there was insufficient proof that the author faced a personal risk to his life or security if returned to Sri Lanka. The author did not have the personal profile of a "young Tamil" who risked forced recruitment by the LTTE or who would be suspected by security forces of being a member or supporter of the LTTE. The author did not apply to the Federal Court for leave to apply for judicial review of this negative decision, as was his right.

4.10 The State party emphasizes that the risk assessment is performed by highly trained officers who consider the Canadian Charter of Rights and Freedoms as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the American Declaration of the Rights and Duties of Man. They also keep up-to-date with new developments in the areas concerned and have access to most recent information on the matter. On 17 September 2007, the PRRA application was rejected. The PRRA decision was based on the same grounds as the decision on the H&C application.

4.11 On 23 October 2007, the author applied to the Federal Court for judicial review and on 24 October 2007, he applied for a stay of removal pending a decision on his leave application. While it considered that the situation in Sri Lanka was no doubt alarming and while there may be massive violations of human rights in that country, the Court considered that the author had not succeeded, as recognized by the PRRA officer, in showing that he would be personally at risk. The Court therefore rejected the author's application for a stay of removal. The author's deportation was set for 1 November 2007. The author failed to appear for his scheduled removal and remained in Canada illegally. On 5 February 2008, the Court denied leave to apply for judicial review of the negative PRRA decision.

4.12 On 22 October 2007, at about the same time as he was seeking judicial review of his first PRRA decision, the author applied for another PRRA. His claim was essentially the same. The author added information related to his wife and son who had allegedly stayed for two years outside Sri Lanka travelling in neighbouring countries. Upon their return, the author's son was allegedly arrested on several occasions. The PRRA officer only considered the elements of proof that post-dated the first PRRA application. The author's application was rejected on the basis that the author did not fit the profile of a Tamil who would be subject to persecution, that his situation was no different from that of all the



Tamils living in Sri Lanka and that he would not face more than a mere possibility of persecution. The Federal Court denied the author's application for judicial review on 4 September 2009. As for the author's second application for a residence permit based on humanitarian and compassionate grounds that he submitted on 29 October 2007, it was rejected on 21 April 2009. His application for leave for judicial review was denied on 4 September 2009.

4.13 The State party contends that the author has not exhausted domestic remedies in relation to his claims under articles 6, paragraph 1, and 7 as he has submitted two pieces of evidence to the Committee that post-date the decisions made in the author's latest PRRA and H&C applications and as such, have not been considered by the domestic authorities. These documents are a medical report dated 26 June 2009 and a letter from Amnesty International dated 1 June 2009. The State party relies on the Committee's jurisprudence in *Dawood Khan v. Canada*, where it has considered that the author should have submitted the said medical report to the domestic remedies before submitting his communication to the Committee. The Committee considered that it was not too late to request a new PRRA or application for permanent residence on humanitarian and compassionate grounds based on the new reports<sup>7</sup>. The State party also contends that the author has failed to exhaust domestic remedies as he did not apply for judicial review against the first decision on the H&C application dated 14 September 2007 (see paragraph 4.10 above).

4.14 The State party further contends that the author has not sufficiently substantiated his claims under articles 6, paragraph 1, and 7 of the Covenant. Despite the defeat of the LTTE in May 2009, the author alleges that he remains at risk from Sri Lankan authorities because he is an ethnic Tamil from the North of Sri Lanka, he has been previously detained by the army and his body bears the scars of past torture. The communication is based on the same facts and largely the same evidence as were presented to the Canadian tribunals and risk assessment officer, whose decisions were reviewed and upheld by the Federal Court. There is no explanation provided as to why either of the documents now available to the Committee could not have been obtained during the course of the author's more than five years of domestic proceedings. Without wishing to appear to prejudge the probative value of those documents, which is a role properly attributed to the independent PRRA officer on any future application for protection, the State party notes that the two documents are not based on independent knowledge of his personal situation. The medical report merely confirms that he has scars on his chest that are compatible with his story of past torture. With respect to the letter from Amnesty International, it speaks generally of the risks that the author faces because of his profile as an ethnic Tamil male from northern Sri Lanka who is a failed asylum seeker and has claimed to have suffered past abuse.

4.15 As such, there is nothing to suggest that the author is at personal risk of torture or ill-treatment in Sri Lanka. The State party recalls that it is not the role of the Committee to re-evaluate facts and evidence unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice. The material submitted by the author cannot lead to such a conclusion. However, should the Committee decide to re-evaluate findings with respect to the author's credibility, a consideration of the totality of the evidence permits only one conclusion, which is that the author's allegations are not credible. In this regard, the State party refers to the inconsistencies pointed out by the IRB as referred to above (see paragraphs 4.6-4.7).

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<sup>7</sup> The State party refers to communication No. 1302/2004, *Dawood Khan v. Canada*, Inadmissibility Decision adopted on 25 July 2006, para. 5.5

4.16 As for the human rights situation in Sri Lanka, the State party refers to the jurisprudence of the United Nations Committee against Torture in *V.N.I.M v. Canada*<sup>8</sup> in which it found the author's allegations not to be credible or corroborated by objective evidence. It therefore considered that as such it was not necessary to examine the general human rights situation in the country of return. Even if Tamils are subjected to being stopped and questioned at security checkpoints and human rights abuses against some Tamil men continue to be reported in Sri Lanka, this is not sufficient by itself to be the basis of a violation of the Covenant if the author is returned there. However, should the Committee wish to consider the general situation of human rights in Sri Lanka, the State party contends that the situation has been improving since the Government's defeat of the LTTE in May 2009. The resettlement of internally displaced persons is proceeding at a rapid pace, and the Government has increased its military and police presence in the north and east of the country to maintain peace<sup>9</sup>. The State party further argues that about 20 per cent of Colombo residents are Tamils and anyone can stay in Colombo without having to give prior notice to the local authorities, although they have to register with the local police. While the number of checkpoints has not been significantly reduced in Colombo, no arrest has been reported at those checkpoints since June 2009. The State party therefore considers that there are viable internal flight alternatives for the author and the latter has not shown that he could not safely live in Colombo should he prefer not to return to his area of origin. The State party concludes that the author has not sufficiently substantiated that he faces a personal risk of a violation of article 6, paragraph 1, or article 7 of the Covenant. His claims in this regard are therefore inadmissible pursuant to article 2 of the Optional Protocol.

4.17 As for the author's allegations related to article 9, paragraph 1, the State party reiterates that this part of the communication should be declared incompatible with the provisions of the Covenant. The author has not alleged that the State party has arrested or detained him in violation of article 9, paragraph 1, but that by deporting him to Sri Lanka where he might be arbitrarily detained, the State party would violate this provision. It emphasizes the limited number of rights to which the Committee has given extraterritorial application, article 9, paragraph 1, not being one of those. The State party quotes general comment No. 31 which states that only the most serious breaches of fundamental rights can constitute exceptions to the power of the State to determine the conditions for allowing foreigners to enter and remain on its territory. The State party submits that arbitrary arrest or detention does not rise to the level of grave and irreparable harm contemplated in general comment No. 31<sup>10</sup>. The State party therefore requests that article 9, paragraph 1, be considered inadmissible as incompatible with the provisions of the Covenant. In the alternative, it requests the Committee to find it inadmissible for non-substantiation.

4.18 In the alternative, the State party requests the Committee to reject the author's claims as being without merits.

4.19 Finally, and in reply to the criticisms made by the author on the refugee determination and asylum procedure, the State party reminds the Committee that it is not

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<sup>8</sup> The State party refers to CAT communication No. 119/1998, *V.N.I.M v. Canada*, Views adopted on 12 November 2002, paras. 8.4 and 8.5.

<sup>9</sup> The State party refers to the South Asia Intelligence Review, Sri Lanka: Approximating Normalcy, 30 November 2009; and Progress in Sri Lanka, Robert O. Blake speech of 8 December 2009.

<sup>10</sup> The State party refers to General Comment 31 on article 2 of the Covenant regarding the nature of the general legal obligation imposed on States parties to the Covenant, 2004.

within its competence to consider the Canadian system in general, but only to examine whether, in the present case, it complied with its obligations under the Covenant.<sup>11</sup>

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

5.1 On 24 June 2010, the author rejects the State party's observations stating that they only concentrate on the admissibility of the case. The State party limits itself to stating that the case is without merits without supporting its argument. The author therefore focuses in his comments on the admissibility of the communication. As for the merits of the communication, the author's original submission has already addressed this aspect.

5.2 The author rejects the State party's contention that the domestic remedies have not been exhausted. Neither a renewed PRRA application nor a renewed H&C application would protect the author against deportation from Canada. Indeed, the State party's legislation expressly provides that such application does not entitle the author to a stay of removal pending determination thereof. Moreover, the State party's position is disingenuous insofar as, in the domestic context, it takes the position that such evidence would not be admissible in the context of a renewed PRRA or H&C application, as it could have been available at the time of previous applications. In the present case, the PRRA officer who determined the author's second PRRA application refused to consider evidence that related to facts predating the first PRRA. Thus, the medical report in question would not be assessed in a renewed PRRA as it related to old facts.

5.3 In the H&C context, in domestic litigation, the State party takes the position that the doctrine of *res judicata* applies to all issues that have been previously decided or could have been raised by the author in the course of a previous application and that, as such, evidence that could have been filed in support of a previous application will not be considered. Thus, the author rejects the State party's argument that he could file this evidence in support of a renewed PRRA or H&C, given that the State party's position in the domestic context is precisely that such evidence need not be considered in the context of such applications.

5.4 Moreover, the medical report simply confirms that the author bears scars on his chest and abdomen, a fact that was alleged in his refugee claim, PRRA and H&C applications and the veracity of which was never denied by the State party. The situation therefore differs markedly from that in *Dawood Khan v. Canada* where the evidence in question was a psychological report diagnosing the author with post-traumatic stress disorder, a fact novel to the proceedings. Further, the Amnesty International opinion letter does not present any new facts. It simply reviews the publicly available information on Sri Lanka and offers its opinion on the author's situation. The non-production of this letter earlier cannot constitute non-exhaustion of domestic remedies.

5.5 As for the State party's contention that the author failed to exhaust domestic remedies by not applying for judicial review against the negative decision on his first H&C application, the author considers it without merits. The author filed a new H&C application which was rejected. Had he sought judicial review and had judicial review been granted, the Federal Court would have done no more than to order the State party to redetermine the H&C application which has already been done in this case in the context of his refiled H&C application. For all these reasons, the author considers that he has exhausted domestic remedies. Indeed, the only reason why he remains in Canada is because the Committee

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<sup>11</sup> The State party refers to the jurisprudence of the Committee against Torture in communication No. 15/1994, *Tahir Hussain Khan v. Canada*, Views adopted on 15 November 1994, para. 12.1.

issued a request for interim measures demanding that the State party withhold his deportation.

5.6 With regard to the State party's contention that the author failed to substantiate a risk under article 6, paragraph 1, and article 7 of the Covenant, the author replies that the PRRA officer recognized the risks faced by ethnic Tamils from the North and East of Sri Lanka, but failed to properly apply the law to those accepted facts. The evidence submitted by the author clearly discloses a risk of death and torture or cruel, inhuman or degrading treatment. Indeed, it was on the basis of that evidence that the Committee issued a request for interim measures of protection.

5.7 The State party takes the position that the author's account is not credible and not supported by objective evidence. However, not only do the author's submissions demonstrate that the real risk of violations of articles 6, paragraph 1, 7 and 9 of the Covenant do not in any way depend on those allegations that the State party has deemed non-credible, but the claim that the risks are not supported by objective evidence is not founded. There is voluminous documentary evidence demonstrating the risks faced by someone with the author's profile. Furthermore, while the State party takes the position that the author has an internal flight alternative in Colombo, where it says that he can reside provided that he registers with the police, the 2009 United States Department of State country report on human rights practice in Sri Lanka published on 11 March 2010 states that Colombo police refused to register Tamils from the north and east, as required by Emergency Regulation 23, sometimes forcing them to return to their homes in areas affected by the conflict. Therefore Colombo is not safe for the author. The State party mentions that Tamils from the west might be questioned at checkpoints. This is precisely the situation of the author. Moreover, questioning by the Sri Lankan authorities frequently involves violations of article 7 of the Covenant. The author's communication in this regard is therefore sufficiently substantiated.

5.8 With regard to the State party's contention in relation to article 9 of the Covenant, while the author does not take issue with the State party's position that detention per se or even arbitrary detention per se, may not constitute irreparable harm, in the present case, the author's submissions make clear that the risk of arbitrary detention of the author in Sri Lanka brings with it the risk of torture or cruel and unusual punishment while in detention. Thus the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of article 7 of the Covenant.

5.9 The author considers that as such, whatever the merits or demerits of the system may be, the fact remains that the system failed to protect the author's most fundamental rights and it now falls to the Committee to make this assessment.

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

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author has not exhausted domestic remedies because he has submitted two new pieces of evidence to the Committee that were not previously examined by domestic authorities; and that he failed to apply for judicial review of the first H&C application which had been rejected on 14 September

2007. The Committee notes the author's argument that the position of the State party is to reject evidence that relates to facts predating the first PRRA application procedure, which is the case with the two documents mentioned; and that those documents only corroborate the author's allegations previously rejected for lack of credibility. The Committee further notes the author's contention that he filed a new H&C application which was rejected; and that neither a renewed PRRA application nor a renewed H&C application would protect the author against deportation from Canada, therefore not providing an effective remedy to the author.

6.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.<sup>12</sup> The Committee notes that, throughout the proceedings, the author has claimed to have been tortured. In the light of the information available to it, the Committee considers that none of the two avenues mentioned by the State party (PPRA application and H&C application) in the present circumstances would have the effect of staying or preventing the author's deportation to Sri Lanka. The Committee further considers that given the current legislation in the State party and the nature of the documents concerned, it is unlikely that they would have changed the outcome of the proceedings. The Committee therefore considers that it is not precluded from considering the author's claims pursuant to article 5, paragraph 2 (b), of the Protocol.

6.5 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure to substantiate the author's claims under articles 6, paragraph 1, 7 and 9, paragraph 1, of the Covenant. As far as article 6 is concerned, the Committee notes that the information submitted to it does not provide sufficient grounds to believe that the author's expulsion to Sri Lanka would expose him to a real risk of a violation of his right to life. The author's contentions in this respect are general allegations mentioning the risk of arbitrary arrest and detention, which could ultimately lead to his death, but without reference to any particular circumstances suggesting that his life would be in danger. In these circumstances, the Committee considers that the author has not sufficiently substantiated his claims under article 6 of the Covenant. The Committee therefore declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

6.6 With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that this provision has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention. The Committee takes note of the author's allegations that the risk of his arbitrary detention in Sri Lanka brings with it the risk of torture or cruel and unusual punishment while in detention. The Committee therefore concludes that the risk of a violation of article 9, paragraph 1, cannot be dissociated from the real risk of a violation of article 7 of the Covenant.

6.7 As for the author's claims under article 7 of the Covenant, the Committee notes that he has explained the reasons why he feared to be returned to Sri Lanka, based on the arrests and treatment he allegedly suffered both in the hands of the authorities and the LTTE. The Committee also notes that the author has provided documentary evidence in support of such claims which are serious enough to be considered on the merits. The Committee

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<sup>12</sup> See communication No. 1959/2010, *Jama Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; communication No. 1003/2001, *P.L. v. Germany*, Decision on admissibility of 22 October 2003, para. 6.5; and communication No. 433/1990, *A.P.A. v. Spain*, Decision on admissibility of 25 March 1994, para. 6.2.

accordingly finds the author's claims under both articles 7 and 9 admissible and proceeds to their consideration on the merits.

*Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee considers it necessary to bear in mind the State party's obligation under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.

7.3 The Committee notes the author's claim that as an ethnic Tamil from the North of Sri Lanka, who has in the past been detained on several occasions and tortured by the Sri Lankan army, as evidenced by the scars he retained on his chest, he faces a real risk of being subjected to treatment contrary to article 7 of the Covenant if returned. The Committee notes the State party's contention that the author's applications before domestic authorities were essentially rejected on the grounds that the author lacked credibility, having noted inconsistencies in his statements and the lack of evidence in support of his allegations. The Committee further notes the State party's argument, as evidenced by the PRRA officer at national level, that even accepting that the author had been arrested in 1987 and 1989, he had not established that he had had problems with either the army or the LTTE since then; and therefore, there was insufficient proof that the author faced a real risk for his life or security if returned to Sri Lanka. The Committee finally notes the State party's argument that the author does not fit the profile of the young Tamil male who would be subject to persecution, and that his situation is no different from that of all the Tamils living in Sri Lanka.

7.4 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm<sup>13</sup>. The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such risk exists.<sup>14</sup>

7.5 In the circumstances of this case, the Committee finds that insufficient weight was given to the author's allegations of a real risk of being tortured if deported to his country of origin, given the high prevalence of torture in Sri Lanka.<sup>15</sup> The Committee notes that the inconsistencies highlighted by the State party were not directly related to his claim of having been tortured and cannot in themselves vitiate the whole credibility of the author's allegations with regard to his past torture and harassment by both the army and the LTTE. Contrary to the State party's assumption that the author did not support his claim of having been tortured by the army after 1989, the author pointed to scars on his chest as evidence of recent torture. This physical evidence should have been enough for the State party authorities to request an independent expertise on the possible causes for those scars and their age.

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<sup>13</sup> See General Comment No. 31[80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 12.

<sup>14</sup> See communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; see also communication No. 1819/2008, *A.A. v. Canada*, Decision on admissibility adopted on 31 October 2011, para. 7.8.

<sup>15</sup> See communication No. 1763/2008 (footnote 14 above).

7.6 Indeed, it was for the IRB and PPRA officers to dispel any doubts that might have persisted as to the cause of such scarring.<sup>16</sup> The State party failed to direct an expert opinion as to the causes and age of the scars observed on the author's chest and based its decision to reject the author's asylum claim merely on inconsistencies that are not central to the general allegation faced by the author as an ethnic Tamil from the North of Sri Lanka.

7.7 The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the author's allegations of torture and the real risk he might face if deported to his country of origin, in the light of the documented prevalence of torture in Sri Lanka. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee considers that further analysis should have been carried out in this case.<sup>17</sup> The Committee therefore considers that the removal order issued against the author would constitute a violation of article 7 of the Covenant if it were enforced.

7.8 In the light of its findings on article 7, the Committee does not deem it necessary to further examine the author's claims under article 9 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to Sri Lanka would violate his rights under article 7 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of the author's claim regarding the risk of treatment contrary to article 7, should he be returned to Sri Lanka, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. 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 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

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

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<sup>16</sup> See ECHR, *R.C. v. Sweden*, Appl. No. 41827/07, Judgment of 9 June 2010, para. 53.

<sup>17</sup> See communication No. 1763/2008 (footnote 14 above).

## Appendix

### **Individual (dissenting) opinion of Mr. Krister Thelin**

The majority has admitted the author's claim under article 7 of the Covenant, considered it on the merits and found a violation. I disagree.

The Committee is in essence asked, and the majority has agreed thereto, to act as a fourth instance, even though it is clear from the Committee's jurisprudence that, as a general rule, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether the alleged risk exists. The exception to this general rule is where the evaluation was clearly arbitrary or amounted to a denial of justice. That is not the case in the communication before us, and, therefore, the claim should not have been admitted. (See my dissenting opinion in communication No. 1763/2008, *Pillai et al. v. Canada* with references)

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

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