

# No. 9/2013 (Sri Lanka)

## Communication addressed to the Government on 12 November 2012

### Concerning Santhathevan Ganesharatnam

**The Government replied to the communication on 14 February 2013. The State is a party to the International Covenant on Civil and Political Rights.**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights (UDHR) and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (ICCPR) (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

#### **Submissions**

*Communication from the source*

3. **Mr. Santhathevan Ganesharatnam** (hereinafter Mr. Ganesharatnam), a 38-year old Tamil from Sri Lanka, usually residing in Vavuniya, Pooneryn, Sri Lanka, is an accountant by profession, and was working as a Senior Financial Adviser at the Union Assurance PLC company at the time of his arrest.

#### **The circumstances surrounding the arrest and detention of Mr. Ganesharatnam**

4. On 5 January 2010, at or around 11.30 a.m., five officers attached to the Terrorist Investigation Division (TID) together with an officer identified as Sub-Inspector Jude of Vavuniya TID Unit, came

to the office of Mr. Ganesharatnam at Union Assurance PLC in Vavuniya and made inquiries about him from the Manager. As Mr. Ganesharatnam was not in the office at the time, the Manager immediately contacted him via telephone and requested him to return to the office. Upon return to the office, the TID officers escorted Mr. Ganesharatnam to the Vavuniya TID office. Mr. Ganesharatnam was accompanied by his Manager.

5. Mr. Ganesharatnam was allegedly not informed of the reasons for his arrest. He inferred from the questioning during the police interrogation that he had been arrested on suspicion of being an informant for the Liberation Tigers of Tamil Eelam (LTTE). A detention order had allegedly been brought against him under the Prevention of Terrorism Act (PTA) No. 48 of 1979. Neither Mr. Ganesharatnam nor his family had seen such a detention order.

6. Mr. Ganesharatnam was detained at the Vavuniya TID office from 5 to 7 January 2010. He was then transferred to the Colombo TID office (Headquarters) on 1 March 2011. On 31 March 2011, Mr. Ganesharatnam was brought before the Chief Magistrate's Court in Colombo, and then remanded to the Colombo Remand Prison, where he remains.

7. The source alleges that Mr. Ganesharatnam was arrested and is held in detention pursuant to the PTA, which under its section 9.(1) allows the Minister of Defence to issue a detention order for a period of up to 18 months, if he has reason to believe that this "person is connected with or concerned in any unlawful activity" under the Act. Section 7.(1) prescribes that if a detainee is arrested under the PTA and produced before a magistrate, the court is required to place the individual in remand until the conclusion of the trial. The PTA does not require any charge to be pressed against the accused.

**Source's contention regarding the arbitrary character of Mr. Ganesharatnam's detention**

8. The source contends that the arrest and detention of Mr. Ganesharatnam are arbitrary because he was arrested without a warrant and was not informed of the charges or reasons for his detention. He has been detained for over three years without the authorities bringing any charges against him or bringing him to trial.

9. The source also reports that Mr. Ganesharatnam was physically assaulted and subjected to psychological torture in custody in an effort to extract a false confession. He was reportedly threatened with prolonged detention. Mr. Ganesharatnam alleged having been slapped hard and repeatedly with an open palm. The source reports that, due to this treatment and the resulting psychological trauma, Mr. Ganesharatnam is unable to recall specific dates or times of the interrogation sessions to which was subjected.

10. Mr. Ganesharatnam was allegedly questioned about whether he had worked for the Intelligence Wing of the LTTE and whether he had supplied information to the LTTE Intelligence Wing to assassinate Douglas Devananda MP (leader of the Eelam People's Democratic Party (EPDP)) and his supporters. The interrogators reportedly accused Mr. Ganesharatnam of supplying information regarding groups linked with Karuna Amman, an ex-LTTE military leader who at the time of this incident was the Deputy Minister of Resettlement in the Government of Sri Lanka. It is reported that the interrogators repeatedly asked Mr. Ganesharatnam whether he had undergone any armed training with the LTTE, and specifically whether he had undergone any armed training in the Mullaitivu Camp in or around 2009.

11. Even though Mr. Ganesharatnam had denied all the allegations, Sub-Inspector Abdeen tried to force him to sign a 28-page written statement in Sinhala, a language Mr. Ganesharatnam cannot read. He refused to sign the aforementioned statement, even though Sub-Inspector Abdeen threatened to detain Mr. Ganesharatnam's wife and children.

12. On or around 1 March 2011, Sub-Inspector Abdeen and other officers allegedly handed Mr. Ganesharatnam several blank sheets of paper and reportedly threatened and coerced him to sign these. When Mr. Ganesharatnam refused to do so, officers reportedly grabbed him by his throat and beat him with their fists. Mr. Ganesharatnam ultimately signed the blank sheets due to the threats of continued beatings and the threats against his family.

13. On or around 3 March 2011, Sub-Inspector Abdeen dictated a statement to Mr. Ganesharatnam which he was forced to write down verbatim in Tamil and sign. Mr. Ganesharatnam remembers being forced to write that a man called Murugiah Komakan (an acquaintance who had followed an

information technology course with Mr. Ganesharatnam) had shown him the residence of Karuna Amman. Mr. Ganesharatnam cannot recall all the details of the statement that he was forced to write.

14. The source adds that on 31 March 2011, Mr. Ganesharatnam was produced before the Chief Magistrate's Court in Colombo and was remanded to the Colombo Remand Prison. The source contends that he was administratively detained under the 1979 PTA pending indictment. He was allegedly not charged with an offence before his transfer to Colombo Remand Prison and has not yet been charged.

15. The PTA does not provide for any of the legal safeguards in detention, such as the requirement that an individual arrested must be informed promptly of the charges levelled against him and, if charged, be promptly put on trial before an independent and impartial tribunal and to have the opportunity to defend himself. The source holds that this is in violation of article 10 of the Universal Declaration on Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

16. Owing to the absence of these basic safeguards, Mr. Ganesharatnam has been subjected to prolonged detention without an opportunity to challenge the lawfulness of his detention. The source maintains that the authorities have no information to substantiate any reasonable suspicion that he has committed acts that could form the basis of such detention. As the maximum 18-month period of detention provided for by the PTA under a Ministry of Defence detention order lapsed long ago, Mr. Ganesharatnam is now being held pending trial (as dictated by the PTA section 7.(2) under part II, "Investigation of offences"). He has not been charged with any offence and the Act does not require that the detainee be charged before remand. The source submits that this runs contrary to articles 9 and 13 of the UDHR and articles 9, 12 and 14 of the ICCPR.

17. It was reported that Mr. Ganesharatnam has had limited access to a lawyer. The source reports that access to lawyers is left largely to the discretion of the police. The PTA has no provision guaranteeing access to legal counsel. Section 257 of Sri Lanka's Code of Criminal Procedure Act (No. 15 of 1979) recognizes the right of accused persons to be defended in court and to be represented in court by a lawyer, but does not address the right of pretrial detainees to legal counsel or access to counsel during questioning by the police.

18. Further, the source contends that the PTA violates international human rights and due process rights by allowing indefinite administrative detention and reversing the burden of proof if torture is alleged.

19. The source refers to the findings of the Human Rights Committee, according to which several provisions of the PTA are incompatible with articles 4, 9 and 14 of the ICCPR ("Concluding observations of the Human Rights Committee: Sri Lanka" (CCPR/CO/79/LKA, December 2003), para. 13). The PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sect. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sect. 9). The PTA also eliminates the power of the judge to order bail or impose a suspended sentence, and places the burden of proof on the accused to show that a confession was obtained under duress.

20. Mr. Ganesharatnam has appealed to the Supreme Court of Sri Lanka (SC FR 98/12) arguing that his fundamental rights have been violated and seeking release. On 29 March 2012, when his case was heard before the Supreme Court, the Attorney General's Department appearing for the State informed the Court that a decision had been taken for an indictment against Mr. Ganesharatnam, but that the papers had not yet been completed. The case was listed again for 1 June 2012, to enable the court to monitor the situation. At the time the Attorney General's Department had still not filed the indictment. The case was to be listed again in court on 19 July 2012 to monitor whether the indictment had been filed. At this stage the Petitioner was to inform the Court whether he wished to proceed with the fundamental rights application in the light of the planned filing of the indictment; however, at the time of writing of the submission to the Working Group the listing of the case had been postponed.

21. In the light of the foregoing, the source submits that Mr. Ganesharatnam's detention under the PTA is arbitrary, being in violation of articles 9 and 13 of the UDHR and articles 9, 12 and 14 of the

ICCPR. The source also contends that the treatment of Mr. Ganesharatnam during the interrogation process by the TID officers is in violation of principles 1, 6, 10, 11, 12, 13, 14, 17, 18 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 22. The Working Group transmitted the above allegations to the Government of Sri Lanka on 12 November 2012 requesting it to provide, in its reply, detailed information about the current situation of Mr. Ganesharatnam and the legal provisions justifying his continued detention.

*Response from the Government*

23. In response to allegations from the source, the Government of Sri Lanka states that Mr. Ganesharatnam "has been arrested and produced before the Colombo Chief Magistrate under case No. B/3367/8/10 on 31 March 2011 and remanded under the Prevention of Terrorism Act (PTA). Indictments have been served on him in the High Court under case number 6275/12 in the Colombo High Court, and under case number 2397/12 in Vavuniya High Court".

24. The Government further states that: "Mr. Santhathevan Ganesharatnam was arrested on 5 January 2012 by the Terrorist Investigation Division (TID) in connection with LTTE activities. This person has been a member of the LTTE who had joined the organization in June 1996 and trained in Mullathivu jungles. After basic training, he has joined the LTTE Intelligence Wing and worked under Kapil Master and Madawan Master, two of the very prominent LTTE intelligence wing leaders. He was involved in intelligence activities and had worked with Newton, another prominent LTTE intelligence wing cadre. The subject has supported Newton in killing members of the Karuna faction during this period. He was involved in the shooting and killing of Thangarajah Thappamurthy in October 2004."

*Further comments from the source*

25. The response of the Government of Sri Lanka was sent to the source for comments. The source reiterated its earlier position regarding the arbitrary nature of Mr. Ganesharatnam's detention and also pointed out some factual errors in the response.

26. The Government claims that Mr. Ganesharatnam was arrested on 5 January 2012 by the TID. The source reiterates that he was arrested on 5 January 2010 stating that the Government of Sri Lanka contradicts its own statement by later claiming that Mr. Ganesharatnam "has been arrested and produced before the Colombo Chief Magistrate Court under case number B3367/8/10 on 31 March, 2011 and remanded under the Prevention of Terrorism Act (PTA)". The source notes that when Mr. Ganesharatnam was remanded under the PTA on 31 March 2011 (which accords with information previously submitted to the Working Group by the source), he was not charged with an offence and had by then already been held in detention almost 14 months without charge. He has alleged that he was tortured by TID personnel during his detention and interrogation.

27. The source, further comments that the Government response to the Working Group indicates that subsequent indictments were filed against Mr. Ganesharatnam in the Colombo and Vavuniya High Courts, but does not indicate when this occurred. At the time of the source's initial submission to the Working Group in September 2012, it was not aware of any formal charges brought against Mr. Ganesharatnam.

28. The source also notes that, according to the information available to it, the indictments referred to by the Government of Sri Lanka may have been issued after June 2012, making Mr. Ganesharatnam's period of detention without charge at least two and a half years long. As previously reported by the source, Mr. Ganesharatnam filed a case in the Supreme Court of Sri Lanka (SC FR 98/12) arguing that his fundamental rights had been violated and seeking release. On 29 March 2012, when his case was heard before the Supreme Court of Sri Lanka, the Attorney General's Department appearing for the State informed the Court that a decision had been taken to serve an indictment against Mr. Ganesharatnam, but that the papers had not been completed. The case was listed on 1 June 2012 to enable the Court to monitor the situation. The indictment had still not been filed by the Attorney General's Department at the time. The case was to be listed again in Court on 19 July 2012 to monitor if the indictment had been filed.

29. At this stage the Petitioner was to inform the Court whether he wished to proceed with the fundamental rights application in the light of the indictment being filed, but the hearing was postponed. Available Supreme Court records do not appear to contain any reference to his

application having been reviewed after the Court session of 19 July 2012 at which it had been last listed.

### **Discussion**

30. The Working Group, upon assessing and analysing information provided to it, notes with deep concern a consistent pattern of cases emanating from Sri Lanka relating to persons that have been deprived of their liberty under the 1979 PTA and other emergency laws in operation in Sri Lanka.<sup>1</sup> The combination of civilian and emergency regulations in Sri Lanka has resulted in a worsening situation for the protection of human rights, a state of facts that has been pointed out by national, regional and international organizations including the United Nations. The case in hand is one of many cases that have come to light as a result of lack of respect for human rights, in reaction to the conflict and post conflict situation in Sri Lanka.<sup>2</sup>

31. For a long time, Sri Lanka has been under emergency laws, the foundation of which dates back to British colonial rule and the Public Security Ordinance of 1947 (PSO) which has enabled declarations of emergency regulations in the country ever since. The second law in this regard is the PTA (Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. Human rights advocates and the international community have repeatedly called for the repeal or amendment of these laws as these have resulted in dissipating the core of rights protecting persons deprived of their liberty including rules governing detention, due process and the right to a fair trial. Since 2005 the PSO has been used to enact a total of 20 regulations by the Government of Sri Lanka, leading to undermining of the human rights regime in general and in particular the rights related to arrest, detention and fair trial.

32. Immunity provisions contained in these laws and regulations (including those contained in Regulation 73 of the Emergency (Miscellaneous Provisions and Powers) (EMPPR 2005); sections 9 and 23 of the PSO and section 26 of the PTA), seek to severely limit the accountability of civilian and military authorities exercising emergency powers, provided that the action of the official took place in the course of discharging official duties. Further, the overly vague definitions of offences, sweeping powers to the military, arbitrary grounds for arrest and detention, erosion of fair trial and due process rights, and the curtailing of fundamental freedoms endanger the life, liberty and security of the people.

33. It is important to note that the Emergency Regulations are in operation despite the fact that on 9 June 2010, the Government of Sri Lanka informed the Human Rights Committee that: "The recent amendments to the Emergency Regulations that have come into effect from 2 May 2010 are in keeping with the consistent commitment of Sri Lanka towards the promotion of human rights and the maintenance of strong judicial safeguards. It is in this context that the Government of Sri Lanka at the outset wishes to enumerate the terminations of derogations of the following ICCPR articles [ : 9 (2), 12, 14 (3), 17 (1), 19 (2), 21 and 22 (1)] ..."

34. Various provisions of the PTA significantly diminish possibilities for ensuring basic minimum standards at the time of arrest, during detention and at trial. For instance, under section 9.(1) of the PTA, detention orders for a person detained under this law may be issued for up to 18 months without the need to be charged. Similarly under section 7.(1) a detainee arrested under the PTA and produced before a magistrate is to be in remand until the conclusion of the trial. In all the cases from Sri Lanka of which the Working Group has thus far been seized, it is important to note that the 18-month period of pre-charge detention easily slips far beyond this period itself (see, for instance, the Working Group's Opinions Nos. 30/2008; 49/2011; 26/2012; 38/2012 and 50/2012).

35. In the instant case, Mr. Ganesharatnam was arrested on 5 January 2010 and not produced before a magistrate until 31 March 2011 at which date he was remanded under the PTA. The Government response is vague as to when he was actually arrested and indicted as it simply states that Mr. Ganesharatnam was arrested and produced before a magistrate on 31 March 2011. Case numbers presented by the Government indicate that this was done some time in 2012. The source, however, in its further comments states that these indictments may have been issued some time after June 2012 making it a total period of close to 30 months after arrest. Bearing in mind that there is a contradiction in the dates as presented by the Government, this may well be the case. (See

paragraphs 23-24 above where the Government states that the detainee was produced before a magistrate on 31 March 2011 and then proceeds to say that he was arrested on 5 January 2012.)

36. The Working Group believes that this delay in presenting a detainee with reasons for his being arrested and detained moves beyond the minimum standards accepted internationally.

37. Arrest and detention without judicial oversight under the PTA also means that detainees are at the mercy of the law-enforcing authorities. These same authorities can also contribute to the delay in processing of these cases before the courts. The case in hand of Mr. Ganesharatnam is evidence of this possibility

38. The Working Group has in its past reports, stated its concerns regarding the use of various counter-terrorism legislation by States that result in the arbitrary deprivation of liberty of persons. It noted that there was a continuing tendency to use deprivation of liberty in the context of States' legitimate fight against terrorism. However, the Working Group considers it necessary to reiterate that some States continue to use deprivation of liberty without charges or trial or other applicable procedural guarantees against persons accused of terrorist acts in the implementation of criminal policies against terrorism, a practice which is contrary to international human rights instruments.<sup>3</sup>

39. The prohibition of arbitrary detention in articles 9 of the UDHR and ICCPR extends to all forms of detention, with the right to an effective remedy in article 8 of the UDHR and article 9, paragraph 5, of the ICCPR. Due process rights are stated in article 10 of the UDHR and article 14 of the ICCPR. The proportionality review which determines whether a restriction on liberty can be justified is strict and takes into account the high value attached to personal liberty. Measures taken are subject to the legality criteria and must be suitable, necessary and proportionate.

40. The Working Group would like to remind the Government of Sri Lanka of its duties to comply with international human rights obligations including the duty not to detain arbitrarily, to release persons arbitrarily detained and to provide compensation to them. In a number of Opinions, the Working Group has "recalled that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law, may constitute crimes against humanity. The duties to comply with international human rights that are peremptory and erga omnes norms such as the prohibition of arbitrary detention rest not only on the Government but on all officials including judges, police and security officers, and prison officers with relevant responsibilities. No person can contribute to human rights violations" (Opinion No. 47/2012).<sup>4</sup>

#### **Disposition**

41. In the light of the preceding paragraphs, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Santhathevan Ganesharatnam is arbitrary, and constitutes a breach of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, falling within category III of the categories applicable to the cases submitted to the Working Group.

42. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Santhathevan Ganesharatnam and adequate reparation to him.

43. The Working Group brings to the attention of the Government the recommendations of the Human Rights Council that national laws and measures aimed at combating terrorism shall comply with all obligations under international law, in particular international human rights law.<sup>5</sup>

44. Finally, the Working Group reminds the Government of the Human Rights Council's call for States to take account of the Working Group's views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty. States are also requested to extend their cooperation to the Working Group's requests for information and to give due consideration to the recommendations it has made.<sup>6</sup>

[Adopted on 2 May 2013]

<sup>1</sup>Opinion 26/2012 (Sri Lanka) concerning Pathmanathan Balasingam and Vijiyanthan Seevaratnam.

<sup>2</sup>See also Opinion 30/2008 (Sri Lanka) and Opinion 38/2012 (Sri Lanka) concerning Jayasundaram Gunasundaram available at <http://www.unwgadatabase.org/un/>.

<sup>3</sup>A/HRC/10/21; A/HRC/7/4; E/CN.4/2005/6; E/CN.4/2004/3.

<sup>4</sup>See footnote 1.

<sup>5</sup>Human Rights Council resolution 7/7 of 27 March 2008.

<sup>6</sup>Human Rights Council resolution 15/18 on arbitrary detention (A/HRC/RES/15/18), paras. 3-4(a).