

Human Rights Committee

Geneva

Switzerland

GUNETHTHIGE

v.

SRI LANKA

**INDIVIDUAL COMMUNICATION**

submitted pursuant to Article 2 of the First Optional Protocol  
to the International Covenant on Civil and Political Rights

July 2011

## **I. INFORMATION CONCERNING THE COMMUNICATION**

### **THE AUTHORS**

1. The Authors of the present communication are **Ms Misilin Nona GUNETHTHIGE** who is 64 years old and **Ms Piyawathie GUNETHTHIGE** who is 56 years old. Both Authors are of Akkaraheththedeka, Kindelpitiya, Millewa, Sri Lanka.
2. Nationality of the Authors: Sri Lankan.

### **THE VICTIMS**

3. The deceased victim is Mr Thissera Sunil HEMACHANDRA. The Authors are his mother (M.N. Guneththige) and aunt (P. Guneththige). The Authors are also victims of a separate violation of the Covenant in respect of them personally.
4. Nationality of the victims: Sri Lankan.

### **STATE PARTY**

5. The Democratic Socialist Republic of **Sri Lanka**.

### **REPRESENTATION**

6. Both Authors are represented by Mr Sergey GOLUBOK, of Russian nationality, Advocate, Member of St. Petersburg Bar, Russian Federation, and Legal Programme Officer with REDRESS Trust (Ground Floor, 87 Vauxhall Walk, London, SE11 5HJ, United Kingdom of Great Britain and Northern Ireland), and Ms Sharmaine GUNARATNE, of Sri Lankan nationality, member of Sri Lankan Bar (64 D Romford Road, London, E15 4EE, United Kingdom of Great Britain and Northern Ireland). The Authors are assisted by the **Asian Legal Resource Centre** and **REDRESS Trust**, non-governmental organisations which are based in Hong Kong and London, respectively. They are also assisted by *Janasansadaya*, a Sri Lanka-based non-governmental organisation.
7. The address for correspondence is REDRESS, Ground Floor, 87 Vauxhall Walk, London, SE11 5HJ, United Kingdom of Great Britain and Northern Ireland.

## **II. SUMMARY OF CLAIM**

8. T. Sunil Hemachandra (“Sunil”) died on 26 July 2003 following head injuries sustained while in police custody in Sri Lanka.
9. His arrest around midnight of 22/23 July 2003 and subsequent detention at the Moragahahena Police Station had no lawful basis.
10. Prior to his death Sunil was subjected to torture, cruel, inhuman and degrading treatment in police custody which led to his death.
11. Alternatively, the authorities failed to protect his life while in detention and provide him with adequate medical assistance.
12. The Sri Lankan authorities have not conducted a prompt, impartial and effective investigation into his arrest, torture and death.
13. The Authors, other relatives of Sunil, and local non-governmental organisation repeatedly lodged complaints concerning his arrest, torture and death with the Sri Lankan authorities, in particular, the police superiors, the National Human Rights Commission, and the Supreme Court, but to no effect. All available and effective domestic remedies have been exhausted. The authorities of the State Party failed to provide any redress in respect of the violations forming the subject matter of this communication.
14. The Authors claim that Sri Lanka has violated article 2 (3) of the Covenant separately and read in conjunction with articles 6 (1), 7, 9 (1), (2) and (4), and 10 (1), as well as each of those articles separately.
15. The Authors respectfully request the Committee:
  - a) to declare the present communication admissible;
  - b) to find that the State Party committed violations of article 2 (3) of the Covenant separately and read in conjunction with its articles 6 (1), 7, 9 (1), (2) and (4) and 10 (1) of the Covenant, as well as each of those articles separately, in respect of the arrest, torture and death of T. Sunil Hemachandra and lack of prompt, impartial and effective investigation thereto;
  - c) to find that the State Party committed a separate violation of article 7 of the Covenant, read in conjunction with article 2 (3) of the Covenant, with regard to the Authors;
  - d) to determine that the State Party is under an obligation to conduct a prompt, impartial and effective investigation into the circumstances of the arrest, torture and death of T. Sunil Hemachandra capable of establishing the facts, identifying those responsible for the violations and leading to their prosecution and ultimate punishment; and
  - e) to determine that the State Party is under an obligation to provide reparations to the Authors, including adequate compensation for pecuniary and non-pecuniary damage, public apology, rehabilitation, and appropriate guarantees of non-repetition.

### **III. FACTS**

#### **A. THE BACKGROUND**

16. T. Sunil Hemachandra (Sunil) was born on 27 October 1969. He was a healthy and literate man with no criminal record. He was a daily paid labourer and was mostly engaged in tapping rubber and climbing trees to pluck coconuts and fruits.
17. Since approximately 1979, Sunil had been living with the family of his aunt, the second Author, who is the sister of the first Author (his mother).<sup>1</sup>
18. On or about 28 June 2003 Sunil bought a lottery ticket.<sup>2</sup>
19. On 29 June 2003 Sunil learnt that he had won more than three million rupees (approximately US\$ 25,000) in the lottery. On the same date, Mr Ranasinghage Lionel (“Lionel”), a lottery sales agent for the area described as “well connected to the police”<sup>3</sup> came to the second Author’s house with a police officer. They suggested that Sunil apply for police “protection”.<sup>4</sup> Sunil declined the offer.
20. As Sunil did not possess a national identity card of his own at the time, he used the second Author’s national identity card to claim the lottery money. On 4 July 2003 Sunil, together with the second Author and Lionel, went to the Development Lotteries’ Board in Colombo and received the lottery money against Sunil’s lottery ticket but in the name of the second Author.<sup>5</sup> The money was paid by cheque no. 830852 issued by the Kollupitiya Branch of the Bank of Ceylon. On 7 July 2003 the cheque was paid into the bank account held by the second Author with the Horana Branch of the Bank of Ceylon.<sup>6</sup>
21. On 7 July 2003 Sunil withdrew two million and one hundred thousand rupees from the second Author’s bank account. On the same date he purchased a van for one million and two hundred thousand rupees which was registered under the second Author’s name.<sup>7</sup>
22. On or around 14 July 2003 Sunil purchased a three-wheeler for the second Author’s granddaughter and gave five thousand rupees to his nephew as a gift.
23. On or around 21 July 2003 a team of police officers of the Moragahahena Police Station (“MPS”) arrived at the second Author’s house looking for Sunil. They asked the second Author how Sunil had spent his lottery money. One of the police officers warned that Sunil’s “happiness would not last long”. The police officers requested that Sunil report to the MPS.
24. On the same date Sunil accompanied by Chanaka Dinesh Kumara (“Chanaka”) – his acquaintance whom Sunil had commissioned to drive his new van and son

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<sup>1</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 2 in Annex 3.

<sup>2</sup> Ibid., at para. 4.

<sup>3</sup> See Affidavit of Chanaka dated 21 August 2003, at para. 7 in Annex 4.

<sup>4</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 7 in Annex 3.

<sup>5</sup> Ibid., at para. 8.

<sup>6</sup> Ibid., at para. 9.

<sup>7</sup> Ibid.

of Lionel – reluctantly went to the MPS. At the station, one of the police officers (sub-inspector) requested Sunil to pay money as “support”. Sunil replied that the money was with the Second Author and declined to pay. The same policeman then insisted on the payment of twenty-five thousand rupees “to cover the expenses of a procession of Vidyarathana temple in Horana”.<sup>8</sup>

## **B. DETENTION AND DEATH OF SUNIL**

25. In the late evening of 22 July 2003, close to midnight, five police officers from the MPS arrived in a vehicle at the Second Author’s house. The Second Author opened the door. The police officers entered the room where Sunil was sleeping with the following words: “He is the one who won the lottery.”<sup>9</sup> Several police officers proceeded to beat Sunil,<sup>10</sup> including by hitting him on his head. The police officers arrested Sunil and Chanaka<sup>11</sup> who had been staying at the Second Author’s house that night.<sup>12</sup>
26. Before being loaded into a police jeep and during the ride to the MPS several police officers severely beat Sunil on his head and in the abdominal area. Chanaka, who was seated facing Sunil, was hit in the face several times when he asked the officers to stop the beatings.<sup>13</sup>
27. Sunil and Chanaka were taken to the MPS and placed in a cell of 5 by 8 feet with several other detainees.<sup>14</sup>
28. On the morning of the following day, that is 23 July 2003, at approximately 6:45 am, Sunil was visibly unwell. He was bleeding from his nose and mouth.<sup>15</sup> Chanaka alerted the police officers at the scene to Sunil’s critical state of health.<sup>16</sup> Sunil was not able to stand and had to lie down.<sup>17</sup> Instead of calling for a medically qualified person to provide the required medical assistance to him, the police officers asked Chanaka to take Sunil to the backyard to wipe the blood off and wash his face.<sup>18</sup> The bleeding from his nose and mouth continued<sup>19</sup> and he vomited blood clots. One of the police officers directed Chanaka to give an iron rod to Sunil to hold.<sup>20</sup> This is done in case of epileptic

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<sup>8</sup> See Affidavit of Chanaka dated 21 August 2003, at para. 6, in Annex 4; Affidavit of Deepal, at para. 11, in Annex 7.

<sup>9</sup> See Affidavit of Chanaka dated 21 August 2003, at para. 10, in Annex 4; Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6; and Affidavit of the Second Author dated 23 August 2003, at para. 11 in Annex 3.

<sup>10</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 11 in Annex 3.

<sup>11</sup> See Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6.

<sup>12</sup> See Affidavit of Chanaka dated 21 August 2003, at para. 10, in Annex 4.

<sup>13</sup> Ibid., at paras. 13-16.

<sup>14</sup> Ibid., at paras. 17-18.

<sup>15</sup> Ibid., at paras. 19-20.

<sup>16</sup> Ibid., at para. 21.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., at para. 24.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid., at paras. 25-26; Affidavit of Deepal, at para. 14, in Annex 7.

attacks, and the police officer seemingly believed or wanted to give the impression that Sunil was suffering from epilepsy. However, there were no reasons to conclude that it was a case of such an attack as Sunil had not been seen by any medical professional nor did he have a known medical record of epilepsy.<sup>21</sup>

29. On the same morning, at around 8 a.m., the Second Author came to the MPS to visit Sunil. She saw him lying on the floor of the cell bleeding from his nose and mouth.<sup>22</sup> She emotionally alarmed the police officers to Sunil's grave condition but was chased away by them.<sup>23</sup> The police officer further told her that Sunil's condition had resulted from epilepsy. She did not believe the police officer as she knew that Sunil had never suffered from that medical condition.
30. Only at around 10 a.m. Sunil was taken to the Horana Base Hospital in a police jeep.<sup>24</sup> Having been initially prevented from seeing Sunil,<sup>25</sup> the Second Author visited him in that hospital later that day. Sunil told her that he had been brutally assaulted by the police officers.<sup>26</sup> He was in severe pain and his face was reddened and swollen.
31. Later on the same day two MPS police officers arrived at the hospital to record a statement from Sunil. Although Sunil only named himself, the police officers wrote something on two lists of paper while talking to each other. They then obtained two impressions of Sunil's left thumb on the bottom of that "document" in lieu of his signature.<sup>27</sup> Sunil had completed four grades at school and was able to sign his name. He had never used his thumb impression in lieu of his signature before.
32. On the next day, 24 July 2003, the Authors learnt by chance that Sunil had been transferred to the National Hospital in Colombo where he had undergone brain surgery and was being treated in an intensive care unit.
33. On 26 July 2003 the Second Author was informed by the staff of the National Hospital that Sunil had passed away earlier that day.<sup>28</sup>

### C. PURSUIT OF DOMESTIC REMEDIES

#### 1) Initial complaints to the police superiors and the National Human Rights Commission

34. On 23 July 2003, at 9 a.m., the Second Author went to the office of the Assistant Superintendent of the Police of Horana and attempted to complain about the

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<sup>21</sup> See Cause of Death statement dated 29 July 2003, at page 2, in Annex 9b.

<sup>22</sup> See Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 15 in Annex 3.

<sup>27</sup> See Affidavit of Deepal, at paras. 21-22, in Annex 7.

<sup>28</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 18 in Annex 3.

arrest and torture of Sunil but her complaint was not entertained.<sup>29</sup> No one recorded it, and the Assistant Superintendent did not see her. One of the members of his staff telephoned the MPS, but no further steps were taken in respect of the complaint.<sup>30</sup>

35. On 26 July 2003 the Authors and Chanaka – who had been released from detention on 23 July – visited the MPS and reported Sunil’s death. On the same date, at approximately 4 p.m., their statements were recorded by the Assistant Superintendent of the Police of Horana.<sup>31</sup>

## **2) Proceedings before the National Human Rights Commission**

36. On 23 July 2003 the Second Author contacted the non-governmental human rights organisation *Janasansadaya* which helped her to complain immediately to the National Human Rights Commission (NHRC) by way of a faxed letter. In that complaint the Second Author asked the NHRC “to take legal action regarding [the] baseless arrest and assault on [Sunil]”.<sup>32</sup>

37. It appears that the NHRC did not take any measures in response to the Second Author’s complaint. On 21 August 2008 the NHRC wrote to the Second Author to explain that they could not inquire into the circumstances described in her complaint as the same matter was pending before the Supreme Court.<sup>33</sup> The NHRC has not been in contact with the Authors since and there is no realistic prospect that it will reopen the inquiry following the dismissal of the case by the Supreme Court as this has never happened before in practice. The NHRC’s stated policy is that it is barred from further handling of the case by a dismissal of the fundamental rights’ petition by the Supreme Court.

## **3) Inquiry conducted by the Magistrates and its consequences**

38. On 27 July 2003 the Additional Magistrate of Colombo opened an inquiry into the death of Sunil. He heard the Second Author and Chanaka. On 27 July 2003 the Additional Magistrate reported that in the police report from the MPS “there [was] no entry whatsoever revealing the reason for which [Sunil] had been arrested by the police”.<sup>34</sup> On 28 July 2003 he observed the body of the deceased in the mortuary and noticed, among other injuries, “an injury of about one inch slightly above the buttocks on the left side of the back”.<sup>35</sup> Upon the request of the police officer in charge of the MPS, the Additional Magistrate ordered an adjournment until 31 July 2003.

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<sup>29</sup> See Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6.

<sup>30</sup> See Affidavit of the Second Author dated 23 August 2003, at para. 13 in Annex 3.

<sup>31</sup> Affidavit of Deepal, at para. 26, in Annex 7

<sup>32</sup> See Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6.

<sup>33</sup> See Annex 11.

<sup>34</sup> See Annex 5a.

<sup>35</sup> See Annex 5b.

39. On 29 July 2003 a Consultant Judicial Medical Officer (JMO) from Colombo conducted a *post mortem* examination and produced a report which was subsequently relied upon in the proceedings before the Supreme Court. The report documented ten pre-mortal injuries: four contusions, four abrasions, one peri-orbital haematoma (“black eye”) around the left eye, and one surgical incision<sup>36</sup> but not the injury on the left side of the back observed the day before by the Additional Magistrate of Colombo. The cause of Sunil’s death was identified as “acute sub-dural haemorrhage following a head injury caused by blunt trauma”.<sup>37</sup>
40. The JMO report of 29 July 2003 is inconclusive in respect of the causes of Sunil’s death. The report suggested, for the first time, that it was “possible” that Sunil had died as a result of a fall following alcohol withdrawal, a finding apparently derived from the sole fact that Sunil had an enlarged and fatty liver.<sup>38</sup>
41. On 31 July 2003 the Additional Magistrate of Colombo heard further witnesses who were brought to the court in police vehicles. The lawyer acting for the family of the deceased objected to this procedure because it could result in the witnesses being unduly influenced by the police. The Additional Magistrate overruled the objection and decided to take the testimony from the witnesses, including Lionel’s mother whose testimony suggested that the immediate cause of the Sunil’s death had been an epileptic attack.
42. On 8 August 2003 the Magistrate of Horana, to whom the inquiry was transferred from the Additional Magistrate of Colombo, directed the Senior Superintendent of Panadura Police to investigate and produce the suspects before court<sup>39</sup> as the circumstances leading to the Sunil’s death seemed suspicious.
43. On 29 April 2004 the Attorney General decided that no charges would be filed in connection with Sunil’s death as there was no evidence of any assault against him. On 19 November 2004 the Magistrate removed the case from the roll with the sole reference to the Attorney General’s decision of 29 April 2004.<sup>40</sup>

#### **4) Fundamental rights’ petition to the Supreme Court**

44. On 25 August 2003 the First Author and Ms Guneththige Jayalatha (sister of Sunil) lodged a fundamental rights’ petition with the Supreme Court of Sri Lanka (amended on 9 September 2003).<sup>41</sup> The following officials and institutions were cited as respondents: police constable Muthubanda (who led the police party which arrested Sunil and Chanaka late in the evening of 22 July 2003);<sup>42</sup> police officer Maheepala (officer in charge of the MPS); police constable Wijemanna (who warned the second Author that the victim’s

<sup>36</sup> See *Post mortem* examination report dated 29 July 2003, at page 2, in Annex 9a.

<sup>37</sup> See Cause of Death statement dated 29 July 2003, at page 1, in Annex 9b.

<sup>38</sup> *Ibid.*, at page 2.

<sup>39</sup> See Annex 5c.

<sup>40</sup> See Annex 10.

<sup>41</sup> See Annex 8.

<sup>42</sup> See paragraph 25 above.

“happiness [would] not last long”),<sup>43</sup> the Inspector General of Police, and the Attorney General of Sri Lanka.

45. After almost seven years of proceedings, on 6 August 2010, a three judges bench of the Supreme Court dismissed the fundamental rights’ petition of the First Author and Guneththige Jayalatha.<sup>44</sup> The Supreme Court concluded that it was “highly probable” that Sunil had died as a result of a fall “following alcohol withdrawal”.<sup>45</sup>

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<sup>43</sup> See paragraph 23 above.

<sup>44</sup> See Annex 12.

<sup>45</sup> Ibid., at page 12.

#### **IV. ADMISSIBILITY OF THE COMMUNICATION**

46. This communication meets the admissibility criteria established under the First Optional Protocol to the Covenant (“the First Protocol”).

##### **1) Recognition of Committee’s competence**

47. Sri Lanka recognized the competence of this Committee to receive and consider communications from individuals subject to its jurisdiction in respect of violations of any of the rights set forth in the Covenant pursuant to the First Protocol to which Sri Lanka acceded on 3 October 1997.

##### **2) Standing**

48. The standing of the Authors in submitting the present communication is justified by reason of close family connection with the deceased victim.<sup>46</sup> The First Author is a very close relative of the victim as she is his mother; the Committee very frequently considers the communications lodged by the mothers of the deceased victims.<sup>47</sup> The Second Author is the victim’s aunt in whose household the latter had been living for more than two decades, and who was an eye-witness of his violent arrest and who persistently pursued the domestic remedies on behalf of him, in particular, brought the matter to the attention of the police superiors and the NHRC. Therefore, she also has standing for the purposes of submission of the present communication on the basis of her close connection with the deceased victim.

##### **(3) Exhaustion of domestic remedies**

49. The exhaustion of domestic remedies pursuant to article 5 (2)(b) of the First Protocol requires resort to remedies that are effective, available and not unduly prolonged.<sup>48</sup> In respect of the serious violations of human rights, such as torture, civil remedies would not suffice as the State Party is under an obligation not only to conduct thorough investigations into credible allegations that such violations took place but also to prosecute, try and punish those held responsible for such violations.<sup>49</sup> It follows that criminal investigation is indispensable in the present case.

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<sup>46</sup> *Massera et al. v. Uruguay*, Human Rights Committee, R.1/5 (15 August 1979), at para. 5.

<sup>47</sup> See, as recent authorities, *Tarasova v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/88/D/1057/2002 (20 October 2006), *Chikunova v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/89/D/1043/2002 (16 March 2007), *Kirpo v. Tajikistan*, Human Rights Committee, UN Doc. CCPR/C/97/D/1401/2005 (27 October 2009).

<sup>48</sup> *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at para. 6.3

<sup>49</sup> *Sharma v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/94/D/1469/2006 (6 November 2008), at paras. 7.10, 9; *Akwanga v. Cameroon*, Human Rights Committee, UN Doc. CCPR/C/101/D/1813/2008 (22 March 2011), at para. 9; *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at paras. 7.10 and 9.

50. The Authors complained to the police and took part in the inquiry conducted by the magistrates (“the criminal investigation”). They also brought the matter to the attention of the Supreme Court through a fundamental rights’ petition which is a public-law remedy (“the Supreme Court proceedings” or “the fundamental rights proceedings before the Supreme Court”) and of the NHRC.
51. The criminal investigation led to the decision of the Attorney General dated 29 April 2004 not to file charges.<sup>50</sup> No further effective remedy was available to the Authors in respect of this decision.
52. The judgment rendered on 6 August 2010 was the final decision in the Supreme Court proceedings.<sup>51</sup> In any event, by that time the Supreme Court proceedings had already lasted for more than seven years and had been unreasonably prolonged. They had therefore ceased to constitute an effective remedy within the meaning of article 5 (2)(b) of the First Protocol.<sup>52</sup>
53. The fact that the Supreme Court proceedings were pursued by the First Author and Sunil’s sister is immaterial. Had the Second Author chosen to lodge the same petition it would have been joined with the pending petition (lodged by the First Author and Sunil’s sister) and would have resulted in the same outcome.

#### **4) Other requirements**

54. The same matter is not being examined under another procedure of international investigation or settlement within the meaning of article 5 (2)(a) of the First Protocol.
55. There is no other reason as to why the present communication may be declared inadmissible.
56. It follows therefore that the present communication is admissible within the meaning of Rule 96 of the Rules of Procedure of this Committee.

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<sup>50</sup> See paragraph 43 above.

<sup>51</sup> See paragraph 45 above.

<sup>52</sup> *Rajapakse v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/87/1250/2004 (14 July 2006), at para. 9.2.

## V. MERITS

### 1. VIOLATION OF ARTICLE 2 (3) OF THE COVENANT SEPARATELY AND IN CONJUNCTION WITH ARTICLES 6, 7, 9 and 10 (1) OF THE COVENANT

57. The Authors submit that the State Party failed to conduct an adequate investigation into the unlawful and arbitrary arrest and detention, torture, cruel, inhuman and degrading treatment of Sunil and his death, in violation of its obligations under article 2 (3) of the Covenant separately and read in conjunction with articles 6 (1), 7, 9 (1), (2) and (4), and 10 (1) of the Covenant.
58. Article 2 (3) of the Covenant provides, *inter alia*, that each State Party undertakes to ensure that any person whose rights or freedoms recognised by the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (subparagraph “a”), and that any person claiming such a remedy shall have his or her right determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State Party concerned, and to develop the possibilities of judicial remedy (subparagraph “b”).
59. The Committee has observed that article 2 (3) of the Covenant “requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”.<sup>53</sup>
60. Investigation into credible allegations of serious human rights violations, such as arbitrary deprivation of life, torture and arbitrary detention, should be “thorough, prompt and impartial”.<sup>54</sup> The effective investigation into the circumstances of those violations should be capable of leading to the establishment of facts and the prosecution of the perpetrators.<sup>55</sup>
61. The Committee has noted in a previous case against Sri Lanka: “Expedition and effectiveness are particularly important in the adjudication of cases involving torture”.<sup>56</sup>
62. In the Authors’ submission, the investigation into and adjudication of credible allegations of serious abuses committed by the police officers against Sunil were

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<sup>53</sup> Human Rights Committee, *General Comment No. 31: Nature of General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), at para. 15.

<sup>54</sup> *Eshonov v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/99/D/1225/2003 (22 July 2010), at para. 9.2.

<sup>55</sup> Human Rights Committee, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Sri Lanka*, UN Doc. CCPR/CO/79/LKA (1 December 2003), at para. 9.

<sup>56</sup> *Rajapakse v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/87/D/1250/2004 (14 July 2006), at para. 9.5.

not in compliance with the above-listed requirements of the Covenant. The investigation, in particular, (a) was not independent and impartial, (b) lacked promptness and expedition, and, as a result, (c) was ineffective. The proceedings before the Supreme Court did not cure those defects and themselves lacked the required expeditiousness and effectiveness.

## 1) Criminal investigation

### a) International standards

63. Criminal investigations into credible allegations of serious human rights violations, such as arbitrary killings and torture, must be impartial, prompt and effective.
64. Such investigations must be impartial, *i.e.* free from bias, and independent, *i.e.* carried out by bodies institutionally independent from those allegedly involved<sup>57</sup> to ensure propriety of investigations and to prevent any impression of undue interference with the objective of establishing the facts and identifying the perpetrators. This entails that the alleged perpetrators, especially if they are law-enforcement officials, should be subject to suspension or re-assignment during the process of investigation.<sup>58</sup>
65. Investigations must be carried out without delay, that is, as quickly as possible, and investigative measures need to be taken expeditiously throughout the investigation. Nigel Rodley, former UN Special Rapporteur on Torture, noted: “Complaints about torture should be dealt with immediately”.<sup>59</sup> The duty to commence an investigation is triggered when there are reasonable grounds to suggest that acts of torture or ill-treatment have been committed. Prompt investigations are essential to ensure that evidence can still be obtained, particularly, regarding the physical traces of torture, cruel, inhuman and degrading treatment,<sup>60</sup> and to demonstrate that the authorities diligently pursue any complaint or information relating to allegations of torture.
66. Investigations must be effective. States must take all steps necessary to establish the facts, including a medical examination (or an autopsy where the victim has died), securing and obtaining physical evidence, and questioning of the victim, witnesses and alleged perpetrators.<sup>61</sup> Investigations into allegations of serious

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<sup>57</sup> Human Rights Committee, *Concluding Observations on the Second Periodic Report of Kenya*, UN Doc. CCPR/CO/83/KEN (29 April 2005), at para. 18.

<sup>58</sup> Human Rights Committee, *Concluding Observations on the Second Periodic Report of Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), at para. 12.

<sup>59</sup> Special Rapporteur on Torture, *Report submitted pursuant to Commission on Human Rights Resolution 1992/32*, UN Doc. E/CN.4/1995/34 (12 January 1995), at para. 926.

<sup>60</sup> *Blanco Abad v. Spain*, Committee against Torture, UN Doc. CAT/C/20/D/59/1996 (14 May 1998), at para. 8.2.

<sup>61</sup> See Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OHCHR Professional Training Series No. 8/Rev.1 (“Istanbul Protocol”) (2004), chapter I (Relevant International Legal Standards), at paras. 100-106.

human rights violations made against the State representatives should be conducted in good faith.<sup>62</sup>

67. Investigations and prosecutions should lead to due punishment of those responsible where sufficient evidence is available and the victims, their families and heirs should be kept informed throughout proceedings and be able to participate in them as appropriate.<sup>63</sup>
68. Credible allegations relating to an arbitrary deprivation of life, especially in a detention setting, must lead to a thorough, prompt and impartial investigation capable of confirming or rebutting the presumption of unlawful killing.<sup>64</sup>
69. The same general considerations apply in cases of arbitrary and unacknowledged detention, particularly where it may be used, as in the present case, to facilitate torture or cruel, inhuman and degrading treatment<sup>65</sup> and may, under certain circumstances, *per se* constitute such treatment.<sup>66</sup>

**b) Application of the standards to the facts of the present case**

70. The investigation was carried out by the same police force (MPS) as the implicated police officers belonged to. MPS officers conducted all important investigative actions; in particular, they took Sunil's statements on 23 July 2003<sup>67</sup> and the statements of the Authors and Chanaka on 26 July 2003.<sup>68</sup> None of the officers implicated in the alleged violations was suspended or re-assigned pending inquiry. Neither was the case referred to the special investigation unit.
71. The magistrates limited the scope of their inquiry by the circumstances of the death of Sunil. In any event, they had to rely on the evidence collected by the police officers who lacked requisite impartiality and independence. The Attorney General refused to inquire into the matter in spite of the express order of the Magistrate in Horana to do so. The Supreme Court did not order any further investigative action or a full separate investigation to take place. It follows that the subsequent involvement of the judicial authorities and Attorney-General's office was not capable of curing and did not cure the fundamental defect of the investigation, namely the fact that it was conducted by the MPS

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<sup>62</sup> *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at para. 7.4.

<sup>63</sup> Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005), Principle 19.

<sup>64</sup> *Eshonov v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/99/D/1225/2003 (22 July 2010), at para. 9.2.

<sup>65</sup> UN Special Rapporteurs on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Working Groups on Arbitrary Detention and on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, UN Doc. A/HRC/13/42 (2010), at para. 34.

<sup>66</sup> *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at para. 7.6.

<sup>67</sup> See paragraph 31 above.

<sup>68</sup> See paragraph 35 above.

police officers who lacked both independence and impartiality as the members of the same police force who were responsible for the unlawful arrest and detention of Sunil, his torture and ill-treatment while in custody and ultimately for his death.

72. The authorities did not take prompt and effective action capable of establishing the truth about the circumstances surrounding the arrest and detention of Sunil at the MPS, particularly in relation to torture and the violation of his right to life. No forensic medical examination was ordered when he was still alive although the Second Author had complained about his torture three days prior to his death, that is, on 23 July 2003.<sup>69</sup> No police officers involved in his arrest and detention were identified. Chanaka, who was transported to the MPS in a police jeep together with Sunil and detained there together with him, was questioned only after Sunil's death. This was done by the police officers of the MPS who, as noted above, lacked requisite independence and impartiality. The Second Author who was the eyewitness of Sunil's arrest and alleged beating in her house was also questioned only after his death and by the police officers who were neither independent nor impartial. The only really prompt measure taken by police was visiting Sunil, who was in the most precarious condition in the hospital, for the purposes of falsifying his statement.<sup>70</sup>
73. Lack of good faith and genuine desire to establish the circumstances of Sunil's arrest, detention, torture and ultimate death in the present case is evident in the failure to subject him to a medical examination when he was still alive, investigate the allegations by an independent body which is institutionally separate from police, and identify the police officers involved. Although the JMO *post mortem* examination report refers to four probabilities as to the origins of the injuries on the body of Sunil, no attempts were made to look into alternatives such as a "heavy blow to the back of the body either with a weapon or a kick with boots on."<sup>71</sup>
74. The decision of the Magistrate of Horana of 8 August 2003<sup>72</sup> was not acted upon by the Attorney General<sup>73</sup> and no explanation was given to the Authors in this respect. This failure to carry out a judicial directive constitutes further proof of the criminal investigation's overall ineffectiveness and inherent lack of good faith.
75. These shortcomings were not addressed by the Supreme Court which did not conduct or commission another investigation which would have satisfied the above-listed requirements. It relied on the testimony and other evidence

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<sup>69</sup> See paragraph 34 and 36 above.

<sup>70</sup> See paragraph 31 above.

<sup>71</sup> See Cause of Death statement dated 29 July 2003, at page 2, para. (e)(1), in Annex 9b.

<sup>72</sup> See paragraph 42 above.

<sup>73</sup> See paragraph 43 above.

gathered directly or under control of the MPS police officers, that is, the implicated law-enforcement personnel.

76. The lack of independent, prompt and effective investigation in the present case cannot be seen as an isolated incident. It is evidence of a systematic problem persistent in Sri Lanka that prompted the Committee against Torture to recommend that an independent body be established to conduct prompt, impartial and effective investigations into widespread and well-documented allegations of torture and ill-treatment.<sup>74</sup>

## **2) Fundamental rights proceedings before the Supreme Court**

77. The proceedings before the Supreme Court constituted a separate violation of the right to an effective remedy.

78. Effective remedies require expeditiousness of proceedings. A remedy cannot be deemed effective where it is unduly prolonged. The length of proceedings are to be assessed with reference to the complexity of the case and the behaviour of the parties.<sup>75</sup>

79. The Committee has found a violation of article 2 (3) of the Covenant read together with articles 7 and 9 of the Covenant in an earlier case against Sri Lanka where the fundamental rights' application before the Supreme Court was disposed of "only after a long delay of six years".<sup>76</sup>

80. As the Supreme Court proceedings focused on State responsibility, it should have requested the Inspector-General of Police to conduct a proper inquiry and to submit a report. The Supreme Court however failed to do so and absolutely disregarded its duties. Therefore, it failed to provide an effective remedy. Moreover, since the Supreme Court proceedings in the present case lasted almost seven years and there was nothing in terms of the complexity of the case (the Supreme Court used only sixteen pages to dismiss the fundamental rights' petition) or conduct of the parties to justify the delay, the protracted character of the proceedings by itself constituted a violation of article 2 (3) of the Covenant read together with articles 6 (1), 7, 9 (1), (2) and (4), and 10 (1) of the Covenant and contributed to the same violations in the course of the criminal proceedings.

## **3) Other remedies pursued**

81. The Second Author lodged a complaint with the NHRC. She is not aware of any actions taken by the NHRC. More than five years thereafter, the NHRC

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<sup>74</sup> Committee against Torture, *Conclusions and Recommendations on the Second Periodic Report of Sri Lanka*, UN Doc. CAT/C/LKA/CO/2 (15 December 2005), at para. 12 (a).

<sup>75</sup> Human Rights Committee, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32 (23 August 2007), at para. 27.

<sup>76</sup> *Silva v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/95/D/1432/2005 (23 April 2009), at para. 8.3.

explained that they could not inquire into the allegations due to the matter being *sub judice*.<sup>77</sup> It follows that the proceedings before the NHRC themselves were unduly delayed and ineffective.

#### **4) Conclusion**

82. The State Party has violated article 2 (3) of the Covenant taken alone and in conjunction with articles 6 (1), 7, 9 (1), (2) and (4) and 10 (1) of the Covenant by failing to independently, promptly, and effectively investigate the circumstances of Sunil's arrest, detention, torture, cruel, inhuman and degrading treatment and death and provide the Authors with an effective remedy in this respect.

### **2. VIOLATION OF ARTICLE 9 OF THE COVENANT**

83. The Authors submit that by arbitrarily and unlawfully arresting and detaining Sunil the State Party violated his rights under article 9 (1) of the Covenant. He was also not informed, at the time of his arrest, of the reasons of such arrest, in violation of article 9 (2) of the Covenant. Further, the unacknowledged character of his arrest and detention effectively deprived him of any meaningful possibility to take proceedings before a court in order that that court may decide without delay and pursuant to article 9 (4) of the Covenant on the lawfulness of his detention and order his release if the detention was not lawful.

#### **1) Violation of article 9 (1) of the Covenant**

84. Article 9 (1) of the Covenant provides that no one shall be subject to arbitrary arrest or detention and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. It follows from this provision that any deprivation of physical liberty, in particular, any arrest or detention, must be lawful, that is based "on such grounds... as are established by law", and must be effected in accordance with due process of law, that is "in accordance with such procedure as [is] established by law".

85. In accordance with the Committee's well-established jurisprudence, in order to be compatible with the provisions of the Covenant, in particular, article 9 (1) thereof, remand in custody should not only be lawful (it is a *conditio sine qua non*) but also reasonable and necessary in the circumstances.<sup>78</sup>

86. There was no clear lawful basis for Sunil's arrest at the Second Author's house and his subsequent detention at the MPS. In any event, his arrest and detention were unnecessary and unreasonable. It has been confirmed by the Additional

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<sup>77</sup> See paragraphs 36-37 above.

<sup>78</sup> *Mukong v. Cameroon*, Human Rights Committee, UN Doc. CCPR/C/51/D/458/1991 (21 July 1994), at para. 9.8, and *Marinich v. Belarus*, Human Rights Committee, UN Doc. CCPR/C/99/D/1502/2006 (16 July 2010), at para. 10.4.

Magistrate of Colombo – a first judicial officer who dealt with the case – who noted on 27 July 2003 that there was no reason whatsoever capable of justifying Sunil’s arrest by police at the first place.<sup>79</sup>

87. Be as it may, the Supreme Court considered several grounds which might have served to justify Sunil’s arrest: “1. [His] attempt to assault the police; 2. [Him being] after consumption of liquor; 3. [He] vouched that he would commit suicide if the Police take Chanaka away”.<sup>80</sup> None of these grounds, as will be shown below, withstand closer scrutiny.
88. There is no objective evidence to substantiate the allegation that Sunil assaulted or attempted to assault the police. There is no record of an investigation in this respect and no charges in respect of assault – an offence under the Sri Lankan Penal Code – were brought against Sunil. Indeed, neither he nor anyone else, to the Authors’ knowledge, was questioned in this respect. The well-documented practice of fabricating charges by police to deter complaints of torture and ill-treatment in Sri Lanka<sup>81</sup> strongly suggests that this claim is unsubstantiated.
89. The allegation put forward by the Supreme Court that Sunil was drunk at the time of arrest has not been supported by any evidence. No medical examination was undertaken upon his admission to the MPS and there are no hospital records to this effect. Even if this assertion were true, detention on this ground was unnecessary and unreasonable in the circumstances of the present case. It would have been appropriate to leave him in peace at the house of the Second Author. Detention of “alcoholics” may be justified only if their conduct and behaviour under the influence of alcohol pose a threat to the public or themselves.<sup>82</sup> The Supreme Court did not make any conclusive finding as to the existence of such a threat that would have justified the detention of Sunil in the present case.
90. There is no evidence to support the last allegation put forward by the Supreme Court that Sunil had threatened to commit suicide or was at risk of committing suicide either at the time of his arrest or during his detention. The fact that Sunil was placed in a very small cell, with other detainees,<sup>83</sup> and no medical or psychological assistance was offered to him is irreconcilable with the suggestion that he was detained with a view to preventing self-harm.

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<sup>79</sup> See paragraph 38 above.

<sup>80</sup> See Decision of the Supreme Court dated 6 August 2010, at page 14, in Annex 12.

<sup>81</sup> See *Cases of Torture and Ill-Treatment in Sri Lanka in 2006-2010* recorded by the Asian Human Rights Commission: <http://www.humanrights.asia/countries/sri-lanka/countries/sri-lanka/resources/special-reports/AHRC-SPR-001-2011-SriLanka.pdf>, especially at pages 94-95; REDRESS, *Responses to Human Rights Violations: The Implementation of the Right to Reparation for Torture in India, Nepal, and Sri Lanka*: <http://www.redress.org/downloads/publications/IndianSeminarReport.pdf>, especially at page 58.

<sup>82</sup> *Witold Litwa v. Poland*, European Court of Human Rights, Application No. 26629/95 (4 April 2000), at para. 77, and *Kharin v. Russia*, European Court of Human Rights, Application No. 37345/03 (3 February 2011), at para. 34

<sup>83</sup> See paragraph 27 above.

91. The circumstances of Sunil’s arrest strongly suggest that it was motivated by a desire of individual police officers stationed at the MPS to extort money from Sunil who, as they knew from Lionel, had won a considerable amount of money in the lottery. The facts of the present case should be viewed in the context of the well-documented practice of police corruption in Sri Lanka which has resulted in a series of cases involving extortion and ill-treatment.<sup>84</sup> Indeed, the Committee on Economic, Social and Cultural Rights expressed concerns about the “high levels of corruption” in the State Party and the lack of “firm and effective measures to combat corruption and impunity associated with it”.<sup>85</sup>
92. Sunil’s arrest and detention were unlawful and arbitrary, in violation of article 9 (1) of the Covenant.

### **2) Violation of article 9 (2) of the Covenant**

93. Article 9 (2) of the Covenant stipulates that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest.
94. Sunil was not informed of the reasons for his arrest and subsequent detention at the moment of the arrest nor at any time thereafter. This violation was confirmed by the Supreme Court which found: “In the instant case both the deceased and Chanaka had been arrested without giving them the reasons for such arrest”.<sup>86</sup>
95. It follows that the procedural guarantee enshrined in article 9 (2) of the Covenant has been violated.

### **3) Violation of article 9 (4) of the Covenant**

96. Article 9 (4) of the Covenant stipulates that anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take *habeas corpus* proceedings, *i.e.* proceedings before a court in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.
97. In order for this guarantee to be effective, international standards require the detaining authority to record the reasons for the arrest, the time of the arrest, identities of the law-enforcement officials involved, and place of custody, and to communicate such records to the detained person or his counsel.<sup>87</sup> Indeed, as emphasised by several UN Special Procedures mandate holders, secret detention (*incommunicado*) effectively takes detainees outside the legal framework and

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<sup>84</sup> See REDRESS, *Comments to Sri Lanka’s Second Periodic Report to the Committee against Torture*: <http://www.redress.org/downloads/publications/SubmissionSL31Oct2005.pdf> (31 October 2005), at pages 6-7.

<sup>85</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Sri Lanka*, UN Doc. E/C.12/LKA/CO/2-4 (9 December 2010), at para. 12.

<sup>86</sup> See Decision of the Supreme Court dated 6 August 2010, at page 13, in Annex 12.

<sup>87</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly Resolution 43/173 (9 December 1988), Principle 12.

renders safeguards contained in international instruments meaningless including, importantly, that of *habeas corpus*.<sup>88</sup>

98. Sunil's next-of-kin were not informed about the place of his detention. He was not provided with an opportunity to contact his relatives, no records of his arrest and detention were put together and forwarded to him or anyone else, and he had no legal representation. It was only by chance that the Second Author was able to locate him at the MPS. Sunil was, in violation of article 9 (4) of the Covenant, effectively deprived of a genuine opportunity to obtain a decision by a court on the lawfulness of his detention.<sup>89</sup>

### 3. VIOLATION OF ARTICLE 7 OF THE COVENANT

99. The Authors submit that Sunil was subjected to torture, cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

100. The MPS police officers subjected Sunil to severe beating during the course of his arrest in the Second Author's house, particularly, on his head.<sup>90</sup> Beatings continued in the police jeep during the Sunil's and Chanaka's transfer to the MPS, particularly, in form of beatings on Sunil's head and abdomen.<sup>91</sup>

101. Sunil died four days thereafter.<sup>92</sup> The cause of his death was identified as "acute sub-dural haemorrhage following a head injury caused by blunt trauma",<sup>93</sup> and many smaller injuries were found on his body.<sup>94</sup> It has never been in dispute, in particular, throughout the Supreme Court proceedings, that those injuries were sustained while in police custody,<sup>95</sup> although versions concerning the origins of the injuries vary.

102. Pursuant to the Committee's well-established case-law, in cases where the author of the individual communication and the State Party do not have equal access to evidence the burden of proof cannot rest alone on the author of the communication.<sup>96</sup> When injuries are sustained in police custody, as in the present case, it is clear that the author(s) of a communication and the State Party do not have equal access to evidence which is in essence "solely in the hands" of the authorities.<sup>97</sup> As a result, the burden of proof should be shifted.

103. No investigation compatible with the requirements of article 2 (3) of the Covenant taken alone and in conjunction with article 7 of the Covenant was conducted into the circumstances of Sunil's alleged torture and ill-treatment

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<sup>88</sup> Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, *supra* note 65, at page 4.

<sup>89</sup> *Berry v. Jamaica*, Human Rights Committee, UN Doc. CCPR/C/50/D/330/1988 (7 April 1994), at para. 11.1.

<sup>90</sup> See paragraph 25 above and sources cited therein.

<sup>91</sup> See paragraph 26 above and sources cited therein.

<sup>92</sup> See paragraph 33 above.

<sup>93</sup> See paragraph 39 above and Cause of Death statement dated 29 July 2003, at page 1, in Annex 9b.

<sup>94</sup> See paragraph 38 above and *post mortem* examination report dated 29 July 2003, at page 2, in Annex 9a.

<sup>95</sup> See Annex 12.

<sup>96</sup> *Eshonov v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/99/D/1225/2003 (22 July 2010), at para. 9.6.

<sup>97</sup> *Giri v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/101/D/1761/2008 (24 March 2011), at para. 7.4.

during arrest and subsequent detention in the MPS.<sup>98</sup> Taking this into account the Committee should give due weight to the version of events advanced on behalf of the Authors, in line with its well-established case-law.<sup>99</sup> In the context of the present case, due weight should also be given to the assessment of the overall situation in the State Party, with particular emphasis on widespread practice of torture in police custody, given by the Committee against Torture.<sup>100</sup>

104. It must therefore be presumed that the injuries found on Sunil's body were inflicted by beatings by the MPS police officers during his arrest in the Second Author's house and his transfer in a police vehicle to the MPS, during the course of the night 22/23 July 2003.

105. The State Party is in violation of article 7 of the Covenant.

#### 4. VIOLATION OF ARTICLES 7 AND 10 (1) OF THE COVENANT

106. The State Party failed to provide Sunil with adequate and timely independent medical assistance on 23 July 2003 at the MPS, in separate violation of articles 7 and 10 (1) of the Covenant.

107. Article 10 (1) of the Covenant stipulates that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

108. A proper medical examination shall be offered to a detained person as promptly as possible after his or her admission to the place of detention.<sup>101</sup> Its results should be duly recorded and access to such records shall be ensured.<sup>102</sup> Contrary to these international standards, Sunil was not medically examined upon his admission to the MPS.

109. The right promptly to receive independent medical assistance is one of the basic guarantees applicable to all persons deprived of their liberty.<sup>103</sup> "At every detention institution there shall be available the services of at least one qualified medical officer."<sup>104</sup> Medical care and treatment shall be provided to any detainee whenever necessary and free of charge.<sup>105</sup>

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<sup>98</sup> See paragraphs 63-82 above.

<sup>99</sup> *Avadanov v. Azerbaijan*, Human Rights Committee, UN Doc. CCPR/C/100/D/1633/2007 (25 October 2010), at para. 9.5.

<sup>100</sup> See *supra* note 74.

<sup>101</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the UN General Assembly Resolution 43/173 of 9 December 1988, Principle 24.

<sup>102</sup> *Ibid.*, Principle 26.

<sup>103</sup> Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2 (24 January 2008), at para. 13.

<sup>104</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955), approved by the UN Economic and Social Council (resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), Rule 22 (1).

<sup>105</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 24.

110. The Committee has found on previous occasions that inhuman conditions of detention which are incompatible with the Standard Minimum Rules for the Treatment of Prisoners entail a violation of article 10 (1) of the Covenant.<sup>106</sup> However, prolonged, deliberate or aggravated lack of medical assistance may also lead to a violation of article 7 of the Covenant, in conjunction with article 10 (1) of the Covenant.<sup>107</sup>

111. On 23 July 2003, at approximately 7 a.m., the authorities of the State Party were made aware that Sunil was bleeding severely and was in a weak state.<sup>108</sup> This constituted a serious and potentially life-threatening situation that required immediate medical treatment, including transfer to a hospital given that such treatment could not be provided *in situ*.

112. The actual response, however, was clearly inadequate. Co-detainee Chanaka was ordered to wipe the blood off<sup>109</sup> and wash Sunil's face and give him an iron rod.<sup>110</sup> The latter measure, even if taken in the genuine belief that Sunil became the victim of an epileptic attack, was clearly inadequate as the police officer could not have relied on personal assessments without the benefit of medical knowledge or advice. It took more than three hours for Sunil to be transferred to a hospital.<sup>111</sup> This delay must be considered inordinate in a situation, such as in the present case, where a person is suffering from severe bleeding and is not provided adequate treatment.

113. It follows that the failure of the State Party to provide timely and adequate medical assistance to Sunil at the MPS constituted separate violation of articles 7 and 10 (1) of the Covenant.

## 5. VIOLATION OF ARTICLE 6 (1) OF THE COVENANT

114. The Authors submit that Sunil was arbitrarily deprived of his life by the State Party, in violation of article 6 (1) of the Covenant.

115. Article 6 (1) of the Covenant provides that “[e]very human being has the inherent right to life” which “shall be protected by law” and “[n]o one shall be

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<sup>106</sup> *Akwanga v. Cameroon*, Human Rights Committee, UN Doc. CCPR/C/101/D/1813/2008 (12 May 2011), at para. 7.3.

<sup>107</sup> *Mika Miha v. Equatorial Guinea*, Human Rights Committee, UN Doc. CCPR/C/51/D/414/1990 (8 July 1994), at para. 6.4; *Brown v. Jamaica*, Human Rights Committee, UN Doc. CCPR/C/65/D/775/1997 (23 March 1999), at para. 6.13; and *Mulezi v. Democratic Republic of the Congo*, Human Rights Committee, UN Doc. CCPR/C/81/D/962/2001 (23 July 2004), at para. 5.3. The indispensable character of full compliance with the requirements of the Standard Minimum Rules while providing medical assistance to the detainees has also been emphasized by the Special Rapporteur on Torture in *Report to the UN General Assembly*, UN Doc. A/64/215 (3 August 2009), at para. 56.

<sup>108</sup> See paragraph 28 above.

<sup>109</sup> See paragraph 28 above.

<sup>110</sup> See paragraph 28 above.

<sup>111</sup> See paragraph 30 above.

arbitrarily deprived of his [or her] life”. This right was described by the Committee as “the supreme right” which is “basic to all human rights”.<sup>112</sup>

116. The States Parties to the Covenant should, first of all, refrain from arbitrarily taking the lives of those within their territory and subject to their jurisdiction. This implies a range of limitations on the use of lethal force by law-enforcement personnel and associated safeguards.<sup>113</sup>
117. As a rule of general international law,<sup>114</sup> law-enforcement officials may use force, particularly lethal force such as firearms, “only when strictly necessary and to the extent required for the performance of their duty”.<sup>115</sup>
118. In the context of detention, no force should be used by law-enforcers against detainees except “when strictly necessary for the maintenance of security and order within the institution” or “when personal safety” of the law-enforcers themselves is threatened.<sup>116</sup>
119. The right to life also implies positive obligations<sup>117</sup> including the duty to enact legislation containing necessary safeguards, to protect the lives of those under the control of the State and to investigate the suspicious deaths.
120. The obligation to take positive measures to protect life is particularly stringent in the detention context.
121. Custodial death is characterised by the implications of the custodial context for the State’s human rights obligations which concern the State obligations to both prevent deaths and respond to those deaths that occur. When the State detains an individual, it is held to a heightened level of diligence in protecting that individual’s rights. Therefore, when an individual dies in State custody, there is a presumption of a State responsibility.<sup>118</sup>
122. As it was put by Professor Philip Alston, former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in his report to the fourteenth session of the UN Human Rights Council: “States have a heightened level of

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<sup>112</sup> Human Rights Committee, *General Comment No. 14: Right to Life*, UN Doc. HRI/GEN/1/Rev.9, Vol. I (9 November 1984), at para. 1.

<sup>113</sup> See, in particular: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990).

<sup>114</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Interim Report*, UN Doc. A/61/311 (5 September 2006), at para. 35.

<sup>115</sup> Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly Resolution 34/169 (17 December 1979), Article 3.

<sup>116</sup> *Ibid.*, Principle 15; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955), approved by the UN Economic and Social Council (resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), Rule 54 (1).

<sup>117</sup> *De Guerrero v. Colombia*, Human Rights Committee, R.11/45 (31 March 1982), at para. 13.1.

<sup>118</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Interim Report*, UN Doc. A/61/311 (5 September 2006), at para. 50.

responsibility in protecting the rights of detained individuals. Indeed, when an individual dies in State custody, there is a presumption of State responsibility. The obligation of the State is not only to prohibit and prosecute killings by guards or other officials, but also to prevent deaths and to respond effectively to the causes of the deaths.”<sup>119</sup> This applies equally in situations such as in the present case where the deceased died in a hospital following a transfer from police custody and as a result of injuries sustained – for whatever reason – while in detention.

123. The Special Rapporteur’s statement is in line with the Committee’s jurisprudence. The Committee has affirmed that it is incumbent on States to ensure the right to life of detainees, since by arresting and detaining individuals they take the responsibility to care for their life. It is therefore up to States to organise their detention facilities in such a way as “to know about the state of health of the detainees”.<sup>120</sup>

124. The direct medical cause of Sunil’s death is not clear. The JMO suggested that he could have died because of falling down in a state of alcohol withdrawal. However, the opinion is inconclusive and tentative on this point. The JMO does not explain which examinations were carried out by him, for example, whether the corpse was subjected to a histological investigation in order for the assumptions and suggestions on which his report is based to be confirmed or rebutted. The poor quality of the JMO’s report is also confirmed by his failure to detect the injury which was identified by the Additional Magistrate and numerous defects of this report as shown by Dr Clifford Perera, a Sri Lankan and British forensic medical specialist and Senior Lecturer in Forensic Medicine at the University of Dundee, Scotland, in his enclosed opinion.<sup>121</sup> In particular, Dr Perera emphasizes the absence of appropriate additional examinations carried out on the corpse of Sunil, such as toxicological and histological examinations of the body, and neuropathological examination of the brain. In addition, he notes that “fatty liver” condition may occur due to a variety of reasons, including multiple pathological conditions that affect liver, and are not related to the alcohol abuse. In fact, it was this sole suggestion of the JMO’s report which was used by the authorities of the State Party to explain the cause of Sunil’s death.

125. In any case, even assuming the JMO’s report’s accuracy, it suggests at least four versions of what could have triggered Sunil’s death. No further measures, such as identifying the police officers involved, taking their testimony or examining the scene of the alleged violation, were taken to investigate the other possible causes of Sunil’s death suggested by the JMO. It follows that the cause of the death was not conclusively and unequivocally established by the competent authorities of the State Party.

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<sup>119</sup> UN Doc. A/HRC/14/24 (20 May 2010), at para. 49.

<sup>120</sup> *Lantsova v. Russia*, Human Rights Committee, UN Doc. CCPR/C/74/D/763/1997 (26 March 2002), at para. 9.2.

<sup>121</sup> See paragraph 39 above, and Annex 13, respectively.

126. In cases of death in custody, when the State Party alone has effective access to relevant information, the burden of proof cannot rest alone on the author of the communication.<sup>122</sup> In the present case, the lack of a Covenant-compliant investigation into the death means that the State Party has not met that burden, and the Committee should draw appropriate inferences and proceed on the basis that Sunil's death was a direct consequence of his ill-treatment, specifically, being severely beaten up on his head and abdomen by the police during and immediately after his arrest.
127. This approach is in accord with the case-law of the regional human rights courts.<sup>123</sup>
128. It follows that the State Party has arbitrarily deprived Sunil of his life in breach of article 6 (1) of the Covenant.
129. Alternatively and with no prejudice to the primary contention that Sunil's death was a direct consequence of torture, cruel, inhuman and degrading treatment to which he was subjected during his arrest and immediately thereafter while in the hands of the police from MPS, the authorities failed to take the requisite steps to duly protect Sunil's health and life while in detention. No medical examination was carried out upon his admission to the MPS detention facility in order to establish whether he had any condition (intoxication, epilepsy, mental instability) that would have warranted taking precautions to prevent him from inflicting life-threatening harm to himself or others, or otherwise being harmed. Instead, he was placed in a very small cell with other detainees with no medical supervision.<sup>124</sup>
130. When it was found that Sunil was severely bleeding, no medical assistance was forthcoming in the course of at least three hours.<sup>125</sup> No medical officer or nurse was available at the MPS and Sunil began receiving medical treatment only after his belated transportation to the hospital.<sup>126</sup> This lack of prompt action in the situation of evident life-threatening injury on the detainee meant loss of critical time and by itself is incompatible with the State Party's obligations under article 6 (1) of the Covenant.
131. It follows that the State Party failed to discharge its positive obligation to protect life under article 6 (1) of the Covenant.

## **6. SEPARATE VIOLATION OF ARTICLE 7 OF THE COVENANT IN RESPECT OF THE AUTHORS**

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<sup>122</sup> *Eshonov v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/99/D/1225/2003 (22 July 2010), at para. 9.6.

<sup>123</sup> *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Series C No 5 (29 July 1988), at paras. 136-137; *Timurtaş v. Turkey*, European Court of Human Rights, ECHR 2000-VI (13 June 2000), at paras. 82-83.

<sup>124</sup> See paragraph 27 above.

<sup>125</sup> See paragraphs 28-30 above.

<sup>126</sup> See paragraph 30 above.

132. The Committee has confirmed that the aim of article 7 of the Covenant is to protect not only the physical but also mental integrity of the individual.<sup>127</sup> Hence, the prohibition of torture in article 7 of the Covenant relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.<sup>128</sup>
133. It is internationally recognised that the term “victim” in the context of human rights violations also includes, where appropriately, “the immediate family... of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.<sup>129</sup>
134. This approach is confirmed by the case-law of the regional human rights courts<sup>130</sup> and reflected in this Committee’s jurisprudence.<sup>131</sup> The Committee found a violation of article 7 of the Covenant on account of the anguish and psychological pressure suffered by the wife and children of a man killed in disputed circumstances.<sup>132</sup> The Committee emphasised that those close family members had suffered and continued to suffer because they did not know the circumstances surrounding the death of their husband and father.<sup>133</sup> The refusal to conduct an investigation into his death was outlined by the Committee as the main reason for the finding that State Party’s attitude to the family of the deceased constituted inhuman treatment, in breach of article 7 of the Covenant.<sup>134</sup> In another case, the Committee concluded that article 7 of the Covenant had been violated in respect of the author on the basis of “the anguish and stress caused to the author’s family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts”.<sup>135</sup>
135. The Committee also found that the author of the communication was subjected to inhuman treatment in violation of article 7 of the Covenant as although over seven years had elapsed since the death of his son in detention he still did not know the exact circumstances surrounding it and the State Party’s authorities had not indicted,

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<sup>127</sup> Human Rights Committee, *General Comment No. 20: Prohibition of Torture and Cruel Treatment or Punishment*, UN Doc. HRI/GEN/1/Rev.6 (10 March 1992), at para. 2.

<sup>128</sup> *Ibid.*, at para. 5.

<sup>129</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annexed to the UN General Assembly Resolution 40/34 of 29 November 1985, at para. 2 *in fine*; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147 of 16 December 2005, at para. 8.

<sup>130</sup> *Villagrán-Morales et al. v. Guatemala* (“Street Children”), Inter-American Court of Human Rights, Series C No. 63 (19 November 1999), at para. 174; *Sangariyeva and Others v. Russia*, European Court of Human Rights, Application no. 1839/04 (29 May 2008), at paras. 90-93.

<sup>131</sup> *Sharma v. Nepal*, Human Rights Committee, UN Doc. CCPR/C/94/D/1469/2006 (6 November 2008), at para. 7.9.

<sup>132</sup> *Sankara et al. v. Burkina Faso*, Human Rights Committee, UN Doc. CCPR/C/86/D/1159/2003 (11 April 2006), at para. 12.2.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Sarma v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/78/D/950/2000 (16 July 2003), at para. 9.5.

prosecuted or brought to justice anyone in connection with this custodial death that had taken place in the highly suspicious circumstances.<sup>136</sup>

136. In the present case the authorities, as noted above,<sup>137</sup> failed to conduct a Covenant-compliant investigation into Sunil's death. More than eight years after the death of their son and nephew in detention, the Authors still do not know the exact circumstances surrounding the event and the State Party's authorities have failed to indict, prosecute or bring to justice anyone in connection with his custodial death.

137. The First Author is Sunil's mother and the Second Author is his aunt in whose household he had been living for more than two decades<sup>138</sup> and who casually referred to him as her son.<sup>139</sup> Therefore, they both had a sufficiently close bond with Sunil to suffer continued anguish and psychological pressure caused by the authorities' persistent refusal to investigate the circumstances surrounding the torture and death of their loved one in custody.

138. It follows that the State Party's attitude to the circumstances of Sunil's custodial death constituted inhuman treatment of the Authors, in breach of article 7 of the Covenant.

## **VI. THE REDRESS SOUGHT**

139. In light of the above, the Authors respectfully request the Committee:

- to declare the present communication admissible; and
- to find that the State Party has breached article 2 (3) of the Covenant taken alone and in conjunction with articles 6, 7, 9 (1), 9 (2), 9 (4), and 10 (1) of the same and each of those articles separately.

140. The Authors respectfully request the Committee to declare that the State Party is under an obligation to take all necessary measures to ensure that remedies are provided in respect of the above-mentioned violations of the Covenant in the *cas d'espèce* as required by article 2 (3)(a) of the Covenant.

141. In particular, cessation of an ongoing violation is an essential element of the right to an effective remedy.<sup>140</sup> Further, article 2 (3) of the Covenant requires that States Parties make reparation to individuals whose Covenant rights have been violated, without such reparation the obligation to provide an effective

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<sup>136</sup> *Eshonov v. Uzbekistan*, Human Rights Committee, UN Doc. CCPR/C/99/D/1225/2003 (22 July 2010), at para. 9.10.

<sup>137</sup> See paragraph 82 above.

<sup>138</sup> See paragraph 17 above.

<sup>139</sup> See, in particular, Complaint of the Second Author to the National Human Rights Commission dated 23 July 2003, in Annex 6.

<sup>140</sup> Human Rights Committee, *General Comment No. 31*, at para. 15.

remedy which is central to the efficacy of this provision of the Covenant is not discharged.<sup>141</sup>

142. According to the well-established principles of general international law contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>142</sup> victims of gross violations of international human rights law, such as violations of the Covenant in the present case, are entitled to the following forms of reparation: restitution, compensation, rehabilitation, satisfaction (which can include public apologies),<sup>143</sup> and guarantees of non-repetition.<sup>144</sup> As restitution is not possible, other types of remedies should be provided to the Authors.
143. First, the State Party should ensure cessation of the ongoing violation and carry out a full and independent investigation into the circumstances of the arrest, detention, torture, cruel, inhuman and degrading treatment and custodial death of Sunil and take appropriate measures against those responsible.<sup>145</sup> The preliminary and final results of such investigation should be communicated to the Authors in order to ensure that their right to the truth is fully respected.
144. Second, the State Party should ensure payment of full and adequate compensation to the Authors pursuant to the Committee's case-law in similar cases,<sup>146</sup> in respect of the violations of the Covenant committed against the deceased victim and against the Authors. The amount of the compensation should be proportionate to the seriousness of the violations of the Covenant in the present case and the damage and sufferings caused by them.
145. Third, by way of satisfaction, the State Party should issue a public apology containing an unequivocal acknowledgement of the numerous violations of the Covenant in the present case.
146. Fourth, the State Party should provide as full rehabilitation as possible to the Authors, including psychological counselling services if appropriate.<sup>147</sup>
147. Finally, as guarantees of non-repetition, the State Party should establish an independent body or institution tasked with investigating complaints into serious

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<sup>141</sup> Ibid., at para. 16.

<sup>142</sup> Adopted by the UN General Assembly Resolution 60/147 of 16 December 2005.

<sup>143</sup> Human Rights Committee, *General Comment No. 31*, at para. 16.

<sup>144</sup> Ibid., at para. 18.

<sup>145</sup> *Sarma v. Sri Lanka*, Human Rights Committee, UN Doc. CCPR/C/78/D/950/2000 (16 July 2003), at para. 11; *Wilson v. the Philippines*, Human Rights Committee, UN Doc. CCPR/C/79/D/868/1999 (30 October 2003), at para. 9; and *Akwanga v. Cameroon*, Human Rights Committee, UN Doc. CCPR/C/101/D/1813/2008 (22 March 2011), at para. 9.

<sup>146</sup> *Kalenga v. Zambia*, Human Rights Committee, UN Doc. CCPR/C/48/D/326/1988 (27 July 1993), at para. 8, and *Koné v. Senegal*, Human Rights Committee, UN Doc. CCPR/C/52/D/386/1989 (21 October 1994), at para. 10.

<sup>147</sup> See, in particular, REDRESS, *Rehabilitation as a Form of Reparation under International Law* (2009), available at: <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>.

human rights violations committed by the police officers and other law-enforcement personnel pursuant to the recommendations of the Committee against Torture.<sup>148</sup> This body or institution should be capable of documenting and investigating torture and cruel, inhuman and degrading treatment pursuant to the pertinent international standards including those contained in the Istanbul Protocol.<sup>149</sup>

VII. **CONCLUSION**

148. The Committee is respectfully requested to declare the present communication admissible in its entirety, establish violations of the Covenant by the State Party as listed in paragraph 139 above and indicate redress as proposed in paragraphs 141-147 above.

Respectfully submitted,

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Advocate, Legal Programme Officer

Sh. Gunaratne

Attorney-at-Law

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<sup>148</sup> See footnote 74 above.

<sup>149</sup> See footnote 61 above.

## LIST OF ANNEXES:

1. Copies of the national identity cards of the Authors.
2. Authorisation letters signed by the Authors.
3. Copy and translation of the affidavit of the Second Author dated 23 August 2003.
4. Copy and translation of the affidavit of Chanaka dated 21 August 2003.
5. Copy of the Magistrates' Courts' proceedings and translations of the following parts thereof:
  - a) entry made by the Acting Magistrate of Colombo dated 27 July 2003 (at pages 2-3);
  - b) notes made by the Acting Magistrate of Colombo following his visit to the mortuary and inspection of the victim's corpse dated 28 July 2003 (at page 13);
  - c) proceedings before the Magistrate of Horana dated 8 August 2003 (at pages 6-7).
6. Copy and translation of the complaint lodged by the Second Author with the National Human Rights Commission dated 23 July 2003.
7. Affidavit of Peyumpuli Arachchige Don Tharanga Deepal Samarabandu ("Deepal") dated 8 July 2011 and certified in Colombo, Sri Lanka, and translation thereof.
8. Copy of the amended fundamental rights' petition lodged with the Supreme Court.
9. Copies of the documents issued by the Consultant Judicial Medical Officer of Colombo dated 29 July 2003:
  - a) *Post mortem* examination report;
  - b) Cause of Death statement.
10. Copy and translation of the proceedings before the Magistrate in Horana dated 19 November 2004.
11. Copy and translation of the National Human Rights Commission letter of 21 August 2008.
12. Copy of the Supreme Court decision of 6 August 2010 in the matter no. SC(FR)429/2003.
13. Second Opinion by Dr Clifford Perera dated 14 July 2011.