



# International Convention for the Protection of All Persons from Enforced Disappearance

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## Committee on Enforced Disappearances

### Views adopted by the Committee under article 31 of the Convention, concerning communication No. 3/2019\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	E.L.A. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	24 September 2018 (initial submission)
<i>Document references:</i>	Decision under article 31 of the Convention, transmitted to the State party on 19 September 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	25 September 2020
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of enforced disappearance upon return to country of origin
<i>Article of the Convention:</i>	16

1.1 The author of the communication is E.L.A., a citizen of Sri Lanka born in 1982. He has filed several asylum applications in France, all of which have been refused. He claims that his removal to Sri Lanka would constitute a violation by France of his rights under article 16 of the Convention. He is not represented by counsel.

1.2 The State party recognized the competence of the Committee to consider individual communications on 9 December 2008. The Convention entered into force for the State party on 23 December 2010.

1.3 On 19 September 2019, the Committee, acting through its Rapporteur on new communications and interim measures, requested the State party not to deport the author to Sri Lanka while his complaint was being considered by the Committee. On 17 December 2019, the Committee, through its Rapporteur, agreed to the State party's request to lift the interim measures granted in respect of the author.

\* Adopted by the Committee at its nineteenth session (7–25 September 2020).

\*\* The following members of the Committee participated in the examination of the communication:  
Mohammed Ayat, Moncef Baati, Milica Kolaković-Bojović, Barbara Lochbihler, Juan José López Ortega, Horacio Ravenna, Teraya Koji and Carmen Rosa Villa Quintana. Pursuant to rule 47 of the Committee's rules of procedure, Olivier de Frouville did not participate in the examination of the communication.

\*\*\* The texts of the dissenting opinions of Moncef Baati and Juan José López Ortega are appended to the present document.



### The facts as submitted by the author

2.1 The author belongs to the Tamil community of northern Sri Lanka. In 1997, when he was 15 years old, he was arrested during a raid carried out at his high school following an attack by the Liberation Tigers of Tamil Eelam and was detained for a week at the Kurunagar camp. In June 1998, after the Liberation Tigers of Tamil Eelam attacked a military convoy, he was arrested at the family home and detained for several days at a police station in Atchuvely, where he was subjected to torture. His grandfather was also arrested and tortured, and was eventually killed by the armed forces on 27 July 2005.

2.2 On 28 January 1999, after the police found his identity card on a fighter from the Liberation Tigers of Tamil Eelam, the author was arrested and detained for several months at the Palali military camp. He was finally released on 31 July 1999. On 29 March 2000, after he participated in a humanitarian operation for refugee populations in the Vanni, the Army arrested him at his home on suspicion of trying to help the Liberation Tigers of Tamil Eelam. He was detained for two days at the Atchuvely camp and then transferred to the Palali camp. His parents paid a bribe to members of the Eelam People's Democratic Party and he was released on 19 October 2000 on the condition that he comply with a reporting requirement once a week.

2.3 The author was ill-treated every time he reported in, and so took refuge at his aunt's house in Uduppiddya. On 20 November 2000, his parents were ill-treated by military personnel, who wanted them to reveal the author's whereabouts. On 19 December 2000, the Army set fire to their second home and killed a friend of one of his relatives, who was a member of the Liberation Tigers of Tamil Eelam. As a result of the attack, the author's father was hospitalized. Fearing for his safety, the author stopped complying with the reporting obligations imposed on him by the Army and eventually left Sri Lanka in February 2001. He went to Turkey, where he lived for two years before moving to France in 2003.

2.4 On 24 September 2003, he applied for asylum. He reported fearing both that the Sri Lankan authorities would seek him out and that the Liberation Tigers of Tamil Eelam might attempt to recruit him into their ranks. On 2 April 2004, the French Office for the Protection of Refugees and Stateless Persons found that there was no conclusive evidence to support the author's statements and rejected his asylum application on the ground that it lacked credibility.<sup>1</sup> The documentary evidence provided was found to be insufficient. On 8 February 2005, the author's appeal was rejected by the Refugee Appeals Commission,<sup>2</sup> which considered that neither the evidence in the file nor the statements made at the public hearing were sufficient to prove the allegations or show the author's fears to be justified.<sup>3</sup> In particular, documents written in a foreign language that were not accompanied by French translations were not taken into consideration.

2.5 On 9 May 2004, the author's brother was kidnapped by the Sri Lankan Army and went missing. On 11 May 2004, his family filed a complaint with the police station in Jaffna, Sri Lanka, and with the Human Rights Commission of Sri Lanka.

2.6 On 4 May 2006, the author filed an application for review of his asylum application, reporting once again that the Sri Lankan authorities had conducted arrests and searches. In addition, he stated that his parents had been questioned about the activities of his siblings in February 2005, that his home had been searched by military personnel on 15 March 2005, resulting in the hospitalization of his family members, and that the village chief had been questioned about him and issued with a summons from the Criminal Investigation Department on 10 May 2005. On 9 May 2006, the French Office for the Protection of Refugees and Stateless Persons rejected the author's application on the grounds that his written statements were inconsistent and did not substantiate the new facts or his reported

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<sup>1</sup> In its observations of 21 January 2020, the State party submits that, on 7 January 2004, the author was heard during a confidential interview with a protection officer, and was assisted by a Tamil language interpreter.

<sup>2</sup> The Commission became the National Court on the Right of Asylum in 2007.

<sup>3</sup> The Commission noted that, from 1996 onward, the author had supported the Student Organization of the Liberation Tigers and the Liberation Tigers of Tamil Eelam.

fears, and that the investigation sheet and the letters attached to the file had no probative value. The decision was upheld by the Refugee Appeals Commission on 8 November 2007.

2.7 On 5 February 2009, the author submitted a second application for review of his asylum claim, reporting that his home had been searched on 24 January 2008 and that his family members had been questioned about him. He also reported that the body of one family member arrested during the incident had been found on 3 February 2008. The author further indicated that, on 5 March 2008, his family had been driven from their home and that, on 30 May 2008, the house had been damaged by grenades. On 10 February 2009, the French Office for the Protection of Refugees and Stateless Persons rejected the author's application. The Office noted that the affidavit from the Criminal Investigation Department in Colombo, dated 27 April 2005, had been issued before the previous decisions taken by the Office and the Refugee Appeals Commission and was therefore inadmissible. With regard to the other elements, the Office found that, although they were new, the written statements were unconvincing and the supporting documents provided, namely, the arrest warrant and the affidavits from a notary public, the Forum for Human Dignity and the Sri Lanka Red Cross Society, were questionable, and considered that they did not substantiate the author's allegations.

2.8 The author appealed, arguing that he could not return to Sri Lanka without fearing for his safety. He produced documents detailing the problems faced by his family, including the murder of his uncle in February 2009 and the disappearance of his brother, who had been involved with the Liberation Tigers of Tamil Eelam, in 2004.<sup>4</sup> The author claimed that, while he had been in France, he had witnessed illegal acts and had assisted the French authorities in arresting the perpetrators. He also claimed to have received repeated death threats after one of them was released. On 22 July 2010, the National Court on the Right of Asylum considered the merits of this new information. The Court dismissed the author's appeal, however, holding that the evidence in the file and the statements made at the public hearing were superficial and devoid of precise and detailed information on the new facts reported and did not prove the author's claims or justify his fears. A document relating to the registration of a complaint with the Human Rights Commission on 17 June 2010 and an affidavit from a reverend dated 12 May 2010 were considered ineffective for the purposes of considering the new facts. Press articles that were submitted without translations could not be taken into account. Lastly, the assaults and threats to which the author had been subjected in France for assisting the authorities, together with the documents in the file relating to these events, were deemed to be unrelated to the examination of his personal fears in the event of his return to Sri Lanka.

2.9 On 10 March 2011, the author submitted a third application for review of his asylum claim. He argued that he still feared persecution if he returned to his country, reiterating the facts already set out and adding that his sister had been killed by the Sri Lankan Army in 2010, without providing details of the circumstances. On 21 March 2011, the French Office for the Protection of Refugees and Stateless Persons again rejected his application, since, with the exception of his sister's death, regarding which he had provided no further details, all the other facts had already been brought to the attention of the National Court on the Right of Asylum and were inadmissible because they were not new. With regard to his sister's death on an unspecified date, the Office considered that the author's statements, which were superficial and devoid of precise information on the circumstances, causes and possible perpetrators, were not sufficient to prove the allegations or justify the author's fears in the event of his return. On 13 June 2012, the National Court on the Right of Asylum dismissed the author's appeal on the ground that he had not presented any serious evidence to challenge the reasoning of the Office's decision.

2.10 On 26 May 2016, the author submitted a fourth application for review of his asylum claim. He produced a medical certificate, dated 20 May 2011, which contained details of a

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<sup>4</sup> The decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court notes that the author's brother disappeared in 2004 and that his body was found in a mass grave five years later. However, on 12 March 2018, the Working Group on Enforced or Involuntary Disappearances transmitted to Sri Lanka the case of the author's brother's disappearance, stating that his whereabouts were unknown.

number of scars allegedly caused by acts of torture<sup>5</sup> and described him as clearly suffering from post-traumatic stress disorder. He also provided a document dated 12 October 2011 from Amnesty International. He also referred to a statement dated 26 March 2015 from the Committee on Petitions of the European Parliament in Brussels, describing him as a victim of torture in Sri Lanka.<sup>6</sup> His status as a victim of torture in Sri Lanka was subsequently confirmed by the Court of Versailles on 17 April 2015 and by doctors on 12 May 2015. In support of his claims, the author produced a statement dated 1 June 2015 from a Sri Lankan parliamentarian, a certificate dated 30 June 2015 from the Comité pour la santé des exilés (Committee for the Health of Exiles) attesting to several scars on the author's body<sup>7</sup> and his post-traumatic stress disorder, and an undated report from a psychiatric expert.

2.11 On 30 May 2016, the French Office for the Protection of Refugees and Stateless Persons declared the author's application inadmissible, considering that the documents from 2011 related to events prior to the decision of 13 June 2012 of the National Court on the Right of Asylum and did not set out any valid reason why the author had failed to submit them earlier. With regard to the document from the Committee on Petitions of the European Parliament, the Office found that the first name indicated on the document did not match that of the author. In the absence of convincing written statements, the document, which was submitted in copy form, was therefore considered to have no probative value. Furthermore, the Office ruled that, although a psychiatrist had diagnosed the author with post-traumatic stress disorder, the causes or circumstances of the disorder had not been specified. The Office and the National Court on the Right of Asylum have found on several occasions that the events that the author alleges to have been the cause of his disorder have not been substantiated, making the circumstances surrounding it implausible. In this context, and in the absence of other elements, the statement from the parliamentarian, which was drafted for the purposes of the author's application for review, must be regarded as devoid of probative value. The medical certificate issued by the Comité pour la santé des exilés, which attests that the sequelae observed are consistent with the author's statements, does not invalidate this analysis.

2.12 On 31 October 2016, the National Court on the Right of Asylum rejected the author's appeal, in which he claimed that he still feared persecution for the political opinions attributed to him by the Sri Lankan authorities. The Court held that the author had failed to explain the difficulties that had allegedly prevented him from producing the medical certificate dated 20 May 2011 and the Amnesty International document dated 12 October 2011, both of which predated the Court's previous decision of 13 June 2012. Although the documents from the European Parliament – in particular a letter dated 26 March 2015 from the Committee on Petitions, an email dated 22 June 2016 referring to the spelling mistakes made in the author's surname and forename when the petition was registered, and extracts from the Parliament's website – demonstrated the steps taken by the author and the publication of his petition, they were nevertheless deemed insufficiently conclusive. The author did not provide any information that would allow the Court to conclude that, as a result of the petition, he has a high profile that would attract the unfavourable attention of the Sri Lankan authorities. His

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<sup>5</sup> On the lateral outer edge of the right eye socket, a scar measuring 0.2 cm x 0.3 cm, attributed to a punch using brass knuckles; halfway up the neck, a clearly visible long linear scar covering almost half the circumference of the neck and measuring 0.3 cm x 0.4 cm in width, attributed to strangulation with a steel cable; on the left arm, a scar measuring 4 cm x 0.2 cm, and on the left elbow, a scar measuring 2 cm x 0.4 cm, attributed to stab wounds; on the left thigh, at least seven circular pigmented scars measuring approximately 1.5 cm in diameter, consistent with cigarette burns; on the right knee, a suprapatellar scar measuring 3 cm x 0.3 cm, and on the left knee, three contiguous subpatellar scars measuring 1.5 cm, consistent with blows with sticks, batons and metal bars; on the right leg, a bullet entry wound measuring 1.5 cm; on the insides of both feet, flat pigmented scars, consistent with scalding with boiling water; a fracture, damage to the root canal and anterior displacement of the left upper incisor, consistent with a blow to the face with the butt of a gun.

<sup>6</sup> In the statement, the Committee on Petitions declared the author's request admissible under the Rules of Procedure of the European Parliament but found that it was not in a position to consider the request on the merits.

<sup>7</sup> A scar on the front of the throat, a broken upper tooth, a hypochromic lesion on the right foot consistent with burns, scarring on the right leg from a penetrating wound consistent with a gunshot, and a scar on the right elbow.

claims that the authorities questioned people in his village following the publication of his petition are not corroborated by any tangible evidence. The correspondence from his uncle dated 17 October 2016 and from the two Sri Lankan parliamentarians dated 1 June 2015 and 9 October 2016 contain no additional information about the author's personal situation. Secondly, the undated document, which was stamped with the seal of the Court of Versailles and signed by a psychiatrist, does not corroborate his claims, but merely confirms that the author does not have a dangerous condition requiring involuntary hospitalization. Furthermore, the medical evidence produced, namely, the medical certificate dated 30 June 2015 from the Comité pour la santé des exiles, a letter dated 11 May 2015 from a doctor from the Comité pour la santé des exilés, a situation report dated 19 May 2015 and the conclusions of a psychiatrist, which make reference to the author's post-traumatic stress disorder, are not sufficient to nullify the assessment of the author's situation, since they refer merely to facts that the French Office for the Protection of Refugees and Stateless Persons and the National Court on the Right of Asylum did not consider to have been substantiated. Lastly, the general reference to the security context in his country of origin, together with press articles and excerpts from international reports, does not provide a basis for his appeal in the absence of any personal elements that could be derived from them.

2.13 On 28 February 2017, the Prefect of Val-d'Oise issued an order requiring the author to leave French territory within 30 days and return to Sri Lanka. The author challenged this decision, invoking, in particular, articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which relate, respectively, to the prohibition of torture and to the right to respect for private and family life. In a binding decision handed down on 20 April 2017, Cergy-Pontoise Administrative Court rejected his application because he had not provided any convincing evidence showing that, if he returned to Sri Lanka, he would face sufficiently personal, present and real risks to his life or person. Furthermore, the Court held that the fact that the author had not been invited to comment before the order for him to leave the country and return to Sri Lanka was issued was not sufficient for it to consider that he had been deprived of his right to be heard, since he had been heard in the course of the examination of his application for refugee status.<sup>8</sup> The author did not appeal this decision.

### **The complaint**

3.1 The author claims a violation of article 16 of the Convention. He claims that, if the State party returns him to Sri Lanka, he risks being subjected to enforced disappearance, since his brother has also disappeared. He states that, under the counter-terrorism law currently in force in Sri Lanka, he could be detained indefinitely and subjected to enforced disappearance. A number of Tamils have already been arrested and detained without trial on the basis of this law. If he returns to Sri Lanka, the Criminal Investigation Department will conclude, on the basis of his physical scars, that he is a veteran of the Liberation Tigers of Tamil Eelam and will imprison him without trial. He refers to several press articles on the security context in Sri Lanka and provides a video that he claims depicts acts of torture filmed in a prison in Sri Lanka on 22 November 2018.

3.2 The author claims that his scars, in particular one on his right leg caused by a bullet, are evidence of the torture that he suffered in Sri Lanka.<sup>9</sup> Various medical examinations attest to the truthfulness of his account. However, the French authorities rejected this evidence without providing an explanation as to the causes of all his physical scars and injuries. They also disregarded the present risk that the author faces if he returns to Sri Lanka.

3.3 The author argues that, on 21 April 2018, there was a terrorist attack in Sri Lanka targeting the Christian community, of which he is a member. Following the attack, several countries warned their citizens not to travel to Sri Lanka.

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<sup>8</sup> The Court notes that the right to be heard implies that, before taking a decision ordering a foreign national to leave French territory, the prefectoral authorities must give the person concerned the opportunity to submit written observations and, upon request, allow him or her to make oral observations in order to make known, in a meaningful and effective manner, his or her point of view on a proposed measure before it is ordered.

<sup>9</sup> The author submits photos with his communication.

3.4 The author adds that he has referred his brother's case to the Working Group on Enforced or Involuntary Disappearances. Since that case is being brought against the Sri Lankan Army, the authorities would easily be able to identify the author and put him in prison. On 31 December 2013, he also submitted a petition to the European Parliament against the Sri Lankan Army. The author states that this petition is still available online on the European Parliament website and that "the President of the European Commission in Brussels stated that he had been a victim of torture in Sri Lanka".

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

4.1 On 21 January 2020, the State party submitted to the Committee its observations on the admissibility and on the merits of the communication. It requested that the communication be declared inadmissible under article 31 (2) (d) of the Convention.

4.2 The State party recalls that, under the Convention, all domestic remedies must have been exhausted in order for a communication to be declared admissible. It argues that the author did not appeal the decision of 20 April 2017, despite the fact that, under the provisions of article R776-9 of the Code of Administrative Justice, he could have done so within one month of the date on which he was notified of the decision. In considering an appeal, judges are required to re-examine the entire file. They rule on questions of fact and of law. Appeals are therefore an effective means of redress in this context.

4.3 The State party also indicates that, under article L561-2 of the Code on the Entry and Residence of Aliens in France and the Right of Asylum, the author cannot be placed under house arrest or in detention in preparation for his removal because more than a year has passed since he was ordered to leave French territory. If a new decision were to be taken to remove the author to Sri Lanka, the usual remedies for challenging administrative decisions would be available to him, including the emergency procedures provided for under articles L521-1 and L521-2 of the Code of Administrative Justice, which allow for the execution of such a decision to be suspended pending a judge's ruling on the merits of the application. Accordingly, the State party asks the Committee to declare the present communication inadmissible.

4.4 If the Committee decided to declare the communication admissible, it would have no option but to find that there had been no violation of the rights set forth in the Convention. The author's fears have already been examined on more than 10 occasions by the French authorities, mainly asylum bodies, and administrative courts. The author has therefore benefited from important safeguards, given that the fears he raises are, in any event, unsubstantiated.

4.5 Having reviewed the guarantees that accompany examinations of cases by the asylum authorities and the administrative courts, the State party points out that the author's situation has been examined on five occasions by the French Office for the Protection of Refugees and Stateless Persons and the National Court on the Right of Asylum – one initial application and four applications for review – and then by the administrative court following an appeal against the last decision, and could have been examined again if he had appealed against the administrative court's decision. Consequently, in the course of repeated examinations of his asylum claim and applications for review, he has been afforded numerous safeguards and would have been afforded others if he had exercised the additional remedies available to him. The risk of enforced disappearance that he might face if returned to his country of origin was therefore dismissed only after a thorough analysis. In any case, the risk has not been substantiated.

4.6 The State party considers that, while there is no longer a general risk to Tamils upon return to Sri Lanka,<sup>10</sup> some individuals, including senior officials from the Liberation Tigers of Tamil Eelam and separatist activists in the diaspora, may be at risk. According to the most recent information available to the State party, provided by the Asia and Oceania Department of the Ministry for Europe and Foreign Affairs, the current administration in Sri Lanka, led

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<sup>10</sup> See European Court of Human Rights, *J.K. v. France*, application No. 7466/10, 7 April 2015; *B.M. v. France*, application No. 5562/11, 7 April 2015; and *T.T. v. France*, application No. 8686/13, 7 April 2015.

by Mr. Rajapaksa, ended the civil war with the Liberation Tigers of Tamil Eelam, which wanted independence for part of the island.

4.7 While Tamils living in the diaspora, as the author does, generally feel nostalgia for the struggle of the Liberation Tigers of Tamil Eelam, Tamils living in Sri Lanka, where they make up 20 per cent of the population, are more interested in integration and safeguarding peace. In particular, they support the reconciliation policy of the outgoing administration, which was in power between 2015 and 2019. To the State party's knowledge, there have been no enforced disappearances in Sri Lanka for many years. According to the information available, in recent years there have been no prosecutions of individuals with backgrounds similar to that of the author.

4.8 Moreover, the decisions taken by the asylum authorities regarding the author demonstrate a consistent and reasoned position on his claims, based in particular on the author's statements, which are considered to be implausible and contradictory, and the lack of probative value of the documents submitted. The author has not submitted, either to the asylum authorities or to the Committee, any new evidence to substantiate his claims, and has continued to rely on the allegations that he and certain members of his family suffered in his country of origin due to his links with the Liberation Tigers of Tamil Eelam, leading him to leave Sri Lanka.

4.9 Firstly, the petition submitted to the European Parliament by the author does not demonstrate the existence of the alleged risks. This has already been established by the National Court on the Right of Asylum, which pointed out in its most recent decision, dated 31 October 2016, that the author had not provided any information that would lead to the conclusion that, as a result of his communication with the European Parliament, the authorities in his country would have regarded him unfavourably and that the village authorities would have decided to question him following the publication of the petition. There is no tangible evidence that such questioning occurred or that the authorities in Sri Lanka might have been aware of the author's petition.

4.10 Similarly, there is no evidence to prove the author's claims that he was tortured. His scars, which have been confirmed by medical certificates, have been taken into consideration by the various bodies that have examined his case. However, as has been pointed out on several occasions by the asylum bodies, the author's account of his experiences and his links with the Liberation Tigers of Tamil Eelam have not been proven, and the cause of the scars and the circumstances in which they occurred cannot therefore be considered to be related to the risk that the author claims he would face if returned to his country of origin.

4.11 The author has demonstrated that he suffers from post-traumatic stress disorder. However, as with the scars on his body, no link with his account can be established, as shown by the analysis conducted on 30 June 2015 by a doctor from the Comité pour la santé des exilés. The doctor referred to the wording of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), which set out the first detailed international guidelines on the matter. Paragraph 187 of the Manual contains a description of the degrees of consistency between the physical and psychological sequelae observed and the form of torture to which the patient attributes them.<sup>11</sup>

4.12 In the present case, the doctor noted only that the sequelae observed were consistent with the author's claims, which is the second of the degrees referred to in the Istanbul Protocol. In so doing, the doctor indicated that the sequelae could have been caused by other means and, consequently, that there was reasonable doubt as to whether their causes were linked to the author's experiences as he had described them. Furthermore, no supporting information was provided to explain where the events depicted in the video submitted by the author took place. The video depicts incidents at a place of deprivation of liberty which involve the use of violence by persons who appear to be in positions of authority. However, it is not possible to make a connection between the video and the author, his alleged experiences or his claim to be at risk of enforced disappearance. This assertion is supported

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<sup>11</sup> It should be noted that there is no consensus among practitioners on this method.

by the fact that the video appears to be a documentary broadcast by the IBC Tamil channel, whose logo appears on the recording.

4.13 As for the fears that the author raised on the basis of his Christian faith (on his initial asylum application form, he described himself as a Roman Catholic), he does not provide any justification for such fears in the event of his return to his country of origin. He refers to the matter in a single sentence in an undated letter to the Committee and does not provide details of how it affects his personal situation.

4.14 On the basis of the elements set out above, it is clear that, if the Committee were to find the author's communication admissible, his claims are manifestly unfounded and his allegations do not disclose any violation by the State party of his rights under the Convention.

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

5.1 On 24 March 2020, the author submitted his comments on the State party's observations. He reiterates that he was a victim of torture in Sri Lanka and that his brother went missing in 2004.

5.2 With regard to the fact that he did not appeal the decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court, the author states that he had only one month in which to appeal, was unemployed and did not have money to pay for legal representation. He claims that, even if he had applied for legal aid, he would not have received a response before the time limit for appeal had expired. In addition, his domestic appeals have been examined on several occasions without him being summoned by the asylum authorities or administrative bodies.

5.3 With regard to the petition that he registered with the European Parliament in 2013, the author states that he had requested confirmation of the fact that he had been tortured by the Sri Lankan Army. He had also requested that France accept his asylum application. The author recalls that, on 26 March 2015, the Chair of the Committee on Petitions of the European Parliament stated that the author had been a victim of torture in Sri Lanka at the hands of the Sri Lankan military and that his asylum application was admissible.

5.4 With respect to the State party's assertion that the usual remedies for challenging administrative decisions would be available to the author if a new decision were taken to remove him to Sri Lanka, the author argues that the judge would not decide in his favour because he has exhausted all domestic remedies. He mentions that he has married a Sri Lankan woman in France and that he seeks international protection.

5.5 Lastly, the author refers to the security context in Sri Lanka.<sup>12</sup> He alleges that, while a new administration has recently taken office, it has been accused of committing "war crimes during the civil war". He explains that the Sri Lankan Government threatened to withdraw from a Human Rights Council resolution after travel restrictions were imposed on the Chief of Staff of the Sri Lankan Army. The United States of America has banned General Shavendra Silva and his immediate family from entering the country because he is accused of committing crimes against humanity during the final months of the 1983–2009 Sri Lankan civil war, when the current Prime Minister, Mahinda Rajapaksa, was himself President. The Prime Minister retaliated by announcing the country's withdrawal from resolution 30/1 and accusing his predecessor of "historic treason" for having supported it in 2015. According to a United Nations report, almost 45,000 Tamil civilians were allegedly killed in the final months of the conflict. There is therefore an ongoing risk to the Tamil population.

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<sup>12</sup> Human Rights Watch, "Sri Lanka: Human Rights Gains in Grave Peril", 14 January 2020; Human Rights Watch, "Sri Lanka: Routine Police Torture Devastates Families", 23 October 2015; RFI, "Sri Lanka: le président annonce morts les milliers de disparus de la guerre" (President of Sri Lanka declares dead thousands of people who disappeared during the war), 21 January 2020; RFI, "Sri Lanka: le rapporteur de l'ONU dénonce des actes de torture en toute impunité" (Sri Lanka: UN rapporteur denounces acts of torture committed with impunity), 22 April 2019; Al-Jazeera, "Alleged War Criminal Named Second-in-Command of Sri Lanka Army", 10 January 2019; and Paris Match, "Enlèvement d'une employée d'ambassade: la Suisse convoque l'ambassadeur sri-lankais" (Embassy worker kidnapped: Switzerland summons Sri Lankan Ambassador), 3 December 2019.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any complaint contained in a communication, the Committee must decide whether the communication is admissible under article 31 (1) and (2) of the Convention. The Committee has ascertained, as it is required to do under article 31 (2) (c) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes, first of all, that the facts supporting the author's allegations before the Committee took place between 2003 and 2017, while the Convention entered into force for the State party on 23 December 2010. The Committee recalls that a State party's obligations under the Convention apply from the date on which the Convention entered into force for it. In the present case, the Committee notes that the author's third and fourth requests for a review of his asylum application and the corresponding decisions were made after the entry into force of the Convention for the State party. It also notes that these decisions ruled on the matter of the risks cited by the author in the event of his removal to Sri Lanka, which are the basis of the author's application to the Committee. The Committee therefore considers that the communication before it falls within its jurisdiction *ratione temporis*.

6.3. The Committee further notes that the State party has contested the admissibility of the communication on the ground of non-exhaustion of domestic remedies. The State party argues, firstly, that the author did not appeal the decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court, despite the fact that he could have done so within one month and that the judges would have re-examined the case file in its entirety. The State party therefore considers that such an appeal constitutes an effective remedy in this context. Secondly, the State party argues that the time limit for enforcing the decision to remove the author from French territory has expired and that, if a new decision were to be taken to that effect, the usual remedies for challenging administrative decisions would be available to the author. Lastly, the Committee notes the author's argument that his appeals have been examined on several occasions by the asylum authorities and administrative bodies.

6.4 The Committee notes, first of all, that the author's asylum application has been examined and re-examined on a total of five occasions by the asylum courts. At the end of these five asylum procedures, and as a direct consequence, the Prefect of Val-d'Oise ordered the author to leave French territory, a decision which he challenged. On 20 April 2017, in a binding decision, Cergy-Pontoise Administrative Court dismissed the author's appeal against the Prefect's order. The Committee notes the State party's clarification that the provisions of the Code of Administrative Justice allow for the execution of such a decision to be suspended pending a judge's ruling on the merits of the application. The Committee therefore takes note of the fact that suspensive effect is not guaranteed. In this regard, the Committee recalls that the suspensive effect of a remedy is one of the essential procedural guarantees in expulsion proceedings, since its aim is to prevent possible violations of the principle of non-refoulement.<sup>13</sup>

6.5 Furthermore, the State party has not demonstrated, including through domestic case law, how an administrative body tasked with considering a challenge to an administrative order issued following several asylum procedures could rule differently on the alleged risks of refoulement, when this falls within the purview of the asylum authorities. Therefore, in the absence of relevant information from the State party in this regard, and in the light of the fact that this remedy does not guarantee for any person subject to a deportation order the right to lodge an appeal with a suspensive effect on the execution of that order, the Committee concludes that such an appeal is not effective or efficient.

6.6 The Committee observes that during the various asylum procedures, the author does not appear to have expressly invoked before the national courts the right that he claims to derive from article 16 of the Convention, which is linked to the risk of being subjected to enforced disappearance. It further observes that the State party has not raised the question of non-exhaustion of domestic remedies. Nevertheless, the Committee must consider whether,

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<sup>13</sup> Committee against Torture, general comment No. 4 (2017), paras. 13, 18 (e) and 34.

in the light of the author's allegations before the domestic courts regarding the risk of enforced disappearance, such a risk has, in substance, been brought to the attention of the competent authorities. In this respect, the Committee notes that, under the rule of exhaustion of domestic remedies, persons submitting communications are obliged, in principle, to raise before the appropriate domestic courts, at least in substance, the claims that are subsequently to be brought before the Committee in order to enable them to remedy alleged violations of the Convention.<sup>14</sup>

6.7 In the present case, the Committee observes that, during the various asylum procedures, the author repeatedly claimed that he would be at risk of persecution by the Sri Lankan Army, as well as by the Liberation Tigers of Tamil Eelam, if he were forcibly returned to Sri Lanka. He claims to have been tortured by members of the Liberation Tigers of Tamil Eelam and makes it clear that his brother, who was involved with that organization, was subjected to enforced disappearance by the Sri Lankan Army. The Committee notes that, since submitting his initial asylum application, the author has reported fears in connection with both the Sri Lankan authorities, who would seek him out, and the Liberation Tigers of Tamil Eelam. In these circumstances, the Committee considers that the claims raised by the author before the domestic courts, even if he did not make explicit reference to the risk of enforced disappearance that he might face, go to the very substance of the risk of enforced disappearance. Taking into account the specific circumstances of the case at hand, including the author's personal experience and that of his family, and the general context of enforced disappearance in Sri Lanka, the Committee considers that the author has, in fact, reported to the national authorities the risk of enforced disappearance that he could face if he returned to Sri Lanka. Accordingly, the Committee considers that article 31 (2) (d) of the Convention does not constitute an obstacle to the admissibility of the present communication.

6.8 In the absence of any other question as to the admissibility of the communication, the Committee declares it admissible, given that it raises questions under article 16 of the Convention and that the facts and basis of the author's claims have been duly substantiated, and proceeds with its consideration of the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties.

7.2 In the present case, the Committee must decide whether the forced return of the author to Sri Lanka would violate the State party's obligation under article 16 (1) of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. According to article 16 (2), for the purpose of determining whether there are such grounds, the competent authorities must take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law. Furthermore, additional grounds must be adduced to show that the individual concerned would face a real and personal risk of being subjected to enforced disappearance in his or her specific circumstances.<sup>15</sup> Each person's case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards.<sup>16</sup>

7.3 In the present case, the Committee notes the State party's argument that the author's fears of persecution in the event of his return to Sri Lanka have already been examined on more than 10 occasions by the French authorities and that the author has been afforded significant guarantees. The risk that he might be subjected to enforced disappearance if returned to his country of origin was therefore dismissed only after a thorough analysis. In addition, the State party submits that the link between the author's post-traumatic stress

<sup>14</sup> See, inter alia, *Parra Corral v. Spain* (CCPR/C/83/D/1356/2005), para. 4.2.

<sup>15</sup> See, inter alia, *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), para. 8.3; *R.A.Y. v. Morocco* (CAT/C/52/D/525/2012), para. 7.2; *L.M. v. Canada* (CAT/C/63/D/488/2012), para. 11.3; and *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), para. 15.3.

<sup>16</sup> Committee against Torture, general comment No. 4, para. 13.

disorder and the scars on his body, and his allegations as to the circumstances in which they were allegedly caused, cannot be established.

7.4 The Committee notes that the decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court refers to the fact that the author's brother disappeared in 2004 and that his body was found in a mass grave five years later. However, the Committee notes that the Court did not give due weight to the consequences that could ensue for the author as a result of his brother's disappearance.

7.5 The Committee also notes that, during the examination of the author's asylum claims, the national authorities found that the alleged facts had not been corroborated and that the medical certificates produced by the author to substantiate the risk that he might face upon return were all rejected, either because they had not been translated or because they related to facts that the authorities did not consider to have been proved. However, the Committee notes that this evidence was dismissed without stating the reasons: it is clear from the circumstances of the case that the central purpose of the action initiated by the author was precisely to avoid the risk of torture and persecution in the event of his expulsion and implicitly, in substance, of enforced disappearance. Therefore, the Committee sees no compelling reason for the domestic authorities to have disregarded the risks raised by the author, as supported by the evidence submitted, in particular the disappearance of his brother and the medical certificates, as well as the general context of enforced disappearance in Sri Lanka.

7.6 The Committee considers that the risk of enforced disappearance must be examined by the domestic courts in a comprehensive manner. In this respect, domestic courts must meticulously examine the essential issues before them, rather than merely giving formal answers to the arguments raised by the author or simply endorsing the conclusions of a lower court or both.<sup>17</sup> In the present case, the mere fact that the courts of appeal endorsed the decisions adopted in this case by the French Office for the Protection of Refugees and Stateless Persons and the arguments on which they were based could not release them from their obligation to examine the merits of the issues raised in the author's appeals.

8. The Committee, acting under article 31 (5) of the Convention, finds that the author's return to Sri Lanka would give rise to a violation by the State party of article 16 of the Convention.

9. In accordance with article 31 (5) of the Convention, the Committee urges the State party to:

(a) Examine the author's application for asylum in the light of its obligations under the Convention and in the light of the present Views;

(b) Refrain from deporting the author while his asylum application is pending before the domestic courts.

10. The Committee hereby requests the State party to provide it with information, within six months of the date of transmission of these Views, on the action that it has taken to implement the recommendations set out above.

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<sup>17</sup> See, inter alia, European Court of Human Rights, *Helle v. Finland*, 19 December 1997, Reports of Judgments and Decisions 1997-VIII, para. 60.

## Annex I

### **Individual opinion of Moncef Baati (dissenting)**

1. In the present case, the Committee has found a violation of the provisions of article 16 of the Convention. In order to reach this conclusion, the Committee had to circumvent the fact that the communication was inadmissible on the ground of non-exhaustion of remedies, which forms the basis of the State party's claims. In so doing, the Committee found that the remedy in question was "not effective or efficient".

2. I regret that, for the reasons set out below in relation to the admissibility of the communication, I do not agree with the assessment and conclusions of my colleagues.

#### **Consideration of admissibility**

3. Article 31 of the Convention, which recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, applies only to countries that chose to accept it at the time of ratification of the Convention, which the State party did. Article 31 (2) explicitly states that the Committee must declare a communication inadmissible if all effective available domestic remedies have not been exhausted. This rule does not apply where the application of the remedies is unreasonably prolonged.

4. The direct and imperative nature of article 31 reflects its exceptional nature and the wish of the Convention's authors to expand the range of tools available to combat the repugnant crime of enforced disappearance, while, at the same time, encouraging States parties to accept the treaty's application.

5. In the present case, it should be noted that the author's asylum application was considered on several occasions, both before and after the Convention entered into force for the State party. The issue that should be the focus of our attention is the author's decision, after some 15 years of proceedings, not to appeal against the binding decision in which Cergy-Pontoise Administrative Court upheld the Prefect's order for him to return to his country of origin. Firstly, when the author claims that the time limit was too short for him to take action, he overlooks the fact that he could have submitted an urgent request for the execution of the refoulement decision to be suspended, pending an administrative judge's ruling on the merits. This type of request is an integral part of the procedure for appealing before the administrative courts decisions that must be enforced within a specified time frame, as in the present case. Secondly, the author claims that he lacks the financial resources to hire a lawyer, but, at the same time, failed to apply for legal aid. Moreover, with respect to the State party's claim that there is a remedy available for challenging a new prefectoral decision to remove the author, the latter argues that the judge will not decide in his favour, and adds that he is married in France and has applied for international protection. However, if the author had lodged an appeal, he could have invoked the need to protect his family life.

6. From all the above, it can be deduced that: (a) domestic remedies have not been exhausted, as acknowledged by the author; (b) the author did not take any action either to appeal the decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court or to request the suspension of its enforcement; and (c) the period of one month is reasonable, since the time limit for the enforcement of this type of decision conforms to the second condition set out in article 31 (2) (d) of the Convention, namely, that appeal procedures must not be unreasonably prolonged.

7. In addition, the submission of an urgent request to suspend the enforcement of the decision upholding the Prefect's order, pending a final decision on the merits by the appeal body, is an additional guarantee intended to offset any risk related to the time limit for appeal. The usefulness and effectiveness of this type of appeal are derived from the fact that it is both substantive and procedural in nature.

8. The State party has not shown any urgency or expedited any proceedings in this case. The author's first asylum application dates back to 2003, while the Prefect's binding decision,

which was accompanied by a time limit of 30 days for its enforcement, was issued on 28 February 2017.

9. From the foregoing, it can be concluded that the requirements of article 31 (2) (d) of the Convention have been met, that domestic remedies have patently not been exhausted, as acknowledged by the author himself, and that the communication is clearly inadmissible.

### **Consideration of the merits**

10. Given that the State party and the Committee have taken a decision on the merits, I am inclined to make a few observations and recommendations relating to the future work of the Committee.

11. The State party examined the situation to assess whether there were substantial grounds for believing that the author would be at risk of enforced disappearance if returned to Sri Lanka. To that end, the competent authorities have been consulted, thus enabling the State party to assert that “the risk of enforced disappearance that he might face if returned to his country of origin was therefore dismissed only after a thorough analysis”, that “in any case, the risk has not been substantiated”, that “there is no longer a general risk to Tamils upon return to Sri Lanka” and that “there have been no enforced disappearances in Sri Lanka for many years”.

12. The State party’s analysis is corroborated by the fact that Sri Lanka signed the Convention on 10 December 2015 and ratified it on 25 May 2016, only nine months before the Prefect’s order was issued. It should be added that, since then, only one request for urgent action concerning Sri Lanka has been registered.

13. If the Committee does not agree with the State party’s analysis, it should make its own assessment by requesting Sri Lanka to submit its initial report and scheduling its consideration as soon as possible. It also falls to the Committee to examine the possibility of establishing criteria to facilitate the homogeneous application of the provisions of article 16 of the Convention.

## Annex II

[Original: Spanish]

### Individual opinion of Juan José López Ortega (dissenting)

1. I regret that I do not share the opinion of the majority of the members of the Committee, who have found that the expulsion order issued by the Prefect of Val-d’Oise and upheld by Cergy-Pontoise Administrative Court was contrary to the Convention.

2. For the sake of brevity, I will limit myself to expressing my opinion on the merits with regard, firstly, to the material scope of the Committee’s competence and, secondly, to the reasons given for claiming that the decisions taken by the French authorities did not take adequate account of the risks faced by the author.

#### Competence of the Committee

3. As is the case with regional protection bodies, the treaty bodies cannot act as a court of third instance. The role of the Committee is to verify, without conducting any additional investigations of its own, whether the national authorities acted in a manner consistent with the requirements of the Convention.

4. The Committee must therefore determine whether the proceedings that took place in the State party were conducted correctly, that is to say, whether the author was given adequate opportunity to set out his or her claims and to submit evidence; whether the decision was handed down or reviewed by an independent body or authority; and whether the reasons for the decision, even if it is negative, were duly set out and are not arbitrary or unreasonable.

5. If the proceedings that took place in France are considered in the light of these principles, it is clear that the author’s rights have been fully respected.

6. The author not only had the opportunity to make an asylum application on his arrival in France in 2003, but was able to resubmit it on four occasions – in 2006, 2009, 2011 and 2016. On each occasion, he was able to submit new claims and had every opportunity to address the bodies responsible for deciding his application. If the proceedings are considered as a whole, it cannot be said that the author did not have the opportunity to defend his interests or that his ability to defend himself was unduly limited.

7. Furthermore, the various administrative and judicial bodies involved in the proceedings have considered and carefully weighed the claims and evidence put forward by the author. A reading of the background to this opinion is sufficient to reveal the author’s inconsistent behaviour and the reasons why his claims were dismissed, namely, because they were vague and lacking in detail (paras. 2.8 and 2.9); because they did not include any new elements or because, when they did, they were submitted too late (paras. 2.10 and 2.11); and because they were inconsistent (para. 2.6), unsubstantiated (para. 2.12) or implausible (para. 2.11).

8. There is therefore nothing to suggest that the national authorities’ assessment of the risks facing the author was arbitrary or unreasonable. On the contrary, the above-mentioned background demonstrates that the author’s claims were assessed in detail in a rigorous, exhaustive and thorough manner. While the author understandably disagrees with the assessment, this difference in opinion does not render the decisions handed down unfounded or make them arbitrary or unreasonable.

#### Assessment of the risks facing the author

9. The domestic proceedings culminated in the binding decision handed down on 20 April 2017 by Cergy-Pontoise Administrative Court. In its decision, the Court concluded that the author’s claims did not establish that there was a real and present risk of danger to his life or safety.

10. It is therefore a question of determining whether, in the author’s specific circumstances, there was a real and present risk of him being subjected to enforced

disappearance if he were deported to Sri Lanka. In doing so, the gap of 14 or more years between the submission of his first asylum application and the conclusion of the proceedings is of particular relevance. Although the risk may have been greater at first, it is clear that, over time, it has diminished to the point where it can now be said to fall below the minimum threshold of severity required by the Convention. The author has not provided any compelling reasons to support his claim that he would still be targeted by the Sri Lankan authorities.

11. The Committee does, however, give significant weight to the disappearance of his brother, a fact which does not appear to have been given due consideration by the French authorities. However, regardless of the amount of time that has elapsed since his brother's disappearance, there is much confusion regarding this matter. The author claimed before the French administrative court that his brother's remains had been found in a mass grave five years after his abduction but, astonishingly, this information was not transmitted to the relevant United Nations bodies.

12. Lastly, the existence of a situation of risk cannot be inferred from the existence of widespread human rights violations in the State of destination. The State party's claims are very revealing of the developments in the situation in Sri Lanka, which have led the European Court of Human Rights to dismiss other cases against France, such as *J.K. v. France*, application No. 7466/10; *B.M. v. France*, application No. 5562/11; and *T.T. v. France*, application No. 8686/13.

13. I feel compelled to draw attention to this situation, which demonstrates that there is disagreement between the treaty bodies and the European Court of Human Rights in Strasbourg and which is all the more regrettable as it concerns an area of protection in which the regional system is particularly active.

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