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PROHIBITION OF INCITEMENT TO NATIONAL, RACIAL AND RELIGIOUS HATRED IN ACCORDANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Some aspects of the work of the UN Human Rights Committee

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1. Introduction

According to the most recent General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee (hereafter, "the Committee"), "Articles 19 and 20 are compatible with and complement each other."[1] This unequivocal relationship between Articles 19 and 20 of the International Convention of the Convention on Civil and Political Rights (ICCPR), the subject of this seminar, has indelible relevance for Asian Pacific countries. Author David Wright-Neville, Ph.D.,[2] wrote that, in what has been deemed a global "war on terror," East Asian states in particular, in an effort to insulate its civilians from potential acts of terrorism, have in fact denied civil and political rights under the guise of these "counterterrorist efforts."[3] He argues that it is at this juncture, at the naming of a global "war on terror," that we find ourselves in a precarious situation with regard to the successful implementation of civil and political rights, particularly focusing on East Asia. The state's sovereign right to self-protect could, and sometimes does, tragically curtail civilians' freedoms. This is merely an example of the ways in which incitement to hatred and violence, that is undeniably linked to, and rooted in, negative attitudes related to ethnicity, coupled with the restraints on media to document such incitement in Asia Pacific countries, has gravely curtailed civil and political freedoms to civilians. Neville writes:

> "Without the rule of law, without judicial systems free of state and corporate corruption, and without the participation in politics of a wide range of social groups, there is no guarantee it will be the genuine terrorists who are subjected to these "get tough" policies. Unless the media is free, well informed, and critically engaged, there is no check on the abuse of state power. Unless minority peoples and the culturally, economically, and politically disenfranchised are given a voice and some space to exercise their rights, there will be a steady supply of replacements for every suspected terrorist arbitrarily arrested or executed."[4]

Within specific Asia Pacific countries, we see Neville's logic carry over to the topic on which we are focusing in this meeting. Asian Pacific countries will often cite as their principle argument when brought before the HRC on ICCPR violation allegations: "The sanctioning of our citizen was in order to protect national security." These cases will be discussed below in more detail.

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[1] HRC: Draft General Comment No. 34, CCPR/C/GC/34/CRP/4 (2011) at para. 52.

[2] David Wright-Neville, Ph.D., is senior lecturer in the School of Political and Social Inquiry at Monash University in Melbourne, where he is also a member of the multidisciplinary Global Terrorism Research project. Before returning to academe in 2002 he worked as a senior terrorism analyst in the Australian intelligence community, specializing in terrorist and militant groups in Southeast Asia.

[3] David Wright-Neville, East Asia and the "War on Terror": Why Human Rights Matter, *Searching for Peace in Asia Pacific* (2005).

[4] *Id.*

We also have seen numerous large-scale incitements to national, racial and religious hatred. For example, Nepal is still in transition to achieve a more democratic society, after having been subjected to a 10-year Maoist rebel insurgency, from 1996 until 2006. Maoists were largely responsible for inciting hatred between Madhesis and Pahadis as a way to keep themselves in power. Lingering today, nearly five years after the ceasefire, human rights defenders, journalists, political parties and other sectors of civil society still face risks, and still face constraints to freedom of expression.

The Committee has continued to emphasize the need for a cohesive and coherent Article 19 and 20 framework, especially in light of various incidents of political incitement to ethnic hatred and violence that continues to impact Asian Pacific states. A clear example is the ongoing civil war fueled by the Liberation Tigers of Tamil Eelam, which continues to ravage Sri Lanka and its civilians. On 22 June 2010, the Secretary-General announced that a Panel of Experts would be appointed to set forth the implementation plan of the joint commitment of accountability in relation to the "nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka."[5] This agreement was entered into between the President of Sri Lanka and the Secretary-General on 23 March 2009, after decades of the territory having been embroiled in a civil war. In this 2011 report, the panel of experts found "credible allegations [that[point to a violation of [ICCPR, article 19] insofar as the complete closure of the conflict area to independent journalists was disproportional to any public safety objective. The imposition of media guidelines in 2008 tightly limited reporting on the war and impeded media freedom. Journalists and media outlets seeking to present divergent from those of the Government are credibly alleged to have faced a range of threats and some have been killed, disappeared or severely beaten."[6] Incitement to inter-racial hatred fueled the Liberation Tigers of Tamil Eelam (LTTE) rebels, which purports to represent the aspirations of the minority ethnic Tamils in Sri Lanka, has persistently waged a violent campaign against majority Sinhalese government and civilians, sometimes against its own ethnic community. Tragically, the full extent of deaths, injuries and destruction cannot be ascertained because of the government's historical refusal to allow independent media and monitoring in the conflict zone.

The Human Rights Committee has made a number of observations and recommendations in regard to the ongoing struggles of which numerous Asian Pacific states have been accused; namely, those freedoms highlighted under Articles 19 and 20 of the ICCRP, some of which are discussed below.

2. General Comments of the Human Rights Committee

In providing greater detail on the substantive obligations of States parties with regard to Article 19, the Committee observes in various paragraphs of the first draft of General Comment 34 on freedom of speech that "...freedom of expression and freedom of opinion constitute the foundation stone for every free and democratic society. They form a basis for the full enjoyment of a wide range of other human rights. The scope of the right to seek, receive and impart information and ideas of all kinds embraces even views that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article

[5] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, page i.
[6] *Id.*

19, paragraph 3 and Article 20. Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order or of public morals." Elaborating further on conditions under which restrictions in paragraph 3 may be imposed, the Committee states that "...the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 and must be justified as being necessary for the State party for one of those grounds."

Discussing the relationship between articles 19 and 20, the Committee issued the following comments:

> "The acts that are addressed in article 20 are of such an extreme nature that they would all be subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.
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> What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19 [para 53]."
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> The Committee is concerned with the many forms of "hate speech" that, although a matter of concern, do not meet the level of seriousness set out in article 20. It also takes account of the many other forms of discriminatory, derogatory and demeaning discourse. However, it is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, while the State is not precluded in general terms from having such prohibitions, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19 [para 54]."[7]

Lastly, in General Comment 29 (2001), the Committee, in discussing derogations from the provisions of the Covenant, held that "...no declaration of a state of emergency made pursuant to article 4, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence."[8]

3. Concluding observations of Human Rights Committee

As long ago as 1983, the Committee noted in its General Comment 11 that many State reports failed to give sufficient information concerning national legislation and practice that is relevant to Article 20. Consequently, not much has been documented in the Committee's concluding observations on Article 20, nor on the link between incitement under article 20 and freedom of expression under article 19.

In the case of Israel, the Committee's concluding observations from the 77th and 78th Sessions expressed concerns about public pronouncements that were made by several prominent Israeli personalities in relation to Arabs, which may constitute advocacy of racial and religious hatred that constitutes incitement to discrimination, hostility and violence. This action would be in

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[7] ICCPR Draft General Comment No 34, CCPR/C/GC/CRP/5 at para 52.
[8] ICCPR general Comment 29, A/56/40 vol 1, (2001) 202 at para 13(e).

direct conflict with the purpose of article 20, paragraph 2, of the Covenant. The Committee concluded that the State party must take whatever action necessary to punish such acts by ensuring adherence to, and respect for, article 20, paragraph 2. The Committee also found that sweeping measures taken by the State party during its state of emergency appeared to come into conflict with the Covenant provisions, and were not permissible under such provisions as article 19, paragraph 3. These two provisions, however, are not stated together, and were instead analyzed as separate conflicts affecting the State party's violations of the Covenant.

The Committee's 101st Session offered concluding observations in the case of Mongolia, whereby the Committee cited concerns about information received on frequent threats and attacks on journalists and/or their family members, and about the delays that have elapsed since the beginning of the discussion on the draft law on freedom of information in 2001. The Committee stated that the State party should guarantee the full compliance of the draft law on freedom of information with article 19 of the Covenant, consider decriminalizing defamation, and ensure that journalists are protected from threats and harm. Also addressed was the widespread discriminatory attitudes towards lesbian, gay, bisexual and transgender (LGBT) persons, along with the limited access of persons with disabilities to education, health and social services because of discrimination and lack of adequate infrastructure to support persons with disabilities. Both of these issues were addressed as violations of article 20 of the Covenant, and the Committee urged the State party to address the stigmatization and marginalization of these groups of individuals, prosecute those who are perpetrators of such attacks against LGBT persons, and ensure that access to justice are available to both groups of individuals.

In the case of the Republic of Korea, the Committee addressed concerns about the National Security Law (NSL) in Korea, and the consensus concerning its alleged continued necessity for reasons pertaining to the maintenance of its national security. The restrictions that were placed on the freedom of expression based on this alleged need by the Republic of Korea was determined to be in conflict with article 19, article 3 of the Covenant. The concerns of the Committee are apparent and justified: there is a delicate balancing act when determining what amounts to a restriction on one's personal inherent right to speak, and the right of the State to self-protect. The Committee stated that the State party should as a matter of urgency ensure the compatibility of article 7 of the NSL with the requirements of the Covenant. The provisions of the NSL, the case law surrounding NSL and the views of the HRC regarding these cases can be found in the proceeding section of this paper.

Furthermore, in the HRC's 72nd Session, it concluded that there are various provision of the Press Law in the Democratic People's Republic of Korea that is similarly in direct conflict with article 19 of the Covenant. The HRC strongly expressed the following view with regard to the denial of foreign media representatives and foreign newspapers and publications not being permitted to be disseminated to the public at large, along with journalists being denied to travel abroad freely. It said that the State party should specify reasons that have led to the prohibition of certain publications and should refrain from measures that restrict the dissemination of publications, and should allow journalists the freedom to travel. The use of "threat to the State security" is not to be used haphazardly, without offering specific reasons for such reasoning when preventing publications and/or the travel of journalists abroad.

The 79th Session of the HRC offered concluding observations with regard to Sri Lanka's restrictions on privately disseminated radio and television programmes, despite the fact that the government had taken media-related initiatives to repeal laws that provide for State control of the media. The HRC strongly urged the State to protect media pluralism and avoid state monopolization of the media, which undermines the principle of freedom of expression embodied in the Covenant. Simiarly to the case of the Republic of Korea, the HRC was concerned about persistent reports that media personnel and journalists face harassment, and are being rejected or ignored by authorities in the State. The Committee urged the State to take sufficient steps to prevent these cases of harassment, and to ensure freedom of expression is honored.

Cases of persistent harassment and prevention of reporting by journalists in various countries persist across the Asian Pacific, including in Tajikistan, Thailand, Uzbekistan, Yemen, Mongolia, Lebanon, Kyrgyzstan, just to name a few countries. The HRC has condemned such acts of repression of expression by the States, and in doing so, has largely not addressed the link between incitement under article 20 and freedom of expression under article 19.

4. Some summaries of the Case law of the Human Rights Committee relating to Asian Pacific countries.

The Committee's case law on Asian Pacific countries deals largely with violations of Article 19 than express prohibitions of Article 20.

***Keun-Tae Kim v. Republic of Korea* (574/1994), CCPR, A/54/40 (3 November 1998)**

Mr. Keun-Tae Kim, a Korean citizen residing in Dobong-Ku, Seoul, Republic of Korea, was a founding member of the National Coalition for Democratic Movement (Chunminryum, hereinafter NCDM). Documents in which the Government of the Republic of Korea and its foreign allies were criticized, and in which there was a general appeal for national reunification, were drafted. These documents were subsequently distributed on 21 January 1989 at the inaugural meeting of the NCDM. It was read out to approximately 4,000 participants there. At the conclusion of the meeting, Mr. Kim was arrested. The state had argued that his statements were a threat to its national security because the country was in a state of war, and the material distributed coincided with the policy statement of the DPRK (North Korea).

The Human Rights Committee found that the facts revealed that there was a violation of article 19, paragraph 3, of the Covenant; Mr. Kim had been denied the right to freedom of expression which was not compatible with the Covenant. Further, the state failed to reveal clear indicators of how the publications would threaten public security, if at all.

***Yong-Joo Kang v. Republic of Korea* (878/1999), CCPR A/58/40 (15 July 2003)**

Mr. Yong-Joo Kang, a Korean citizen, was an opponent of the State's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others, and made and unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous

political, historical, economic and social issues. He was arrested in July 1985 without a warrant by the Agency for National Security Planning, and was held incommunicado and interrogated in ANSP detention. There, he suffered "torture and other mistreatments" for over 36 days. In August 1985, a judicial warrant was issued for his arrest. In September 1985, he was formally indicted for alleged violations of the National Security Law of 31 December 1980.[9] The allegation forwarded by the state was that Mr. Kang was a member of a spy ring, engaging in "enemy-benefitting activities" in favor of North Korea, gathering and divulging state or military secrets, and engaging in conspiracy. He was convicted in 1985 and in 1986 on those charges. He contended that his confessions had been obtained by torture, but the court convicted him, sentencing him to life imprisonment. Mr. Kung was held in solitary confinement, and was classified as a communist "confidential criminal."

The Human Rights Committee found that Mr. Kung's conviction was in violation of article 19, paragraph 1, as the "ideology conversion system" restricts freedom of expression, of manifestation of belief on the discriminatory basis of political opinion and of manifestation of belief on the discriminatory basis of political opinion.

***Tae Hoon Park v. Republic of Korea* (628/1995), CCPR, A/54/40 (20 October 1998)**

Mr. Tae-Hoon Park, a Korean citizen, was found guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law.[10] He was sentenced to one year's suspended imprisonment, and one year's suspension of exercising his profession. While he appealed to the Seoul High Court, he was conscripted into the Korean Army under the Military Service Act, following which the Seoul High Court transferred the case to the High Military Court of Army. There, the case was dismissed, and the Supreme court confirmed Mr. Park's conviction thereafter. His conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1980.[11]

The Human Rights Committee found that the state failed to specify the precise nature of the threat by Mr. Park's membership in the YKU. His conviction was thus regarded as a violation of

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[9] The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military coup d'etat. Forming or joining an "anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

[10] "(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than 7 years...
(3) Any person who has formed or joined the organization which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year...
(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

[11] The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

his right under article 19, paragraphs 1, 2 and 3. His arrest and conviction for acts of expression were in direct violation of the Covenant.

***Victor Ivan Majuwana Kankanamge v. Sri Lanka* (909/2000), CCPR, A/59/40 (27 July 2004)**

Mr. Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, was a journalist and editor of the newspaper "Ravaya." Since 1993, he has been indicted several times for allegedly having defamed ministers and high level officials of the police and other departments in articles and reports published in his newspaper. There were three indictments against the author, dated 26 June 1996 (Case Nr. 7962/96), 31 March 1997 (Case Nr. 8650/07), and 30 September 1997 (Case Nr. 9128/97), were pending before the High Court. In February 1998, Mr. Kankanamge applied to the Supreme Court for an order invalidating indictments, on the ground that they breached articles 12(1) and 14(1)(a) of the Sri Lankan Constitution, guaranteeing equality before the law and equal protection of the law, and the right to freedom of expression. In April 1998, the Supreme Court decided that author had not presented a prima facie case that the indictments were discriminatory, arbitrary or unreasonable; he was refused a leave to proceed with his application.

The Human Rights Committee found that the indictments against Mr. Kankanamge, all related to articles in which he allegedly defamed high State party officials, are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Thus, the Committee found that there was a breach of article 19, paragraphs 2 and 3, of the Covenant.

***Avon Lovell v. Australia* (920/2000), CCPR, C/80/D/920/2000 (24 March 2004)**

Avon Lovell, an Australian citizen, was retained as an industrial advocate by a trade union in 1992, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electric Division, Western Australia Branch (CEPU), when it became involved in industrial action against Hamersley Iron PTY Ltd. (Hamersley). Hamersley commenced civil proceedings in the Supreme Court of Western Australia against the CEPU, and a number of its officials, seeking injunctions and compensatory damages on a number of grounds. Hamersley was required to make available for discovery by the CEPU and its officials all relevant documents for which privilege could not be claimed. These documents were obtained and inspected by Mr. Lovell and the CEPU. Included were five documents, in relation to which Hamersley alleged that Mr. Lovell and the CEPU, by revealing their contents publicly in a radio interview, in newspaper articles and in a series of briefings prepared for distribution to members of the CEPU and other unions, and by using them contrary to the rules of discovery, had committed contempt of court. In May 1998, Mr. Lovell and the CEPU convicted at first impression in the Full Court of the Supreme Court of Western Australia (three judges) on two accounts of contempt of court.

Although the five documents were directed to be discovered on the application of Mr. Lovell and the CEPU, they were not allowed to be adduced in evidence with the result that they did not become part of the published record of the case. The restriction of the publication of these five documents into evidence, and thus made unpresentable in court as published evidence, is a

permissible restriction provided by the law of contempt of court and was necessary for achieving the aim of protecting the rights of others, i.e. Hammersley, or for the protection of public order. The Human Rights Committee accordingly concluded that the author's conviction for contempt was a permissible restriction of his freedom of expression, in accordance with article 19, paragraph 3, and that there had not been a violation of article 19, paragraph 2, of the Covenant.

***Patrick John Coleman v. Australia* (1157/2003), CCPR, A/61/40 (17 July 2006)**

Patrick John Coleman, an Australian national, delivered public address at the Flinders Pedestrian Mall, Townsville, Queensland, in December 1998, without a permit. He loudly spoke for some 15 to 20 minutes on a range of subjects including the bills of rights, freedom of speech and mining and land rights. He was charged under section 8(2)(e) of Townsville City Council Local Law No. 39 ("the bylaw"), for taking part in a public address in a pedestrian mall without a permit in writing from the town council.[12] In March 1999, he was convicted for delivery of an unlawful address, fined $300, and ordered to 10 days imprisonment on default, plus costs. Then, in June 1999, Queensland District Court dismissed his appeal against the conviction. In August 1999, Mr. Coleman again delivered a speech at the same pedestrian mall, and was arrested pursuant to a warrant for non-payment of the original fine within a three month period. He was held in police custody for five days for sitting on the ground and refusing voluntarily to accompany the police. He was also charged with obstructing police under section 120(1) of the Police Powers and Responsibilities Act 1997. In September 1999, he was transferred to Townsville Correctional Centre, and was released the same day. He was convicted and fined $400, with 14 days imprisonment on default, for obstruction of police in December 1999. The appeal was dismissed in November 2000, and the High Court denied his further application for special leave to appeal in June 2002.

The Human Rights Committee found that the State violated article 19, paragraphs 2 and 3, of the Covenant becuase the State's reactions in response to Mr. Coleman's conduct was disproportionate and amounted to a restriction of his freedom of speech, incompatible with article 19, paragraph 3, of the Covenant. Mr. Coleman's public address was on issues of public interest, not in opposition to public order.

***A.K. and A. R. v. Uzbekistan* (1233/2003), CCPR, A/64/40 (31 March 2009)**

A.K. and A.R., Uzbekistan citizens, were arrested in March 1999 because authorities discovered numerous publications and written materials on religious themes in A.K.'s brother's attic. This follows the following unrest in Uzbekistan. **In February 1999,** terrorist bombings took place in Tashkent, the capital of Uzbekistan. The government blamed them on the Islamic Movement of Uzbekistan, led by Mr. Tokhir Yuldashev and Mr. Zhumaboi Khodzhiev. It also held the international Sunni pan-Islamist political party, known as Hizb ut-Tahrir (Party of Liberation),

[12] Section 8 of the bylaw provided at the material time as follows: "(1) This bylaw does not apply to the setting up and use of booths for religious, charitable, educational or political purposes or of a booth to be used at or near a polling place for, or for a meeting in connection with, an election in respect of either House of the Commonwealth Parliament , the Legislative Assembly or a Local Authority. (2) No person shall ... (e) take part in any public demonstration or any public address. (3) A person who desires to obtain a permit for the purposes of this bylaw shall make application in writing therefore in the prescribed form. The application shall be lodged with the Council [which may grant a permit, with or without conditions, or refuse it] .....

responsible. In February 1999, the head of the investigations unit of the Samarkand Regional Prosecutor's Office requested an expert examination of exhibits relating to criminal cases involving various persons including Mr. Mamatov, who was mentioned by the Samarkand Regional Criminal Court, the court of first impression. Books, magazines and leaflets (in Arabic and Cyrillic scripts) found during searches of detainees homes [and other citizens] were submitted for expert examination by a group of specialists from Samarkand State University, to determine:
(1) whether they were "harmful" or "harmless";
(2) whether the acts in question constituted an offense; and,
(3) whether this written material was compatible with the Constitution.

A.K. and A.R. were arrested because the publications and written materials found in their possession promoted anti-constitutional activities to change the established order in Uzbekistan, argued the State. The State also argued that the written materials promoted ideas counter to Uzbek law, called for the establishment of an Islamic State, promoting ideology of religious fundamentalism and religious law, advocated for a recourse to violence as part of the "Jihoz," and promoted religious extremism and fundamentalism which threatened the public order and national security. Each party was subsequently sentenced to 16 years of imprisonment.

The Human Rights Committee found that this was a legitimate use of State power, and there was no violation of any of the articles in the International Covenant on Civil and Political Rights.[13]

***Anthony Michael Emmanuel Fernando v. Sri Lanka* (1189/2003), CCPR, A/60/40 (March 31, 2005)**

Mr. Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong, filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation for redress in respect to injuries related to a fall he suffered while he was an employee of the Young Men's' Christian Association (Y.M.C.A). In January 1998, he refused to accept the offered settlement. His claim was subsequently dismissed, so he filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. In November 2002 the Supreme Court considered the two motions jointly and dismissed them. In January 2003, he filed a third motion, claiming that the first two motions should not have been heard jointly, and consolidation violated his constitutional right to a "fair trial." Then, in January 2003, his motion was similarly dismissed. A fourth motion was filed in February 2003 to the Chief Justice of Sri Lanka. He claimed that the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. In February 2003, Mr. Fernando was summarily convicted of contempt of court and sentenced to one year of "rigorous imprisonment." Two weeks later, a "second"

[13] The Committee stated, "...it is apparent that the courts, while not explicitly addressing article 19 of the Covenant, were concerned with a perceived threat to national security (violent overthrow of the constitutional order) and to the rights of others. The Committee also notes the careful steps, in particular the consultation with the group of experts, engaged in by the judicial process."

contempt order was issued; he persisted in disturbing court proceedings.[14] In February 2003, he was transferred to a prison ward of the General Hospital due to medical issues; he was made to sleep on the floor with his leg chained, only permitted to move to go to the toilet and no family members were notified. In February 2003, he experienced severe pain all over his body and was not given medical attention. On the same day, he was returned to prison, where he was assaulted several times by prison guards during his transfer.[15] A fundamental rights petition was filed in March 2003 under 126 of the Constitution regarding the alleged torture, and an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction, including being subjected to a disproportionate sentence, was filed. The same three judges who had originally convicted him heard the appeal, and subsequently dismissed it on 17 July 2003.

The Human Rights Committee found that it did not need to consider whether or not there was a violation of article 19, because, under article 9, paragraph 1, author's detention was arbitrary and in violation of that article.

***Omar Sharif Baban, on his own behalf and on behalf of his son, Bawan Heman Baban, v. Australia* (1014/2001), CCPR, A/58/40 (August 8, 2003)**

Omar Sharif Baban, brings the communication on his own behalf and that of his son Bawan Heman Baban, also an Iraqi national of Kurdish ethnicity. Both were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia. In Iraq, Mr. O. Baban was an active member of the Patriotic Union of Kurdistan (PUK), was threatened by the Kurdistan Democratic Party (KDP) and had been the target of an Iraqi Mukhabarat agent sent to carry out assassinations in Northern Iraq. In June 1999, the Babans arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. In June 1999, they applied for refugee status, and in July 1999, O. Baban was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA). DIMA rejected the author's claim. In September 1999, the Refugee Review Tribunal

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[14] "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offense of contempt of Court and sentence him to one year rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit ....".
"Article 105 (3), provides that "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere: Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

[15] In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on Independence of the Judges and Lawyers, who expressed concern about the case.

(RRT) dismissed the author's appeal against DIMA's decision. DIMA advised his case did not satisfy requirements for an exercise of Minister's discretion to allow a person to remain in Australia on humanitarian grounds. In April 2000, the Federal Court dismissed his application for judicial review of decision. The two participated in hunger strike in a recreation room at Villawood Detention Centre, Sydney in July 2000, which were allegedly cut off from power and contact with the outside world. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. The hunger strikers (and the Mr. Baban's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia.[16] In August 2000, they were returned to the Villawood detention centre in Sydney to attend hearing in the Full Federal Court. When the Full Court of the Federal Court dismissed the men's further appeal in September 2000 against the Federal Court's decision, the authors lodged an application for special leave to appeal. They escaped from Villawood Detention Centre in June 2001, and there current precise whereabouts are unknown. In July 2001, the Registry of the High Court of Australia listed the Baban case for hearing on 12 October 2001. Then, in October 2001, the High Court adjourned hearing of the appeal until they were located.

The Human Rights Committee found that the State's contention that they were protecting other detainees from health complications by ending the hunger strike was legitimate; thus, Baban had not substantiated, for the purposes of admissibility, his claim of a violation of his rights under article 19 of the Covenant.

5. Conclusion

As this paper elucidates, some Asian Pacific countries have broadened the scope of Article 20 of the ICCPR in a manner that that does not meet the strict test under Article 19(3). It is also evident that the Asian Pacific national legal systems lack clearly formulated provisions for the protection of freedom of expression as required by article 19, and for the prohibition against incitement to hatred, as required by article 20. In addition, most of the case law relating to freedom of expression is concerned with political violations and restrictions of freedom of expression rather than expressly prohibiting incitement to national, racial and religious hatred. Therefore, it is evident that national legislation and case law should be drafted in a way that clearly links the prohibition of incitement to national, racial or religious hatred to freedom of expression. This would remove ambiguity in interpreting such legislation and provide a solid framework for enabling the provisions to be implemented most effectively.

[16] At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son was regularly fed from the day after arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied.