



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 – 30 July 2004

VIEWS

Communication No. 909/2000

Submitted by: Victor Ivan Majuwana Kankanamge
(represented by counsel, Mr. Suranjith
Richardson Kariyawasam Hewamanna)

Alleged victim: The author

State party: Sri Lanka

Date of initial communication: 17 December 1999 (initial submission)

Document references: Special Rapporteur's rule 91 decision,
transmitted to the State party on 20 January
2000. (not issued in document form)

CCPR/C/72/D/909/2000 – decision on
admissibility dated 6 July 2001.

Date of decision: 27 July 2004

On 27 July 2004, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 909/2000. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Eighty-first session

concerning

Communication 909/2000**

Submitted by: Victor Ivan Majuwana Kankanamge
(represented by counsel, Mr. Suranjith
Richardson Kariyawasam Hewamanna)

Alleged victim: The author

State party: Sri Lanka

Date of initial communication: 17 December 1999 (initial submission)

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

Meeting on 27 July 2004,

Having concluded its consideration of communication No. 909/2000, submitted to the Human Rights Committee by Victor Ivan Majuwana Kankanamge, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication, dated 17 December 1999, is Mr. Victor Ivan Majuwana Kankanamge, a Sri Lankan citizen, born on 26 June 1949, who claims to be a victim of a violation by Sri Lanka of articles 2 (3), 3, 19 and 26 of the Covenant. The communication also appears to raise issues under article 14(3)(c). The author is represented by counsel.

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Ms. Ruth Wedgwood.

1.2 The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 11 June 1980 and 3 January 1998 respectively. Sri Lanka also made a declaration according to which “[t]he Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date. The Democratic Socialist Republic of Sri Lanka also proceeds on the understanding that the Committee shall not consider any communication from individuals unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement”.

1.3 On 17 April 2000, the Committee, acting through its Special Rapporteur for new communications, decided to separate the examination of the admissibility from the merits of the case.

The facts as presented by the author

2.1 The author is 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. He claims that these indictments were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka’s High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, 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.

2.3 On 16 February 1998, the author applied to the Supreme Court for an order invalidating these 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 the same application, the author sought an interim order from the Supreme Court to suspend the indictments, pending the final determination of his application. On 3 April 1998, the Supreme Court decided that the author had not presented a *prima facie* case that the indictments were discriminatory, arbitrary or unreasonable, and refused him leave to proceed with the application.

The Complaint

3.1 The author claims that by transmitting to the High Court indictments charging him with defamation, the Attorney-General failed to properly exercise his discretion under statutory guidelines (which require a proper assessment of the facts as required in law for criminal defamation prosecution), and therefore exercised his power arbitrarily. By doing so, the Attorney-General violated the author's freedom of expression under article 19 of the Covenant, as well as his right to equality and equal protection of the law guaranteed by article 26.

3.2 The author also claims that his rights under article 2, paragraph 3, of the Covenant were violated because the Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

3.3 Finally, the author claims a violation of article 3, but offers no explanation of that claim.

State party's observations on admissibility

4.1 On 17 March 2000, the State party provided observations only on the admissibility of the communication, as authorized by the Committee's Special Rapporteur on Communications pursuant to rule 91 (3) of the Committee's Rules of Procedure.

4.2 The State party considers the communication inadmissible because it relates to facts that occurred before the Optional Protocol entered into force for Sri Lanka, that is 3 January 1998. Moreover, upon ratification of the Protocol, Sri Lanka entered a reservation by which the State party recognized the competence of the Committee to consider communications from authors who claim to be victims of a violation of the Covenant only as a consequence of acts, omissions, developments or events that occurred after 3 January 1998. The State party submits that, since the alleged violations of the Covenant were related to indictments that were issued by the Attorney-General prior to that date, the claims are covered by the reservation and therefore inadmissible.

4.3 The State party contends that article 19(3) of the Covenant does not support the author's claim of a violation, because under that provision the exercise of the rights protected carries with it special duties and responsibilities and may be subject to restrictions provided by law which are necessary for the respect of the rights or reputations of others.

4.4 The State party argues that the author has not exhausted all available domestic remedies, which would have included representations to the Attorney-General regarding the indictments, or complaining to the Parliamentary Commissioner for Administration (the Ombudsman) or the National Human Rights Commission.

4.5 Finally, the State party considers that the author cannot invoke the jurisdiction of the Committee under article 2 (3) of the Covenant, because he has not established a violation of any of the rights under the Covenant for which remedies are not available under the Sri Lankan Constitution.

Comments by the author

5.1 On 16 June 2000, the author responded to the State party's observations. On the competence of the Committee *ratione temporis*, and the State party's reservation on the entry into force of the Optional Protocol, he recalls the Human Rights Committee's General Comment No. 24, according to which "the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date". He affirms that the violations he has alleged are continuing violations, so that the Committee has competence *ratione temporis*.

5.2 By reference to paragraph 13 of General Comment No. 24, the author argues that even acts or events that occurred prior to the entry into force of the Optional Protocol for the State party should be admitted as long as they occurred after the entry into force of the Covenant for the State party.

5.3 On the State party's argument that the complaint should be rejected as inadmissible because the restrictions under article 19 (3) of the Covenant are attracted, the author replies that this is not an objection to admissibility but addresses the merits of the communication.

5.4 On the issue of exhaustion of domestic remedies, the author affirms that the Supreme Court is the only authority with jurisdiction to hear and make a finding on infringements of fundamental rights by executive or administrative action. As to representations to the Attorney-General, the author notes that there is no legal provision for making such representation once indictments have been filed, and in any case such representations would not have been effective since the Attorney General was himself behind the prosecutions. As regards a complaint to the Ombudsman or the National Human Rights Commission, the author stresses that these bodies are appointed by the President of Sri Lanka, and that they are vested only with powers of mediation, conciliation and recommendations but have no powers to enforce their recommendations. Only the Supreme Court is vested with the power to act on his complaint and to grant effective redress.

5.5 In relation to the State party's argument on article 2, paragraph 3, of the Covenant the author argues that a State party cannot invoke its internal laws as a reason for non-compliance with obligations under the Covenant.

Decision on admissibility

6.1 At its 72nd session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the facts that were submitted to it.

6.2 The Committee noted that the State party contested the Committee's competence *ratione temporis* because, upon acceding to the Optional Protocol, Sri Lanka had entered a declaration restricting the Committee's competence to events following the entry into force of

the Optional Protocol. In this respect, the Committee considered that the alleged violations had continued. The alleged violations had occurred not only at the time when the indictments were issued, but were continuing violations as long as there had not been a decision by a Court acting on the indictments. The consequences of the indictments for the author continued, and indeed constituted new alleged violations so long as the indictments remained in effect.

6.3 As regards the State party's claim that the communication was inadmissible because the author had failed to exhaust domestic remedies, the Committee recalled that the Supreme Court is the highest court of the land and that an application before it constituted the final domestic judicial remedy. The State party had not demonstrated that, in the light of a contrary ruling by the Supreme Court, making representations to the Attorney-General or complaining to the Ombudsman or to the National Human Rights Commission would constitute an effective remedy. The Committee therefore found that the author had satisfied the requirement of article 5, paragraph 2 (b) of the Optional Protocol and declared the communication admissible on 6 July 2001.

6.4 On 6 July 2001, the Committee declared the communication admissible. Whilst it specifically determined that the author's claims under articles 2(3) and 19 should be considered on the merits, it left open the possibility of considering the author's other claims under articles 3, 14(3)(c) and 26.

State party's observations on the merits

7.1 On 4 April 2002, the State party commented on the merits of the communication.

7.2 The State party draws attention to the fact that the indictments challenged by the author in his application to the Supreme Court were served during the term of office of two former Attorneys-General. It makes the following observations on certain aspects of the indictments in question:

-Regarding indictment Nr. 6774/94 of 26 July 1994, further to an article written about the Chief of the Sri Lankan Railway, the State party notes that this indictment was withdrawn and could not be challenged before the Supreme Court, because it had been issued by a different Attorney-General than the one in office at the time of the application to the Supreme Court.-Regarding indictment Nr. 7962/96 of 26 June 1996, which related to an article about the Minister of Fisheries, the State party notes that the information on which the article was based was subject to an official investigation, which allegedly confirmed the veracity of the information in question. This was never presented to the Attorney-General and could still be transmitted with a view to securing a withdrawal of the indictment.-Regarding indictment Nr. 9128/97 of 30 September 1997, which related to an article about the Inspector General of Police (IGP) and to the alleged shortcomings of a criminal investigation in a particular case, the State party contends that the prosecution acted properly, in the best interest of justice, and in accordance with the relevant legal procedures.

7.3 The State party notes that, in addition to those complaints which led to criminal proceedings, there were 9 defamation complaints filed against the author between 1992 and 1997 in relation to which the Attorney-General decided *not* to issue criminal proceedings.

7.4 The State party underlines that the offence of criminal defamation, defined in section 479 of the Penal Code, may be tried summarily before the Magistrate's Court or the High Court, but no prosecution for this offence may be instituted by the victim or any other person, except with the approval of the Attorney-General. Moreover, for such an offence, the Attorney General has the right, in accordance with section 393 (7) of the Code of Criminal Procedure, to file an indictment in the High Court or to decide that non-summary proceedings will be held before the Magistrate's Court, "having regard to the nature of the offence or any other circumstances". The Attorney-General thus has a discretionary power under this provision.

7.5 The State party considers that, in the present case, the Attorney-General acted in accordance with the law and his duty was exercised "without any fear or favour", impartially and in the best interest of justice.

7.6 Regarding the Supreme Court's jurisdiction, the State party recalls that leave to proceed for an alleged breach of fundamental rights is granted by at least two judges and that the author was given an opportunity to present a *prima facie* case of the alleged violations complained about. The Supreme Court, after exhaustively analyzing the discretionary power of the Attorney-General and examining the material submitted to it in respect of the numerous complaints against the author, was of the opinion that the indictments served on the author were not arbitrary and did not constitute a continued harassment or an intention to interfere with his right to freedom of expression. In this connection, it took into account four previous indictments against the author, and concluded that they did not amount to harassment, because three were withdrawn or discontinued, and there was nothing to suggest any impropriety on the part of the prosecution. Moreover, during the same period, the Attorney General had refused to take action on nine other complaints referred to in 7.3 above.

Author's comments

8.1 By submission of 17 June 2002, the author contended that the State party avoided the main issue of his complaint, failing to explain why the Attorney General decided to file direct indictments in the High Court. In his opinion, the essence of the complaint is that, from 1980, the State party's government favoured important officials by prosecuting those critical of their actions for defamation – a minor offence otherwise triable by a magistrate - directly in the High Court. In the author's case, while conceding that the Attorney General's discretion was not absolute or unfettered, the Supreme Court did not call the Attorney General to explain why he sent these indictments to the High Court. The Supreme Court carefully examined the three contested indictments and summarily refused leave to proceed to his application, which deprived him of the opportunity to establish a breach of the rights to equality and freedom of expression. The author considers that the Supreme Court overlooked that the media exercise their freedom of expression in trust for the public, and that heads of government and public officials are liable to greater scrutiny.

8.2 The author considers that, in its comments on the merits, the State party failed to explain why it believed that the Attorney General acted "without fear or favour", in the best interest of justice and why a direct indictment was preferred to a non summary inquiry.

8.3 The author considers that in examining defamation charges, the following elements are relevant:

- The offence is normally tried in the Magistrate Court;
- The Attorney General's approval is required for filing defamation proceedings in the Magistrate Court;
- The offence is amenable for settlement when tried before the Magistrate Courts but not before the High Court;
- Finger printing is only done after conviction in the Magistrate Court while it is done in the High Court when the indictment is served – the author was finger printed in the course of each of the proceedings against him.

8.4 The author finally submits that the 9 cases referred to by the State party in which the Attorney General declined prosecution is no argument in support of the impartiality of the Attorney General, since the complainants in these other cases were either not influential, or were opponents to the government.

8.5 On 25 June 2004, the author's counsel advised that the outstanding indictments had been withdrawn.

Reconsideration of admissibility and examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol. It considers that no information has been offered by the author in support of his claim of a violation of article 3, and accordingly declares this part of the communication inadmissible for lack of substantiation under article 2 of the Optional Protocol.

9.2 On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997, and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant.

9.3 Regarding the author's claim that the indictments pending against him in the High Court constitute a violation of article 19 of the Covenant, the Committee has noted the State party's arguments that, when issuing these indictments, the Attorney General exercised his power under section 393 (7) of the Code of Criminal Procedure "without any fear or favour", impartially and in the best interest of justice.

9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3(c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2(3).

9.5 In light of the Committee's conclusions above, it is unnecessary to consider the author's remaining claims.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2(3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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