CHILDREN'S RIGHTS - GENERAL

III. JURISPRUDENCE

ICCPR

- *Campbell v. Jamaica* (307/1988), ICCPR, A/48/40 vol. II (24 March 1993) 41 (CCPR/C/47/D/307-1988) at para. 6.4 and Individual Opinion of Mr. Bertil Wennergren, 46.

...
6.4 Article 14 of the Covenant gives everyone the right to a fair and public hearing in the determination of a criminal charge against him; an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence. The Committee observes that the detention of witnesses in view of obtaining their testimony is an exceptional measure, which must be regulated by strict criteria in law and in practice. It is not apparent from the information before the Committee that special circumstances existed to justify the detention of the author's minor child. Moreover, in the light of his retraction, serious questions arise about possible intimidation and about the reliability of the testimony obtained under these circumstances. The Committee therefore concludes that the author's right to a fair trial was violated.
...
Individual Opinion of Mr. Bertil Wennergren...

... [M]y reasons for finding a violation of the author's right to a fair trial differ from those explained by the Committee in paragraph 6.4 of the views.

Article 14, paragraph 1, of the Covenant entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law. Paragraph 3 of the same article contains further guarantees for those charged with a criminal offence. In the present context, one may recall article 14, paragraph 3 (e), which guarantees that an accused shall have the right, in full equality, to examine or have examined, the witnesses against him and to obtain the attendance and the examination of witnesses on his behalf under the same conditions as witnesses against him. In my opinion, however, the issue in this case is not whether the principle of equality of arms was violated with respect to hearing the author's son Wayne as a witness, but whether his examination was compatible with the principles of due process of law and fair trial. It must be recalled first that, when Wayne was heard as a witness by the court, he was merely 13 years of age, and he was expected to truthfully recount an event which had occurred nearly three years earlier, when he was 10, and which might seriously incriminate his father. Secondly, measures of coercion were employed against him to make him testify and otherwise comply with his obligations as a witness.

Although most legal systems provide for the possibility of hearing children as witnesses in

court, it is generally understood that particular care must be exercised in view of the vulnerability of children. Measures must be taken to ensure that a child is stable and mature enough to withstand the pressures and the stress that witnesses in a criminal case may encounter. If a hearing is considered necessary and may be carried out without risk for the child's well-being, every effort must be made to conduct the hearing in as considerate and sympathetic a way as possible. In the same context, it should be recalled that article 24 of the Covenant entitles every child to such measures of protection as are required by his status as a minor.

...Some legal systems exempt individuals from the obligation to testify against close relatives, the rationale being that an obligation to testify would be inhuman and thus unacceptable. Due to the lack of a generally recognized principle in this respect, however, I cannot rule out as inadmissible the hearing of Wayne as a witness simply because he was the son of the accused.
...
Testimony in a court of law is civic duty and all legal systems provide for certain coercive measures to guarantee compliance with that duty. Subpoena and imprisonment are the most common coercive measures and should be used for the equal benefit of the prosecution and the defence, whenever deemed necessary for the presentation of evidence to the jury which, on the basis of such evidence, must determine guilt or innocence of the accused. In its views, the Committee observes that the detention of witnesses is an exceptional measure, which must be regulated by strict criteria in practice and in law, and that it is not apparent that special circumstances existed in the author's case the detention of a 13-year old. For me, it is difficult to imagine circumstances that would justify a child's detention in order to compel him to testify against his father. In any event, this case in no way discloses such special circumstances; the judge therefore must be deemed to have violated the principle of due process of law, and the requirements of a fair hearing under article 14, paragraph 1. The violation was in fact the violation of the rigfhts of a witness, but its negative impact on the conduct of the trial was such that it rendered it unfair within the meaning of article 14, paragraph 1, of the Covenant.

- *Santacana v. Spain* (417/1990), ICCPR, A/49/40 vol. II (15 July 1994) 101 (CCPR/C/51/D/417/1990) at paras. 10.1, 10.5 and 11.

...
10.1 On the merits, the questions before the Committee concern the scope of articles 23, paragraphs 1 and 4, and 24, paragraph 1, i.e. whether these provisions guarantee an unqualified right of access for a divorced or separated parent, or not, and a child's right to have contact with both parents...
...
10.5 The author has claimed a violation of article 24, paragraph 1, since his daughter, as a

minor, has not benefitted from the appropriate measures of protection, by law or otherwise, on the part of her family and the State. The Committee cannot share this conclusion. On the one hand, the girl's mother has, on the basis of the available documentation, fulfilled her obligations as custodian of the child; secondly, there is no indication that the applicable Spanish law, in particular Sections 154, 156, 159 and 160 of the Civil Code, do not provide for appropriate protection of children upon dissolution of a marriage or the separation of unmarried parents.

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11. The Human Rights Committee...is of the view that the facts before it do not reveal a breach by the State party of any of the provisions of the Covenant.

- *Mónaco et al. v. Argentina* (400/1990), ICCPR, A/50/40 vol. II (3 April 1995) 10 (CCPR/C/53/D/400/1990) at paras. 2.1-2.4, 10.3-10.5, 11.1 and 11.2.

...

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents...

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en

lo Criminal y Correccional Federal of Buenos Aires...

...

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986, 4/ and the Committee is not in a position *ratione temporis* to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994,

and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24, 5/ in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

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11.1 The Human Rights Committee...is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

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4/ See the Committee's decision on admissibility concerning Communication No. 275/1988, *S. E. v. Argentina*, declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3.

5/ General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.

- *Celis Laureano v. Peru* (540/1993), ICCPR, A/51/40 vol. II (25 March 1996) 108 (CCPR/C/56/D/540/1993) at paras. 8.7, 9 and 10.

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8.7 The author has claimed a violation of article 24, paragraph 1, as the State party failed to protect his granddaughter's status as a minor. The Committee notes that during the investigations initiated after the author's initial detention by the military, in June 1992, the

judge on the civil court of Huacho ordered her provisional release because she was a minor. However, subsequent to her disappearance in August 1992, the State party did not adopt any particular measures to investigate her disappearance and locate her whereabouts to ensure her security and welfare, given that Ms. Laureano was under age at the time of her disappearance. It concludes that, in the circumstances, Ms. Laureano did not benefit from such special measures of protection she was entitled to on account of her status as a minor, and that there has been a violation of article 24, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations of articles 6, paragraph 1; 7; and 9, paragraph 1, all *juncto* article 2, paragraph 1; and of article 24, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the victim and the author with an effective remedy. The Committee urges the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary.

- *Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.3 and 9.

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2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.1/

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.2/ His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity,

because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.3/ On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.4/

...

8.3 The author has raised a...claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there

were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

3/ No further details have been provided on of the type of detention facility nor on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.
