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III. JURISPRUDENCE

ICCPR

- *Carballal v. Uruguay* (R.8/33), ICCPR, A/36/40 (27 March 1981) 125 at para. 11.

  ...
  11. The Human Rights Committee has considered whether acts and treatment which *prima facie* are not in conformity with the Covenant could, for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the "prompt security measures". The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submission of fact or law to justify derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances.

See also:
- *Perdomo v. Uruguay* (R.2/8), ICCPR, A/35/40 (3 April 1980) 111 at para. 15.
- *Ramírez v. Uruguay* (R.1/4), ICCPR, A/35/40 (23 July 1980) 121 at para. 17.
- *Seqeira v. Uruguay* (R.1/6), ICCPR, A/35/40 (29 July 1980) 127 at para. 14.
- *Motta v. Uruguay* (R.2/11), ICCPR, A/35/40 (29 July 1980) 132 at para. 15.
- *Weinberger v. Uruguay* (R.7/28), ICCPR, A/36/40 (29 October 1980) 114 at para. 14.
- *Burgos v. Uruguay* (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at para. 11.6.

- *de Montejo v. Colombia* (R.15/64), ICCPR, A/37/40 (24 March 1982) 168 at para.10.3.

  ...
  10.3 In the specific context of the present communication there is no information to show that article 14 (5) was derogated from in accordance with article 4 of the Covenant; therefore the Committee is of the view that the State party, by merely invoking the existence of a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenant, the State party is on duty bound, when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned.

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- *Gutiérrez Vivanco v. Peru* (678/1996), ICCPR, A/57/40 vol. II (26 March 2002) 46 (CCPR/C/74/D/678/1996) at para. 7.1 and Individual Opinion by Mr. Ivan Shearer.

...

7.1 The author maintains that there has been a violation of article 14 (1) because the trial at which he was convicted of a terrorist offence was not conducted with due guarantees: the proceedings took the form of private hearings in a court composed of faceless judges; he could not summon as witnesses the police officers who arrested and interrogated him or question other witnesses during the oral stage of the proceedings, because the law does not allow this; his right to have a lawyer of his choice was restricted; and the government prosecutor was obliged by law to bring charges against the prisoner. The Committee takes note of the State party's declaration that the trial was conducted with minimum guarantees, since these are contained in the pre-established procedures and the author was tried in accordance with these procedures. Nevertheless, the Committee recalls its decision in the *Polay Campos v. Peru* case 6/ regarding trials held by faceless courts, and trials in prisons to which the public are not admitted, at which the defendants do not know who are the judges trying them and where it is impossible for the defendants to prepare their defence and question witnesses. In the system of trials with "faceless judges" neither the independence nor the impartiality of the judges is guaranteed, which contravenes the provisions of article 14 (1) of the Covenant.

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Notes

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6/ Communication No. 577/1994, Views of 6 November 1997.

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Individual Opinion by Mr. Ivan Shearer

I have joined the Views of the Committee in this case. However, I think it desirable to make clear that the Committee has not condemned the practice of "faceless justice" in itself, and in all circumstances. The practice of masking, or otherwise concealing, the identity of judges in special cases, practised in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime, may become a necessity for the protection of judges and of the administration of justice. When States parties to the Covenant are faced with this extraordinary situation they should take the steps set out in article 4 of the Covenant to derogate from their obligations, in particular those arising from article 14, but only to the extent strictly required by the exigencies of the situation. These statements of derogation should be communicated to the Secretary-General of the United Nations in the manner provided in that article. In formulating any necessary statements the States parties should have regard to General Comment No. 29 (States of Emergency) adopted by the Committee on 24 July 2001. In the present case the State party presented no observations on

the claims of the author based on any situation of emergency. Nor had the State party made any declarations of derogation under article 4 of the Covenant. Hence those possible aspects of the case did not arise for determination.

- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1, 2.2, 5.2 and 6.1.

...
2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

> "The President of the Republic;
>
> Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;
>
> Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;
>
> Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;
>
> Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;
>
> Having regard to urgency, necessity and appropriateness;
>
> On the proposals of the Minister of Justice;
>
> Hereby decrees:
>
> Article 1:
>
> The following individuals are dismissed from their functions as judges...".

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2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report1/ by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

...

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999...and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant...

...

6.1 The Human Rights Committee...is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

Notes

1/ The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of

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Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

CAT

- *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at para. 13.8.

...
13.8 The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, owing to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy the requirements of article 3 of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.