LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

III. JURISPRUDENCE

ICCPR

- *Perdomo v. Uruguay* (R.2/8), ICCPR, A/35/40 (3 April 1980) 111 at paras. 14 and 16.

...

14. The Committee...decides to base its views on the following considerations:

> (i) Alcides Lanza Perdomo was arrested for investigation on 2 February 1976 and detained under the prompt security measures as stated by the Government. He was kept *incommunicado* for many months. It is not in dispute that he was kept in detention for nearly eight months without charges, and later for another 13 months, on the charge of "subversive associations" apparently on no other basis than his political views and connections. Then, after nearly 21 months in detention, he was sentenced for that offence by a military judge to three years severe imprisonment, less the period already spent in detention. Throughout his period of detention and during his trial he had no effective access to legal assistance...
>
> (ii) Beatriz Weismann de Lanza was arrested for investigation on 17 February 1976 and detained under the prompt security measures, as stated by the Government. She was kept *incommunicado* for many months. It is not in dispute that she was kept in detention for more than seven months without charges, and later, according to the information provided by the Government, she was kept in detention for over 18 months (28 September 1976 to April 1978) on the charge of "assisting a subversive association", apparently on similar grounds to those in the case of her husband. She was tried and sentenced in April 1978 by a military judge, at which time her offence was deemed to be purged by the period spent in custody pending trial. She was, however, kept in detention until 11 February 1979. Throughout her period of detention and during her trial she had no effective access to legal assistance...

...

16. The Human Rights Committee...is of the view that the facts...disclose violations of the International Covenant on Civil and Political Rights, in particular...of article 14 (1), (2) and (3) because they had no effective access to legal assistance, they were not brought to trial within a reasonable time, and further because they were tried in circumstances in which irrespective of the legislative provisions they could not effectively enjoy the safeguards of fair trial.

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- *Sequeira v. Uruguay* (6/1977)(R.1/6), ICCPR, A/35/40 (29 July 1980) 127 at paras. 12 and 16.

  ...
  12. The Human Rights Committee...hereby decides to base its views on the following facts, which have not been contradicted by the State party:

  Miguel Angel Millin Sequeira, 20 years old at the time of the submission of the communication in 1977, was arrested in April and released in May 1975, He was rearrested on 18 September 1975 and detained until he escaped from custody on 4 June 1976. On both occasions he was told that the reason for his arrest was that he was suspected of being "a militant communist". Although brought before a military judge on three occasions, no steps were taken to commit him for trial or to order his release. He did not have access to legal assistance and was not afforded an opportunity to challenge his arrest and detention.
  ...
  16. The Human Rights Committee...is of the view that these facts...disclose violations of the Covenant, in particular of:
  ...
  Article 14 (1) and (3), because he had no access to legal assistance, was not brought to trial without undue delay, and was not afforded other guarantees of due process of law.

See also:

- *Ramírez v. Uruguay* (R.1/4), ICCPR, A/35/40 (23 July 1980) 121 at paras. 15 and 18.
- *Muteba v. Zaire* (124/1982) (R.26/124), ICCPR, A/39/40 (24 July 1984) 182 at paras. 10.2 and 12.

- *Weinberger v. Uruguay* (R.7/28), ICCPR, A/36/40 (29 October 1980) 114 at paras. 12 and 16.

  ...
  12. The Committee...decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Ismael Weinberger Weisz was arrested at his home in Montevideo, Uruguay, on 25 February 1976 without any warrant of arrest. He was held *incommunicado* at the prison of "La Paloma" in Montevideo for more than 100 days and could be visited by family members only 10 months after his arrest...Ismael Weinberger was first brought before a judge and charged on 16 December 1976, almost 10 months after his arrest. On 14 August 1979, three and a half years after his arrest, he was sentenced to eight years of imprisonment by the Military judge of the Court

of First Instance for "subversive association"...Ismael Weinberger was not granted the assistance of counsel during the first 10 months of his detention. Neither the alleged victim not his counsel had the right to be present at the trial, the proceedings being conducted in writing. The judgement handed down against him was not made public...

...

16. The Human Rights Committee...is of the view that these facts, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose violations of the Covenant, in particular of:

...

Article 14 (3), because he did not have access to legal assistance during the first 10 months of his detention and was not tried in his presence...

See also:

- *Pietraroia v. Uruguay* (R.10/44), ICCPR, A/36/40 (27 March 1981) 153 at paras. 13.1, 13.2 and 17.

- *Carballal v. Uruguay* (R.8/33), ICCPR, A/36/40 (27 March 1981) 125 at paras. 9 and 13.

  ...

  9. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties...hereby decides to base its views on the following facts which have been essentially confirmed by the State party, are unrefuted or are uncontested, except for denials or a general character offering no particular information or explanation. Leopoldo Buffo Carballal was arrested on 4 January 1976 and held *incommunicado* for more than five months, much of the time tied and blindfolded, in several places of detention. Recourse to *habeas corpus* was not available to him. He was brought before a military judge on 5 May 1976 and again on 28 June or 28 July 1976, when an order was issued for his release. He was, however, kept in detention until 26 January 1977.

  ...

  13. The Human Rights Committee...is of the view that these facts...disclose violations of the Covenant, in particular:

  ...

  of article 14(3), because the conditions of his detention effectively barred him from access to legal assistance.

- *Tourón v. Uruguay* (R.7/32), ICCPR, A/36/40 (31 March 1981) 120 at paras. 8 and 12.

  ...

  8. The Human Rights Committee, considering the present communication in the light of all

information made available to it by the parties...hereby decides to base its views on the following facts which have either been essentially confirmed by the State party, or are unrefuted: Luis Tourón was arrested on 21 January 1976 and was detained *incommunicado* from the date of his arrest until August 1976 when he was brought before a judge and formally charged with the offence of "subversive association" and "conspiracy to overthrow the Constitution followed by preparatory acts." It was not until then that he was afforded the right to have the assistance of counsel. He was not allowed to be present at his trial or to defend himself in person. There was no public hearing, and judgement was not delivered in public...

...

12. ...[T]he Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, in particular:

> ...
> of article 14(3) because he did not have access to legal assistance during the first seven months of his detention and was not tried in his presence.

- *Burgos v. Uruguay* (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at paras. 10.1, 10.2, 11.5 and 13.

...

10. The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties...The Committee bases its views *inter alia* on the following undisputed facts:

10.2 Sergio Rubén López Burgos was living in Argentina as a political refugee until his disappearance on 13 July 1976; he subsequently reappeared in Montevideo, Uruguay, not later than 23 October 1976, the date of his purported arrest by Uruguayan authorities, and was detained under "prompt security measures." On 4 November 1976 pre-trial proceedings commenced when the second military examining magistrate charged him with the offence of "subversive association", but the actual trial began in April 1978 before a military court of first instance, which sentenced him on 8 March 1979 to seven years' imprisonment...

...

11.5 ...The State Party has stated that López Burgos was not prevented from choosing his own legal counsel. It has not, however, refuted witness testimony indicating that López Burgos and others arrested with him, including Monica Soliño and Inés Quadros, whose parents are attorneys, were forced to agree to *ex officio* legal counsel.

...

13. The Human Rights Committee...is of the view that the communication discloses violations of the Covenant, in particular:

...
of article 14(3) (d) because López Burgos was forced to accept Colonel Mario Rodríguez as his legal counsel.

See also:

- *Viana v. Uruguay* (110/1981) (R.25/110), ICCPR, A/39/40 (29 March 1984) 169 at paras. 13.2 and 15.

- *Casariego v. Uruguay* (R.13/56), ICCPR, A/36/40 (29 July 1981) 185 at paras. 9 and 11.

...
9. On 12 November 1978 Lilian Celiberti de Casariego was arrested in Porto Alegre (Brazil) together with her two children and with Universindo Rodriguez Diaz. The arrest was carried out by Uruguayan agents with the connivance of two Brazilian police officials...She was forcibly abducted into Uruguayan territory and kept in detention...On 23 March 1979, she was charged with "subversive association", "violation of the Constitution by conspiracy and preparatory acts thereto", and with other violations of the Military Penal Code in conjunction with the ordinary Penal Code. She was ordered to be tried by a Military Court. She was ordered to be kept in "preventive custody" and assigned an *ex officio* defense lawyer.
...
11. The Human Rights Committee...is of the view that the facts as found by the Committee, disclose violations of the International Covenant on Civil and Political Rights, in particular of:

...
Article 14 (3) (b), because she had no counsel of her own choosing...

See also:

- *Izquierdo v. Uruguay* (R.18/73), ICCPR, A/37/40 (1 April 1982) 179 at paras. 7.2-7.7 and 9.

- *Setelich/Sendic v. Uruguay* (R.14/63), ICCPR, A/37/40 (28 October 1981) 114 at paras. 16.2 and 20.

...
16.2 ...[The author] was sentenced to 30 years' imprisonment plus 15 years of special security measures. He was not informed of the charges brought against him. He was never able to contact the lawyer assigned to him, Mr. Almicar Perrea. His trial was held in camera and in his absence and he was not allowed to present witnesses in support of his case...
...

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20. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly:

> ...
> of article 14 (3) (b) because he was unable either to choose his own counsel or communicate with his appointed counsel and was, therefore, unable to prepare his defence;
> ...
> of article 14 (3) (d) because he was unable to attend the trial at first instance...

- *Simones v. Uruguay* (R.17/70), ICCPR, A/37/40 (1 April 1982) 174 at paras. 11.2 and 12.

...
11.2 Mirta Cubas Simones was arrested on 27 January l976, without any warrant for her arrest, in her family's home, in the presence of her mother and her sister. For the subsequent three months she was held incommunicado at an unknown place. During this time the Uruguayan authorities denied her detention. In July 1976, five months after her arrest, Mirta Cubas Simones was brought to trial and charged with the offence of "aiding a conspiracy to violate the law" (*asistencia a la asociacion para delinquir*) and a three-year prison sentence was requested by the public prosecutor. Upon appeal to the Supreme Military Tribunal in August 1978, she was charged in addition with the offence of "subversion", and the public prosecutor asked for the sentence to be increased to six years. Judgement was pronounced on 2 October 1979. In November 1979 a plea was made on her behalf that the sentence be reduced. This plea was rejected by the Supreme Military Tribunal. Mirta Cubas Simones was tried *in camera*, the trial was conducted without her presence and the judgement was not rendered in public. She was assigned a court-appointed military defence counsel whom she was unable to consult. The Committee further notes that the State party did not comply with the Committee's request to enclose copies of any court order or decisions of relevance to the matter under consideration. For all these reasons the Committee is unable to accept that Mirta Cubas Simones had a fair trial...

12. Accordingly, the Human Rights Committee...is of the view that the facts as found by it...disclose the following violations of the Covenant, in particular:

> ...
> of article 14 (3) (b), because she was unable to communicate with her court-appointed defence lawyer and therefore did not have adequate facilities for the preparation of her defence;
>
> of article 14 (3) (d), because she was not tried in her presence.

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See also:

- *Estrella v. Uruguay* (74/1980) (R.18/74), ICCPR, A/38/40 (29 March 1983) 150 at paras. 8.6 and 10.
- *Wolf v. Panama* (289/1988), ICCPR, A/47/40 (26 March 1992) 277 at para. 6.3.

- *Marais v. Madagascar* (49/1979) (R.12/49), ICCPR, A/38/40 (24 March 1983) 141 at paras. 17.3, 17.4 and 19.

...

17.3 Dave Marais' first attorney, Jean-Jacques Natai, left Madagascar; he was subsequently refused re-entry into Madagascar. Later Maître Eric Hamel became the defence attorney for Dave Marais. Although Maître Hamel obtained a permit from the Examining Magistrate to see his client, he was repeatedly prevented from doing so. From December 1979 to May 1981, Dave Marais was unable to communicate with Maître Hamel and to prepare his defence, except for two days during the trial itself. On 11 February 1982, Malagasy political police authorities arrested Maître Hamel, detained him in the basement of the Ambohibao political police prison and, subsequently, expelled him from Madagascar, thereby further impairing his ability effectively to represent Dave Marais.

17.4 In December 1979, Dave Marais was transferred from the Antananarivo Prison to a cell measuring lm by 2m in the basement of the political police prison at Ambohibao and has been held *incommunicado* ever since, except for two brief transfers to Antananarivo for trial proceedings.

...

19. ...The Committee is of the view that the communication discloses violations of the Covenant, in particular,

> ...
>
> of article 14 (3) (b) and (d), because he has been denied adequate opportunity to communicate with his counsel, Maître Hamel, and because his right to the assistance of his counsel to represent him and prepare his defence has been interfered with by Malagasy authorities.

- *Mbenge v. Zaire* (16/1977) (R.3/16), ICCPR, A/38/40 (25 March 1983) 134 at paras. 14.1, 14.2 and 21.

...

14.1 ...According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably

rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art.14(3) (a)). Judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).

14.2. The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused...However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.

...

21. The Human Rights Committee...is of the view that the facts...disclose violations of the International Covenant on Civil and Political Rights, in particular:

(a) With respect to Daniel Monguya Mbenge:

> of article 14 (3) (a), (b), (d) and (e), because he was charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process, enshrined in these provisions.

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- *Vasilskis v. Uruguay* (80/1980), ICCPR, A/38/40 (31 March 1983) 173 at paras. 9.2, 9.3 and 11.

...
9.2 ...Elena Beatriz Vasilskis was arrested on 4 June 1972 on the charge of being a member of the Tupamaros National Liberation Movement...

9.3 ...Judgement was pronounced by the court of first instance on 14 December 1977. She was sentenced to 28 years of rigorous imprisonment and 9 to 12 years of precautionary detention. The trial on appeal took place in May 1980 and the sentence was raised to 30 years and 5 to 10 additional years of precautionary detention (*medidas eliminatives de seguridad*). The Military Court appointed Colonel Otto Gilomen as defence counsel, although he was not a lawyer. The trial took place in secrecy and not even the closest relatives of the accused were present.
...
11. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly of:

> ...
> article 14, paragraph 3 (b) and (d), because she did not have adequate legal assistance for the preparation of her defence...

- *Caldas v. Uruguay* (43/1979) (R.10/43), ICCPR, A/38/40 (21 July 1983) 192 at paras. 13.3 and 14.

...
13.3. The Committee observes that the holding of a detainee incommunicado for six weeks after his arrest is not only incompatible with the standards of humane treatment required by article 10 (1) of the Covenant, but it also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14 (3) (b) and, therefore, of one of the most important facilities for the preparation of his defence.
...
14. The Human Rights Committee...is of the view that the facts as found by the Committee disclose violations of the International Covenant on Civil and Political Rights, particularly:

> ...
> of article 14 (3) (b), because he was unable, particularly while kept *incommunicado*, to communicate with counsel of his own choosing...

- *Nieto v. Uruguay* (92/1981), ICCPR, A/38/40 (25 July 1983) 201 at paras. 9.3 and 11.

...
9.3. Towards the end of 1980, shortly before he was due for release upon the completion of his term of imprisonment, new criminal proceedings were started against Juan Almirati Nieto by the military judiciary without the knowledge of his defence lawyer for offences alleged to have been committed prior to his imprisonment and in respect of which new evidence was alleged to have emerged. The military prosecutor has asked that Juan Almirati Nieto should be sentenced to 22 years' imprisonment. The Committee has received no information as to the outcome of these proceedings or that they have been concluded.
...
11. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly:

> ...
> of article 14 (3) (b) and (d), because he has not had adequate facilities for the preparation of his defence and he has been unable to defend himself through legal assistance...

- *Machado v. Uruguay* (83/1981) (R.20/83), ICCPR, A/39/40 (4 November 1983) 148 at paras. 11.2 and 13.

...
11.2 Raúl Noel Martínez Machado was arrested on 16 October 1971. In January 1973 he was transferred to Libertad prison. In 1974 he came under the jurisdiction of the military courts. In 1979 he was sentenced to nine and a half years' imprisonment. He was to have completed the sentence on 16 April 1981. On 26 November 1980 he was moved from Libertad prison to another detention establishment for interrogation in connection with his alleged involvement in operations aimed at reactivating a subversive organization (the "Tupamaros" movement) from within Libertad prison. From November 1980 to May 1981 he was held *incommunicado*. On 11 May 1981, Raul Martinez was again brought to trial (*procesado*) for the offence of "conspiracy to subvert". His *ex-officio* lawyer is Colonel Ramirez.
...
13. The Human Rights Committee...is of the view that the facts...disclose violations of the International Covenant on Civil and Political Rights, particularly:

> ...
> - of article 14 (3) (b) because the conditions of his detention from November 1980 to May 1981 effectively barred him from access to legal assistance...

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See also:

- *Izquierdo v. Uruguay* (R.18/73), ICCPR, A/37/40 (1 April 1982) 179 at paras. 7.2-7.7 and 9.

- *Manera v. Uruguay* (123/1982) (R.26/123), ICCPR, A/39/40 (6 April 1984) 175 at paras. 9.3 and 10.

  ...
  9.3 Mr. Manera was indicted on 12 January 1973. Six years later, in 1979, he was sentenced to the maximum penalty of 30 years' imprisonment and 15 additional years of precautionary detention (*medidas de seguridad eliminativas*) by a military tribunal of first instance he was subsequently sentenced by the court of second instance. From March 1975 to mid 1977 Mr. Manera was not allowed to see his defence lawyer.

  10. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly of:

  ...
  - Article 14 (3) (b), because he was not allowed adequate facilities to communicate with his counsel...

- *O. F. v. Norway* (158/1983), ICCPR, A/40/40 (26 October 1984) 204 at paras. 1.2, 5.6 and 7.

  ...
  1.2 Following a radar control undertaken by the police on a State road for measuring traffic speed, O. F. was in July 1982 charged with having driven his car at a speed of 63 km per hour in a 50 km per hour zone in violation of the traffic law. O. F. states that he requested details from the police concerning the conduct of the radar control, but that he did not receive any. The case was taken up in the district court (Bodo byrett) on 22 October 1982, together with another unrelated charge, concerning an alleged failure by O. F. in 1981 to furnish information to an official register about a business firm which he operated. O. F. claims to have requested a postponement of the case, so that he could adequately prepare his defence, but that such postponement was denied. He claims that he was denied adequate access to the documents of the court, that he was not given an opportunity to assess whether it would be necessary to engage a lawyer or to have witnesses called on his behalf. Further, he claims that the method of the court to deal in one case with two totally unrelated charges unjustly affected his possibilities to defend himself.
  ...

5.6 With regard to article 14, paragraph 3 (d), the only disputed issue in this case is whether the author should have been assigned free legal assistance. The Covenant foresees free legal assistance to a charged person "in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it." The author has failed to show that in his particular case the "interests of justice" would have required the assignment of a lawyer at the expense of the State party.

...

7. The Human Rights Committee therefore decides:

> The communication is inadmissible.

- *Oxandabarat v. Uruguay* (103/1981) (R.24/103), ICCPR, A/39/40 (4 November 1984) 154 at paras. 9.2 and 11.

...

9.2 Batlle Oxandabarat was a trade-union leader and had been a member of the Tupamaros National Liberation Movement since 1968. He has been kept in detention continuously since he was arrested in June 1972. A final sentence of 13 years' imprisonment was imposed on 4 March 1980 by the court of second instance. He did not have counsel of his choice, but a court-appointed lawyer, who did not visit him nor inform him of developments in the case.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly of:

> - Article 14, paragraph 3 (b), because Batlle Oxandabarat did not have adequate legal assistance for the preparation of his defence...

- *Wight v. Madagascar* (115/1982) (R.25/115), ICCPR, A/40/40 (1 April 1985) 171 at para. 17.

...

17. The Human Rights Committee...is of the view that the facts...disclose violations of the International Covenant on Civil and Political Rights, with respect to:

> - article 14, paragraph 3 (b), because during a 10-month period (from September 1978 to July 1979), while criminal charges against him were being investigated and determined, he was kept incommunicado without access to legal counsel.

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- *Conteris v. Uruguay* (139/1983), ICCPR, A/40/40 (17 July 1985) 196 at paras. 9.2 and 10.

...
9.2. Hiber Conteris was arrested without a warrant by the Security Police on 2 December 1976, at the Carrasco airport and taken to the intelligence service headquarters in the city. He was later transferred to different military establishments, including the establishment known as "El Infierno" and the Sixth Calvary Headquarters. From 2 December 1976 to 4 March 1977, he was held *incommunicado*, and his relatives were not informed of his place of detention...He was never brought before a judge and was kept uninformed of the charges against him for over two years. He was not granted a public hearing at which he could defend himself and he had no opportunity to consult with his court appointed lawyer in preparation for his defence. He was tried and sentenced by a military court of first instance to 15 years' imprisonment and, it appears, to one to five years of precautionary detention. His own statements to the military court of first instance were ignored and not entered into the court records...

10. The Human Rights Committee is of the view that the facts as found by the Committee disclose violations of the Covenant, in particular:

> ...
> - of article 14, paragraph 3(b), because he had no effective access to legal counsel for the preparation of his defence;
> ...
> - of article 14, paragraph 3(d), because he was not tried in his presence and could not defend himself in person or through legal counsel of his own choosing...

- *Peñarietta v. Bolivia* (176/1984), ICCPR, A/43/40 (2 November 1987) 199 at para. 16.

...
16. The Human Rights Committee...is of the view that the facts...disclose violations of the Covenant with respect to:

> ...
> Article 14, paragraph 3 (b), because during the initial 44 days of detention [the authors] had no access to legal counsel.

- *Robinson v. Jamaica* (223/1987), ICCPR, A/44/40 (30 March 1989) 241 at paras. 10.3, 10.4 and 11.

...
10.3. The main question before the Committee is whether a State party is under an

obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, should the counsel selected by the author for whatever reason decline to appear. The Committee, noting that article 14, paragraph 3 (d) stipulates that everyone "shall have legal assistance assigned to him, in any case where the interests of justice so require," believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted unfair trial.

10.4. The refusal of the trial judge to order an adjournment to allow the author to have legal representation, when several adjournments had already been ordered when the prosecutions witnesses were unavailable or unready, raises issues of fairness and equality before the courts. The Committee is of the view that there has been a violation of article 14, paragraph 1, due to inequality of arms between the parties.

...

11. The Human Rights Committee...is of the view that the facts as submitted reveal a violation of article 14, paragraphs 1 and 3 (d), of the Covenant.

- *Pratt and Morgan v. Jamaica* (210/1986 and 225/1987), ICCPR, A/44/40 (6 April 1989) 222 at para. 13.2.

...

13.2 ...[T]he Committee notes that legal representation was available to the authors. Although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation of article 14, paragraph 3 (d), by the State party. Nor is the Committee in a position to ascertain whether the failure of Mr. Pratt's lawyer to insist upon calling the alibi witness before the case was closed was a matter of professional judgement or of negligence. That the Court of Appeal did not itself insist upon the calling of this witness is not in the view of the Committee a violation of article 14, paragraph 3 (e) of the Covenant.

- *Pinto v. Trinidad and Tobago* (232/1987), ICCPR, A/45/40 vol. II (20 July 1990) 69 at paras. 12.5 and 13.1.

...

12.5 ...[T]he Committee reiterates that it is axiomatic that legal representation must be made available in capital cases. a/ This does not only apply to an accused person at the trial in the court of first instance, but also in appellate proceedings. In the instant case, it is uncontested that counsel was assigned to the author for the appeal. What is at issue is whether the author had a right to object to the choice of court-appointed attorney, who had also, in his opinion, inadequately represented him at trial. It is uncontested that the author never saw or approved the grounds of appeal filed on his behalf, and that he was never provided with an opportunity to consult with his counsel on the preparation of the appeal. From the material before the Committee, it can be clearly inferred that the author did not wish his counsel to represent him beyond the first instance...In the circumstances, and bearing in mind that this is a case involving the death penalty, the State party should have accepted the author's arrangements for another attorney to represent him for purposes of the appeal, even if this would have entailed an adjournment of the proceedings. The Committee is of the opinion that legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice. This was not done in the author's case. To the extent that the author was denied effective representation during the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

13.1 The Human Rights Committee...is of the view that the facts, as found by the Committee, disclose a violation of articles 6 and 14, paragraph 3 (d), of the Covenant...

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a/ See Communication No. 223/1987 (*Robinson v. Jamaica*), views adopted on 30 March 1989, para. 10.3.

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- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at paras. 11.4 and 13.

...

11.4 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings...What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal...indicated that that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no merit in the author's appeal and was not prepared to advance arguments in favour of it being granted, thus effectively leaving him without legal representation. In the circumstances, and

bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

...

13. The Committee also takes this opportunity to express concerns about the practical operation of the system of legal aid under the Poor Prisoners' Defence Act...The Committee considers that in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid...

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b/ See Communication No. 223/1987 (*Robinson v. Jamaica*), final views adopted on 30 March 1989, para.10.3.

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- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at paras. 5.9, 5.10, 6 and 7.

...

5.9 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case...It is to be noted, however, that the material before the Committee does not disclose whether either counsel or author complained to the trial judge that the time or facilities were inadequate. Furthermore, there is no indication that counsel decided not to call witnesses in the exercise of his professional judgment, or that, if a request to call witnesses was made, the trial judge disallowed it. The Committee therefore finds no violation of article 14, paragraph 3(b) and (e).

5.10 As to the issue of the author's representation, in particular before the Court of Appeal, the Committee recalls that it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings...The Committee is of the opinion that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken

to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.

...

6. The Human Rights Committee...is of the view that the facts before the Committee...disclose violations of articles...14, paragraphs 3 (c) and (d) and 5 of the Covenant.

7. It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. The Committee is of the view that Mr. Paul Kelly, victim of a violation of article 14, paragraphs 3 (c) and (d) and 5 of the Covenant, is entitled to a remedy entailing his release.

For dissenting opinion in this context, see Kelly v. Jamaica (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at Individual Opinion by Mr. Waleed Sadi (dissenting in part), 250.

See also:

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at para. 8.6.
- *Perkins v. Jamaica* (733/1997), ICCPR, A/53/40 vol. II (30 July 1998) 205 (CCPR/C/63/D/733/1997) at para. 11.5.

- *Sawyers and McLean v. Jamaica* (226/1987 and 256/1987), ICCPR, A/46/40 (11 April 1991) 226 (CCPR/C/41/D/226/1987) at paras. 13.6, 13.7 and 14.

...

13.6 As to the author's claims relating to article 14, paragraphs 3 (b) and (e), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the circumstances of each case. While it is uncontested that none of the accused met with their lawyers more than twice before the trial, the Committee cannot conclude that the lawyers were placed in a situation where they were unable properly to prepare the case for the defence. In particular, the material before the Committee does not reveal that an adjournment of the case was requested on grounds of insufficient time for the preparation of the defence; nor has it been argued that the judge would have denied such an adjournment, had it been requested. The Committee is not in a position either to ascertain whether the alleged failure of the representatives to call witnesses

who might have corroborated the authors' testimony was a matter of professional judgement or of negligence.

13.7 Furthermore, the Committee notes that both Mr. Sawyers and Messrs. McLean were represented by privately retained counsel during trial; on appeal, Messrs. McLean were represented by the same privately retained counsel. Mr. Sawyers was represented by a different counsel, who withdrew before the appeal was concluded (instead, a legal aid lawyer, a Queen's counsel, was appointed). Any shortcomings regarding time for consultation and preparation of the defence cannot, therefore, be attributed to the State party.
...
14. The Human Rights Committee...is of the view that the facts before the Committee do not disclose any violation of the provisions of the Covenant.

- *Henry v. Jamaica* (230/1987), ICCPR, A/47/40 (1 November 1991) 210 (CCPR/C/43/D/230/1987) at paras. 8.2 and 8.3.

...
8.2 In respect of the first claim, the State party has not denied the author's claim that he did not have adequate time for the preparation of his defence, that his opportunities to consult with counsel prior to trial were minimal, and that his defence actually was prepared on the first day of the trial. The Committee cannot ascertain, however, whether the court actually denied counsel adequate time for the preparation of the defence. Similarly, the Committee cannot ascertain whether the prosecution witnesses were not properly cross-examined because of objections on the part of the court or because of a professional judgement made by author's counsel. In the circumstances, the material before the Committee does not suffice for a finding of a violation of article 14, paragraphs 3 (b) and (e).

8.3 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings. In Mr. Henry's case, it is uncontested that legal counsel was available to him for the appeal: the appeal form...reveals that the author did not wish to be represented before the Court of Appeal by a court-appointed lawyer, but by counsel of his own choice, whose services he had the mean to secure, and that he wished to attend the hearing of the appeal. What is at issue is whether the author had the right to be present during the appeal although he was represented by counsel, albeit by substitute counsel. The Committee considers that once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing and not to arrange for the author to be present, cannot be attributed to the State party but instead lies within the author's responsibility; in the circumstances, the latter cannot claim that the fact that he was absent during the hearing of the appeal constituted a violation of the

Covenant. Accordingly, the Committee concludes that article 14, paragraph 3 (d), has not been violated.

- *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at para. 7.6.

...
7.6 ...A remedy is not "available" within the meaning of the Optional Protocol where, as in the instant case, no legal aid is made available in respect of constitutional motions, and no lawyer is willing to represent the author on a pro bono basis. The Committee further reiterates that in capital punishment cases, legal aid should not only be made available; it should also enable counsel to prepare his client's defence in circumstances that can ensure justice. c/

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c/ See [Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II], annex IX, sect. J, Communication No. 250/1987 (*Carlton Reid v. Jamaica*), views adopted on 20 July 1990, para. 13.

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- *Little v. Jamaica* (283/1988), ICCPR, A/47/40 (1 November 1991) 268 (CCPR/C/43/D/283/1988) at paras. 8.3 and 8.4.

...
8.3 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. In the instant case, it is uncontested that the author did not have more than half an hour for consultation with counsel prior to the trial, and approximately the same amount of time for consultation during the trial; it is further unchallenged that he was unable to consult with counsel prior to and during the appeal, and that he was unable to instruct his representative for the appeal.

8.4 On the basis of the material placed before it, and bearing in mind particularly that this is a capital punishment case and that the author was unable to review the statements of the

prosecution's witnesses with counsel, the Committee considers that the time for consultation was insufficient to ensure adequate preparation of the defence, in respect of both trial and appeal, and that the requirements of article 14, paragraph 3 (b), were not met. As a result, article 14, paragraph 3 (e) was also violated, since the author was unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him. On the other hand, the material before the Committee does not suffice for a finding of a violation of article 14, paragraph 3 (d), in respect of the conduct of the appeal: this provision does not entitle the accused to choose counsel provided to him free of charge, and while counsel must ensure effective representation in the interests of justice, there is no evidence that the author's counsel acted negligently in the conduct of the appeal itself.

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at para. 6.6.

...
6.6 Concerning the adequacy of the author's legal representation, both on trial and on appeal, the Committee recalls that it is axiomatic that legal assistance be made available to individuals facing a capital sentence. In the present case, it is uncontested that the author instructed his lawyer to raise objections to the confessional evidence, as he claimed this was obtained through maltreatment; this was not done. This failure had a clear incidence on the conduct of the appeal; the written judgement of the Court of Appeal...emphasizes that no objections were raised by the defence in respect of the confessional evidence. Furthermore, although the author had specifically indicated that he wished to be present during the hearing of the appeal, he was not only absent when the appeal was heard but, moreover, could not instruct his representative for the appeal, despite his wish to do so. Taking into account the combined effect of the above-mentioned circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have allowed the author to instruct his lawyer for the appeal, or to represent himself at the appeal proceedings. To the extent that the author was denied effective representation in the judicial proceedings and in particular as far as his appeal is concerned, the requirements of article 14, paragraph 3(d), have not been met.

- *Thomas v. Jamaica* (272/1988), ICCPR, A/47/40 (31 March 1992) 253 at paras. 11.4 and 11.5.

...
11.4 ...Sufficient time and facilities must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time and facilities" requires an assessment of the individual circumstances of each case. In the instant case, it is

uncontested that the author's defence was prepared on the first day of the trial. The Committee can not ascertain, however, whether the Court actually denied counsel adequate time for the preparation of the defence. Similarly, the material before the Committee does not disclose whether either the author or his counsel complained to the trial judge that the time or facilities were inadequate. The Committee therefore finds no violation of article 14, paragraph 3 (b), of the Covenant during the trial of first instance.

11.5 ...In respect of the third claim concerning the author's representation before the Court of Appeal, it is uncontested that the author was only informed about the date of the hearing after it had taken place. He was therefore unable to communicate with his representative with regard to the appeal. Taking into account the combination of circumstances in the instant case, the Committee is of the opinion that the appeal proceedings did not meet the requirements of a fair trial, under article 14, paragraph 1, of the Covenant.

- *Wright v. Jamaica* (349/1989), ICCPR, A/47/40 (27 July 1992) 300 (CCPR/C/45/D/349/1989) at para. 8.4.

...
8.4 The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. There was considerable pressure to start the trial as scheduled on 17 March 1983, particularly because of the return of the deceased's wife from the United States to give evidence; moreover, it is uncontested that Mr. Wright's counsel was instructed only on the very morning the trial was scheduled to start and, accordingly, had less than one day to prepare Mr. Wright's defence and the cross-examination of witnesses. However, it is equally uncontested that no adjournment of the trial was requested by either of Mr. Wright's counsel. The Committee therefore does not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party; if counsel had felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial. Accordingly, the Committee finds no violation of article 14, paragraph 3(b).8.5 With respect to the alleged violation of article 14, paragraph 3(e), it is uncontested that the trial judge refused a request from counsel to call a witness on Mr. Wright's behalf. It is not apparent, however, that the testimony sought from this witness would have buttressed the defence in respect of the charge of murder, as it merely concerned the nature of the injuries allegedly inflicted on the author by a mob outside the Waterford police station. In the circumstances, the Committee finds no violation of this provision.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Quelch v. Jamaica* (292/1988), ICCPR, A/48/40 vol. II (23 October 1992) 37 (CCPR/C/46/D/292/1988) at para. 9.3.

  ...
  9.3 With regard to the author's claim that he was not represented during the appeal proceedings, the Committee notes that the written judgement of the Court of Appeal shows that counsel for the author was present during the appeal hearing, and argued that the evidence against the author, based solely on identification by one eye-witness and the author's own statement to the police, was not sufficient. Accordingly, the Committee, in this respect, finds no violation of article 14, paragraph 3 (d), of the Covenant.

- *Simmonds v. Jamaica* (338/1988), ICCPR, A/48/40 vol. II (23 October 1992) 78 (CCPR/C/46/D/338/1988) at paras. 8.3-8.5.

  ...
  8.3 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under Sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings. Mr. Simmonds' case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether he should have been notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing of the appeal, and whether he should have been afforded an opportunity to be present during the hearing of the appeal.

  8.4 The author's application for leave to appeal to the Court of Appeal, dated 10 November 1987, indicates that he wished to be present during the hearing of the appeal and that he did not wish the Court to assign legal aid to him. The Registry of the Court of Appeal ignored the author's wish, as his application for leave to appeal was heard in his absence and in the presence of a legal aid attorney, B.S., who argued the appeal on a ground that Mr. Simmonds had not wished to pursue. The Committee further notes with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal; this delay jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself. His opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present. In the circumstances, the Committee finds a violation of article 14, paragraph 3(b) and (d).

  8.5 The Committee considers that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been respected constitutes, if no

further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

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b/ See Communication No. 272/1988 (*Alrick Thomas v. Jamaica*), Views of 31 March 1992, para. 11.4.

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- *Gordon v. Jamaica* (237/1987), ICCPR, A/48/40 vol. II (5 November 1992) 5 (CCPR/C/46/D/237/1987) at paras. 3.5, 3.6 and 6.2.

...

3.5 In the author's opinion article 14, paragraph 3(b), of the Covenant was also violated in his case. While acknowledging that he was assisted by a lawyer in the preparation of his defence and during the trial, he alleges that he was not given sufficient time to consult with his lawyer prior to and during the trial. In this context, the lawyer is further said to have failed to employ the requisite emphasis in requesting a change of venue.

3.6 The author further alleges a violation of article 14, paragraph 3(d), of the Covenant, since he was not present during the hearing of his appeal before the Jamaican Court of Appeal. In this connection, he claims that the issue of self-defence on which the case was factually based, was not adequately dealt with. Moreover, the Court of Appeal allegedly erred in not admitting into evidence a statement made by police Corporal Afflick.

...

6.2 In respect of the author's claim of a violation of article 14, paragraph 3(b) and (d), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. On the basis of the material before it, however, the Committee cannot conclude that the author's two lawyers were unable to properly prepare the case for the defence, nor that they displayed lack of professional judgment or negligence in the conduct of the defence. The author also

claims that he was not present at the hearing of his appeal before the Court of Appeal. However, the written judgment of the Court of Appeal reveals that the author was indeed represented before the Court by three lawyers, and there is no evidence that author's counsel acted negligently in the conduct of the appeal. The Committee therefore finds no violation of article 14, paragraph 3(b) and (d).

- *Campbell v. Jamaica* (307/1988), ICCPR, A/48/40 vol. II (24 March 1993) 41 (CCPR/C/47/D/307/1988) at para. 6.2.

...
6.2 In respect of the author's claim that he was not properly represented during the hearing of his appeal, the Committee notes with concern that the author was not notified of the name of his court-appointed lawyer until after the appeal was dismissed. This effectively prevented the author from consulting with his lawyer and from giving him instructions in preparation of the appeal. In the circumstances the Committee finds a violation of article 14, paragraph 3 (d), of the Covenant...

- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at para. 8.2.

...
8.2 As to the author's legal representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to a convicted prisoner under sentence of death. This applies to all stages of the judicial proceedings. Counsel was entitled to recommend that an appeal should not proceed. But if the author insisted upon the appeal, counsel should have continued to represent him or, alternatively, Mr. Collins should have had the opportunity to retain counsel at his own expense. In this case, it is clear that legal assistance was assigned to Mr. Collins for the appeal. What is at issue is whether counsel had a right to effectively abandon the appeal without prior consultation with the author. Counsel indeed opined that there was no merit in the appeal, thus effectively leaving Mr. Collins without legal representation. While article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit...

- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993) 28 (CCPR/C/47/D/282/1988) at para. 10.4.

...

10.4 As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. d/ The determination of what constitutes "adequate time" requires an assessment of the circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3(b), of the Covenant.

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d/ See Communications Nos. 253/1987 (*Paul Kelly v. Jamaica*), views adopted on 8 April 1991, para. 5.9; and 283/1988 (*Aston Little v. Jamaica*), views adopted on 1 November 1991, para. 8.3.

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- *Gentles v. Jamaica* (352/1989), ICCPR, A/49/40 vol. II (19 October 1993) 42 (CCPR/C/49/D/352/1989) at paras. 11.1 and 11.2.

...

11.1 In respect of the authors' claims under article 14, paragraphs 3(b) and (d), the Committee reiterates that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. The

material before the Committee discloses that neither leading or junior counsel, nor the authors complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. The Committee notes that if the authors or counsel had felt that they were improperly prepared, it would have been incumbent upon them to request an adjournment of the trial. Moreover, the Committee cannot conclude, on the basis of the available material, that the authors' representatives were unable to adequately represent them, nor that they displayed lack of professional judgment in the conduct of the defence of their clients. The same is true for the appeal. The written judgment of the Court of Appeal reveals that each of the authors was represented before the Court by different counsel, and there is no evidence that their lawyers were unable to properly prepare the cases for the appeal. The Committee therefore finds no violation of article 14, paragraphs 3(b) and (d).

11.2 It remains for the Committee to decide whether the failure of the State party to make legal aid available to the authors for purposes of a constitutional motion violated their rights under article 14, paragraph 5, of the Covenant. Article 14, paragraph 5, guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". In this context, the authors claim that, because of the nonavailability of legal aid, they are denied effective access to the Supreme (Constitutional) Court of Jamaica. In its previous jurisprudence, e/ the Committee had examined the question whether article 14, paragraph 5, guarantees the right to a single appeal to a higher tribunal or whether it guarantees the possibility of further appeals when these are provided for by the law of the State concerned. It observed that the Covenant does not require States parties to provide for several instances of appeal. It found, however, that the words "according to law" in article 14, paragraph 5, must be understood to mean that, if domestic law provides for further instances of appeal, the convicted person should have effective access to each of them. The Committee observes that, in the instant case, the State party provided the authors with the necessary legal prerequisites for an appeal of the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. It further observes that Jamaican law also provides for the possibility of recourse to the Constitutional Court, which is not, as such, a part of the criminal appeal process. Thus, the Committee finds that the availability of legal aid for constitutional motions is not required under article 14, paragraph 5, of the Covenant. Accordingly, the Committee concludes that the authors' rights under this provision were not violated.

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e/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX. B, Communication No. 230/1987 (*Raphael Henry v. Jamaica*), para. 8.4.

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LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

See also:

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at para. 8.4.

- *Currie v. Jamaica* (377/1989), ICCPR, A/49/40 vol. II (29 March 1994) 73 (CCPR/C/50/D/377/1989) at para. 13.4.

  ...

  13.4 The determination of rights in proceedings in the Constitutional Court must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1. In this particular case, the Constitutional Court would be called on to determine whether the author's conviction in a criminal trial has violated the guarantees of a fair trial. In such cases, the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles in paragraph 3 (d) of article 14. It follows that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the regularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14, paragraph 1, *juncto* article 2, paragraph 3.

See also:

- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at para. 9.7.
- *P. Taylor v. Jamaica* (707/1996), ICCPR, A/52/40 vol. II (18 July 1997) 234 (CCPR/C/60/D/707/1996) at para. 8.2.
- *Shaw v. Jamaica* (704/1996), ICCPR, A/53/40 vol. II (2 April 1998) 164 (CCPR/C/62/D/704/1996) at para. 7.6 and Individual Opinion by Mr. N. Ando, P. Bhgwati, T. Buergenthal and D. Kretzmer (dissenting in part), 173.
- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998) 174 (CCPR/C/62/D/705/1996) at para. 7.3 and Individual Opinion by Mr. Nisuke Ando, Mr. P. Bhagwati, Mr. T. Buergenthal and Mr. D. Kretzmer (dissenting in part), 182.

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at paras. 8.4 and 8.6.

  ...

  8.4 Concerning the author's claims relating to the preparation of his defence and his legal representation on trial, the Committee recalls that the right of an accused person to have

adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. The determination of what constitutes 'adequate time' requires an assessment of the circumstances of each case. The Committee notes that the material before it does not disclose whether either the author or his attorney complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. Nor is there any indication that the author's attorney acted negligently in the conduct of the defence. In this context the Committee notes that the trial transcript discloses that E.M. and D.S. were thoroughly cross-examined on the issue of identification by the defence. The Committee therefore finds no violations of article 14, paragraphs 3(b) and (d).

...

8.6 The author also claims that the preparation of his defence and his representation before the Court of Appeal were inadequate, and that counsel assigned to him for this purpose was not of his own choosing. The Committee recalls that, while article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appellate instance that the appeal has no merit...While it is not for the Committee to question counsel's professional judgement that there was no merit in the appeal, it is of the opinion that he should have informed Mr. Grant of his intention not to raise any grounds of appeal, so that Mr. Grant could have considered any other remaining options open to him. In the circumstances, the Committee finds that the author's rights under article 14, paragraphs 3 (b) and (d) were violated in respect of his appeal.

- *Berry v. Jamaica* (330/1988), ICCPR, A/49/40 vol. II (7 April 1994) 20 (CCPR/C/50/D/330/1988) at para. 11.6.

...

11.6 As to the author's claims under article 14, paragraph 3 (b), (d) and 5, concerning the conduct of his appeal, the Committee begins by noting that a lawyer was assigned to the author for purposes of his appeal, and that article 14, paragraph 3(d), does not entitle an accused to choose counsel provided to him free of charge. The Committee further notes that the author's claim that he did not have the opportunity to instruct counsel for the appeal prior to the hearing has not been contested by the State party. In communication No. 248/1987 (*Glenford Campbell v. Jamaica*), b/ the Committee held that the combined effect of the lawyer's failure to raise objections at the trial in respect of the confessional evidence allegedly obtained through maltreatment, the consequences this failure had on the conduct of the appeal and the lack of an opportunity to instruct counsel for the appeal or to defend himself in person, amounted to a denial of effective representation in the judicial proceedings

and non-compliance with the requirements of article 14, paragraph 3 (d), of the Covenant. The Committee notes, however, that in the present case the author would not have been allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by counsel in the course of the trial. In the circumstances, and taking into account that the author's appeal was in fact heard by the Court of Appeal, the Committee finds no violation of article 14, paragraphs 3 (b), (d) and 5, of the Covenant.

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Notes

...

b/ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex IX.D; views adopted on 30 March 1992 at the forty-fourth session, para. 6.6.

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- *Reid v. Jamaica* (355/1989), ICCPR, A/49/40 vol. II (8 July 1994) 59 (CCPR/C/51/D/355/1989) at para. 14.2.

...

14.2 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that it is uncontested that the legal aid lawyer who represented the author at the preliminary inquiry was not present at all the hearings and that the author met the legal aid lawyer who was going to represent him at the trial only ten minutes before its start. In the absence of any evidence that might prove otherwise, the Committee considers that the time and facilities for the preparation of the author's defence were not adequate and that this must have been known to the investigating magistrate and the trial judge. The Committee therefore concludes that the facts of the case reveal a violation of article 14, paragraph 3(b), of the Covenant.

- *Griffin v. Spain* (493/1992), ICCPR, A/50/40 vol. II (4 April 1995) 47 (CCPR/C/53/D/493/1992) at para. 9.8.

...

9.8 As to the author's complaint about inadequate preparation and conduct of his defence at trial, the Committee notes that the barrister was privately retained by R. L. and the author, who granted power of attorney to her on 26 April 1991. It further notes from the information submitted by the author, that he was in constant contact with his lawyer in Canada and with the Canadian Embassy in Madrid, and that he had been assigned an attorney for the purpose of the preliminary hearing. If the author was dissatisfied with the performance of the barrister, he could have requested the judicial authorities to assign a lawyer to him, or he

could have requested his Canadian lawyer to assist him in obtaining the services of another lawyer. Instead, the author continued to retain the services of the said barrister after his trial and conviction, until 8 November 1991. The Committee considers that, in the circumstances, any complaints, whether verified or not, about the author's barrister's conduct prior to or during the trial cannot be attributed to the State party. Accordingly, the Committee finds no violation of article 14 of the Covenant in this respect.

- *G. Peart and A. Peart v. Jamaica* (464/1991 and 482/1991), ICCPR, A/50/40 vol. II (19 July 1995) 32 (CCPR/C/54/D/464/1991) at para. 11.7.

...
11.7 Andrew Peart has further alleged that he did not have unimpeded access to his lawyer because prison officials were present during an interview. The Committee considers that the author has not substantiated in what way the mere presence of the officers hindered him in preparing his defence and notes in this context that no such claim was advanced before the local courts. The Committee concludes therefore that the facts before it do not disclose a violation of article 14 of the Covenant in this respect...

- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995) 35 (CCPR/C/55/D/459/1991) at paras. 10.2 and 10.4-10.6.

...
10.2 ...In the circumstances, the Committee considers that it is undisputed that Mr. Wright was not represented by counsel at the preliminary hearing of the charges against him. The Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. The Committee notes that there is no indication that the lack of representation at the preliminary hearing was attributable to Mr. Wright. The Committee finds therefore that the failure to make legal representation available to Mr. Wright at the preliminary hearing constitutes a violation of article 14, paragraph 3(d), of the Covenant.
...
10.4 Mr. Wright has claimed that his counsel did not consult with him beforehand about the appeal and that this indicates that he was not effectively represented. The Committee notes that Mr. Wright was represented at the appeal by the lawyer who defended him at trial, and that counsel filed and argued several grounds of appeal, challenging several decisions made by the judge, and questioning his directions to the jury. In these specific circumstances, the Committee finds that Mr. Wright's right to an effective representation on appeal has not been violated.

10.5 As regards Mr. Harvey's claim that he was not effectively represented on appeal, the Committee notes that the Court of Appeal judgment shows that Mr. Harvey's legal aid counsel for the appeal conceded at the hearing that there was no merit in the appeal. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage another counsel. The Committee is of the opinion that in the instant case, Mr. Harvey should have been informed that his counsel was not going to argue any grounds in support of the appeal so that he could have considered any remaining options open to him. In the circumstances, the Committee finds that Mr. Harvey was not effectively represented on appeal, in violation of article 14, paragraphs 3(b) and (d).

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". b/ In the present case, since the final sentence of death was passed without legal representation for Mr. Wright at the preliminary hearing, without due respect for the requirement that an accused be tried without undue delay, and without effective representation for Mr. Harvey on appeal, there has consequently also been a violation of article 6 of the Covenant.

Notes

...

b/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, General Comment No. 6 (16), para. 7.

See also:

- *Morrison and Graham v. Jamaica* (461/1991), ICCPR, A/51/40 vol. II (25 March 1996) 43 (CCPR/C/52/D/461/1991) at paras. 10.4-10.6.
- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at paras. 9.5 and 9.8.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Burrell v. Jamaica* (546/1993), ICCPR, A/51/40 vol. II (18 July 1996) 121 (CCPR/C/53/D/546/1993) at paras. 9.3 and 9.4.
- *Price v. Jamaica* (572/1994), ICCPR, A/52/40 vol. II (6 November 1996) 153 (CCPR/C/58/D/572/1994) at paras. 9.2 and 9.3.
- *Steadman v. Jamaica* (528/1993), ICCPR, A/52/40 vol. II (2 April 1997) 22 (CCPR/C/59/D/528/1993) at para. 10.3.
- *Jones v. Jamaica* (585/1994), ICCPR, A/53/40 vol. II (6 April 1998) 45 (CCPR/C/62/D/585/1994) at para. 9.5.
- *Daley v. Jamaica* (750/1997), ICCPR, A/53/40 vol. II (31 July 1998) 235 (CCPR/C/63/D/750/1997) at para. 7.5.
- *Morrison v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 8.6.
- *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C/65/D/668/1995) at para. 7.3.
- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 7.4.

- *Chaplin v. Jamaica* (596/1994), ICCPR, A/51/40 vol. II (2 November 1995) 197 (CCPR/C/55/D/596/1994) at para. 8.3.

  ...
  8.3 As to the author's representation on appeal, in particular the fact that counsel assigned to him for this purpose was not of his own choosing, the Committee recalls that, while article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, the Court must ensure that counsel, once assigned, provides effective representation in the interests of justice. The written judgment of the Court of Appeal shows that author's counsel argued the appeal, even if he did not advance all the grounds that the author would have wanted argued. In the circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d) was not violated.

- *Kulomin v. Hungary* (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/50/D/521/1992) at para. 11.5.

  ...
  11.5 As regards the author's claim under article 14 of the Covenant, the Committee notes that a lawyer was appointed for the author on 20 August 1988, that the author requested to meet his lawyer, that the State party submits that it did forward the author's requests to the lawyer, and that the author states that he did not meet his lawyer. The Committee further notes that it is unclear when the author met his lawyer for the first time, but that it appears

from the file that the author had several meetings with his lawyer before the beginning of the trial against him. Further, the Committee notes that the author was given opportunity to study the case file in preparation for his defence with the assistance of an interpreter and that there is no indication that he ever complained to the Hungarian authorities about this being insufficient. As to his representation at the trial, the author has not made any specific complaint about any particular failure of his lawyer in the conduct of his defence, nor does it appear from the file that the lawyer did not represent the author properly. In the circumstances, the Committee finds that the facts before it do not show that the author was denied adequate time and facilities to prepare his defence, nor does the information before the Committee permit to conclude that the author's lawyer did not provide effective representation in the interests of justice.

- *Tomlin v. Jamaica* (589/1994), ICCPR, A/51/40 vol. II (16 July 1996) 191 (CCPR/C/57/D/589/1994) at paras. 8.1 and 8.3.

...

8.1 The author has alleged a violation of article 14, paragraphs 3 (b) and (e), and 5, in that he was unable to adequately consult with his lawyer and to interrogate witnesses on his behalf, thus effectively denying him the right to have his sentence and conviction reviewed. The State party has replied that an argument of self-defence was advanced by counsel, and that counsel merely exercised his professional judgement by not calling witnesses for the defence. The Committee considers that States parties cannot be held accountable for decisions that lawyers may choose to make when exercising their professional judgement, such as the calling and examination of witnesses on behalf of their client unless it is manifestly evident that counsel acted in a manner contrary to his client's interests. Had counsel needed more time to prepare the case, he could have requested additional time or an adjournment; from the record, it appears that no such request was made. By choosing not to do so, he once again exercised his professional judgement. On the basis of the information available, the Committee concludes that there has been no violation of article 14, paragraph 3 (b) and (e), of the Covenant.

...

8.3 The author has finally contended that his correspondence has been interfered with arbitrarily, in violation of his right to privacy. The State party contends that there is no evidence to support this claim. The Committee notes that the material before it does not reveal that the State party's authorities, in particular the prison administration, withheld the author's letter to counsel for a period exceeding two months. In this respect, it cannot be said that there was an "arbitrary" interference with the author's correspondence within the meaning of article 17, paragraph 1. The Committee considers, however, that a delay of two and half months in the transmittal of the author's letter to his counsel could raise an issue in respect of article 14, paragraph 3 (b) in so much as it could constitute a breach of the author's

right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author's right to prepare adequately his defence, it cannot be considered to amount to a violation of article 14, paragraph 3 (b). After carefully weighing the information available to it, the Committee concludes that there has been no violation of either article 14 paragraph 3 (b), or of article 17, paragraph 1, of the Covenant.

- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at paras 9.2-9.4 and 11.

...

9.2 The author has claimed a violation of article 14, paragraph 3 (b), because he was unable to communicate with a lawyer of his choosing until five days after his being taken into custody...[U]nder Jamaican law, the author had the right to consult with an attorney following his arrest. According to the file, which was made available to the State party for comments, the author, when brought the police station in Hanover on 24 March 1988, told the police officers that he wanted to speak to his lawyer, Mr. McLeod, but the police officers ignored the request for five days. In the circumstances, the Committee concludes that the author's right, under article 14, paragraph 3 (b), to communicate with counsel of his choice, was violated.

9.3 Regarding the alleged violation of article 14, paragraph 3 (d), because of the perceived incompetence of the author's legal aid lawyer during the conduct of the trial, the Committee notes that the materials available to it do not reveal that Mr. Kelly's lawyer's decision not to call several potential alibi witnesses, or failure to point to discrepancies in the identification parade, was attributable to anything other than the exercise of his professional judgment; this is confirmed by the author's replies to a questionnaire that was put to him by counsel for the present communication. The author did not bring his counsel's perceived failures or omissions to the attention of the Court of Appeal. In the circumstances, the Committee concludes that there was no violation of article 14, paragraph 3 (d), as far as the conduct of the trial is concerned.

9.4 As to the author's notification of the date of his appeal and his representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to convicted prisoners under sentence of death. This applies to all stages of the judicial process. In the author's case, the first issue to be determined is whether he was properly notified of the date of his appeal and could prepare his appeal with the lawyer assigned to represent him before the Court of Appeal. Mr. Kelly insists that he was not informed of the hearing of his appeal until after its dismissal, whereas the State party argues that the Registry of the Court of Appeal notified Mr. Kelly of the date of his appeal. While the State party is unable to pinpoint the exact date of the notification or to provide a copy of

the notification letter, the Committee notes from the file that the lawyer assigned to the author for the appeal, Mr. D. Chuck, was notified of the date of the appeal. This lawyer, in turn, wrote to the author in prison on 24 February 1989, asking him whether he had anything further to convey in preparation of the appeal. Mr. Kelly contends that he had had no contacts with Mr. Chuck before the receipt of the letter on 1 March, but that he sent explanations to Mr. Chuck immediately thereafter. In these circumstances, the Committee concludes that the author was aware of the imminence of the hearing of his appeal.

...

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, Mr. Paul Anthony Kelly is entitled to an effective remedy, which, in the circumstances of the case, should entail the author's release.

- *Lewis v. Jamaica* (527/1993), ICCPR, A/51/40 vol. II (18 July 1996) 89 (CCPR/C/57/D/527/1993) at para. 10.3.

...

10.3 As regards the author's claims concerning his representation at the preliminary enquiry and at the trial, the Committee notes that it is uncontested that the legal aid lawyer assigned to the author did not attend the preliminary enquiry, that the author was consequently represented by counsel of his co-accused with whom he had a conflict of interests, and that the author met his lawyer only one day before the commencement of the trial. The Committee considers that the author's privately retained lawyer could have brought these issues on appeal and that his failing to do so cannot be imputed to the State party. Accordingly, the Committee concludes that the information before it does not justify a finding of a violation of article 14, paragraph 3 (b), (d) and (e), of the Covenant.

- *Sterling v. Jamaica* (598/1994), ICCPR, A/51/40 vol. II (22 July 1996) 214 (CCPR/C/57/D/598/1994) at para. 6.3.

...

6.3 The author has alleged a violation of article 14, paragraphs 3 (b) and (d), in that he was not represented by counsel of his own choosing and was unable to consult with him, because he was unaware that he was in fact already represented before the Judicial Committee of the Privy Council in London by a firm other than his current legal representatives. The Committee considers that neither the author nor his counsel before the Committee have sufficiently substantiated, for purposes of admissibility, how his representation before the Privy Council entailed a violation of his Covenant rights. The Committee therefore finds that this part of the communication is inadmissible.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Henry and Douglas v. Jamaica* (571/1994), ICCPR, A/51/40 vol. II (25 July 1996) 155 (CCPR/C/57/D/571/1994) at para. 9.2.

  ...
  9.2 As regards Mr. Henry's claim that he was not represented by legal counsel during the preliminary enquiry, the Committee notes that the State party argues that this was by Mr. Henry's own choice and that the State party cannot be held responsible for Mr. Henry's decision not to engage counsel. Mr. Henry was represented by private counsel during the trial and there is no indication that Mr. Henry's lack of counsel during the preliminary hearing was due to Mr. Henry's inability to pay for counsel.

- *Hill v. Spain* (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at paras. 14.1 and 14.2.

  ...
  14.1 With regard to the right of everyone charged with a criminal offence to have adequate time and facilities for the preparation of his defence, the authors have stated that they had little time with their legal aid lawyer and that when the latter visited them for only 20 minutes two days before the trial, he did not have the case file or any paper for taking notes. The Committee notes that the State party contests this allegation and points out that the authors had counsel of their own choosing. Moreover, in order to allow the legal aid lawyer to prepare the case, the hearing was adjourned...Based on the records, the Committee finds that the facts do not reveal a violation of article 14, paragraph 3(b), of the Covenant.

  14.2 The Committee recalls that Michael Hill insists that he wanted to defend himself, through an interpreter, and that court denied this request. The State party has answered that the records of the hearing do not show such a request, and that Spain recognized the rights of "auto defence" pursuant to the Covenant and the European Convention of Human Rights, but that "such defence should take place by competent counsel, which is paid by the State when necessary", thereby conceding that its legislation does not allow an accused person to defend himself in person, as provided for under the Covenant. The Committee accordingly concludes that Michael Hill's right to defend himself was not respected, contrary to article 14, paragraph 3(d), of the Covenant.

- *Steadman v. Jamaica* (528/1993), ICCPR, A/52/40 vol. II (2 April 1997) 22 (CCPR/C/59/D/528/1993) at paras. 3.3 and 10.2.

  ...
  3.3 The author further alleges that he is a victim of a violation of article 14, paragraph 3(b)

and (d), since he was denied adequate time and facilities to prepare his defence. In this context, the author claims that he was deprived of adequate legal representation, both at his trial and at his appeal to the Court of Appeal of Jamaica. He submits that the legal aid counsel, who was originally assigned to represent him, failed to appear at the preliminary examination, and that he was then represented by a junior counsel. The author claims that he had no opportunity to instruct his counsel and that this counsel was only present at the first preliminary examination. Following the preliminary examination, the author had no contact with his legal representative until the day of the trial. He therefore alleges that he was denied the opportunity to prepare his defence, whereas the Prosecution had some 28 months to prepare its case.

...

10.2 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that the information before it shows that the author was represented at trial by the same counsel who had represented him at the preliminary examination. The Committee further notes that neither the author nor counsel ever requested the Court for more time in the preparation of the defence. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14, paragraph 3(b), of the Covenant in respect to the author's trial.

- *A. v. Australia* (560/1993), ICCPR, A/52/40 vol. II (3 April 1997) 125 (CCPR/C/59/D/560/1993) at para. 9.6.

...

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it. That A was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

- *Reynolds v. Jamaica* (587/1994), ICCPR, A/46/40 (3 April 1997) 235 (CCPR/C/59/D/587/1994) at para. 6.5.

...
6.5 Concerning the author's allegation that he was unrepresented on any of the identification parades...and that he was prevented by a prison officer from properly filing his appeal, the Committee notes that this claim has not been supported by sufficient evidence for it to justify a finding of a violation of article 14, paragraph 3 (d), of the Covenant.

- *Lewis v. Jamaica* (708/1996), ICCPR, A/52/40 vol. II (17 July 1997) 244 (CCPR/C/60/D/708/1996) at paras. 8.3 and 8.4.

...
8.3 The author has also argued that his continued detention hindered him in the preparation of his defence, since he could not freely consult with his counsel...The Committee observes, however, that the author has never claimed that he was not allowed to see an attorney and that he in fact saw an attorney a week after his arrest. In the instant case, the information before the Committee does not show that the restrictions placed on the author hindered the preparation for his defence to such an extent as to constitute a violation of article 14, paragraph 3 (b), of the Covenant. In this context, the Committee notes also that neither the author nor his counsel requested more time for the preparation of the defence at the beginning at the trial.

8.4 As regards the author's argument that he was not effectively represented on appeal, since his legal aid lawyer failed to consult with him, the Committee notes that the author was informed beforehand who would represent him at the appeal, that he was informed of the date of the hearing and that counsel for the author did argue the appeal on his behalf. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. In the instant case, nothing in the conduct of the appeal by the author's lawyer shows that he was not using his best judgement in the interests of his client. The Committee concludes therefore that the information before it does not show that article 14, paragraph 3 (d), has been violated.

See also:

- *Leslie v. Jamaica* (564/1993), ICCPR, A/53/40 vol. II (31 July 1998) 21 (CCPR/C/63/D/564/1993) at para. 9.4.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *LaVende v. Trinidad and Tobago* (554/1993), ICCPR, A/53/40 vol. II (29 October 1997) 8 (CCPR/C/61/D/554/1993) at para. 5.8.

...

5.8 Regarding the claim under article 14, paragraph 3(d), the State party has not denied that the author was denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council for special leave to appeal. The Committee recalls that it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings. 7/ Section 109 of the Constitution of Trinidad and Tobago provides for appeals to the Judicial Committee of the Privy Council. It is uncontested that in the present case, the Ministry of National Security denied the author legal aid to petition the Judicial Committee in *forma pauperis*, thereby effectively denying him legal assistance for a further stage of appellate judicial proceedings which is provided for constitutionally; in the Committee's opinion, this denial constituted a violation of article 14, paragraph 3(d), whose guarantees apply to all stages of appellate remedies. As a result, his right, under article 14, paragraph 5, to have his conviction and sentence reviewed "by a higher tribunal according to law" was also violated, as the denial of legal aid for an appeal to the Judicial Committee effectively precluded the review of Mr. LaVende's conviction and sentence by that body.

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Notes

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7/ See Views on Communication No. 230/1987 (*Raphael Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.

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- *Thomas v. Jamaica* (532/1993), ICCPR, A/53/40 vol. II (3 November 1997) 1 (CCPR/C/61/D/532.1993) at paras. 6.2 and 6.4.

...

6.2 The Committee notes that the information before it shows that the author was arrested on 26 July 1982, that he was convicted for murder on 5 February 1985, the appeal dismissed on 28 January 1987, that a written judgement was not issued by the Court of Appeal until 12 April 1988 and that the Privy Council denied leave on 23 July 1992. Proceedings against the author therefore took just under 10 years to complete...[T]he Committee concludes that a delay of almost 31 months from arrest to conviction plus a further three years before the completion of the Appeal proceedings cannot be deemed compatible with this provision, in the absence of any explanations from the State party justifying the delay. The denial of legal aid which contributed to the further delay in the author's application for leave to appeal to the Privy Council is also a violation of article 14, paragraph 3(d).

...

6.4 The author claims that his right to appeal to the Court of Appeal of Jamaica was violated because neither he nor his counsel were provided with a copy of Mr. Benjamin's alleged confession statement which would exonerate the author. He also claims that the absence of legal aid prevented him from having further investigations carried out in relation to the alleged confession. In the absence of the document, he claims that he could not pursue his right under Section 29(1) of the Judicature (Appellate Jurisdiction) Act to have his case reviewed. The Committee notes that the State party has not explained why this alleged statement was never made available to the author or to his counsel; it notes too that counsel states that the Deputy Director of Public Prosecutions informed him that the statement was considered by the Jamaica Privy Council on 2 August 1988, and considered that it did not warrant a reference to the Court of Appeal on Section 29 (1), and was not referred. The Committee is of the view that the failure to provide Mr. Thomas with legal aid in Jamaica has denied him the opportunity to have enquiries made about the matter and to pursue such legal remedies as may have been available to him in Jamaica in accordance with the Constitution or otherwise and that this amounts to a violation of article 14, paragraph 3(d), in conjunction with article 2, paragraph 3.

- *Yasseen and Thomas v. Guyana* (676/1996), ICCPR, A/53/40 vol. II (30 March 1998) 151 (CCPR/C/62/D/676/1996) at para. 7.8.

...

7.8 In respect of Mr. Yasseen, counsel claims a violation of article 14, paragraph 3(b) and (d), because the author was unrepresented during the first four days of the last trial (1992). The State party has simply noted that an adjournment was granted between July and September 1992, at the request of author's former counsel, but does not otherwise deny the claim. The Committee recalls that it is axiomatic that legal assistance be available in capital cases. 3/ This is so even if the unavailability of private counsel is to some degree attributable to the author, and even if the provision of legal assistance entails an adjournment of proceedings. This requirement is not made unnecessary by efforts which the trial judge may otherwise make to assist the accused in the handling of his defense, in the absence of counsel. The Committee considers that the absence of legal representation for Mr. Yasseen during the first four days of the trial constitutes a violation of article 14, paragraph 3(b) and (d).

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Notes

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3/ See Views on Communication No.223/1987 (*Frank Robinson v. Jamaica*), adopted 30 March 1989, paragraph 10.3.

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LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *McLeod v. Jamaica* (734/1997), ICCPR, A/53/40 vol. II (31 March 1998) 213 (CCPR/C/62/D/734/1997) at paras. 6.1 and 6.3.

  ...
  6.1. The author claims that he was not properly represented by his legal aid counsel on trial, as counsel did not call an alibi witness, in violation of article 14, paragraph 3 (e). The Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is nothing in the record to suggest that counsel was not using his best judgment; he did call one other alibi witness, (the author's father). The Committee considers that there is no basis for holding the State party accountable for counsel's actions, and consequently finds that there has been no violation of article 14, paragraph 3 (e), of the Covenant.
  ...
  6.3. With regard to the author's claim of deficient representation on appeal, he claims that although consulted before the appeal he was not aware that his legal aid representative would argue no grounds of appeal and that this was not in accordance with his instructions to counsel. The State party does not refute this claim but contends that it is not accountable for the actions of counsel. The Committee notes from the information before it that the Court of Appeal examined the case even though counsel had conceded he could find no grounds to argue. The Committee is of the view, however, that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's rights under article 14, paragraph 3 (b) and (d), have been violated.

- *McTaggart v. Jamaica* (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at paras. 6.2 and 8.3.

  ...
  6.2 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, since he only met with him for a short time prior to the trial and failed to follow his instructions in visiting the scene of the crime and did not call a defence witness in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence where it has held that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that

the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgment. The Committee finds that in this respect, the author has no claim...

...

8.3 With regard to the allegation that the author was not represented at the preliminary enquiry, in violation of article 14, paragraph 3 (d), the Committee notes that the author was brought before the Court on trial for murder by a judge and jury under regular procedures of the Jamaican legal system. He was found guilty by the jury who heard and assessed the evidence against him, and the case was reviewed by the Court of Appeal. The fact that he was joined by "a voluntary bill of indictment", on his return to Jamaica after the preliminary enquiry had already taken place for the rest of the co-accused, following an established procedure, would not necessarily invalidate the fairness of the trial. Furthermore, this matter was never raised before the Courts, either on trial nor on appeal. Consequently, on the basis of the information before it the Committee concludes that there has been no violation of the Covenant in this respect.

For dissenting opinion in this context, see McTaggart v. Jamaica (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at Individual Opinion by Mr. Martin Scheinin (dissenting in part), 230.

See also:

- *Daley v. Jamaica* (750/1997), ICCPR, A/53/40 vol. II (31 July 1998) 235 (CCPR/C/63/D/750/1997) at para. 7.3.
- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 6.2.

- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998) 174 (CCPR/C/62/D/705/1996) at para. 7.2.

...

7.2 Mr. Taylor contends that his defence was flawed because he was represented by the same lawyer as his brother, although there was a conflict of interest between them, since the charges against the brothers differed. The Committee recalls that Desmond and Patrick Taylor were represented by senior counsel, that counsel was privately retained by the brothers for the preliminary enquiry and that at the start of the trial counsel requested that he be assigned on a legal aid basis to both the author and his brother. The Committee observes that both defendants denied their presence at the scene of the crime, or any knowledge of it and that they denied the statements attributed to them. There was in these circumstances no potential for conflict of interests in their defence. Neither was putting forward any evidence or submissions which reflected on the other. The Committee concludes that the facts before

it do not disclose a violation of article 14, paragraph 3 (b) and (d), of the Covenant.

- *Domukhovsky, Tsiklauri, Gelbekhiani and Dokvadze v. Georgia* (623, 624, 626 and 627/1995), ICCPR, A/53/40 vol. II (6 April 1998) 95 (CCPR/C/62/D/623/1995) at para. 18.9.

...
18.9 The Committee notes that it is uncontested that the authors were forced to be absent during long periods of the trial, and that Mr. Domukovsky was unrepresented for part of the trial, whereas both Mr. Tsiklauri and Mr. Gelbakhiani were represented by lawyers whose services they had refused, and were not allowed to conduct their own defence or to be represented by lawyers of their choice. The Committee affirms that at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defence is inalienable and should be adhered to at every instance and without exception. This entails the right to be tried in one's presence, to be defended by counsel of one's own choosing, and not to be forced to accept ex-officio counsel. 3/ In the instant case, the State party has not shown that it took all reasonable measures to ensure the authors' continued presence at the trial, despite their alleged disruptive behaviour. Nor did the State party ensure that each of the authors was at all times defended by a lawyer of his own choosing. Accordingly, the Committee concludes that the facts in the instant case disclose a violation of article 14, paragraph 3(d), in respect of each author.

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Notes

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3/ See Committee's Views in *inter alia* Communications Nos. 52/1979, *Sadías de Lopez v. Uruguay*, adopted on 29 July 1981, 74/1980, *Estrella v. Uruguay*, adopted on 29 March 1983. See also 232/1987, *Pinto v. Trinidad and Tobago*, Views adopted on 20 July 1990.

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- *Whyte v. Jamaica* (732/1997), ICCPR, A/53/40 vol. II (27 July 1998) 195 (CCPR/C/63/D/732/1997) at paras. 7.4 and 9.2.

...
7.4 The author has claimed that he was denied access to a lawyer for the first year of his detention, since no lawyer was assigned to represent him. The State party has stated that the author had legal representation at every stage of the proceedings. The Committee notes that it does not appear from the information before it that the author had requested to see a lawyer and that this was refused, nor has the author claimed that he had no legal representation at the preliminary hearing. The Committee considers therefore that the author has failed to substantiate his claim, for purposes of admissibility...

9.2 The author has claimed that he was deprived of effective representation at the trial because he was represented by an inexperienced junior counsel who failed to follow his instructions and made mistakes in the presentation of the defence. The Committee notes that counsel was granted an adjournment at the beginning of the trial in order to take instructions from the author and that neither she nor the author requested additional time to prepare the defence. There is further no indication that counsel's decision not to call alibi witnesses nor to request the author to give sworn evidence was not made in the exercise of her professional judgement. In this context, the Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraphs 3(b), (d) and (e).

- *Morrison v. Jamaica* (611/1995), ICCPR, A/53/40 vol. II (31 July 1998) 268 (CCPR/C/63/D/611/1995) at para. 6.4.

...
6.4. With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence where it has held that it is not for the Committee to question counsel's professional judgment, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgment. Furthermore, counsel at trial was also representing the author's co-accused Thomas, and had all the relevant documents, since the indictment was of murder by way of joint enterprise between the four co-accused. Consequently, the Committee finds that the author has no claim under article 2 of the Optional Protocol in this respect.

- *C. Johnson v. Jamaica* (592/1994), ICCPR, A/54/40 vol. II (20 October 1998) 20 (CCPR/C/64/D/592/1994) at para. 10.2.

...
10.2 With regard to the author's claim that article 14, paragraph 3(b) and (d) was violated in his case, the Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial in the court of first instance, but also to any preliminary hearings relating to the case...The Committee considers that, when the author appeared at the preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his

right to have legal representation and to ensure legal representation for the author, if he so wished. The Committee therefore concludes that the absence of legal representation for the author at the preliminary hearing constituted a violation of article 14, paragraph 3(d) of the Covenant.

- *Phillip v. Trinidad and Tobago* (594/1992), ICCPR, A/54/40 vol. II (20 October 1998) 30 (CCPR/C/64/D/594/1992) at paras. 7.2 and 7.3.

...
7.2. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice. The Committee considers that in a capital case, when counsel for the accused who are was not experienced in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee is of the opinion that in the instant case, Mr. Phillip's counsel should have been granted an adjournment. In the circumstances, the Committee finds that Mr. Phillip was not effectively represented on trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

7.3 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not respected constitutes, if no further appeal against conviction is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". In this case, since the final sentence of death was passed without due respect for the requirements of article 14, the Committee must hold that there has also been a violation of article 6 of the Covenant.

- *Lindon v. Australia* (646/1995), ICCPR, A/54/40 vol. II (20 October 1998) 285 at para. 6.5.

...
6.5 The Committee has considered the author's claim that he is a victim of a violation of article 14, paragraph 3(d), as he at the proceedings before the Full Court in September 1989 was denied a legal aid lawyer of his own choosing. The Committee notes that the proceedings concerned the author's interlocutory applications regarding his defence against a trespassing charge where the penalty was a fine, and in the circumstances, the Committee

finds that the author, for purposes of admissibility, has failed to substantiate his claim that the interests of justice required the assignment of legal aid. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

- *Forbes v. Jamaica* (649/1995), ICCPR, A/54/40 vol. II (20 October 1998) 127 at para. 7.1

...
7.1 With respect to the author's claim that he is a victim of a violation of article 14, paragraphs 3(b) and 3(d), as senior counsel on the last day of the trial proceedings had to leave the court on a personal engagement and thereby left to junior counsel the remainder of the examination-in-chief of the author, the examination-in-chief of the author's only alibi witness, and the closing argument, the Committee recalls its prior jurisprudence where it has held that the State party cannot be held accountable for any alleged deficiencies in the defence of the accused or alleged errors committed by the defence lawyer, unless it should have been manifest to the court that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, the information in the file does not support an allegation that junior counsel was not qualified to give effective, legal representation. It is clear that it was both senior counsel's and the trial judge's opinion that the remainder of the defence was left in capable hands. The file shows that junior counsel was a qualified lawyer, and that he had worked closely with senior counsel in the preparation of the case. The trial transcripts show that he had conducted the cross-examination of several of the Prosecution's witnesses earlier in the proceedings. In the circumstances, the Committee concludes that there has been no violation of article 14 of the Covenant.

- *Morrison v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 8.4.

..
8.4 With regard to the author's claim that he did not have sufficient time to brief his co-accused's lawyer during the preliminary hearing, the Committee notes that the defence is not presented at the preliminary hearing. Consequently, the Committee finds that the facts before it do not constitute a violation of article 14, paragraph 3 (b) and (d).

- *Levy v. Jamaica* (719/1996), ICCPR, A/54/40 vol. II (3 November 1998) 208 (CCPR/C/64/D/719/1996) at paras. 6.3, 7.2 and 8.

...
6.3 As to the author's claim that, in violation of article 14, paragraph 3(b) and 3(d), he only

met his lawyer on the day of the trial, and that he therefore had no time to prepare his defence properly, including giving counsel instructions as to witnesses he wanted to be called in his defence, the Committee notes that the trial transcripts show, as opposed to what was explicitly stated by counsel, that the author's legal aid counsel at the trial in fact asked for and was granted an adjournment for two days, in order to interview two possible witnesses of whom he knew the identity. In these circumstances, the Committee finds this claim inadmissible as an abuse of the right to submission...

...

7.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented in the preliminary hearing that was held prior to trial. In its jurisprudence 102/ the Committee has held that the requirement that legal assistance must be made available to an accused faced with a capital crime applies not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case...As previously held by the Committee, it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings.

...

8. The Human Rights Committee...is of the view that the facts before it disclose violations of...article 14, paragraph 3(d)...

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Notes

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102/ See the Committee's Views on Communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995.

103/ See *inter alia*, the Committee's Views on Communication No.223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

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- *Marshall v. Jamaica* (730/1996), ICCPR, A/54/40 vol. II (3 November 1998) 228 (CCPR/C/64/D/730/1996) at paras. 6.2-6.6.

...

6.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented on the first day of the preliminary hearing. In its jurisprudence116/, the Committee has held that legal assistance must be made available to an accused faced with a capital crime not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case. In the present case, the Committee notes that it is not disputed that the author was unrepresented on the first day of the preliminary hearing, and, notwithstanding that it is unclear whether the author explicitly requested legal aid, it finds that the facts disclose a violation of the Covenant. As previously held by the Committee117/, it is

axiomatic that legal assistance be available at all stages of the proceedings in capital cases. The Committee therefore finds that article 14, paragraph 3(d), was violated when the court commenced and proceeded through a whole day of the preliminary hearing without informing the author of his right to legal representation.

6.3 With regard to the alleged violation of article 14, paragraphs 1 and 3(d), on the ground that the author's counsel on two occasions during the trial was absent from the courtroom, the Committee again reiterates the importance of adequate, legal representation at all stages of the legal proceedings in capital cases. However, the Committee is of the opinion that the mere absence of defence counsel at some limited time during the proceedings does not in itself constitute a violation of the Covenant, but that it must be assessed on a case-by-case basis whether counsel's absence was incompatible with the interests of justice. With regard to the first occasion counsel was missing, the Committee notes from the trial transcripts that counsel was not present at the beginning of the prosecution's examination of Sergeant Clauchar (who had arrested the author on the day after the murders, and merely testified as to the circumstances of arrest) at 1.20 p.m. on 6 February 1992, but that he was present at 1.25 p.m. and that he at that time in fact performed a cross-examination. With regard to the second incident, the transcript shows that the judge started his summing up on 7 February 1992 with defence counsel present, but that he was absent when the proceedings resumed on 10 February 1992. Although defence counsel's absence during the summing up is a matter of some concern, the Committee notes that all the major legal issues had been dealt with on 7 February and that the judge during counsel's absence merely summarized the facts. Moreover, counsel conveyed a message to the court that he had no objections to the judge's continuing. The Committee therefore holds that the facts before it do not reveal a violation of the Covenant on this ground.

6.4 The author also alleges a violation of article 14, paragraphs 3(b), 3(d) and 3(e), on the ground of lack of opportunity to communicate with his counsel before and during the trial, with the result that no investigation was initiated on his behalf, that no witnesses were called and no depositions were taken on behalf of the author, and that counsel was not in a position to adequately cross-examine the prosecution's witnesses. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence. The Committee notes that the author's legal aid counsel was assigned in due time for the trial. Furthermore, neither counsel nor the author actively requested an adjournment, and there is nothing else in the trial transcript which can suggest that the State party denied the author and his counsel opportunities to prepare for the trial or that it should have been manifest to the court that the defence team was inadequately prepared. Similarly, as to counsel's failure to call witnesses and to provide medical and ballistic evidence on behalf of the author, the Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have

been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

6.5 Similarly, as to the alleged violation of article 14, paragraphs 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that the new counsel met with the author before the appeal hearing, and that she argued grounds of appeal on his behalf. There is nothing in the file which suggests that counsel was exercising other than her professional judgement when choosing not to pursue certain grounds. Nor is there anything in the file to suggest that the State party denied the author and his counsel time to prepare the appeal or that it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. With reference to its prior jurisprudence, as cited by counsel, the Committee notes that it has found violations of the provisions in question in situations where counsel has abandoned all grounds of appeal and the court has not reassured that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which counsel argued the appeal, but chose not to pursue certain grounds. The Committee concludes, therefore, that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

6.6 With regard to the author's claim to be a victim of article 6, paragraph 2, of the Covenant, the Committee notes its General Comment 6[16], where it held that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review of the conviction and sentence by a higher tribunal". In the present case, the preliminary hearing was conducted without meeting the requirements of article 14, and as a consequence the Committee finds that also article 6, paragraph 2, was violated as the death sentence was imposed upon conclusion of a procedure in which the provisions of the Covenant were not respected.

Notes

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116/ See the Committee's Views on Communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995.

117/ See, *inter alia*, the Committee's Views on Communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

See also:

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Smart v. Trinidad and Tobago* (672/1995), ICCPR, A/53/40 vol. II (29 July 1998) 142 (CCPR/C/63/D/672/1995) at para. 10.3.
- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at para. 7.2.

- *Henry v. Trinidad and Tobago* (752/1997), ICCPR, A/54/40 vol. II (3 November 1998) 238 (CCPR/C/64/D/752/1997) at paras. 7.5 and 7.6.

...

7.5 Counsel has claimed that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant. The State party has challenged this claim saying that legal aid is in principle available for constitutional motions, but that the granting of legal aid is not automatic but subject to conditions. The Committee has held on previous occasions that the determination of rights in the hearing of constitutional motions must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1, and that legal assistance must be provided free of charge where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires. 122/

7.6 In this particular case, the issue which the author wished to bring in the constitutional motion was the question of whether his execution, the conditions of his detention or the length of his stay on death row amounted to cruel punishment. The Committee considers that, although article 14, paragraph 1, does not expressly require States parties to provide legal aid outside the context of the criminal trial, it does create an obligation for States to ensure to all persons equal access to courts and tribunals. The Committee considers that in the specific circumstances of the author's case, taking into account that he was in detention on death row, that he had no possibility to present a constitutional motion in person, and that the subject of the constitutional motion was the constitutionality of his execution, that is, directly affected his right to life, the State party should have taken measures to allow the author access to court, for instance through the provision of legal aid. The State party's failure to do so, was therefore in violation of article 14, paragraph 1.

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122/ See *inter alia* the Committee's Views in respect of Communications Nos. 377/1989 (*Anthony Currie v. Jamaica*), adopted on 29 March 1994, and 705/1996 (*Desmond Taylor v. Jamaica*), adopted on 2 April 1998.

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- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999) 260 (CCPR/C/65/775/1997) at paras. 6.6-6.9 and 6.15.

...

6.6 With regard to the author's representation at the preliminary hearing, the Committee notes that it appears from the trial transcript that the author's representative was absent during the deposition of two prosecution witnesses at the preliminary hearing on 8 June 1992, and that the magistrate continued the hearing of the witnesses and only adjourned when the author indicated that he did not wish to cross-examine the witnesses himself. The cross-examination was then adjourned to 17 June 1992, and, in the absence of the lawyer, again to 7 July 1992. After the adjournment of 17 June 1992, the judge appointed new counsel for the author, who however declined to cross-examine the witnesses. The Committee refers to its jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases. 128/ In the present case, the Committee is of the opinion that the magistrate, when aware of the absence of the author's defence counsel, should not have proceeded with the deposition of the witnesses without allowing the author an opportunity to ensure the presence of his counsel. The Committee is of the opinion that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.7 The author has further claimed that he did not have enough time in order to prepare for his defence at the retrial and that an adjournment was refused by the trial judge. It appears from the transcript of the trial, that an adjournment was granted by the judge on 12 February 1996, in order to give counsel the opportunity to interview his client. However, on 13 February 1996, counsel requested a further adjournment since he had not met yet with the author. It further appears that counsel was assigned to the author's defence in October 1994, and that he had requested an adjournment of the trial on several occasions, apparently because he was seeking copies of certain documents in possession of the Prosecution. He met with his client for the first time in May 1995. In the circumstances, the Committee finds that the facts before it do not show that the State party has violated the author's right, pursuant to article 14, paragraph 3(b), of the Covenant to have adequate facilities for the preparation of his defence.

6.8 Nevertheless, the Committee recalls its jurisprudence that the State party should ensure that counsel once assigned, provide effective representation of the accused. The Committee considers that it should have been apparent to the trial judge that counsel was not providing effective representation of the accused, at the latest when he noticed that counsel was absent

when he started his summing-up. Consequently, article 14, paragraph 3(d), has been violated in the author's case.

6.9 With regard to the author's claim that his appeal counsel never consulted with him before the hearing of the appeal, the Committee notes that a legal representative was assigned by the State party to represent the author, that counsel did argue grounds for appeal and that the Court of Appeal heard the appeal. The Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. 129/ In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

...

6.15 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In Mr. Brown's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

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128/ See *inter alia*, the Committee's Views in respect of Communication No. 730/1996 (*Clarence Marshall v. Jamaica*), adopted on 3 November 1998.

129/ See *inter alia,* the Committee's decision in Communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

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See also:

- *Brown and Parish v. Jamaica* (665/1995), ICCPR, A/54/40 vol. II (29 July 1999) 157 (CCPR/C/66/D/665/1995) at para. 9.3.
- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at paras. 3.2 and 6.4.

- *Bennett v. Jamaica* (590/1994), ICCPR,A/54/40 vol. II (25 March 1999) 12 (CCPR/C/65/D/590/1994) at para. 6.4.

...

6.4 The author claimed that he did not have sufficient time to prepare his defence, in violation of article 14, paragraph 3(b), of the Covenant. The Committee noted, however, that

the author met with his legal representative on several occasions before the beginning of the trial and that there was no indication that the author or his legal representative complained to the judge at the trial that they had not had sufficient time to prepare the defence. In these circumstances, the Committee considered that the allegation had not been substantiated, for purposes of admissibility. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

- *Lumley v. Jamaica* (662/1995), ICCPR, A/54/40 vol. II (31 March 1999) 142 (CCPR/C/65/D/662/1995) at para. 7.4.

...
7.4 With regard to the author's complaint that he was not present at the hearing of his application for leave to appeal and that he does not know who represented him on appeal, the Committee notes that the State party has submitted that in general the Court of Appeal sends notices to all appellants informing them of the date of the hearing and of the name of their representative. In the instant case, however, the State party has failed to provide any specific information as to whether and when the author was so informed. In the circumstances, it is unclear whether the author was at all represented on appeal, and the Committee therefore is of the opinion that the facts before it disclose a violation of article 14, paragraph 3(d) *juncto* paragraph 5.

- *Fraser and Fisher v. Jamaica* (722/1996), ICCPR, A/54/40 vol. II (31 March 1999) 224 (CCPR/C/65/D/722/1996) at para. 6.5.

...
6.5 Mr. Fraser has claimed that he was not afforded sufficient time with his legal aid lawyer to prepare for his trial, and that the quality of his defence therefore suffered. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. Since there is nothing in the material before the Committee which suggests either that the author and his counsel were denied opportunity to prepare adequately or that the lawyer's conduct was incompatible with the interests of justice, the Committee holds that also this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C/65/D/668/1995) at para. 7.2.

  ...

  7.2 The authors claim to be victims of a violation of article 14, paragraph 3(d), on the ground that their legal assistance before the Home Circuit Court was inadequate. The author Stewart also alleges a violation of article 14, paragraph 3(b), as he was not afforded sufficient time with his legal aid lawyer to prepare for his trial. With regard to the quality of defence, it is submitted that the legal aid lawyers failed to challenge the prosecution's case in an appropriate manner as they failed both to call any witnesses and to move for a mistrial or otherwise object to the inaudibility of the prosecution's main witness. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time be granted to the accused and their counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. The Committee notes that neither of the authors nor their counsel requested an adjournment and finds that there is nothing in the file which suggests that it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

See also:

- *Hankle v. Jamaica* (710/1996), ICCPR, A/54/40 vol. II (28 July 1999) 196 (CCPR/C/66/D/710/1996) at para. 7.
- *Brown and Parish v. Jamaica* (665/1995), ICCPR, A/54/40 vol. II (29 July 1999) 157 (CCPR/C/66/D/665/1995) at para. 9.2.

- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at para. 7.1.

  ...

  7.1 The author has claimed that the standard of his defence "fell below the level of acceptable competence" because he was not afforded sufficient time with his legal aid

lawyers to prepare for his trial. In particular, it is submitted that the legal aid lawyers failed to include in the defence important evidence brought to their attention by the author, including the fact that the statements made by his ex-girlfriend and her sister had been precipitated by malicious motives. It is also submitted that the legal aid lawyers refused to call witnesses on the author's behalf even when requested to do so. In this context, the Committee recalls that sufficient time must be granted to the accused and his counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. The Committee notes that neither the author nor his counsel requested an adjournment and that witnesses on behalf of the author in fact were subpoenaed. As regards the statements given by the author's ex-girlfriend, her sister and the shop-owner, one L.N., the Committee notes that none of these were given until some eight years after the trial and that L.N., as opposed to what is held forth in his statement, in fact did give testimony at the trial. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

- *Lestourneaud v. France* (861/1999), ICCPR, A/55/40 vol. II (3 November 1999) 234 at paras. 4.2 and 5.

...
4.2 The Committee notes that the author's claim is based upon the difference in remuneration between legal aid services performed by counsel for the civil claimant and those performed by counsel for the defendant. The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination.
...
5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible ...

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at paras. 3.7, 10.5 and 10.6.

...

3.7 Counsel alleges a violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that defence counsel on appeal, Lord Gifford, made an erroneous submission that there was no arguable point in the author's case, and, contrary to the author's instructions, stated that the author had accepted this advice. 3/ Counsel argues that Lord Gifford thereby failed to make a case as to whether the cautioned statement was forged or not. It is submitted that Lord Gifford failed to inform the Court both that he had advised the author to obtain a handwriting expert to review the signatures on the disputed statement, and that the author wanted to obtain such an expert, but did not have the necessary funds. Furthermore, counsel argues that Lord Gifford failed to ask for an adjournment to enable funds to be raised.

...

10.5 With regard to the alleged violation of article 14, paragraphs 1, 2, 3(b), 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that it is correct as stated by counsel that the Committee in its prior jurisprudence has found violations of article 14, paragraphs 3(d) and 5, in situations where counsel has abandoned all grounds of appeal and the court has not ascertained that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which the Court of Appeal, according to the material before the Committee, did ascertain that the applicant had been informed and accepted that there were no arguments to be made on his behalf. In this regard, the Court of Appeal states:

> "Lord Gifford, QC informed the court that notwithstanding his best efforts he was still firmly of the view that there was nothing he could urge on behalf of the applicant and that he had further informed the applicant accordingly and that he had accepted the advice of counsel."

10.6 The Committee also notes that a letter of 27 December 1995 from Lord Gifford to the author's present counsel, which is appended to the author's original submission, implies that the Court of Appeal's judgment gave a correct account of the events, as he states that he, over a period of about a year, on several occasions discussed the case with the author and informed him that he could see no merit in the appeal unless they came up with new evidence. He also invited the author to get a second opinion. However, even if the situation, as alleged by the author, was that he had not accepted his counsel's advice, this cannot be attributed to the State party. Nor can the Committee find anything else in the material before it to suggest that the lawyer's conduct was incompatible with the interests of justice. In this regard, the Committee notes, as opposed to what has been claimed by the author, that a 10 month adjournment was given in order to obtain new evidence, but that the counsel failed to secure any new evidence in that period. In the view of the Committee, this again cannot be attributed to the State party, and it concludes that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

Notes

...
3/ There is nothing in the file which indicates any earlier mention of such contrary instructions from the author.

_____

- *Gridin v. Russian Federation* (770/1997), ICCPR, A/55/40 vol. II (20 July 2000) 172 at paras. 8.5 and 10.

...
8.5 With respect to the allegation that the author did not have a lawyer available to him for the first 5 days after he was arrested, the Committee notes that the State party has responded that the author was represented in accordance with the law. It has not, however, refuted the author's claim that he requested a lawyer soon after his detention and that his request was ignored. Neither has it refuted the author's claim that he was interrogated without the benefit of consulting a lawyer after he repeatedly requested such a consultation. The Committee finds that denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b) of the Covenant.
...
10. ...[T]he State party is under an obligation to provide Mr. Gridin with an effective remedy, entailing compensation and his immediate release. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Boodlal Sooklal v. Trinidad and Tobago* (928/2000), ICCPR, A/57/40 vol. II (25 October 2001) 264 (CCPR/C/73/D/928/2000) at paras. 2.1-2.3, 4.10, 5 and 6.

...
2.1 In May 1989, the author was arrested and charged with the offences of sexual intercourse and serious indecency with minors...

2.2 In February 1997, the author was tried in the High Court, where he pleaded not guilty. He was represented by a legal aid lawyer. He was convicted and sentenced to 12 strokes with the birch, as well as 50 years of concurrent sentences, equivalent to a sentence of 20 years after remission.

2.3 The author lodged an appeal, which came up for hearing at the Court of Appeal on 19 November 1997. He did not receive any advice from his legal aid lawyer regarding this appeal, and did not meet with his lawyer prior to the hearing. During the proceedings, the author's lawyer, told the court that she could not find any grounds for pursuing the appeal. Consequently, leave to appeal was refused and the sentence was re-affirmed.

...

4.10 With regard to an alleged violation of article 14, paragraph 3 (d), the Committee notes that the State appointed defence counsel conceded that there were no grounds for appeal. The Committee, however, recalls its prior jurisprudence 7/ and is of the view that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's right under article 14, paragraph 3 (d), has been violated.

...

5. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Trinidad and Tobago of articles 9, paragraph 3, 14, paragraph 3 (c) and (d), and article 7 of the Covenant.

6. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future...

Notes

...

7/ In the following cases, the Committee decided that the withdrawal of an appeal without consultation, would amount to a violation of article 14, paragraph 3 (d) of the Covenant: *Collins v. Jamaica* (356/89), *Steadman v. Jamaica* (528/93), *Smith and Stewart v. Jamaica* (668/95), *Morrison and Graham v. Jamaica* (461/91), *Morrison v. Jamaica* (663/95), *McLeod v. Jamaica* (734/97), *Jones v. Jamaica* (585/94).

- *Simpson v. Jamaica* (695/1996), ICCPR, A/57/40 vol. II (31 October 2001) 67 (CCPR/C/73/D/695/1996) at paras. 2.1-2.5, 3.8, 6.2, 7.3, 8 and 9.

...

2.1 On 15 August 1991, the author was arrested on suspicion of murder...

2.2 The author was provided with a lawyer by the Court Registrar as he did not have the means to hire one privately. He did not meet his lawyer before the preliminary hearing and his representation at the preliminary hearing was poor. The author's lawyer was not present for the hearing of two of the four prosecution witnesses as he claimed that he had to leave to be present in another court.

2.3 At trial the author was represented by three lawyers. The author only met one of the lawyers on one occasion for 15 minutes before the beginning of the trial. The lawyers did not sufficiently challenge the evidence against the author. In particular, the description given by one of the prosecution witnesses of the attacker, did not correspond with his physical characteristics, and this was not sufficiently pointed out by the author's lawyer. Consultations between the author and his lawyers during the trial were irregular.

2.4 At the beginning of the trial, the author was charged with two counts of non-capital murder. However, on the fifth day of the trial, the Judge allowed the amendment of the charges to capital murder. The author was re-arraigned, although, apparently by error, the charges put to the author were again charges of non-capital murder. Despite this, the judge appears to have assumed that he was hearing a capital murder trial. The author states that as a result of the amendment, he became nervous and consequently did not give a clear statement from the dock.

2.5 On 6 November 1992, the author was convicted of two offences of capital murder and sentenced to death by the Home Circuit Court in Kingston.1/

...

3.8 It is...claimed that, prior to the preliminary hearing, the author had inadequate time and facilities to prepare his defence and communicate with his attorney, in violation of article 14, paragraph 3 (b), and an inadequate opportunity to examine or procure witnesses, in violation of article 14, paragraph 3 (e). In this context, counsel claims that the fact that the author did not meet with his lawyer prior to the preliminary hearing violates paragraph 3 (b), and his lawyer's failure to be present for the examination of two of the witnesses violates paragraph 3 (e). Counsel claims that as there was insufficient preparation for his preliminary hearing, this culminated in poor quality representation at the trial hearing 4/. Counsel also claims a violation of article 14, paragraph 3 (b) because of the lack of consultation he had with his lawyer prior to the hearing itself. He claims that the author was only allowed 15 minutes with his lawyer when the prison warden asked her to leave. In addition, counsel claims a violation of article 14, paragraph 3 (e) because of counsel's behaviour during the trial as described in paragraph 2.3 above.

...

6.2 With regard to counsel's claim that there was insufficient time to prepare the author's defence, since his lawyers came to see him only once before the trial, the Committee noted that it would have been for the author's representatives or the author himself to request an

adjournment at the beginning of the trial, if they felt that they did not have enough time to prepare the defence. It appears from the trial transcript that no adjournment was sought at the beginning of the trial, and that on a further occasion, an adjournment was granted by the judge to the defence counsel to study new evidence. The Committee considered therefore that this claim was inadmissible under article 2 of the Optional Protocol, as being unsubstantiated. (para. 3.8)

...

7.3 With respect to counsel's allegation that the author's lawyer was absent for the hearing of two of the four witnesses during the preliminary hearing, the Committee decided in its admissibility decision that this allegation may raise issues under article 14, paragraph 1 and paragraph 3 (d). The Committee recalls its prior jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases 9/. It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. In the present case, the Committee notes that it is not disputed that the author's lawyer was absent during the hearing of two of the witnesses nor does it appear that the magistrate adjourned the proceedings until her return. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant. (para. 3.8)

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Jamaica of articles 10, and 14, paragraph 3 (d) of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including adequate compensation, an improvement in the present conditions of detention and due consideration of early release.

Notes

1/ At the trial, the case rested on the eyewitness evidence of three witnesses. They alleged that they saw Simpson coming to George S. Cockett's grocery, where Cecil Cockett (George S. Cockett's father) and his brother Donovan were working at 7.30 p.m. on 8 August 1991. They testified that Simpson drew a gun and fired several shots, outside the shop and in the shop through the window, at Donovan, Cecil and Simon Cockett, which led to the death of Donovan and Cecil Cockett. One of the witnesses testified that a week before the incident, Simpson and Donovan Cockett had an argument in the course of which Simpson threatened to kill the whole family. The author made an unsworn statement in which he denied being present and stated that the accusations against him were being made falsely because one of the witnesses believed that Simpson had informed on him in relation to drug dealing, which had resulted in a police raid a few weeks before the incident.

...

4/ No further elaboration is provided by counsel or the author in relation to this issue.

...

9/ See *inter alia*, the Committee's Views in respect of communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

- *Ashby v. Trinidad and Tobago* (580/1994), ICCPR, A/57/40 vol. II (21 March 2002) 12 (CCPR/C/74/D/580/1994) at paras. 4.2 and 10.4.

...

4.2 It is submitted that the State party violated article 14, paragraph 3 (d), since Mr. Ashby received inadequate legal representation prior to and during his trial. Counsel points out that Mr. Ashby's legal aid attorney spent hardly any time with his client to prepare the defence. The same lawyer reportedly argued the appeal without conviction.

...

10.4 With regard to the claim of inadequacy of legal representation during and in preparation of the trial and the appeals proceedings, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.6/ In the instant case, there is no reason for the Committee to believe that the trial attorney was not using other than his best judgement. It is apparent from the trial transcript that the lawyer cross-examined all witnesses. It is further apparent from the appeals decision that the grounds of appeal submitted by the lawyer were argued and fully taken into account by the High Court in its reasoning. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

Notes

...

6/ See *inter alia*, the Committee's decision in communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

- *Kennedy v. Trinidad and Tobago* (845/1998), ICCPR, A/57/40 vol. II (26 March 2002) 161 (CCPR/C/74/D/845/1998) at paras. 7.10, 8 and 9.

...
7.10 The author...claims that the absence of legal aid for the purpose of filing a constitutional motion amounts to a violation of article 14, paragraph 1, read together with article 2, paragraph 3. The Committee notes that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)). It is further aware that the role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court, provided for under Section 14(1) of the Trinidadian Constitution, available and effective in relation to claims of violations of Covenant rights. As no legal aid was available to the author before the Constitutional Court, in relation to his claim of a violation of his right to a fair trial, the Committee considers that the denial of legal aid constituted a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3.

8. The Human Rights Committee...is of the view that the facts before it reveal violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3(c) and 5, and 14, paragraphs 1 and 3(d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at paras. 2.1, 3.6, 3.7, 9.5-9.7, 10 and 11.

...
2.1 On 28 May 1988, the author was detained by the police and taken to hospital. On 31 May 1988 he was discharged from the hospital and on 2 June 1988 he was formally charged with the murder of his cousin "Lucky" Teesdale on 27 May 1988. After a trial, which started on 6 October 1989, the author was convicted and sentenced to death on 2 November 1989 by the San Fernando Assizes Court. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 22 March 1994, with reasons given on 26 October 1994. On 13 March 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. On 8 March 1996, a warrant for execution on 13 March was read out to the author. On 11 March, the author filed a constitutional motion to the High Court against the execution; the High

Court granted a stay of execution. The Attorney General withdrew the case from the High Court and presented it before the Advisory Committee on the Power of Pardon. On 26 June, the author was informed that the President had commuted his death sentence to 75 years imprisonment with hard labour...

...

3.6 It is submitted that the author never saw an attorney before the day of the trial. During the trial, legal assistance by way of legal aid was ordered and the attorneys advised the author to give unsworn evidence from the dock, threatening to withdraw from the case if he did not. This is said to constitute a violation of article 14, paragraph 3 (b) and (d).

3.7 As regards the appeal, it is submitted that, in December 1993, the author was assigned a legal aid attorney whom he did not want to represent him, since that attorney was just out of law school and did not know the case at all. Although, reportedly, the author informed the legal aid authorities of his objections, counsel continued to represent him, but never consulted with him. The author had no opportunity to give instructions to his attorney and was not present at the appeal hearing. It is therefore submitted that the author has been deprived of an effective appeal in violation of article 14 (5).

...

9.5 Concerning the author's representation at trial, the Committee notes that counsel was not assigned to him until the day of the trial itself. The Committee recalls that article 14, paragraph 3 (b), provides that the accused must have time and adequate facilities for the preparation of his defence. Therefore, the Committee finds that article 14, paragraph 3 (b), was violated.

9.6 The author further claims that at the Appeals Court he was assigned a legal aid attorney, whom he rejected as his representative. Article 14, paragraph 3 (d), stipulates the right to defend oneself in person or through legal assistance of his own choosing. However, the Committee recalls its previous jurisprudence that an accused is not entitled to choice of counsel if he is being provided with a legal aid lawyer, and is otherwise unable to afford legal representation. Therefore, the Committee finds that article 14, paragraph 3 (d), was not violated in the present case.

9.7 Furthermore, the author claims that he was deprived of an effective appeal because he was represented by an attorney who never consulted him and to whom the author could give no instructions. In this connection the Committee considers that appeals are argued on the basis of the record and that it is for the lawyer to use his professional judgement in advancing the grounds for appeal, and in deciding whether to seek instructions from the defendant. The State party cannot be held responsible for the fact that the legal aid attorney did not consult with the author. In the circumstances of the instant case, the Committee is not in a position to find a violation of article 14, paragraph 3 (d) and 5, with regard to the author's appeals hearing.

...
10. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7; 9, paragraph 3; 10, paragraph 1; and 14, paragraphs 3 (b) and (c) of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, Mr. Teesdale is entitled to an effective remedy, including compensation and consideration by the appropriate authorities of a reduction in sentence. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Ricketts v. Jamaica* (667/1995), ICCPR, A/57/40 vol. II (4 April 2002) 29 (CCPR/C/74/D/667/1995) at paras. 3.2 and 7.3.

...
3.2 ...[T]he author claims to be a victim of a violation of articles 14 (3) (b) and (d) of the Covenant. The author's right to a defence was not respected, in that the legal aid lawyer, who represented him before the Jamaican Court of Appeal never met him before the hearing, never contacted the former lawyer and therefore, did not provide the author with effective and adequate representation.
...
7.3 In respect of the author's claim that he was not adequately represented during the hearing of his appeal, the Committee notes that the legal aid lawyer who represented the author for his appeal, did not contact the author or the privately retained lawyer who represented him at the first instance court, before the hearing of the appeal. Nevertheless, although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice. In the circumstances, the Committee is not able to find a violation of article 14 3 (b) and (d).

- *Rodríguez Orejuela v. Colombia* (848/1999) ICCPR, A/57/40 vol. II (23 July 2002) 172 (CCPR/C/75/D/848/1999) at paras. 2.1, 3.3, 3.4, 7.3 and 8.

...
2.1 Mr. Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990...
...
3.3 The author...states that he was deprived of the right to a public trial, with a public hearing and obligatory attendance by defence counsel and a representative of the public prosecutor's office, as provided for in the Code of Criminal Procedure which entered into

force on 1 July 1992. He recalls the decision of the Human Rights Committee in the *Elsa Cubas v. Uruguay* and *Alberta Altesor v. Uruguay* cases,3/ where it found that in both cases there had been a violation of article 14, paragraph 1, of the Covenant because the trial had been conducted *in camera*, in the absence of the defendant, and the judgement had not been rendered in public.

3.4 According to the author, the Regional Court judgement of 21 February 1997 shows that he was convicted on the basis of *in camera* proceedings conducted in his absence, exclusively in writing and without a public hearing which would have enabled him to confront prosecution witnesses and challenge evidence against him. He never attended the Regional Court or had any personal contact with the judges who convicted him, nor did he meet the faceless National Court judges who rendered judgement at second instance. He maintains that he was denied the guarantee of an independent and impartial trial because he was presumed to be the head of the "Cali cartel", an alleged criminal organization.

...

7.3 The author maintains that the proceedings against him were conducted only in writing, excluding any hearing, either oral or public. The Committee notes that the State party has not refuted these allegations but has merely indicated that the decisions were made public. The Committee observes that in order to guarantee the rights of the defence enshrined in article 14, paragraph 3, of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine the witnesses. Taking into account the fact that the author did not have such a hearing during the proceedings that culminated in his conviction and sentencing, the Committee finds that there was a violation of the right of the author to a fair trial in accordance with article 14 of the Covenant.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, of the Covenant.

_____

Notes

...

3/ Ref. *Elsa Cubas v. Uruguay*, View No. 70/1980 of 1 April 1982, and *Alberto Altesor v. Uruguay*, View No. 10/1977 of 23 March 1982.

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- *Borisenco v. Hungary* (852/1999), ICCPR, A/58/40 vol. II (14 October 2002) 119 (CCPR/C/76/D/852/1999) at paras. 2.1, 2.3, 7.5, 8 and 9.

...

2.1 On 29 April 1996, the author and his friend, Mr. Kuspish arrived in Budapest... Because they were late for their train, they ran to the metro station. At this point, they were stopped by three policemen in civilian clothing. The police suspected them of pick-pocketing. They ill-treated the author and his friend by "tightening handcuffs and striking our heads against metal booths when we attempted to speak". They were interrogated for three hours at the police station.

...

2.3 On 2 May 1996 the author and his friend were brought before the Pescht Central District Court for the purpose of deciding whether they should be remanded in custody. The court decided to detain them due to the risk of flight. During the police interrogation, the hearing on detention and the detention itself, the author and his friend were not allowed to contact their Embassy, families, lawyers or sports organization. On 7 May 1996, the police authorities completed the investigation and referred the case to the public prosecutor's office.

...

7.5 With respect to the author's claim that he was not provided with legal representation from the time of his arrest to his release from detention, which included a hearing on detention at which he had to represent himself, the Committee notes that the State party has confirmed that although it assigned a lawyer to the author, the lawyer failed to appear at the interrogation or at the detention hearing. In its previous jurisprudence, the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation. It recalls its prior jurisprudence that legal assistance should be available at all stages of criminal proceedings. Consequently the Committee finds that the facts before it reveal a violation of article 14, paragraph 3 (d) of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3, and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

9. 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 compensation. The State party is also under an obligation to prevent similar violations in the future.

- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at paras. 2.1, 3.1 and 6.2.

...

2.1 The author, who was suspected of having murdered, on 12 December 1992, his three step-children aged 2, 4 and 7, was arrested on 13 December 1992 in West Bank Demerara, Guyana.

...

3.1 The author claims a violation of his Covenant rights because he was denied access to a lawyer when questioned after his arrest.

...

6.2 As to the allegations related to the question of whether or not he was informed of his right to be assisted by a lawyer when he was questioned after his arrest and also the question of his forced confession, raising possibly issues under article 14, paragraph 3 (d) and (g), of the Covenant, the Committee notes that the trial transcript reveals that the author's counsel fully canvassed those issues before the trial court with a view to render his confession inadmissible in evidence and that the Court duly considered it. In this connection, the Committee reiterates its jurisprudence that it is primarily for the courts of States parties to the Covenant to review facts and evidence in a particular case. It is for the appellate courts of States parties to the Covenant, and not for the Committee, to review the conduct of the trial and the judge's instructions to the jury, unless it can be ascertained that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The trial transcript in the author's case did not reveal that his trial suffered from such defects. Accordingly, this part of the communication does not reveal a violation of article 14, paragraph 3 (d) and (g) of the Covenant.

...

- *Hussain v. Mauritius* (980/2001), ICCPR, A/58/40 vol. II (18 March 2003) 516 (CCPR/C/77/D/980/2001) at paras. 2.3 and 6.3.

...

2.3 In September 1996, the author personally contacted a lawyer, Mr. Oozeerally, who agreed to start working on the case as soon as he received the copies of the author's statement as well as of other evidence related to the case. Mr. Oozeerally was later appointed as legal aid counsel. The author claims that his counsel received the documents only five days before the trial.

...

6.3 Concerning the author's claim that his counsel has not received sufficient time to prepare his defence because the case file was transmitted to him only five days prior to the first hearing, which may raise issue under article 14, paragraph 3 (b) and (d), of the Covenant, the Committee notes from the information brought by both parties that counsel had the opportunity to cross-examine the witness as well as to ask for the adjournment of the trial, which he did not do. In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.4/ In the instant case, there is no reason for the Committee to believe

that the author's counsel was not using other than his best judgement. Moreover, the Committee notes that the author eventually decided to plead guilty against the advice of his counsel. The Committee finds therefore that the author has not sufficiently substantiated his claim under article 14, paragraph 3 (b) and (d) of the Covenant. This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

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4/ See *inter alia*, the Committee's decision in Communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.

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- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at paras. 2.1, 3.6 and 6.6.

...

2.1 On 17 March 1986, the author was arrested for murder alleged to have been committed on 28 February 1986 and was subsequently charged with murder. Following a Preliminary Enquiry conducted before a Magistrate's Court, the trial took place before the High Court of Justice of San Fernando between 22 June 1988 and 4 July 1988, and the author was convicted of murder and sentenced to death. On 4 January 1994, the death sentence was commuted to life imprisonment for the rest of his "natural life".

...

3.6 ...[T]he author claims a violation of article 14, read together with article 2, paragraph 3 of the Covenant because a subsequent constitutional challenge to the High Court in relation to the length of the term imposed was not open to him as legal aid is not provided for such motions and the costs involved are beyond the means of the author. He states that an originating motion pursuant to article 14(1) of the Constitution, could have been lodged on the basis that his life imprisonment for the rest of his "natural life" is arbitrary and cruel. However, because of the lack of legal aid for Constitutional Motions, the author claims that he is effectively barred from exercising his constitutional right to seek redress for the violation of his rights. He cites the Human Rights Committee's decision in *Currie v. Jamaica*4/ for the proposition that remedies in the Constitutional Court should be available and effective and in the context of a review of irregularities in a criminal trial legal assistance should be provided to those who have not the means to take such an action. He also cites jurisprudence from the European Court of Human Rights5/ for the proposition that effective right of access to a court may require the provision of legal aid for indigent applicants.

...

6.6 As to the claim that he was denied access to the courts in not being provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation, the Committee recalls its prior jurisprudence12/ that the Covenant does not contain an express obligation as such for any State party to provide legal aid to individuals in *all* cases but only in the determination of a criminal charge where the interest of justice so require. The Committee is therefore of the view that the State party is not expressly required to provide legal aid outside the context of a criminal trial. As the author's claim relates to the commutation of his sentence rather than the fairness of the trial itself, the Committee cannot find that there has been a violation of article 14, paragraph 1, of the Covenant, in this respect.

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4/ Communication No. 377/1989, Views adopted on 29 March 1994, where the Committee found that "where a convicted person seeking constitutional review of the irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State. In the present case the absence of legal aid has denied to the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court and a fair hearing, and is thus a violation of article 14, paragraph 1, juncto article 2, paragraph 3."

5/ *Golder v. UK* [1975] 1 EHRR 524, and *Airey v. Ireland* [1979] 2 EHRR 305.

...

12/ *Kennedy v. Trinidad and Tobago*, [Case No. 845/1998, Views adopted on 26 March 2002].

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- *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 CCPR/C/78/D/796/1998 at paras. 2.1, 2.2, 3.1, 3.2, 7.2 and 7.4.

...

2.1 The author was arrested on 13 January 1983, and charged with two counts of murder with respect to events that occurred on 11 January 1983. At the preliminary hearing, he was assigned a legal aid trial lawyer. At trial before the Clarendon Circuit Court, from 20 to 27 September 1983, the author pleaded not guilty to both counts but admitted to having been at the scene of the murders when they took place. He was convicted by jury on both counts and sentenced to death.

2.2 Immediately upon his conviction and sentence, the author filed a notice of appeal and

requested that the Court of Appeal grant him legal aid. A legal aid lawyer was assigned to him, but the author was not informed of the date of the appeal hearing, nor was he permitted any access to his lawyer to provide him with any instructions. He was not present at the appeal hearing on 2 October 1986, and was not informed of what occurred at the hearing beyond refusal of the appeal. On 13 November 1986, the Court of Appeal dismissed his appeal.

...

3.1 The author claims a violation of article 14, paragraph 3 (b), because he had inadequate time and facilities to prepare his defence at trial, and inadequate communication with counsel of his choice. He argues that his detention up until trial made it doubly important that he was able to give detailed instructions to counsel. However, prior to his preliminary hearing, he was only able to speak to his legal aid lawyer for half an hour. Moreover, he was unable to have another audience with his lawyer before or after the trial. During the time of pre-trial detention, the legal aid lawyer never visited the author and did not review the case with him at all in preparation for the trial. As a consequence, no witnesses were called on his behalf at trial. He was only able to speak to his lawyer directly from the dock, while the trial was actually in progress, and many of his instructions were simply ignored. He was further unable to go through the prosecution statements with his lawyer, who failed to point out significant discrepancies in the prosecution's evidence. The author contends that at one point at trial he informed the judge that he was unsatisfied with his legal representation, but was told that the only alternative would be for him to represent himself.

3.2 The author further alleges a violation of article 14, paragraph 3 (e), in that he had insufficient opportunity to examine, or have examined, the witnesses against him at trial, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. His lawyer made no attempt to accede to his request to call certain witnesses on his behalf, in particular, a serving Jamaican police officer, who had testified at the preliminary hearing that other police officers investigating the murders had planted evidence on the author.4/ The author submits that the primary reason why witnesses were not traced and called was that legal aid rates available to counsel were so inadequate that they are unable to make such enquiries.

...

7.2 As to the claim of a violation of article 14, paragraph 3 (b) and (e), in that the author had inadequate time and facilities to prepare his trial defence at trial and that counsel conducted his defence poorly, the Committee reiterates its jurisprudence that in such a situation, it would have been incumbent on the author or his counsel to request an adjournment at the beginning of the trial, if it was felt that they had not had sufficient opportunity to properly prepare a defence. The trial transcript does not disclose any such application. 9/ As to the issues raised by the author's objection to counsel's conduct of the trial, the Committee recalls that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible

with the interests of justice.10/ The Committee is of the view that, in the present case, there is no indication that counsel's conduct of the trial was manifestly incompatible with his professional responsibilities. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

...

7.4 As to the claim of a violation of article 14, paragraphs 3 (b) and 5, concerning the preparation and conduct of the appeal, the Committee notes that the author signed the application for leave to appeal which detailed the grounds of appeal and is therefore not in a position to claim he was unable to instruct his appellate lawyer. Moreover, the Committee recalls its jurisprudence (referred to in paragraph 7.2 above) that a State party cannot generally be held responsible for the conduct of a lawyer in court. In this case, the Committee does not discern any exceptional matter in the manner the appeal was conducted that would warrant departure from this approach. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

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4/ In *Bell v. Director of Public Prosecutions* [1986] LRC 392, the Privy Council accepted that in Jamaica there exists a real difficulty in securing the attendance of witnesses at court.

...

9/ See, for example, *Simpson v. Jamaica* Case No.. 695/1996, Views adopted on 31 October 2001.

10/ *Ibid*.

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- *Aliev v. Ukraine* (781/1997), ICCPR, A/58/40 vol. II (7 August 2003) 52 (CCPR/C/78/D/781/1997) at paras. 2.1, 2.6, 7.2, 7.3 and 9.

...

2.1 On 8 June 1996, in the town of Makeevka, Ukraine, having consumed a large quantity of alcohol, the author, Mr. Kroutovertsev and Mr. Kot had an altercation in an apartment. The altercation degenerated into a fight. A fourth person, Mr. Goncharenko, witnessed the incident. According to the author, Mr. Kot and Mr. Kroutovertsev beat him severely. Mr. Kroutovertsev also struck him with an empty bottle. While defending himself, the author seriously wounded Mr. Kot and Mr. Kroutovertsev with a knife, whereupon he fled.

...

2.6 The author was held for five months without access to a lawyer; he states that he was not examined either by a forensic psychiatrist, in spite of his medical history, or by a physician. During the reconstruction of the crime, the author was unable to participate,

except when Mr. Kroutovertsev and Mr. Kot were also concerned.

...

7.2 First, the author alleges that he did not have the services of a counsel during his first five months of detention. The Committee notes that the State party is silent in this regard; it also notes that the copies of the relevant judicial decisions do not address the author's allegation that he was not represented for five months, even though the author had mentioned this allegation in his complaint to the Supreme Court dated 29 April 1997. Considering the nature of the case and questions dealt with during this period, particularly the author's interrogation by police officers and the reconstruction of the crime, in which the author was not invited to participate, the Committee is of the view that the author should have had the possibility of consulting and being represented by a lawyer. Consequently, and in the absence of any relevant information from the State party, the Committee is of the view that the facts before it constitute a violation of article 14, paragraph 1, of the Covenant.

7.3 Secondly, the author alleges that, subsequently, on 17 July 1997, the Supreme Court heard his case in his absence and in the absence of his counsel. The Committee notes that the State party has not challenged this allegation and has not provided any reason for this absence. The Committee finds that the decision of 17 July 1997 does not mention that the author or his counsel was present, but mentions the presence of a procurator. Moreover it is uncontested that the author had no legal representation in the early stages of the investigations. Bearing in mind the facts before it, and in the absence of any relevant observation by the State party, the Committee considers that due weight must be given to the author's allegations. The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases in which the accused incurs capital punishment.2/ Consequently, the Committee is of the view that the facts before it disclose a violation of article 14, paragraph 1, as well as a separate violation of article 14, paragraph 3 (d), of the Covenant.

...

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The Committee is of the view that, since the author was not duly represented by a lawyer during the first months of his arrest and during part of his trial, even though he risked being sentenced to death, consideration should be given to his early release. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

2 See for example *Robinson v. Jamaica*, communication No. 223/1987 and *Brown v. Jamaica*, communication No. 775/1997.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

- *Martinez Muñoz v. Spain* (1006/2001), ICCPR, A/59/40 vol. II (30 October 2003) 198 (CCPR/C/79/D/1006/2001) at paras. 2.1, 2.2, 2.4-2.6, 6.4 and 6.5.

...

2.1 On 21 September 1990, the author, together with six other persons, took part in writing *pintadas* ("graffiti") in favour of the right to refuse to perform military service, on the outer facade of the bullring in the town of Yecla. For this reason, they were intercepted by two local policemen. The author alleges that, when one of the policemen attempted to arrest him, a struggle ensued and he accidentally struck the policeman in one eye, causing a contusion.

2.2 The author was held in custody on 21 September 1990 and released on 22 September 1990. The hearing took place on 14 June 1995. The author was accused by the prosecutor of two misdemeanours and an offence and, on 16 June 1995, Criminal Court No. 3 of Murcia sentenced him for the offence of attacking a law enforcement officer to a penalty of six months' and one day's imprisonment and compensation in the amount of 70,000 pesetas in favour of the injured policeman.

...

2.4 The author filed an application for *amparo* and requested the Constitutional Court to allow him to dispense with the *procurador* and to represent himself. That request was denied on 15 January 1996. The author then requested the court to appoint a *procurador*. When that person had been appointed in accordance with article 27 of the Free Legal Assistance Act, the Constitutional Court required the freely chosen lawyer to waive his fees. In the light of this requirement, the author filed an application for reconsideration, which was rejected on 22 March 1996.

2.5 When the freely chosen lawyer refused to waive his fees, on 13 December 1995 the author requested the court to appoint counsel. The lawyer assigned to him requested the Constitutional Court to excuse her from filing an application for *amparo*, since she believed that that remedy was unnecessary because there had been no violation of fundamental human rights.

2.6 The author said that he wished to dismiss the court-appointed counsel. On 1 July 1996, the Constitutional Court informed him that it could not accede to his request but transmitted the pleas of fact to the General Council of Spanish Lawyers which, on 9 September 1996, concluded that the application for *amparo* that the author's court-appointed counsel had not filed was partly sustainable, since it could be admissible only with respect to the complaint of undue delay in the proceedings.

...

6.4 The author...claims a violation of article 14, paragraph 1, of the Covenant, arguing that, since he was not allowed to dispense with a *procurador* and to represent himself before the Constitutional Court, he was placed in a situation of inequality with respect to persons with

a law degree; such inequality was not justified. In this regard, the Committee recalls its constant jurisprudence 1/ that the requirement for representation by a *procurador* reflects the need for a person with knowledge of the law to be responsible for handling an application to that court. The Committee therefore considers that the author's allegations have not been properly substantiated for the purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The author claims that his right to a defence, guaranteed in article 14, paragraph 3 (b), was violated, since the court did not authorize the form - which it called "tendentious" - in which his lawyer wished to question him, nor did it permit the re-enactment of the incident by one of the witnesses, which, according to the author, was crucial to his defence. The Committee notes that the dismissal of that complaint was argued both by the Court of First Instance and by the National High Court in its decision on the appeal. In this regard, the Committee recalls its constant jurisprudence that the interpretation of domestic law in a specific case is essentially a matter for the courts and authorities of the State party concerned. It is therefore not for the Committee to evaluate facts and evidence, unless the domestic decisions are manifestly arbitrary or amount to a denial of justice. In the present case, the author has not substantiated any claim in this regard. Consequently, this part of the communication is declared inadmissible under article 2 of the Optional Protocol.

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Notes

1/ Communication No. 865/1999, *Alejandro Marín Gómez v. Spain,* Views adopted on 22 October 2001, para. 8.4; communication No. 866/1999, *Marina Torregrosa Lafuente et al. v. Spain,* Views adopted on 16 July 2001, para. 6.3; and communication No. 1005/2001, *Concepción Sánchez González v. Spain,* Views adopted on 22 March 2002, para. 4.3.

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- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 2.1, 2.2, 3.4, 3.5, 6.5 and 7.3.

...

2.1 According to the author, Mr. Kurbanov went to the police on 5 May 2001 to testify as a witness. He was detained for seven days in the building of the Criminal Investigation Department of the Ministry of the Interior, where according to the author he was tortured. Only on 12 May 2001, a formal criminal charge of fraud was made against him, an arrest warrant was issued for him, and he was transferred to an investigation detention centre. He was forced to sign a declaration that he renounced the assistance of a lawyer.

...

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of

Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001. In addition to the initial fraud charge, the author's son was, on 30 July 2001, charged with the murders and with illegal possession of firearms 2/. The author claims that her son was tortured before he accepted to write down his confession under duress; during her visits, she noted scars on her son's neck and head, and as well as broken ribs. She adds that one of the torturers - investigation officer Rakhimov - was charged in August 2001 with having received bribes and with abuse of power in 13 other cases also related to the use of torture; he was later sentenced to 5 years and 6 months of imprisonment.

...

3.4 The author claims that when her son was charged with murder, she requested, due to her financial situation, a lawyer be assigned to him *ex officio*, but she was informed that the law provided no such possibility.

3.5 The author also claims that according to the case file, a lawyer assisted her son as of 20 June 2001, but in fact she hired a lawyer for her son only in July 2001. She adds that the lawyer visited her son only two or three times during the investigation, and this was always in the presence of an investigator. After the judgement, her son was unable to see the lawyer and benefit from his assistance. According to the author, the lawyer failed to appeal for cassation. Her son had no opportunity to consult the court's judgement, as no interpreter was provided to him. Mr. Kurbanov prepared a cassation appeal himself, but this was denied, because the deadline for filing the appeal had passed. The author's own cassation appeal was denied on the ground that she was not a party to the criminal case. The extraordinary appeal proceedings which her son availed himself of with the assistance of his lawyer were unsuccessful; they do not, according to author, provide an effective means of judicial protection. Article 14, paragraph 5, of the Covenant allegedly was violated because the author's son was deprived of his right to appeal.

...

6.5 As to the author's claims that her son was denied the assistance of a lawyer during the pre-trial investigation and that even at later stages the assistance of his lawyer remained limited, the Committee notes that these allegations could raise issues under article 14, paragraphs 3 (b) and (d), and recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer 3/ at all stages of the proceedings. However, the Committee notes that the author's son was assisted by a privately hired lawyer from 23 July 2001 onwards, including the actual trial and the extraordinary appeal procedure, and that the author has not given any date for the so-called cross-examination arranged as a part of the pre-trial investigation. Furthermore, the Committee notes that although the author might have been suspected of the murders since the discovery of the bodies, he was informed of his status as a suspect on 11 June 2001 and formally charged with the murders on 30 July 2001, i.e. at a time when he already was assisted by a lawyer. Even though the Committee will have to address on the merits the conduct of the State party's authorities under article 9, paragraph 2, and article 14, paragraph

3 (a), it considers in the circumstances, that no issue under article 14, paragraph 3 (b) and (d) has been substantiated, for the purposes of admissibility.

...

7.3 ...[T]he documents submitted by the State party show that Mr. Kurbanov was, after being detained since 5 May 2001 on other grounds, informed on 11 June 2001 that he was suspected of the killings of 29 April 2001 but charged with these crimes only on 30 July 2001. During his detention from 5 May 2001 onwards, he was, except for the last week starting on 23 July 2001, without the assistance of a lawyer. The Committee takes the view that the delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of Mr. Kurbanov to defend himself, in a manner that constitutes a violation of article 14, paragraph 3 (a), of the Covenant.

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Notes

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2/ It transpires from documents later submitted by the State party that the author's son was on 11 June 2001 initially informed that he was suspected of the murders.

3/ See for example *Aliev v. Ukraine*, communication 781/1997, *Robinson v. Jamaica*, communication No. 223/1987 and *Brown v. Jamaica*, communication No. 775/1997.

...

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- *Arutyunyan v. Uzbekistan* (917/2000), ICCPR, A/59/40 vol. II (29 March 2004) 96 at paras. 6.3, 7 and 8.

...

6.3 The author alleges that her brother's right to defence was violated, because once counsel of his choice was allowed to represent him, the latter was prevented from seeing him confidentially; counsel was allowed to examine the Tashkent City Court's records only shortly before the hearing in the Supreme Court. In support of her allegations, the author produces a copy of the lawyer's request for an adjournment, addressed to the Supreme Court on 17 December 1999; this stated that under different pretexts, he had been denied access to the Tashkent City Court's records. This request was turned down by the Supreme Court. On appeal, counsel claimed that he was unable to meet privately with his client to prepare his defence; the Supreme Court failed to address this issue. In the absence of any pertinent observations from the State party on this claim, the Committee considers that article 14, paragraph 3 (d) has been violated in the instant case.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Arutyunyan with an effective remedy, which could include consideration of a further reduction of his sentence and compensation. The State party is also under an obligation to prevent similar violations in the future.

- *Smartt v. Guyana* (867/1999), ICCPR, A/59/40 vol. II (6 July 2004) 41 at paras. 5.5, 6.2-6.4, 7 and 8.

...

5.5 With respect to the author's claim that the trial against her son was otherwise unfair, the Committee notes that the trial documents submitted by the author reveal that her son was not represented by counsel during the committal hearings. It also notes with concern that, despite three reminders addressed to it, the State party has failed to comment on the communication, including on its admissibility. In the absence of any such comments, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the trial against her son was unfair, and declares the communication admissible, insofar as it may raise issues under articles 6 and 14, paragraph 3 (d), of the Covenant.

...

6.2 The issue before the Committee is whether the absence of legal representation of the author's son during the committal hearings amounts to a violation of article 14, paragraph 3 (d), of the Covenant.

6.3 The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.6/ The pre-trial hearings, having taken place before the Georgetown Magisterial Court between 16 November 1993 and 6 May 1994, that is after the author's son had been charged with murder on 31 October 1993, formed part of the criminal proceedings. Furthermore, the fact that most witnesses of the prosecution were examined at this stage of the proceedings for the first time, and were subject to cross-examination by the author's son, shows that the interests of justice would have required securing legal representation to the author's son through legal aid or otherwise. In the absence of any submission by the State party on the substance of the matter under consideration, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.4 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.7/ In the present case, the sentence of death was passed without meeting the requirements of a fair trial set out in article 14 of the Covenant, and thus also in breach of article 6.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

7. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

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Notes

...

6/ See e.g. communication No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, at para. 6.5; communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, at para. 7.3; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, at para. 6.6.

7/ See *ibid*., at paras. 7.7, 7.4 and 6.15, respectively.

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- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 6.8, 7 and 8.

...

6.8 As to the alleged violation of article 14, paragraph 3 (b), in that the author's husband was legally represented only towards the end of the investigation and not by counsel of his own choice, with no opportunity to consult his representative, and that, contrary to article 14, paragraph 3 (d), Mr. Saidov was not informed of his right to be represented by a lawyer upon arrest, and that his lawyer was frequently absent during the trial, the Committee once more regrets the absence of a relevant State party explanation. It recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer 7/ at all stages of the proceedings. In the present case, the author's husband faced several charges which carried the death penalty, without any effective legal defence, although a lawyer had been assigned to him by the investigator. It remains unclear from the material before the Committee whether the author or her husband have requested a private lawyer, or have contested the choice of the assigned lawyer. However, and in the absence of any relevant State party explanation on this issue, the Committee reiterates that while article 14, paragraph 3 (d) does not entitle an accused to choose counsel free of charge, steps must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.8/ Accordingly, the Committee is of the view that the facts before it reveal a violation of Mr. Saidov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Saidov's rights under articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), and (g), and 5, of the Covenant.

8. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

...

7/ See for example *Aliev v. Ukraine*, communication No. 781/1997, *Robinson v. Jamaica*, communication No. 223/1987, *Brown v. Jamaica*, communication No. 775/1997.

8/ See, *inter alia*, *Kelly v. Jamaica*, communication No. 253/1987.

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- *Ramil Rayos v. The Philippines* (1167/2003), ICCPR, A/59/40 vol. II (27 July 2004) 389 at paras. 7.3, 8 and 9.

...

7.3 With respect to the claim of a violation of article 14, paragraph 3 (b), as the author was not granted sufficient time to prepare his defence and communicate with counsel, the Committee notes that the State party does not contest this claim. Since the author was only granted a few moments each day during the trial to communicate with counsel, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant. As the author's death sentence was affirmed after the conclusion of proceedings in which the requirements for a fair trial set out in article 14 of the Covenant were not met, it must be concluded that the author's right protected under article 6 has also been violated.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 14, paragraph 3 (b), of the Covenant.

9. 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 and appropriate remedy, including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras.

6.4, 7 and 8.

...

6.4 The Committee has noted the author's claims that her son was legally represented only one month after being charged with several crimes and all meetings between him and the lawyer subsequently assigned by the investigation were held in investigators' presence, in violation of article 14, paragraph 3(b). The Committee considers that the author's submissions concerning the time and conditions in which her son was assisted by a lawyer before the trial adversely affected the possibilities of the author's son to prepare his defence. In the absence of any explanations by the State party, the Committee is of the view that the facts before it reveal a violation of Mr. Khomidov's rights under article 14, paragraph 3(b), of the Covenant.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7; 9, paragraphs 1 and 2; 14, paragraphs 1, and 3(b), (e) and (g), read together with article 6, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, a compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

- *Van Hulst v. The Netherlands* (903/2000), ICCPR, A/60/40 vol. II (1 November 2004) 29 at paras. 2.1-2.4, 7.5, 7.6, 7.8 and 7.10.

...

2.1 During a preliminary inquiry against Mr. A.T.M.M., the author's lawyer, telephone conversations between A.T.M.M. and the author were intercepted and recorded. On the basis of the information obtained by this operation, a preliminary inquiry was opened against the author himself, and the interception of his own telephone line was authorized.

2.2 By judgement of 4 September 1990, the District Court of 's-Hertogenbosch convicted the author of participation in a criminal organization, persistent acquisition of property without intent to pay, fraud and attempted fraud, extortion, forgery and handling stolen goods, and sentenced him to six years' imprisonment.

2.3 During the criminal proceedings, counsel for the author contended that the public prosecutor's case should not be admitted, because the prosecution's case contained a number of reports on telephone calls between the author and his lawyer, A.T.M.M, which it was

unlawful to receive in evidence. Counsel argued that, in accordance with article 125h, 2/ paragraph 2, read in conjunction with section 218, 3/ of the Code of Criminal Procedure, the evidence obtained unlawfully should have been discarded.

2.4 Although the District Court agreed with the author that the telephone calls between him and A.T.M.M., could not be used as evidence, insofar as the latter acted as the author's lawyer and not as a suspect, it rejected the author's challenge to the prosecution's case, noting that the prosecutor had not relied on the contested telephone conversations in establishing the author's guilt. While the Court ordered their removal from the evidence, it admitted and used as evidence other telephone conversations, which had been intercepted and recorded in the context of the preliminary inquiry against A.T.M.M., in accordance with section 125g 4/ of the Code of Criminal Procedure, and which did not concern the lawyer-client relationship with the author.

...

7.5 One...question which arises is whether the State party was required by section 125h, paragraph 2, read in conjunction with section 218 of the Code of Criminal Procedure, to discard and destroy any information obtained as a result of the interception and recording of the author's conversations with Mr. A.T.M.M., insofar as the latter acted as his lawyer and as such was subject to professional secrecy. The Committee notes, in this regard, that the author challenges the Supreme Court's jurisprudence that cognizance may be taken of tapped telephonic conversations involving a person entitled to decline evidence, even though section 125h, paragraph 2, provides that the reports on such conversations must be destroyed. The Committee considers that an interference is not "unlawful", within the meaning of article 17, paragraph 1, if it complies with the relevant domestic law, as interpreted by the national courts.

7.6 Finally, the Committee must consider whether the interference with the author's telephonic conversations with Mr. A.T.M.M. was arbitrary or reasonable in the circumstances of the case. The Committee recalls its jurisprudence that the requirement of reasonableness implies that any interference with privacy must be proportionate to the end sought, and must be necessary in the circumstances of any given case 13/. The Committee has noted the author's argument that clients can no longer rely on the confidentiality of communication with their lawyer, if there is a risk that the content of such communication may be intercepted and used against them, depending on whether or not their lawyer is suspected of having committed a criminal offence, and irrespective of whether this is known to the client. While acknowledging the importance of protecting the confidentiality of communication, in particular that relating to communication between lawyer and client, the Committee must also weigh the need for States parties to take effective measures for the prevention and investigation of criminal offences.

...

7.8 The Committee considers that the interception and recording of the author's telephone

calls with A.T.M.M. did not disproportionately affect his right to communicate with his lawyer in conditions ensuring full respect for the confidentiality of the communications between them, as the District Court distinguished between tapped conversations in which A.T.M.M. participated as the author's lawyer, and ordering their removal from the evidence, and other conversations, which were admitted as evidence because they were intercepted in the context of the preliminary inquiry against A.T.M.M. Although the author contested that the State party accurately made this distinction, he has failed to substantiate this challenge.
...
7.10 In the light of the foregoing, the Committee concludes that the interference with the author's privacy in regard to his telephone conversations with A.T.M.M. was proportionate and necessary to achieve the legitimate purpose of combating crime, and therefore reasonable in the particular circumstances of the case, and that there was accordingly no violation of article 17 of the Covenant.

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2/ Section 125h of the Code of Criminal Procedure reads, in pertinent parts: "(1) The investigating judge shall, as soon as possible, order the destruction in his presence of any official reports or other objects from which information may be obtained that has been acquired as a result of the provision of information referred to in section 125f, or of the interception or recording of data traffic referred to in section 125g, and which is of no relevance to the investigation. An official report shall immediately be drawn up on the said destruction. (2) The investigating judge shall, in the same way, order the destruction without delay of any official reports or other objects, as referred to in paragraph 1, if they relate to statements made by or to a person who would be able to decline to give evidence, pursuant to section 218, if he were asked as a witness to disclose the content of the statements. (3) [...] (4) [...]" (Translation provided by the State party.)

3/ Section 218 of the Code of Criminal Procedure reads: "Those who are bound to secrecy by virtue of their position, profession or office may decline to give evidence or to answer certain questions, but only in so far as the information concerned was imparted to them in that capacity." (Translation provided by the State party.)

4/ Section 125g of the Code of Criminal Procedure reads: "During the preliminary judicial investigation, the investigating judge is empowered to order an investigating officer to intercept or record data traffic not intended for the public, which is carried via the telecommunications infrastructure, and in which he believes that the suspect is taking part, provided this is urgently necessary in the interests of the investigation and concerns an offence for which pretrial detention may be imposed. An official report of such interception or recording shall be drawn up within forty-eight hours." (Translation provided by the State party.)

...

13/ See communication No. 488/1992, *Toonen v. Australia*, at para. 8.3.

- *Rolando v. The Philippines* (1110/2002), ICCPR, A/60/40 vol. II (3 November 2004) 161 at paras. 2.1, 2.2, 5.6, 6 and 7.

...

2.1 In September 1996, the author was arrested and detained at a police station, without a warrant. He was told that he was being detained after allegations made by his wife of the rape of his stepdaughter. Before, the author was employed as a police officer. He requested to see his arrest warrant and a copy of the formal complaint, but did not receive a copy of either. He claims that he was not informed of his right to remain silent or of his right to consult a lawyer, as required under article III, section 12 (1) of the Philippine Constitution of 1987. On 1 November 1996, he was released. Throughout his detention, he was not brought before any judicial authority, nor was he formally charged with an offence.

2.2 On 27 January 1997, he was arrested again and charged with the rape of his stepdaughter Lori Pagdayawon, under article 335, paragraph 3, of the Revised Penal Code, as amended. He claims that he was not informed of his right to remain silent or his right to consult a lawyer. He also claims that the first opportunity he had to engage a private lawyer was at the inquest. The same lawyer represented him throughout the proceedings. On 27 May 1997, the Regional Trial Court of Davao City found him guilty as charged and sentenced him to death, as well as to pay the sum of 50,000 pesos to the victim. 1/ According to the author, the death penalty is mandatory for the crime of rape; it is a crime against the person by virtue of Republic Act No. 8353.

...

5.6 As to the author's uncontested claim that he did not have access to a lawyer during his initial period of detention, and that during both periods of detention, he was not informed of his right to legal assistance, the Committee finds a violation of article 14, paragraph 3 (d), of the Covenant.

6. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by the Philippines of articles 6, paragraphs 1, 9, paragraphs 1, 2 and 3 and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

7. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

LEGAL RIGHTS - CRIMINAL - Right to Counsel or Consular Assistance

Notes

1/ The judgement reads as follows: "The crime committed is statutory rape. The penalty imposable, considering the circumstances of relationship being present, is the supreme penalty of death. The court is left with no alternative but to obey the mandate of the law in the imposition of the penalty. In the language of the Supreme Court in *People v. Leo Echegaray, G.R.* No. 117472, June 25, 1996, 'The law has made it inevitable under the circumstances of this case that the accused-appellant face the supreme penalty of death.'"

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.1, 2.4-2.6, 2.8, 2.11, 5.6, 5.7, 6.3 and 6.5.

...

2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, *inter alia*, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

...

2.4 From 16 to 26 October 1999, the author was held *incommunicado* at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for *habeas corpus* with the Supreme Court, challenging the lawfulness of the author's arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic…by arts. 44, 46 all of Law no 22/91 of June 15

(the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.

...

2.8 By reference to article 46 2/ of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the 'truth' of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author's lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as *ex officio* defence counsel an official of the General Attorney's Office working at the Provincial Court's labour tribunal, who allegedly was not qualified to practise as a lawyer.

...

2.11 On 4 April 2000, the author appealed to the Supreme Court of Angola. On 7 April 2000, the Supreme Court issued a public notice criticizing the Bar Association for having qualified the trial judge's suspension of the author's lawyer as null and void for lack of jurisdiction, in a decision of its National Council adopted on 27 March 2000.5/

...

5.6 As regards the author's claim that article 14, paragraph 3 (b), was also violated because the trial judge did not adjourn the trial after having replaced his lawyer by an *ex officio* counsel, thereby denying him adequate time to consult with his new counsel to prepare his defence, the Committee notes that the material before it does not reveal that the author, or his new counsel, requested an adjournment on grounds of insufficient time to prepare the defence. If counsel felt that they were not properly prepared, it was incumbent on him to request the adjournment of the trial.14/ In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.15/ It considers that the author has not substantiated, for purposes of admissibility, that failure to adjourn the trial was manifestly incompatible with the interests of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.7 As to the author's claim that his right to defend himself through legal assistance of his own choosing (art. 14, para. 3 (d)) was breached, the Committee notes that the Supreme Court, while annulling the temporary suspension of the author's lawyer, did not pronounce itself on the legality of the lawyer's removal from the trial. On the contrary, it held that the

abandonment of a client by a lawyer, outside situations specifically allowed by law, was subject to disciplinary sanctions under applicable regulations. In its public notice, the Supreme Court, instead of defending the judge's decision to debar the author's lawyer, expressed its concern about the effects of the Bar Associations criticism (causing "an unjustly suspicious climate [...] discrediting [the judiciary] both domestically and abroad"), while emphasizing that the trial judge's decision "may be cured by a higher court in the legal process". The Supreme Court subsequently declared the author's lawyer's six-month suspension null and void. Similarly, it does not transpire from the trial transcript that counsel was appointed against the author's will or that he limited his interventions during the remainder of the trial to redundant pleadings. According to the transcript, the author, when asked whether he intended to designate a new legal representative, declared that he would leave such decision to the Court. The Committee concludes that the author has not substantiated, for purposes of admissibility, that the removal of his lawyer from the trial was unlawful or arbitrary, that counsel was appointed against the author's will, or that he was unqualified to provide effective legal representation. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

...

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that *incommunicado* detention as such may violate article 9, paragraph 3.17/ It takes note of the author's argument that his 10-day *incommunicado* detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3(b).

...

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his *incommunicado* detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for *habeas corpus* to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (art. 9, para. 4) has been violated.

Notes

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2/ Article 46 of the Press Law reads: "If the person defamed is the President of the Republic of Angola, or the head of a foreign State, or its representative in Angola, then proof of the veracity of the facts shall not be admitted."

...

5/ The translation of the Supreme Court's public notice reads, in pertinent parts: "It does

not make sense, therefore, for a single courtroom incident, resulting from a decision handed down by the Judge in question in open court, a decision which may be cured by a higher court in the legal process, and which is subject to an inter-institutional decision, to have caused such an inflammatory and unnecessary public notice from the Bar Association, creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad, and causing distorted proclamations by individuals, institutions, and even governmental officials."

...

14/ See communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, at para. 8.4.

15/ See communications No. 980/2001, *Hussain v. Mauritius*, decision on admissibility adopted on 18 March 2002, at para. 6.3, and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, at para. 7.3.

...

17/ Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

For dissenting opinions in this context generally, see:

- *Piandiong et al. v. The Philippines* (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at Individual Opinion by Ms. Christine Chanet (partly dissenting), 188, Individual Opinion by Ms. Elizabeth Evatt and Ms. Cecilia Medina Quiroga (partly dissenting), 189 and Individual Opinion by Mr. Martin Scheinin (partly dissenting), 190.

CAT

- *Josu Arkauz Arana v. France* (63/1997), CAT, A/55/44 (9 November 1999) 77 at paras. 11.5 and 12.

...

11.5 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA [the Basque separatist movement], had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their *incommunicado* detention. The deportation was effected

under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, l/ without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

12. In the light of the foregoing, the Committee is of the view that the author's expulsion to Spain, in the circumstances in which it took place, constitutes a violation by the State party of article 3 of the Convention.

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Notes

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l/ At the time of the consideration of the second periodic report submitted by France pursuant to article 19 of the Convention, the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country (A/53/44, para. 143).

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