LEGAL RIGHTS - CRIMINAL - Equal Treatment

III. JURISPRUDENCE

CERD

- *Narrainen v. Norway* (3/1991), CERD, A/49/18 (15 March 1994) 119 (CERD/C/42/D/3/1991) at paras. 2.1, 3.1, 3.2, 9.2-9.5 and 10.

...

2.1 The author is of Tamil origin and was born in Mauritius; in 1972, he was naturalized and became a Norwegian citizen. On 25 January 1990, he was arrested in connection with a drug-related offence. On 8 February 1991, before the Eidsivating High Court (Court of Appeal - "*Lagmannsretten*"), a jury of 10 found him guilty of offences against section 162 of the Criminal Code (drug trafficking), and the author was sentenced to six and a half years' imprisonment. The author appealed to the Supreme Court, but leave to appeal was denied in early March 1991. On 17 February 1992, the author filed a petition for reopening of the case. By order of 8 July 1992, the Court of Appeal refused the request. The author again appealed the order to the Supreme Court which, on 24 September 1992, ruled that the case was not to be reopened.

...

3.1 The author claims that racist considerations played a significant part in his conviction, as the evidence against him would not have supported a guilty verdict. He adds that he could not have expected to obtain a fair and impartial trial, as "all members of the jury came from a certain part of Oslo where racism is at its peak". He asserts that this situation violated his rights under the International Convention on the Elimination of All Forms of Racial Discrimination.

3.2 The author claims that other factors should be taken into consideration in assessing whether he was the victim of racial discrimination. In this context, he mentions the amount of time spent in custody prior to the trial (381 days), out of which a total of nine months were allegedly spent in isolation, and the quality of his legal representation: thus, although he was assigned legal counsel free of charge, his representative "was more of a prosecutor than a lawyer of the defence." Finally, the author considers that a previous drug-related conviction, in 1983, was disproportionably and unreasonably used as character evidence against him during the trial in 1991.

...

9.2 The Committee considers that in the present case the principal issue before it is whether the proceedings against Mr. Narrainen respected his right, under article 5(a) of the Convention, to equal treatment before the tribunals, without distinction as to race, colour or national or ethnic origin. The Committee notes that the rule laid down in article 5(a) applies to all types of judicial proceedings, including trial by jury. Other allegations put forward by the author of the communication are in the Committee's view outside the scope of the

Convention.

9.3 If members of a jury are suspected of displaying or voicing racial bias against the accused, it is incumbent upon the national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased.

9.4 In the present case, the inimical remarks made by juror Ms. J. were brought to the attention of the Eidsivating High Court, which duly suspended the proceedings, investigated the issue and heard testimony about the allegedly inimical statement of Ms. J. In the view of the Committee, the statement of Ms. J. may be seen as an indication of racial prejudice and, in the light of the provision of article 5(a) of the Convention, the Committee is of the opinion that this remark might have been regarded as sufficient to disqualify the juror. However, the competent judicial bodies of Norway examined the nature of the contested remarks and their potential implications for the course of the trial.

9.5 Taking into account that it is neither the function of the Committee to interpret the Norwegian rules on criminal procedure concerning the disqualification of jurors, nor to decide as to whether the juror had to be disqualified on that basis, the Committee is unable to conclude, on the basis of the information before it, that a breach of the Convention has occurred. However, in the light of the observations made in paragraph 9.4, the Committee makes the following recommendations pursuant to article 14, paragraph 7, of the Convention.

10. The Committee recommends to the State party that every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. Consequently, the Committee recommends that in criminal cases like the one it has examined due attention be given to the impartiality of juries, in line with the principles underlying article 5(a) of the Convention.

ICCPR

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

...
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.

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...
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.

- *B. d. B. et al. v. The Netherlands* (273/1989), ICCPR, A/44/40 (30 March 1989) 286 at para. 6.4.

...
6.4 ...[W]hile the authors have complained about the outcome of the judicial proceedings, they acknowledge that procedural guarantees were observed in their conduct. The Committee observes that article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal. Thus, this aspect of the authors' communication falls outside the scope of the application of article 14 and is, therefore, inadmissible under article 3 of the Optional Protocol.

- *Guesdon v. France* (219/1986), ICCPR, A/45/40 vol. II (25 July 1990) 61 at para.10.2.

...
10.2 ...The Committee observes, as it has done on a previous occasion, c/ that article 14 is concerned with procedural equality; it enshrines, *inter alia*, the principle of equality of arms in criminal proceedings. The provision for the use of one official court language by States parties to the Covenant does not, in the Committee's opinion, violate article 14. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.
...

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Notes

...
c/ See Communication No. 273/1988 (*B. d. B. v. Netherlands*, decision on inadmissibility of 30 March 1989, paragraph 6.4).

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- *González del Río v. Peru* (263/1987), ICCPR, A/48/40 vol. II (28 October 1992) 17 (CCPR/C/46/D/263/1987) at para. 5.2.

...
5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judge's involved in the case had referred to its political implications...and justified the courts' inaction or the delays in the judicial proceedings on this ground. The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. It considers that the Supreme Court's position in the author's case was, and remains, incompatible with this requirement...

- *Hoelen v. The Netherlands* (873/1999), ICCPR, A/55/40 vol. II (3 November 1999) 240 at paras. 2, 3.1, 4.2 and 5.

...
2. On 8 May 1993, the author participated in a demonstration which ended in violent disturbances. On 8 June 1993, the author was found guilty by a single judge of the District Court at The Hague for having committed acts of violence against police personnel by throwing stones. He was sentenced to a fine of NGL 750 and a suspended sentence of two weeks' imprisonment. His appeal was heard on 13 October 1994, 9 and 10 February 1995, and rejected by the Court of Appeal on 24 February 1995. His further (cassation) appeal was rejected on 20 February 1996.
...
3.1 The author claims that his right to equality under article 26 of the Covenant has been violated, because no police officers were prosecuted after the disturbances, although independent reports had established that the police had used unreasonable violence.
...
4.2 The Committee recalls that the prosecution of one person and the failure to prosecute another as such does not raise an issue of equality before the law, since each case has to be judged on its own merits. 1/ The author's allegations and the material before the Committee do not substantiate the author's claim that he is a victim of a violation of article 26 in this respect.
...
5. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol...

_____
Notes

1/ See the Committee's decision declaring inadmissible communication No. 579/1994 (*Werenbeck v. Australia*), 27 March 1997, CPR/C/59/D/579/1994, para. 9.9.

- *Gomez v. Spain* (701/1996), ICCPR, A/55/40 vol. II (20 July 2000) 102 at paras. 3.1 and 11.2.

...

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to judicial review proceedings only on very limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, when the case is ready for the hearing, refers it to a single judge ad quo (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law, but also of the facts.

...

11.2 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee considers that different treatment for different offences does not necessarily constitute discrimination. The Committee is of the opinion that the author has not substantiated the allegation of a violation of article 26 of the Covenant.

See also:

- *Sineiro Fernandez v. Spain* (1007/2001), ICCPR, A/58/40 vol. II (7 August 2003) 325 (CCPR/C/78/D/1007/2001) at para. 6.4.

- *Thompson v. Saint Vincent and the Grenadines* (806/1998), ICCPR, A/56/40 vol. II (18 October 2000) 93 at paras. 2.1, 3.1, 3.2, 8.2, 8.3 and 10.

...

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre

Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996...

...

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.1/ In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

...

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory

nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).

...

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

_____

Notes

1/ Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

_____

- *Kavanagh v. Ireland* (819/1998), ICCPR, A/56/40 vol. II (4 April 2001) 122 at paras. 2.1-2.3, 3.2-3.4, 3.6, 10.1-10.3, 11, 12 and Individual Opinion by Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella (concurring), 136 at paras. 1 and 2.

...

2.1 Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order". On 26 May 1972, the Government exercised its power to make a proclamation pursuant to Section 35(2) of the Offences Against the State Act 1939 (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35(4) and (5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

2.2 By virtue of s. 47(1) of the Act, a Special Criminal Court has jurisdiction over a "scheduled offence" (i.e. an offence specified in a list) where the Attorney-General "thinks proper" that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts... The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney-General certifies, under s.47(2) of the Act, that in his or her opinion the ordinary courts are "inadequate to secure the effective administration of justice in relation to the trial of such person on such charge". The Director of Public Prosecutions (DPP) exercises these powers of the Attorney-General by delegated authority.

2.3 In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilises a procedure different from that of the ordinary criminal courts, including that an accused cannot avail himself or herself of preliminary examination procedures concerning the evidence of certain witnesses.

...

3.2 On 19 July 1994, the author was arrested on seven charges related to the incident; namely false imprisonment, robbery, demanding money with menaces, conspiracy to demand money with menaces, and possession of a firearm with intent to commit the offence of false imprisonment. Six of those charges were non-scheduled offences, and the seventh charge (possession of a firearm with intent to commit the offence of false imprisonment) was a 'scheduled offence'.

3.3 On 20 July 1994 the author was charged directly before the Special Criminal Court with all seven offences by order of the Director of Public Prosecution (DPP), dated 15 July 1994, pursuant to s.47(1) and (2) of the Act, for the scheduled offences and the non-scheduled offences respectively.

3.4 On 14 November 1994, the author sought leave from the High Court to apply for judicial review of the DPP's order. The High Court granted leave that same day and the author had his application heard in June 1995. The author contended that the offences with which he was charged had no subversive or paramilitary connection and that the ordinary courts were adequate to try him. The author challenged the 1972 proclamation on the basis that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded, and sought a declaration to that effect. He also sought to quash the DPP's certification in respect of the non-scheduled offences, on the grounds that the DPP was not entitled to certify non-scheduled offences for trial in the Special Criminal Court if they did not have a subversive connection. In this connection, he contended that the Attorney-General's representation to the Human Rights Committee at its 48th session that the Special Criminal Court was necessitated by the ongoing campaign in relation to Northern Ireland gave rise to a legitimate expectation that only offences connected with Northern Ireland would be put before the Court. He further contended that the decision to try him before the Special

Criminal Court constituted unfair discrimination against him.

...

3.6 Concerning the contention that the author was subject to a mode of trial different from those charged with similar offences but who were not certified for trial before the Special Criminal Court, the High Court found that the author had not established that such a difference in treatment was invidious...

...

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the Offences Against the State Act, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are "inadequate to secure the effective administration of justice". The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be "proper", or that the ordinary courts are "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most

exceptional and virtually undemonstrable circumstances.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality "before the courts and tribunals" contained in article 14, paragraph 1, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. 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. The State party is also under an obligation to ensure that similar violations do not occur in the future : it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

Individual Opinion by Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella

1. While the complaint of the author can be viewed in the perspective of Article 26 under which States are bound, in their legislative, judicial and executive behaviour, to ensure that everyone is treated equally and in a non-discriminatory manner, unless otherwise justified on reasonable and objective criteria, we are of the view that there has also been a violation of the principle of equality enshrined in Article 14, paragraph 1, of the Covenant.

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of Article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally, the prohibition against double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

- *Cheban v. The Russian Federation* (790/1997) , ICCPR, A/56/40 vol. II (24 July 2001) 88 at paras. 2.1, 3.3 and 7.2-7.4.

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...

2.1 The authors were convicted on 17 February 1995, by the Moscow City Court, of criminal acts committed on 24 January 1994, consisting of rape of a minor (who was aged 13 at the time of the incident), accompanied by violence and threats, and of acting in concert by prior agreement to commit the crimes. At the time of the offences of which they were convicted, the authors were all aged between 15 and 16 years and were attending a boarding school in Moscow...

...

3.3 The facts as stated by the authors may also imply claims that the State party committed breaches of article 14, paragraph 4, and article 26 of the Covenant. As regards article 14, paragraph 4, the facts as stated by the authors suggest that the court did not take into account the age of the accused. The authors sought on several occasions to invoke article 20 of the Russian Constitution, 1993, which provides that cases in which an accused subject to the death penalty may, at his request, be tried before a jury. Denial of a jury trial to the authors might also raise an issue under article 26 because of a difference in treatment between them and other accused persons who received a jury trial.

...

7.2 The claim of discrimination made by the authors is that they were denied a jury trial, while a jury trial was granted to some other accused persons in courts of the State party. The Committee notes that while the Covenant contains no provision asserting a right to a jury trial in criminal cases, if such a right is provided under the domestic law of the State party, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds.

7.3 The authors claim that they should have been afforded a trial by jury, afforded to all accused persons liable to the death penalty. The Committee notes, however, that in the present case the authors were juveniles at the time the crimes were committed and thus they were not subject to the death penalty according to domestic legislation.

7.4 Another possible claim of violation of article 26 is that trial by jury was made available in trials in some parts of the country but not in Moscow where the authors were tried and convicted. The Committee notes that under the Constitution of the State party the availability of jury trial is governed by federal law, but there was no federal law on the subject. The fact that a State party that is a federal union permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26.2/ As the authors have provided no information on cases in which jury trials have been held in non-capital cases in the city of Moscow, the Committee cannot conclude that the State party violated article 26.

Notes

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1/ The communication contains no direct presentation of the facts by either the authors or counsel.

2/ The Russian Constitution provides in its Article 5 that Regions, and cities with federal status, are equal units ("subjects") of the Russian Federation, have their own legislative authority, and can enact their own legislation. (Article 65 enumerates the units of the Federation. Moscow city and Moscow Region, are equal and separate "subjects" of the Russian Federation.) See also Core document, HRI/CORE/1/Add.52,25 October 1995, paragraphs 24 and 30.

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- *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, 3.9 and 9.8.

...
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. It is submitted that all domestic remedies have been exhausted.
...
3.9 With regard to the commutation of his death sentence in June 1996, the author complains that the decision of the President to sentence him to 75 years of imprisonment with hard labour was unlawful and discriminatory. The author refers to the decision of the Judicial Committee of the Privy Council in the cases of *Earl Pratt and Ivan Morgan* and of *Lincoln Anthony Guerra*, and claims that his sentence should have been commuted to life imprisonment. The author submits that 53 other prisoners, who had been on death row for murder for more than five years, saw their sentence commuted to life imprisonment, which according to the author, means that they will be released after an average period of 12 to 15 years, whereas such parole is not available to him.

...

9.8 Concerning the author's claim that he is a victim of discrimination because of the commutation of his death sentence to 75 years of imprisonment with hard labour, the Committee notes that according to information provided by the author, the State party in 1996 commuted death sentences of prisoners who had been on death row for more then five years to life imprisonment in 53 cases, on the basis of constitutional provisions on commutation of death sentences. The Committee recalls its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities. The Committee considers that the decision to commute a death sentence and the determination of a term of imprisonment is within the discretion of the President and that he exercises this discretion on the basis of many factors. Although the author has referred to 53 cases where the death penalty was commuted to life imprisonment, he has not provided information on the number or nature of cases where death sentences were commuted to imprisonment with hard labor for a fixed term. The Committee is therefore unable to make a finding that the exercise of this discretion in the author's case was arbitrary and in violation of article 26 of the Covenant.

For dissenting opinions in this context, see Teesdale v. Trinidad and Tobago (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at Individual Opinion by Mr. David Kretzmer and Ivan Shearer (partly dissenting) and Individual Opinion by Mr. Hipólito Solari Yrigoyen (partly dissenting).

- *Rodríguez Orejuela v. Colombia* (848/1999) ICCPR, A/57/40 vol. II (23 July 2002) 172 (CCPR/C/75/D/848/1999) at paras. 2.1-2.3, 3.1, 3.2 and 7.2.

...

2.1 Mr. Miguel Ángel Rodríguez Orejuela was charged with, among other activities, the offence of engaging in drug trafficking on 13 May 1990...

2.2 In a judgement handed down by the Bogota Regional Court on 21 February 1997, the author was sentenced to 23 years' imprisonment and a fine. He appealed against the sentence before the National Court, which, in a judgement of 4 July 1997, upheld the conviction at first instance but reduced the sentence to 21 years' imprisonment and a lower fine. An appeal was lodged on 20 October 1997 before the Colombian Supreme Court of Justice, which upheld the conviction on 18 January 2001.

2.3 Both the Bogotá Regional Court and the National Court were established by Emergency Government Decree No. 2790 of 20 November 1990 (Defence of Justice Statute), and were incorporated in the new Code of Criminal Procedure enacted by Decree No. 2700 of 30 November 1991, which entered into force on 1 July 1992, and which was repealed by Law

No. 600 of 2000 which is currently in force. Article 457 on the confidentiality of proceedings held in closed court was repealed by Law No. 504 of 1999. Article 9 of Decree No. 2790 established the public order judges and granted them competence to hear offences provided for in the "Drugs Statute".2/ This article was given permanent legal character by means of Decree No. 2271 of 1991. The above-mentioned Decree No. 2790 withdrew competence to try offences provided for in the "Drugs Statute" from "district criminal courts and district courts exercising mixed jurisdiction" as specialized jurisdictions and established the "public order, faceless or emergency jurisdiction", which was converted into secret "regional justice" after its entry into force on 1 July 1992.

...

3.1 The author claims to be a victim of a violation of the Covenant because Decrees No. 2790 of 20 November 1990 and No. 2700 of 30 November 1991 were applied ex post facto against him. In particular, he claims a violation of article 14, paragraph 1, of the Covenant because neither the Bogotá Prosecution Commission, which conducted the investigation and brought the charges against the author, nor the Bogotá Regional Court, which handed down the judgement against the author, nor the National Court existed at the time the offences were committed, i.e. on 13 May 1990. The author maintains that the Prosecution Commission began the investigation in 1993 and brought charges against him before the Bogotá Regional Court for an offence allegedly committed on 13 May 1990. He states that the court is therefore an unlawful ad hoc body or special commission.

3.2 The author maintains that the court competent to try this case would have been the Cali Circuit Court of Criminal and Mixed Jurisdiction as a specialized court, since it was courts in that category that were competent in drug-trafficking matters at the time the offence was committed. However, since this court was abolished on 15 July 1991, the competent court would have been the Cali Circuit Criminal Court, which is a court of ordinary jurisdiction. The competent court at second instance, at the appeal stage, would have been the Cali Higher Judicial District Court. The author states that the guarantee of a competent, independent and impartial judge or court has been ignored as he was tried by members of an institution established subsequent to the commission of the offence. He likewise claims that the right to be tried in conformity with laws that predated the act of which he was accused and the guarantee enshrined in article 14 of the Covenant that all persons shall be equal before the courts has been breached, as he has been tried under the restrictive emergency provisions introduced subsequent to the offence.

...

7.2 The author claims a violation of article 14, paragraph 1, of the Covenant because he was deprived of his right to be tried by the court that would have been competent at the time that the alleged offence was committed, and was charged in, and tried at first and second instance by, courts whose jurisdiction was established subsequent to the events in question. In this respect, the Committee notes the State party's explanations to the effect that the law in question was established in order to ensure the proper administration of justice, which was

under threat at the time. The Committee considers that the author has not demonstrated how the entry into force of new procedural rules and the fact that these are applicable from the time of their entry into force constitute in themselves a violation of the principle of a competent court and the principle of the equality of all persons before the courts, as established in article 14, paragraph 1.

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Notes

...

2/ This article stipulates that the competence of the public order courts responsible for hearing cases shall include ongoing actions and proceedings for punishable acts assigned to them under the article, regardless of the time when they were perpetrated, and related offences. It further stipulates that in every case favourable substantive law or procedural law having substantive effects of the same character shall have primacy over unfavourable law.

_____

- *Ruiz Agudo v. Spain* (864/1999), ICCPR, A/58/40 vol. II (31 October 2002) 134 (CCPR/C/76/D/864/1999) at paras. 2.1-2.3, 3.3 and 9.4.

...

2.1 From 1971 to 1983, Alfonso Ruiz Agudo held the post of Director of the Caja Rural Provincial in the small town of Cehegín (Murcia), where he was responsible for customer relations. In the period from 1981 to 1983, 75 fictitious loan policies, which duplicated an equal number of real loans, were transacted in the office of the Cehegín bank. In other words, there were bank customers who signed blank loan forms that were later completed in duplicate.

2.2 The Caja Rural Provincial was taken over by the Caja de Ahorros de Murcia, and both banks appeared in the criminal proceedings opened against Alfonso Ruiz Agudo and others as private complainant or injured party. Alfonso Ruiz Agudo's counsel immediately asked for the original files of the accounts, which the author kept at the Cehegín bank and where, according to the complainant, the money from the fictitious loans was deposited, to be produced at the proceedings. According to the author of the communication, these files would have shown that the money went not to Alfonso Ruiz Agudo but to other persons. The bank submitted a computerized version of the files.

2.3 Counsel maintains that, although proceedings were initiated against his client in 1983, no judgement was handed down until 1994. The judgement was eventually passed by the judge of the No. 1 Criminal Court of Murcia, sentencing the author to a custodial penalty of two years, four months and one day of ordinary imprisonment with a fine for an offence of fraud, and to a further identical penalty for the offence of falsifying a commercial document.

...

3.3 He also points out that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary drawn up by the clerk of the court, so that the proceedings, according to the author, lacked essential guarantees. Moreover, the accusing parties were at a clear advantage in the proceedings. He mentions article 790, paragraph 1, of the Criminal Procedure Act, maintaining that the rules of summary proceedings infringe the basic principle of equality of arms in judicial proceedings.

...

9.4 ...[T]he Committee takes note of the author's contention that the summary proceeding, in particular article 790 of the Criminal Procedure Act, infringes the principle of equality of arms. The Committee finds that the author, on the basis of the information and documentation submitted, has not substantiated his complaint for the purposes of determining that there was a violation of article 14, paragraph 1, in this respect.

- *Weiss v. Austria* (1086/2002), ICCPR, A/58/40 vol. II (3 April 2003) 375 (CCPR/C/77/D/1086/2002) at paras. 2.1, 2.3, 2.8, 2.11-2.14, 2.16, 9.6 and 10.1.

...

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges...

...

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention...

...

2.8 On 8 May 2002, the Upper Regional Court...found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.3/

...

2.11 On 24 May, the author...petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

2.13 At the time the author was extradited, two sets of proceedings remained pending before the Constitutional Court, neither of which had suspensive effect under the State party's law. Firstly, on 25 April 2002, the author had lodged a constitutional motion attacking the constitutionality of various provisions of the State party's extradition law, as well as of the extradition treaty with the United States...Secondly, on 17 May 2002, he had lodged a "negative competence challenge"...to resolve the question whether the issue of a right to an appeal must be resolved by administrative decision or by the courts, as both the Upper Regional Court as well as the Minister of Justice had declined to deal with the issue.

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.
...
2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.
...
9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself,

after the event, observed that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgment of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgment of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

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Notes

...

3/ The author provides the terms of the Treaty which provide: "Convictions in absentia.

> "If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

...

25/ See, for example, *Maleki v. Italy* [Case No. 699/1996, Views adopted on 15 July 1999].

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- *Kang v. Republic of Korea* (878/1999), ICCPR, A/58/40 vol. II (15 July 2003) 152 (CCPR/C/78/D/878/1999) at paras. 2.1, 2.2, 2.5 and 7.2.

...

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and

the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

2.2 The author was arrested without warrant on 1 July 1985 by the Agency for National Security Planning (ANSP). He was held *incommunicado* and interrogated in ANSP detention, suffering "torture and other mistreatments", over 36 days. Under torture, he confessed to joining the North Korean Labour Party and receiving instructions for espionage from North Korea. Only on 5 August 1985, was a judicial warrant issued for his arrest. Remaining in detention, he was formally indicted on 4 September 1985 for alleged violations of the National Security Law of 31 December 1980.1/ These allegations encompassed meeting with another member of a spy ring, "enemy-benefitting activities" in favour of North Korea, gathering and divulging state or military secrets (espionage), and conspiracy.

...

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"4/ under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.5/

...

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved in this respect in the succeeding "oath of law-abidance system", which is applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole.15/ The Committee considers that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18, paragraph 1, and 19, paragraph 1, both in conjunction with article 26.

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Notes

1/ The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military coup d'état. Forming or joining an

"anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

...

4/ "Confident criminal" is not specifically defined, but appears from the context of the communication to be a prisoner who fails to comply with the ideology conversion system and its renunciation requirements...

5/ Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".

...

15/ See the comments of the State party arguing the contrary with regard to the Committee's Concluding Observations on their second periodic report. (CCPR/C/79/Add.122, at para 2).

- *Baumgarten v. Germany* (960/2000), ICCPR, A/58/40 vol. II (31 July 2003) 261 (CCPR/C/78/D/960/2000) at paras. 2.1, 2.2, 3.1, 3.2, 4.1, 4.2 and 10.

...

2.1 From 1979 until his retirement in February 1990, the author was Deputy Minister of Defence and Head of Border Troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR).

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of homicide2/ and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The Court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30 April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.

...

3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified Germany of 31 August 1990 (*Einigungsvertrag)*. The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.

...

4.1 The Berlin Regional Court, in its judgment of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's state borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR state practice, would continue to be applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order no. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects:

(1) the totalitarian structure of the GDR which left the author only with a limited scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favor), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

...

10. With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee notes that the Treaty on the Establishment of a Unified Germany provides for the applicability of the criminal law of the former GDR to all acts committed on the territory of the former GDR, prior to the unification becoming effective. The Committee takes note of the author's allegation that certain provisions of the State party's law that would have been applied on the use of firearms by officials of the FRG had not been applied in his case. However, the Committee observes that the author has failed to demonstrate that persons in a similar situation in the former GDR or FRG have, in fact, been treated differently. Therefore, the Committee concludes that he has not substantiated his claim and considers that there has been no violation of article 26 in this respect.

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Notes

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2/ The English translations of these excerpts are based on the translations provided by the State party.

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- *Dugin v. Russian Federation* (815/1998), ICCPR, A/59/40 vol. II (5 July 2004) 34 at paras. 2.1, 2.2, 3.1, 3.2, 9.3, 10 and 11.

...

2.1 On the evening of 21 October 1994, the author and his friend Yuri Egurnov were standing near a bus stop when two adolescents carrying beer bottles passed by. The author and his friend, both of whom were drunk, verbally provoked Aleksei Naumkin and Dimitrii Chikin in order to start a fight. When Naumkin tried to defend himself with a piece of glass and injured the author's hand, the author and his accomplice hit him on the head and, when he fell down, they kicked him in the head and on his body. Naumkin died half an hour later.

2.2 On 30 June 1995, Dugin and Egurnov were found guilty by the Orlov *oblastnoi* (regional) court of premeditated murder with aggravating circumstances. The judgement was based on the testimony of the author, his accomplice, several eyewitnesses and the victim,

Chikin, several forensic reports and the crime scene report. Dugin and Egurnov were each sentenced to 12 years' imprisonment in a correctional labour colony.

...

3.1 The author's counsel states that the surviving victim, Chikin, was not present during the proceedings in the Orlov court, even though the court took into account the statement he had made during the investigation. According to counsel, Chikin gave contradictory testimony in his statements, but as Chikin did not appear in court, Dugin could not cross-examine him on these matters, and was thus deprived of his rights under article 14, paragraph 3 (e), of the Covenant.

3.2 Counsel further claims that the presumption of innocence under article 14, paragraph 2, of the Covenant was not respected in the author's case. He bases this statement on the forensic expert's reports and conclusions of 22 and 26 October, 9 November, 20 December 1994 and 7 February 1995, which were, in his opinion, vague and not objective. He states, without further explanation, that he had posed questions to which the court had had no answer. He therefore requested the court to have the forensic expert appear to provide clarification and comments, and to allow him to lead additional evidence. The court denied his request.

...

9.3 The author claims that his rights under article 14 were violated because he did not have the opportunity to cross-examine Chikin on his evidence, summon the expert and call additional witnesses. While efforts to locate Chikin proved to be ineffective for reasons not explained by the State party, very considerable weight was given to his statement, although the author was unable to cross-examine this witness. Furthermore, the Orlov Court did not give any reasons as to why it refused the author's request to summon the expert and call additional witnesses. These factors, taken together, lead the Committee to the conclusion that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

...

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

11. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee considers that the author is entitled to an appropriate remedy, including compensation and his immediate release.

- *Nazarov v. Uzbekistan* (911/2000), ICCPR, A/59/40 vol. II (6 July 2004) 91 at paras. 6.3, 7

and 8.

...

6.3 The author...alleges that the State party violated article 14, and points to a number of circumstances which he claims, as a matter of evidence, point clearly to the author's innocence. The Committee recalls its jurisprudence and notes that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. However in the current case the author claims that the State party violated article 14 of the Covenant, in that the Court denied the author's request for the appointment of an expert to determine the geographical origin of the hemp, which may have constituted crucial evidence for the trial. In this respect, the Committee has noted that in the court decision submitted before it, the court when denying this request gave no justification. In the absence of any explanation from the State party, the Committee considers that this denial did not respect the requirement of equality between the prosecution and defence in producing evidence, and amounted to a denial of justice. The Committee therefore decides that the facts before it reveal a violation of article 14 of the Covenant.

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.

- *Mulai v. Guyana* (811/1998), ICCPR, A/59/40 vol. II (20 July 2004) 29 at paras. 6.1-6.3, 7 and 8.

...

6.1 The Committee notes that the independence and impartiality of a tribunal are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1, of the Covenant. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee recalls that where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court 4/.

6.2 In the present case, the author submits that the foreman of the jury at the retrial informed

the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

6.3 In accordance with its consistent practice the Committee takes the view 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. In the circumstances of the current case the State party has violated the rights of Bharatraj and Lallman Mulai under article 6 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before reveal violations of article 14, paragraph 1, and article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid similar violations in the future.

Notes

...

4/ See *Willard Collins v. Jamaica*, case No. 240/1987, Views adopted on 1 November 1991, para. 8.4.

LEGAL RIGHTS - CRIMINAL - Equal Treatment

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at para. 6.3.

...
6.3 With regard to the alleged violation of equality before the courts (art. 14, para. 1), the Committee notes that the author has complained about the outcome of the judicial proceedings, compared to the outcome of another similar case. The Committee notes that the State party contends that the circumstances of the case referred to by the author were completely different from those of the author's. The Committee further observes that article 14, paragraph 1, of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results in proceedings before the competent tribunal. This aspect of the author's communication falls outside the scope of application of article 14, paragraph 1, and is, therefore, inadmissible *ratione materiae* under article 3 of the Optional Protocol...