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III. JURISPRUDENCE

ICCPR

- *Borda v. Colombia* (R.11/46), ICCPR, A/37/40 (27 July 1982) 193 at para. 13.3.

  ...
  13.3 The allegations as to breaches of the provision of article 14 of the Covenant concerning judicial guarantees and fair trial, seem to be based on the premise that civilians may not be subject to military penal procedures and that when civilians are nevertheless subjected to such procedures, they are in effect deprived of basic judicial guarantees aimed at ensuring fair trial, which guarantees would be afforded to them under the normal court system, because military courts are neither competent, independent and impartial. The arguments of the author in substantiation of these allegations are set out in general terms and principally linked with the question of constitutionality of Decree No.1923. He does not, however, cite any specific incidents of facts in support of his allegations of disregard for the judicial guarantees provided for by article 14 in the application of Decree No.1923 in the cases in question. Since the Committee does not deal with questions of constitutionality, but with the question whether a law is in conformity with the Covenant, as applied in the circumstances of this case, the Committee cannot make any finding of breaches of article 14 of the Covenant.

- *Pinto v. Trinidad and Tobago* (232/1987), ICCPR, A/45/40 vol. II (20 July 1990) 69 at paras. 12.3 and 12.4.

  ...
  12.3 The Committee...reaffirms that while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of States parties to the Covenant, to evaluate facts and evidence in a particular case. It is not, in principle, for Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. In the Committee's opinion, the judge's instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in cases in which a capital sentence may be pronounced on the accused; this applies, *a fortiori*, to cases in which the accused pleads legitimate self-defence.

  12.4 After careful consideration of the material placed before it, the Committee concludes that the judge's instructions to the jury on 14 June 1985 were neither arbitrary nor amounted to a denial of justice. As the judgement of the Court of Appeals states, the trial judge put the respective versions of the prosecution and the defence fully and fairly to the jury. The

Committee therefore finds that in respect of the evaluation of evidence by the trial court there has been no violation of article 14.

- *Sawyers and McLean v. Jamaica* (226 and 256/1987), ICCPR, A/46/40 (11 April 1991) 226 (CCPR/C/41/D/226/1987) at para. 13.5.

...
13.5 As to the merits, the Committee first addresses the authors' claim that the judge's instructions to the jury were inadequate, in the light of the contradictory evidence that was put before the jury and which it was for the jury to accept or reject. The Committee recalls its established jurisprudence...that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. It is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to denial of justice, or that the judge manifestly violated his obligation of impartiality. The Committee has no evidence that the trial judge's instructions suffered from such defects. Accordingly, the Committee finds no violation of article 14, paragraph 1.

See also:

- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at para. 5.13.
- *Z. P. v. Canada* (341/1988), ICCPR, A/46/40 (11 April 1991) 297 (CCPR/C/41/D/341/1988) at para. 5.2.
- *Little v. Jamaica* (283/1988), ICCPR, A/47/40 (1 November 1991) 268 (CCPR/C/43/D/283/1988) at para. 8.2.
- *Linton v. Jamaica* (255/1987), ICCPR, A/48/40 vol. II (22 October 1992) 12 (CCPR/C/46/D/255/1987) at para. 8.3.
- *Chadee et al. v. Trinidad and Tobago* (813/1998), ICCPR, A/53/40 vol. II (29 July 1998) 242 (CCPR/C/63/D/813/1998) at para. 8.3.

- *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at paras. 2.3, 8.3 and 8.4.

...
2.3 The author was initially brought before the Portland Magistrates Court in connection with his application for bail...[T]he author was well known to the business associates of the Magistrate himself and the author was known to have bad business relations with these associates. During the hearing of the application, the Magistrate allegedly said, apparently only as an aside, that if he were to try the author he would ensure that a capital sentence be

pronounced.

...

8.3 ...It is the Committee's established jurisprudence that it is in principle for the appellate courts of State parties to the Covenant to evaluate facts and evidence in a particular case or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality. d/ In the present case, the Committee has been requested to examine matters in the latter category. After careful consideration of the material before it, the Committee cannot conclude that the remark attributed to Justice G. in the committal proceedings before the Portland Magistrates Court resulted in a denial of justice for Mr. Collins during his retrial in the Home Circuit Court of Kingston. The author has not even alleged in which respect the instructions given by the judge to the jury were either arbitrary or reflected partiality. The Committee further notes that the verdict of the jury necessarily entailed a mandatory death sentence, by which the judge was bound. Secondly, the Committee notes that although the author states that he apprised his counsel of the judge's alleged bias towards him, counsel opined that it was preferable to let the trial proceed. Nor was the matter raised on appeal, although the author's case was at all times in the hands of a professional adviser. Even if the remark was indeed made, in the absence of clear evidence of professional negligence on the part of counsel, it is not for the Committee to question the latter's professional judgement. In the circumstances, the Committee finds no violation of article 14, paragraphs 1 and 2.

8.4 Similar considerations apply to the alleged attempts at jury tampering by the investigating officer in the case. 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 observes that where alleged improprieties in the behaviour of jurors or attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court...Counsel neither conveyed this information to the judge nor sought to challenge the jurors allegedly influenced by Detective G.; in the Committee's opinion, if it had been thought that the complaint was tenable, it would have been raised before the courts. Accordingly, the Committee cannot conclude that Mr. Collins' rights under article 14, paragraphs 1 and 2, were violated by the State party in this respect.

Notes

...

d/ See [Official Records of the General Assembly], Forty-sixth Session, Supplement No. 40 (A/46/40), annex XI, sect. D, Communication No. 253/1987 (*Paul Kelly v. Jamaica*), views adopted on 8 April 1991, para. 5.13.

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For dissenting opinion in this context, see Collins v. Jamaica (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at Individual Opinion by Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and Mr. Bertil Wennergren, 231.

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at para. 6.2.

...
6.2 ...It is the Committee's established jurisprudence that it is in principle for the appellate courts of State parties to the Covenant to evaluate facts and evidence in a particular case or to review the judge's instructions to the jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. e/ In this case, the Committee has been requested to examine matters belonging in this latter category. After careful consideration of the material before it, the Committee concludes that the remarks made by Justice T. about the author's "demeanour" in his summing up to the jury were neither arbitrary nor amounted to a manifest violation of his obligation of impartiality. The Committee cannot conclude either that the judge's directions unfairly buttressed the case of the prosecution. In the circumstances, the Committee finds no violation of article 14, paragraph 1. It follows that the conduct of the trial by the judge had no incidence on the author's right, under article 14, paragraph 2, to be presumed innocent until proved guilty according to law.

_____

Notes

...

e/ See Official Records of the General Assembly, Forty-sixth Session, Supplement No.40 (A/46/40), annex XI, sect. D, Communication No. 253/1987 (*Paul Kelly v. Jamaica*), views adopted on 8 April 1991, para. 5.13; and section C above, Communication No. 240/1987 (*Willard Collins v. Jamaica*), views adopted on 1 November 1991, para. 8.3.

_____

- *Hibbert v. Jamaica* (293/1988), ICCPR, A/47/40 (27 July 1992) 284 (CCPR/C/45/D/293/1988) at para. 7.2.

...
7.2 ...[T]he Committee reaffirms that it is generally for the appellate courts of State parties to the Covenant to evaluate the facts and evidence in a particular case. It is not in principle for the Committee to assess the conduct of the trial by the trial judge or to review his instructions to the jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The Committee lacks evidence that the conduct of the trial by the

judge or his instructions to the jury suffered from such defects. In particular...the Committee has no evidence that by objecting to several of counsel's questions during cross-examination, or by sustaining the prosecution's objections to some of those questions, the judge violated his obligation of impartiality. Nor is there any evidence that the judge's questions "intimidated" any of the witnesses. The Committee, in these circumstances, finds no violation of 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 paras. 8.2 and 8.3.

...
8.2 ...The Committee reaffirms its established jurisprudence that it is generally for the appellate courts of State parties to the Covenant to evaluate facts and evidence in a particular case. It is not in principle for the Committee to make such an evaluation or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. In the present case, the Committee has been requested to examine matters belonging in the latter category.

8.3 In respect of the issue of the time of death of the victim, the Committee begins by noting that the post-mortem of the deceased was performed on 1 September 1981 at approximately 1 p.m., and that the expert concluded that the death had occurred 47 hours before. His conclusion, which was not challenged, implied that the author was already in police custody when the deceased was shot. The information was available to the Court; given the seriousness of its implications, the Court should have brought it to the attention of the jury, even though it was not mentioned by counsel...In all the circumstances, and especially given that the trial of the author was for a capital offence, this omission must, in the Committee's view, be deemed a denial of justice and as such constitutes a violation of article 14, paragraph 1, of the Covenant. This remains so even if the placing of this evidence before the jury might not, in the event, have changed their verdict and the outcome of the case.

- *Karttunen v. Finland* (387/1989), ICCPR, A/48/40 vol. II (23 October 1992) 116 (CCPR/C/46/D/387/1989) at paras. 7.1-7.3 and Individual Opinion by Mr. Bertil Wennergren, 122.

...
7.1 The Committee is called upon to determine whether the disqualification of lay judge V.S. and his alleged disruption of the testimony of the author's wife influenced the evaluation of evidence by, and the verdict of, the Rääkkyla District Court, in a way contrary

to article 14, and whether the author was denied a fair trial on account of the Court of Appeal's refusal to grant the author's request for an oral hearing...

7.2 The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

7.3 It is possible for appellate instances to correct the irregularities of proceedings before lower court instances. In the present case, the Court of Appeal considered, on the basis of the written evidence, that the District Court's verdict had not been influenced by the presence of lay judge V.S., while admitting that V.S. manifestly should have been disqualified. The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the reevaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1.

Individual Opinion by Mr. Bertil Wennergren

...Mr. Karttunen's case concerns procedural requirements before an appellate court in criminal proceedings. The relevant provisions of the Covenant are laid out in article 14, firstly the general requirements for fair proceeding in paragraph 1, secondly the special guarantees in paragraph 3. Paragraph 1 applies to all stages of the judicial proceedings, be they before the court of first instance, the court of appeal, the Supreme Court, a general court of law or a special court. Paragraph 3 applies only to criminal proceedings and primarily to proceedings at first instance. The Committee's jurisprudence, however, has found the requirements of paragraph 3 to be also applicable to review and appellate procedures in criminal cases...That all these provisions should, *mutatis mutandis*, also apply to review procedures is only normal, as they are emanations of a fair trial, which in general terms is required under article 14, paragraph 1.

Under article 14, paragraph 1, everyone is entitled not only to a fair but also to a public hearing; moreover, according to article 14, paragraph 3(d), the accused is entitled to be tried in his presence. According to the *travaux préparatoires* to the Covenant, the concept of a

"public hearing" must be read against the background that in the legal system of many countries, trials take place on the basis of written documentation, which is deemed not to place at risk the parties' procedural guarantees, as the content of all these documents can be made public. In my opinion, the requirement, in paragraph 1 of article 14, for a "public hearing" must be applied in a flexible way and cannot *prima facie* be understood as requiring a public oral hearing. I further consider that this explains why, at a later stage of the *travaux préparatoires* on article 14, paragraph 3(d), the right to be tried in one's own presence before the court of first instance was inserted.

In accordance with the Committee's case law, there can be no *a priori* assumption in favour of public oral hearings in review procedures. It should be noted that the right to be tried in one's own presence has not explicitly been spelled out in the corresponding provision of the European Convention on Human Rights (article 6, paragraph 3(c)). This in my opinion explains why the European Court of Human Rights, unlike the Committee, has found itself bound to interpret the concept of "public hearing" as a general requirement of "oral". The formulations of article 14, paragraphs 1 and 3(d), of the Covenant leave room for a case by case determination of when an oral hearing must be deemed necessary in review procedures, from the point of view of the concept of "fair trial". With regard to Mr. Karttunen's case, an oral hearing was in my view undoubtedly required from the point of view of "fair trial" (within the meaning of article 14, paragraph 3(d)), as Mr. Karttunen had explicitly asked for an oral hearing that could not *a priori* be considered meaningless.

- *González del Río v. Peru* (263/1987), ICCPR, A/48/40 vol. II (28 October 1992) 17 (CCPR/C/46/D/263/1987) at paras. 5.2 and 5.4.

...
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...
...
5.4 On the other hand, the Committee does not find that the author's right, under article 14, paragraph 2, to be presumed innocent until proven guilty according to law was violated. Whereas the remarks attributed to judges involved in the case may have served to justify delays or inaction in the judicial proceedings, they cannot be deemed to encompass a pre-determined judgement on the author's innocence or guilt.

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- *Bahamonde v. Equatorial Guinea* (468/1991), ICCPR, A/49/40 vol. II (20 October 1993) 183 (CCPR/C/49/D/468/1991) at para. 9.4.

...
9.4 The author has contended that despite several attempts to obtain judicial redress before the courts of Equatorial Guinea, all of his *démarches* have been unsuccessful. This claim has been refuted summarily by the State party, which argued that the author could have invoked specific legislation before the courts, without however linking its argument to the circumstances of the case. The Committee observes that the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1. In this context, the Committee has also noted the author's contention that the State party's president controls the judiciary in Equatorial Guinea. The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.

- *Poongavanam v. Mauritius* (567/1993), ICCPR, A/49/40 vol II (26 July 1994) 362 (CCPR/C/51/D/567/1993) at para. 4.3.

...
4.3 As to the author's claim that the jury lists drawn up by the State party's authorities are unrepresentative of Mauritian society, and that therefore the Assizes Court is not an independent and impartial tribunal within the meaning of article 14, the Committee notes that there is no indication that the jury lists referred to by the author were compiled in an arbitrary manner. In the circumstances, it concludes that the author has failed to substantiate, for purposes of admissibility, his claim of a violation of article 14, paragraph 1, in this respect.

- *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at para. 8.3.

...
8.3 On the basis of the material before it, the Committee has no reason to conclude that the Colombian judicial authorities failed to observe their obligation of independence and impartiality. There is no indication of executive pressure on the different tribunals seized of the case, and one of the magistrates charged with an inquiry into the author's claims indeed requested to be discharged, on account of his close acquaintance with the author's ex-

husband.

- *Kulomin v. Hungary* (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/56/D/521/1992) at paras. 11.3 and 11.6.

...
11.3 The Committee notes that, after his arrest on 20 August 1988, the author's pre-trial detention was ordered and subsequently renewed on several occasions by the public prosecutor, until the author was brought before a judge on 29 May 1989. The Committee considers that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3).
...
11.6 The author further has claimed that the judge at the trial of first instance was biased against him and, more specifically, that she discriminated against him because of his nationality. The Committee notes that the judgment of the Court of First Instance shows no trace of bias on the part of the judge and, moreover, that the author or his representative made no objection during the trial to the judge's attitude. In the circumstances, the Committee finds that there is no substantiation for the author's claim that he was discriminated against on the basis of his nationality.

- *Fuenzalida v. Ecuador* (480/1991), ICCPR, A/51/40 vol. II (12 July 1996) 50 (CCPR/C/57/D/480/1991) at para. 9.5.

...
9.5 With regard to the trial in the court of first instance, the Committee finds it regrettable that the State party has not submitted detailed observations about the author's allegations that the trial was not impartial. The Committee has considered the legal decisions and the text of the judgement dated 30 April 1991, especially the court's refusal to order expert testimony of crucial importance to the case, and concludes that this refusal constitutes a violation of article 14, paragraphs 3 (e) and 5, of the Covenant.

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- *Reynolds v. Jamaica* (587/1994), ICCPR, A/52/40 vol. II (3 April 1997) 235 (CCPR/C/59/D/587/1994) at para. 6.3.

...
6.3 After considering those parts of the judge's instructions that were made available to it, the Committee concludes that the judge's instructions to the jury...were neither arbitrary nor amounted to a denial of justice. The Committee has no evidence either that by admitting alleged contradictory statements of prosecution witnesses as evidence, the judge violated his obligations of impartiality. The Committee further notes that the author's allegation that the jury was biased because of the presence of four acquaintances of the deceased has not been supported by any evidence as to whether the author or his counsel sought to challenge these jurors. The Committee, in these circumstances, finds no violation of article 14, paragraph 1, of the Covenant.

- *Adu v. Canada* (654/1995), ICCPR, A/52/40 vol. II (18 July 1997) 304 (CCPR/C/60/D/654/1995) at para. 6.3.

...
6.3 As regards the author's claim that he did not have a fair hearing, once the Federal Trial Court Division rejected the author's application for leave to appeal which was based, *inter alia*, on allegations of bias, no further domestic remedies were available. The author claims that the hearing was not fair, as one of the two Commissioners who participated was of Ghanaian origin and a member of the Ewe tribe whose hostile attitude towards Ghanaian refugees was said to be well known among members of the Ghanaian community in Montreal. However, neither the author nor his counsel raised objections to the participation of the Commissioner in the hearing until after the author's application for refugee status had been dismissed despite the fact that the grounds for bias were known to the author and/or his counsel at the beginning of the hearing. The Committee is therefore of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that his right to a fair hearing by an impartial tribunal was violated. In the circumstances, the Committee need not decide whether or not the decision in the author's refugee claim was a determination "of his rights and obligations in a suit at law", within the meaning of article 14, paragraph 1, of the Covenant.

- *Hopu v. France* (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 74 (CCPR/C/60/D/549/1993) at para. 10.2.

...
10.2 The authors claim that they were denied access to an independent and impartial

tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

- *Polay Campos v. Peru* (577/1994), ICCPR, A/53/40 vol. II (6 November 1997) 36 at paras. 8.8 and 10.

...

8.8 As to Mr. Polay Campos' trial and conviction on 3 April 1993 by a special tribunal of "faceless judges", no information was made available by the State party, in spite of the Committee's request to this effect in the admissibility decision of 15 March 1996...[S]uch trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant. It cannot be held against the author that she furnished little information about her husband's trial: in fact, the very nature of the system of trials by "faceless judges" in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces. In the Committee's opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated.

...

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Victor Polay Campos with an effective remedy. The victim was sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers that Mr. Polay Campos should be released unless Peruvian law provides for the possibility of a fresh trial that does offer all the guarantees required by article 14 of the Covenant.

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See also:

- *Arredondo v. Peru* (688/1996), ICCPR, A/55/40 vol. II (27 July 2000) 51 at paras. 10.5 and 12.

- *McTaggart v. Jamaica* (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at para. 6.3.

  ...
  6.3 With regard to the author's remaining allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of confrontation identification evidence and the relevance of the evidence of a witness, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. McTaggart's trial suffered from such defects. In particular, it is not apparent that his instructions on how to interpret confrontation identification evidence given by the witness Morris, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant...

See also:

- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 6.3.

- *Lindon v. Australia* (646/1995), ICCPR, A/54/40 vol. II (20 October 1998) 285 at para. 6.6.

  ...
  6.6 As to the author's claim that article 14 has been violated because the Full Court which heard his interlocutory applications in September 1989 was not an "independent and impartial tribunal", the Committee notes that both the original hearing and the appeal were concluded before the entry into force of the Optional Protocol for Australia. In order for the Committee to consider the allegations, continuing effects of the violation which in themselves constitute a violation of the Covenant must therefore exist. The Committee takes note of the fact that the author was able to raise, in the hearing before the High Court that took place on 6 November 1997, the issue of a possible bias by certain judges that had dealt with his case. As the High Court heard the author's arguments and responded to them, the

Committee finds that the author has failed to substantiate that any continuing effects of alleged lack of independence or impartiality by lower courts exist. Therefore, the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol.

- *Amore v. Jamaica* (634/1995), ICCPR, A/54/40 vol. II (23 March 1999) 281 at paras. 2.1, 2.3, 3.1, 3.2 and 6.2.

...
2.1 The author was convicted of the murder of one Christopher Jones and sentenced to death on 23 July 1987, by the Home Circuit Court, Jamaica...
...
2.3 At the trial, the case for the prosecution rested on the uncorroborated identification evidence of the sole eyewitness...

3.1 The author claims that the directions by the trial judge to the jury were inadequate and did not meet the requirements of impartiality, and therefore amounted to a denial of justice in violation of article 14, paragraphs 1 and 2...

3.2 Counsel submits that the trial judge erred fundamentally in failing to direct the jury explicitly that identification evidence is fraught with the risk of inculpating innocents, and that due to the vulnerability of visual evidence, honest witnesses can give inaccurate but convincing evidence. Counsel contends that by directing the jury that "the frankness of the witness is very important", the trial judge failed to emphasise the fact that the only issue was the correctness of the witness' identification of the author; the trial judge in effect rendered her directions nugatory by confusing honesty with accuracy. Counsel further contends that the trial judge failed to properly direct the jury that there was no evidence to confirm or support the accuracy of Angella Jones' evidence of identification, or to warn that the evidence before them could mistakenly be regarded as confirming or supporting the accuracy of her identification. Furthermore, counsel submits that the trial judge's analysis of Angella Jones' evidence was inadequate as she failed to analyse the absence of any description of physical features of the intruder in the evidence, or what in particular made his appearance memorable and identifiable to the witness.
...
6.2 With regard to the author's allegation of a violation of article 14 on the ground of improper instructions from the trial judge to the jury on the issues of identification and reasonable doubt, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law, as it in this case was done by the Judicial Committee of the Privy Council. The Committee

can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. The material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, 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.

- *Gutiérrez Vivanco v. Peru* (678/1996), ICCPR, A/57/40 vol. II (26 March 2002) 46 (CCPR/C/74/D/678/1996) at paras. 2.2, 2.3, 2.5, 2.6, 7.1, 9 and Individual Opinion by Mr. Ivan Shearer, 54.

...
2.2 On 27 August 1992, the author was arrested at the home of Luisa Mercedes Machaco Rojas, his fiancée. While he was in her house, the police arrived with his fiancée, and both were arrested and taken in a police van to the offices of the National Directorate against Terrorism (DINCOTE)...

2.3 During this period of police custody the author was not represented by a defence lawyer. However, since he had been hospitalized, he was not asked to make any statement. He was accused by the police, on the basis of statements by other persons charged with him, of having taken part in subversive attacks against the Bata shoe shop and a restaurant.
...
2.5 The oral proceedings were held at private hearings in a room at Miguel Castro Castro Maximum Security Prison,2/ Lima, between 7 April and 17 June 1994, without the presence of witnesses or experts. The court was composed of secret judges who conducted the proceedings behind special windows which prevented them from being identified and with loudspeakers which distorted their voices. In addition, the judges were not necessarily specialists in criminal matters, but could be chosen from among all High Court and Labour Court judges. During this stage of the proceedings, the author was assisted by a lawyer, who was engaged by his mother on the day when the hearings began; this lawyer was in fact representing another defendant in the same proceedings. At the hearings, the senior government prosecutor, when making his oral charges, stated that he did not find the author criminally liable, but even so he was bringing charges against him pursuant to the law.3/

2.6 On 17 June 1994, the Special Terrorism Division of the Lima High Court sentenced the author to 20 years' imprisonment; this sentence was subsequently confirmed by the Supreme Court of Justice on 28 February 1995. The Special Terrorism Division's sentence stated that the author's criminal responsibility had been proved in the interview with Lázaro Gago, one of the co-defendants, who stated that he not only knew the author and his fiancée, but had

also made his home available for them to leave the goods taken during the subversive attacks on the Bata shoe shop. In addition, the sentence stated that the author's congenital illness could not serve as a legal basis for exempting him from all responsibility for the offence since several of the defendants had said that he was a member of Shining Path.

...

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

...

9. Under article 2 (3) (a) of the Covenant, the State party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco. In addition, the State party has the obligation to ensure that similar violations do not occur in the future.

Notes

...

2/ Article 16 of the above-mentioned Decree provides that the trial shall be held in the prison establishment concerned so that the judges, members of the Public Prosecutor's Office and judicial officials may not be identified visually or orally by the defendants or defence lawyers.

3/ Under article 13 (d) of the Decree, senior government prosecutors have an obligation to bring charges, and consequently cannot express an opinion on the innocence of the defendants, even if there is no evidence against them.

...

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

...

Individual Opinion by Mr. Ivan Shearer

LEGAL RIGHTS - INDEPENDENCE OF THE JUDICIARY

I have joined the Views of the Committee in this case. However, I think it desirable to make clear that the Committee has not condemned the practice of "faceless justice" in itself, and in all circumstances. The practice of masking, or otherwise concealing, the identity of judges in special cases, practised in some countries by reason of serious threats to their security caused by terrorism or other forms of organized crime, may become a necessity for the protection of judges and of the administration of justice. When States parties to the Covenant are faced with this extraordinary situation they should take the steps set out in article 4 of the Covenant to derogate from their obligations, in particular those arising from article 14, but only to the extent strictly required by the exigencies of the situation. These statements of derogation should be communicated to the Secretary-General of the United Nations in the manner provided in that article. In formulating any necessary statements the States parties should have regard to General Comment No. 29 (States of Emergency) adopted by the Committee on 24 July 2001. In the present case the State party presented no observations on the claims of the author based on any situation of emergency. Nor had the State party made any declarations of derogation under article 4 of the Covenant. Hence those possible aspects of the case did not arise for determination.

- *Rogerson v. Australia* (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/805/1998) at para. 7.4.

...

7.4 The Committee notes the author's allegations that the Northern Territory Supreme Court and the High Court of Australia lacked impartiality, as provided for in article 14, paragraph 1, when deciding on his conviction of contempt and, later, when deciding on his removal from the Role of Legal Practitioners. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties.2/ In the present case, the author has failed to substantiate, for the purposes of admissibility, that the judges were biased, when hearing his case. This part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

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Notes

...

2/ *Karttunen v. Finland*, Case No. 387/1989, Views of 23 October 1992, para. 7.2.

_____

LEGAL RIGHTS - INDEPENDENCE OF THE JUDICIARY

- *Zheludkov v. Ukraine* (726/1996), ICCPR, A/58/40 vol. II (29 October 2002) 12 (CCPR/C/76/D/726/1996) at paras. 2, 8.2, 8.3, 9 and 10.

...

2. The author states that her son was arrested on 4 September 1992 and was charged, alongside two other men, with the rape of a minor, a 13-year-old girl, H.K. The rape was alleged to have occurred on 23 August 1992. On 28 March 1994, the author's son was convicted by the Ordzhonikidzevsky District Court (Mariupol) and sentenced to seven years' imprisonment. His appeal to the Donetsk Regional Court was dismissed on 6 May 1994. His subsequent appeal to the Supreme Court of Ukraine was dismissed on 28 June 1995.

...

8.2 The Committee must decide whether the State party violated Mr. Zheludkov's rights under articles 9, paragraphs 2 and 3, and article 10, paragraph 1 of the Covenant. The Committee notes the author's claim that her son was held for more than 50 days without being informed of the charges against him and that he was not brought before a competent judicial authority during this period, and further, that medical attention was insufficient, and that he was allegedly denied access to the information in his medical records.

8.3 The Committee notes the information provided by the State party to the effect that, after Mr. Zheludkov's arrest on 4 September 1992 on suspicion of having participated in a rape, his detention was extended by approval of the competent prosecutor in the Novoazosk district on 7 September 1992, and that he was charged on 14 September 1992 - within the legally prescribed 10-days period. It also notes the author's allegations that her son was not informed of the precise charges against him until he had been in detention for 50 days and that he was not brought before a judge or any other official empowered by law to exercise judicial functions during this period. The State party has not contested that Mr. Zheludkov was not brought promptly before a judge after he was arrested on a criminal charge, but has stated that he was placed in pre-trial detention by decision of the procurator (*prokuror*). The State party has not provided sufficient information, showing that the procurator has the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant. The Committee therefore concludes that the State party violated the author's rights under paragraph 3 of article 9 of the Covenant.

...

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of paragraph 3 of article 9, and paragraph 1 of article 10, of the International Covenant on Civil and Political Rights.

10. The Committee is of the view that Mr. Zheludkov is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy, entailing compensation. The State party should take effective measures to ensure that similar violations do not recur in the future, especially

by taking immediate steps to ensure that the decisions concerning the extension of custody are taken by an authority, having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3 of the Covenant.

- *Bondarenko v. Belarus* (886/1999), ICCPR, A/58/40 vol. II (3 April 2003) 161 (CCPR/C/77/D/886/1999) at paras. 2.1-2.3 and 9.3.

...

2.1 Mr. Bondarenko was accused of murder and several other crimes, found guilty as charged and sentenced by the Minsk Regional Court on 22 June 1998 to death by firing squad. The decision was confirmed by the Supreme Court on 21 August 1998...

2.2 ...With regard to the homicide of Mrs. Martinenko, the author considers that there was irrefutable evidence that Mr. Bondarenko was not guilty. Mr. Voskoboynikov allegedly had confessed, on 24 August 1998, that he lied during the investigation and in court, falsely accusing Bondarenko. He had earlier refused to reveal the whereabouts of the murder weapon - his knife, with which he had committed both murders - but now pointed out where it was hidden so that the case could be reopened and a further inquiry initiated.

2.3 The author states that the President of the Supreme Court refused even to add the knife to the case file, holding it did not constitute sufficient evidence in support of the claim that Mr. Bondarenko had not been involved in the murders. Thus the Court is said to have refused to place on file evidence in defence of the author's son which would mitigate his guilt and prove that he had not been actively involved in the murders.

...

9.3 The Committee has noted the author's allegations that the courts did not have clear, convincing and unambiguous evidence, proving her son's guilt of the murders, and that the President of the Supreme Court ignored the testimony of her son's co-defendant given after the trial and refused to include evidence which could have mitigated her son's guilt. In the author's opinion, this shows conclusively that the court had a preordained attitude as far as her son's guilt was concerned, and displays the lack of independence and impartiality of the courts, in violation of articles 6 and 14 of the Covenant. These allegations therefore challenge the evaluation of facts and evidence by the State party's courts. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence in a particular case, unless it can be shown that the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The information before the Committee does not provide substantiation for a claim that the decisions of the Minsk Regional Court and the Supreme Court suffered from such defects, even for purposes of admissibility. This part of

the communication is accordingly inadmissible pursuant to article 2 of the Optional Protocol.
...

- *Adrien Mundyo Buyso, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo* (933/2000), ICCPR, A/58/40 vol. II (31 July 2003) 224 (CCPR/C/78/D/933/2000) at paras. 2.1-2.3, 5.2, 6.1 and 6.2.

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

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

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following

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

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the "Group of the 315 illegally dismissed judges", known as the "G.315", submitted their application to the Minister for Human Rights, without results.

...

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999..., and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence,6/ the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to

which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

...

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

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, *inter alia*: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;7/ and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.8/ The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

Notes

1/ The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued

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Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

...

6/ Communication No. 422/1990 *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo;* general comment No. 25 on article 25 (fiftieth session - 1996).

7/ Communications No. 630/1995 *Abdoulaye Mazou v. Cameroon*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

8/ Communications Nos. 422/1990, 423/1990 and 424/1990 *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.

- *Pastukhov v. Belarus* (814/1998), ICCPR, A/58/40 vol. II (5 August 2003) 69 (CCPR/C/78/D/814/1998) at paras. 2.1-2.5, 7.2, 7.3, 9 and Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring), 75.

...

2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 19961/.

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

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2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.

...

7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

...

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

Notes

1/ "Presidential decree No. 106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

...

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Individual Opinion of Mrs. Ruth Wedgwood and Mr. Walter Kaelin (concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single branch of government through the pretense of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

- *Perera v. Sri Lanka* (1091/2002), ICCPR, A/58/40 vol. II (7 August 2003) 593 (CCPR/C/78/D/1091/2002) at paras. 2.1-2.6, 5.2 and 6.3.

...

2.1 While acting as a Deputy Chief Manager of the People's Bank (a State bank of Sri Lanka), the author was "interdicted" by the bank alleging that he had misled the Regional Office of the Bank in approving the provision of facilities to a customer. According to the author, the bank itself did not incur any loss in this transaction, and the allegations were based on conjecture and bias, in order to cover up certain malpractices of two superior officers who were directly involved in providing facilities to the customer.

2.2 After an internal inquiry, the author was dismissed from service on 2 March 1987, without any opportunity to call witnesses in his favour. In 1988, the author failed to obtain relief from the Labour Tribunal and therefore appealed to the High Court.

2.3 On 13 February 1998, the High Court held that the author had been improperly dismissed, and ordered Rs. 474,941.60 1/ compensation and costs, in lieu of re-instatement, as at that point the author had passed the 55-year retirement age. The author appealed to the Supreme Court, on the basis that the relief granted in the High Court was inadequate, in particular as it did not take into account salary increases that he would have received had he not been dismissed. The author's employer cross-appealed to the same Court against the High Court's finding of improper dismissal.

2.4 On 22 March 2000, the Chief Justice of the Supreme Court, sitting with two other justices of the court, examined the various briefs and allegedly commented that it was not worth reading such a heavy brief on a matter that was "a minor one". The Chief Justice allegedly went on to state that some injustice had been done to the author and suggested "some compensation". The author's counsel objected and argued that the quantum of

damages fixed in the judgement of the High Court was inadequate, and pleaded that the case be argued and heard. That notwithstanding, the Chief Justice advised the counsel for the parties to reach an agreed settlement and postponed consideration of the case.

2.5 On 9 May 2000, when the matter came up for the second time before the Supreme Court, the Chief Justice did not allow the author's counsel to argue the case although it was fixed for argument, and threatened to dismiss the case if no settlement was reached by a further date, which was fixed for 12 September 2000. He allegedly stated that the case should come only before him.

2.6 On 12 September 2000, the employer's counsel agreed to pay SL Rs 469,941.60 (about US$4,690) as compensation to the author. On that basis, the Supreme Court on the same day dismissed both appeals without costs, allegedly over objections from the author's counsel that the author's entitlements to pension rights should be recorded. Since that point, the author contends that his employer has allegedly improperly denied him pension entitlements.

...

5.2 In this connection, the author states that the arbitrary and partisan handling of certain judicial matters has become the subject of investigation by various international bodies, such as the International Bar Association (IBA), which sent a mission to Sri Lanka "to identify the circumstances surrounding the calling of a referendum on the constitution, assess the constitutional position of such action and the implication for the rule of law, in the light of recent cases seeking to disbar the Chief Justice from practicing as a Lawyer (…)".2/ The author also refers to an impeachment motion against the Chief Justice submitted to the Speaker of Parliament on 6 June 2001, regarding other cases where the Chief Justice had allegedly abused his position. The author claims that it is abundantly clear that the attitude of the Chief Justice created a situation where litigants, lawyers and even judges, who all were under the authority of the Chief Justice, were compelled to acquiesce. In such a situation, he contends that he found himself helpless as a litigant and without any means of redress.

...

6.3 As to the author's claim under article 14, paragraph 1, of the Covenant, the Committee notes that the Supreme Court's decision of 12 September 2000 was delivered by three justices of the Court. The allegations of improper conduct in the administration of justice in certain other cases made against the Chief Justice in the parliamentary notice of resolution do not, in the Committee's view, substantiate the author's claim that the encouragement by the Chief Justice to both parties' counsel to reach an amicable settlement on the quantum of damages exceeded the bounds of a superior court's proper management of its judicial resources in violation of article 14, paragraph 1. The Committee notes, in this context, that counsel did not explicitly contest the Court's oral framing of the disposition of the case, and that, in substance, the High Court's findings in the author's favour were almost entirely upheld at the appellate level. Accordingly, the Committee considers this claim unsubstantiated, for the purposes of admissibility, and consequently to be inadmissible under article 2 of the Optional

Protocol.

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Notes

1/ The compensation comprised SL Rs 469,941.60, being the author's last monthly salary multiplied by the months that had passed until judgement, and SL Rs 5,000 as costs.

2/ Report of The International Bar Association 2001, *Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary*. http://www.hg.org/cgi-bin/redir.cgi?url=http://www.ibanet.org.

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- *Kurbanova v. Tajikistan* (1096/2002), ICCPR,A/59/40 vol. II (6 November 2003) CCPR/C/79/D/1096/2002 at paras. 2.2, 2.3, 3.3, 7.6, 7.7, 8 and 9.

...
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...

2.3 On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgment was confirmed by the Supreme Court, following extraordinary appeal proceedings.
...
3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.
...
7.6 As to the author's claim that her son's rights under article14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls 5/ 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 current case, the sentence of death was passed in violation

of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and 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.

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Notes

...

5/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

_____

- *Rameka v. New Zealand* (1090/2002), ICCPR, A/59/40 vol. II (6 November 2003) 330 (CCPR/C/79/D/1090/2002) at paras. 2.1, 2.2, 2.4, 2.5, 3.4 and 7.4.

...

Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred inter alia to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that there was a 20 per cent likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,1/ concurrently to 14 years' imprisonment in respect of the second charge of rape, to 2 years' imprisonment in respect of the aggravated burglary and to two years' imprisonment for the assault with intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

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...
Mr. Harris' case

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of three months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11 year old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not less" than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.
...
3.4 As to the issue of arbitrary detention, the authors argue that there is insufficient regular review of their future "dangerousness", and that they are effectively being sentenced for what they might do when released, rather than what they have done. The authors refer to jurisprudence of the European Court of Human Rights5/ and academic writings6/ in support of the proposition that a detainee has the right to have renewed or ongoing detention that is imposed for preventive or protective purposes to be tested by an independent body with judicial character. The authors observe that under the State party's scheme, there is no possibility for release until 10 years have passed and the Parole Board may consider the case...
...
7.4 ...[I]n terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently

independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and Court of Appeal. In the Committee's view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant24/...

Notes

1/ Sections 75, 77 and 89 *Criminal Justice Act* 1985 provide as follows:

Sentence of preventive detention

"(1) This section shall apply to any person who is not less than 21 years of age, and who either

> (a) is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or
>
> (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.

(2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention. …

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court

> (c) Has first obtained a psychiatric report on the offender; and
>
> (d) Having regard to that report and any other relevant report,-

Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

Period of preventive detention indefinite

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"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

...

5/ The authors cite *Van Droogenboeck v. Belgium* (1982) 4 EHRR 443 (administrative detention "at the Government's disposal" following a two year sentence for theft) and *Weeks v. United Kingdom* (1988) 10 EHRR 293 (discretionary life sentence for armed robbery with release on licence when no longer a threat).

6/ The authors cite Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (Butterworth's, London, 1995) at 108-9, 146, 151-152 and 154, and Wachenfeld "The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights", *Nordic Journal of International Law* 60 (1991) at 174-175.

...

24/ See also *Wilson v. The Philippines* case No. 868/1999, Views adopted on 30 October 2003, at para. 6.5.

- *Perterer v. Austria* (1015/2001), ICCPR, A/59/40 vol. II (8 July 2004) 231 at paras. 2.1, 2.2, 2.4, 2.7, 2.8, 10.2-10.4, 11 and 12.

...

2.1 In 1980, the author was employed by the municipality of Saalfelden in the province of Salzburg. In 1981, he was appointed head of the administrative office of the municipality. On 31 January 1996, the mayor of Saalfelden filed a disciplinary complaint against the author with the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg alleging, *inter alia*, that the author had failed to attend hearings on building projects, that he had used office resources for private purposes, that he had been absent during office hours, and other professional shortcomings. Moreover, the mayor claimed that the author had lost his reputation and the confidence of the public because of his private conduct.

2.2 On 29 February 1996, the trial senate of the Disciplinary Commission initiated proceedings against the author, and on 28 May 1996, suspended him from office, reducing his salary by one third. On 4 June 1996, the author challenged the chairman of the senate, Mr. Guntram Maier, pursuant to section 124, paragraph 3, 2/ of the Federal Civil Servants

Service Act. During a hearing held in June 1996, the chairman himself dismissed the challenge, arguing that the Salzburg Civil Servants of Municipalities Act,3/ as well as the Federal Civil Servants Act (Federal Act), permitted a challenge only with respect to members, but not the chairperson of the senate.

...

2.4 On 4 July 1996, the trial senate of the Disciplinary Commission dismissed the author. By decision of 25 September 1996, the Disciplinary Appeals Commission for Employees of Municipalities (*Disziplinaroberkommission für Gemeindebedienstete*), on the author's appeal, referred the case back to the Disciplinary Commission, on the basis that the participation of the chairman constituted a violation of the author's right to a fair trial, since the right to challenge a member of the senate also extended to its chairperson.

...

2.7 After the Appeals Commission had referred the matter back to the Disciplinary Commission, the trial senate, by procedural decision of 13 July 1999, initiated a third set of proceedings, again suspending the author from office. The author subsequently challenged the senate chairman, Michael Cecon, and two other members appointed by the Provincial Government for lack of impartiality, since they had participated in the second set of proceedings and had voted for his dismissal. By procedural decision of 3 August 1999, the chairman of the senate was replaced by the substitute chairman, Guntram Maier, who had chaired the trial senate in the first set of proceedings, and who had refused to desist when challenged by the author, and against whom the author had brought criminal charges. The author then reiterated his challenge, specifically challenging Mr. Maier, as being *prima facie* biased because of his previous role. On 16 August 1999, the chairman informed the author that Mr. Cecon would resume chairmanship.

2.8 The author subsequently filed complaints against the procedural decisions of 13 July and 3 August 1999 with the Constitutional Court, alleging breaches of his right to a trial before a tribunal established by law because of the composition of the trial senate, at the same time requesting the Court to review the constitutionality of the Salzburg Civil Servants of Municipalities Act (Salzburg Act), insofar as it provided for the participation of members delegated by the interested municipality. On 28 September 1999, the complaints were rejected by the Constitutional Court and, on 21 June 2000, by the Administrative Court, after the matter had been referred to it.

...

10.2 With regard to the author's claim that several members of the trial senate in the third set of proceedings were biased against him, either because of their previous participation in the proceedings, the fact that they had already been challenged by the author, or because of their continued employment with the municipality of Saalfelden, the Committee recalls that "impartiality" within the meaning of article 14, paragraph 1, implies that judges must not harbour preconceptions about the matter put before them, and that a trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot

normally be considered to be fair and impartial 18/. The Committee notes that the fact that Mr. Cecon resumed chairmanship of the trial senate after having been challenged by the author during the same set of proceedings, pursuant to section 124, paragraph 3, of the Federal Civil Servants Act, raises doubts about the impartial character of the third trial senate. These doubts are corroborated by the fact that Mr. Maier was appointed substitute chairman and temporarily even chaired the senate, despite the fact that the author had previously brought criminal charges against him.

10.3 The Committee observes that, if the domestic law of a State party provides for a right of a party to challenge, without stating reasons, members of the body competent to adjudicate disciplinary charges against him or her, this procedural guarantee may not be rendered meaningless by the reappointment of a chairperson who, during the same stage of proceedings, had already relinquished chairmanship, based on the exercise by the party concerned of its right to challenge senate members.

10.4 The Committee also notes that, in its decision of 6 March 2000, the Appeals Commission failed to address the question of whether the decision of the Disciplinary Commission of 23 September 1999 had been influenced by the above procedural flaw, and to that extent merely endorsed the findings of the Disciplinary Commission 19/. Moreover, while the Administrative Court examined this question, it only did so summarily 20/. In the light of the above, the Committee considers that the third trial senate of the Disciplinary Commission did not possess the impartial character required by article 14, paragraph 1, of the Covenant and that the appellate instances failed to correct this procedural irregularity. It concludes that the author's right under article 14, paragraph 1, to an impartial tribunal has been violated.

...

11. The Human Rights Committee...is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

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

Notes

...

2/ Section 124, paragraph 3, of the Federal Civil Servants Act provides: "With the order instituting proceedings (*Verhandlungsbeschluß*), the accused shall be notified of the composition of the senate, including replacement members. The accused may challenge, without stating reasons, a member of the senate within one week after the order has been served. Upon request of the accused, up to three civil servants may be present during the

hearing. The hearing shall otherwise be held in camera."

3/ Section 12 of the Salzburg Civil Servants of Municipalities Act reads, in pertinent parts: "(1) A Disciplinary Commission for Employees of Municipalities is established at the Office of the Provincial Government to conduct first instance disciplinary trials. (2) The Disciplinary Commission is composed of a chairperson, deputy chairpersons, and the necessary number of members. (3) The Provincial Government shall appoint for a period of three years the chairperson and the deputy chairpersons, who have to be chosen from among the civil servants with legal training employed by the Office of the Provincial Government or the Regional Administrative Authorities and the members - with the exception of those members delegated by the municipalities pursuant to paragraph 5 - who have to be chosen from among the civil servants employed by the municipalities governed by the present Act. (4) The Disciplinary Commission tries and decides cases in senates composed of a chairperson and four members. The chairperson and two members chosen from among the civil servants employed by municipalities are appointed by the Provincial Government. (5) Two further members of the senates are delegated by the municipality which is a party to the proceedings. If the municipality fails to delegate two members or replacement members […] within a period of three days after a written request, the chairperson shall select civil servants of the Provincial Government as additional members. […]"

...

18/ See communication No. 387/1989, *Arvo O. Karttunen v. Finland*, Views adopted on 23 October 1992, at para. 7.2.

19/ See page 3 of the decision of 6 March 2000 of the Appeals Commission, No. 11-12294/94-2000.

20/ See pages 7 *et seq*. of the decision of 29 November 2000 of the Administrative Court, No. Zl. 2000/09/0079-6.

- *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.

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- *van den Hemel v. Netherlands* (1185/2003), ICCPR, A/60/40 vol. II (25 July 2005) 386 at paras. 2.1, 2.2, 2.5, 6.3, 6.5 and 7.

...

2.1 The author is an orthodontist living in the Netherlands. On 12 October 1989, he was involved in a car accident in which road signs used by road construction companies were damaged. The author himself suffered "material and non-material" damage and a 20 per cent loss of earning capacity.

2.2 The damage was covered by several insurance companies, including Royal Nederlands Verzekeing Maatschappij NV (Royal), which partially compensated the damage. The insurance company VVAA Schadeverzekeing-smattschappij (VVAA), with whom the author had third party insurance at the time of the accident, partially compensated the damage to Royal. The question of guilt regarding the cause of the car accident and the damaged road signs led to a dispute between the author and the insurance company Royal.

...

2.5 On 26 September 1997, the author appealed the judgement to the Supreme Court. Two of the judges who considered this appeal, judges Herrman and Mijnssen, were at the time of the author's appeal, employed and remunerated by the Supervisory Board of the Insurance Sector (Raad van Toezicht Verzekeringen), which is financed by the League of Insurers (Verbond van Verzekeraars) of which Royal is a member. The Board is a disciplinary body that determines disputes between insurance companies and the insured.

...

6.3 The Committee has noted the author's claim that the hearing of his case violated article 14 of the Covenant because: (a) two of the judges who rendered judgement in the Court of Appeal also sit as substitute judges on the Utrecht Regional Court; (b) the Supreme Court judges who considered his case were biased because of their possible links to Royal (the insurance company that filed a claim against the author), because of their positions on the Supervisory Board of the Dutch Association of Insurers; and (c) the judges who pronounced on his case "could" have been shareholders of Royal.

...

6.5 Inasmuch as the second claim is concerned (bias because of the Supreme Court judges' position on the National Insurers Association Supervisory Board), the Committee observes that the author challenged the two Supreme Court judges in question and requested that they recuse themselves. While expressing some doubts about the propriety of a system that allows judges to sit on a supervisory board established by a business association, the Committee notes that the Supreme Court heard the author's recusal challenge in a different composition, proceeded to a full hearing of the positions and the evidence advanced by the author and the judges in question, and in the end dismissed the challenge and subsequently, on 24 December 1999, also the substance of the appeal. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a

case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice 8/. Nothing in the material before the Committee suggests that the proceedings before the Supreme Court that resulted in the dismissal of the author's challenge on 19 November 1999 and of the substance of his appeal a month later suffered from such defects. Accordingly, this claim is inadmissible under article 2 of the Optional Protocol. The same applies with even more force to the author's claim, under article 14, that one of the Supreme Court judges who considered the author's challenge of the two Supreme Court judges had been a former colleague of one of these judges in the University of Amsterdam.

...

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

...

_____

Notes

...

8/ See *Errol Simms v. Jamaica*, communication No. 541/1993, declared inadmissible 3 April 1995.

_____

CAT

- *M'Barek* v. *Tunisia* (60/1996), CAT, A/55/44 (10 November 1999) 61 at paras. 2.1, 2.4, 3.1, 11.4, 11.5, 11.8-11.10 and 12.

...

2.1 The author affirms that Faisal Baraket, together with others, was arrested on the morning of 8 October 1991...After his arrest, during which he was beaten, he was brought to the headquarters of the Brigade...

...

2.4 On 17 October 1991, Hedi Baraket, the father of Faisal Baraket...was informed that his son had died in a car accident...[H]e was asked to identify the body. He noted that the face was disfigured and difficult to recognize. He was not permitted to see the rest of the body. He was made to sign a statement acknowledging that his son had been killed in an accident...At the funeral, the police brought the coffin and supervised its interment without it being opened.

...

The complaint

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3.1 ...Article 12: The State party claims that the investigation into Faisal Baraket's death was closed and, although it promised in 1992 that it would reopen the case, no investigation has been conducted.

> Article 13: The State party forced the victim's father to sign a statement acknowledging that his son died in an accident, while keeping his other son Jamel in detention for six months after his brother's death...

...

11.4 As regards article 12 of the Convention, the Committee notes first that study of the information forwarded by the parties points to the following established facts:

> The victim Faisal Baraket did indeed die no later than 11 November 1991, the date of the order for an autopsy; dying, according to the author of the communication, as a result of his arrest, or, according to the State party, as a result of a road accident caused by an unknown person.
>
> In October 1991, the State party received allegations that Faisal Baraket died as a result of torture from the following non-governmental organizations: Amnesty International, World Organization against Torture, Action of Christians for the Abolition of Torture (France) and Association for the Prevention of Torture (Switzerland).
>
> On 13 July 1992, a report prepared by the Higher Committee for Human Rights and Fundamental Freedoms, an official Tunisian body, had considered Faisal Baraket's death to be suspicious and had suggested that an inquiry should be begun under article 36 of the Code of Criminal Procedure.

11.5 However, only on 22 September 1992 was an inquiry ordered into these allegations of torture - over 10 months after the foreign non-governmental organizations had raised the alarm and over 2 months after the Driss Commission's report.

...

11.8 Concerning the investigation carried out by the competent authorities of the State party, the following acts may be regarded as having been established:

> The examining magistrate, who was entrusted with the case by the Public Prosecutor's Office on 22 September 1992, ordered a new medical evaluation, which found that it was impossible to determine the mechanism by which the lesions observed on the victim had arisen, or their origin, and dismissed the case.
>
> Assigned the case once again, following communication No. 14/1994, the

> magistrate examined the persons mentioned by the author of the communication. However, as all these persons denied the slightest knowledge of the alleged events, the magistrate again dismissed the case.

11.9 The Committee notes in this regard that, among other things, the examining magistrate had at his disposal the results of other important investigations which are customarily conducted in such matters, but made no use of them:

> First, notwithstanding the statements made by the witnesses mentioned, and in particular bearing in mind the possibility of incomplete recall, the magistrate could have checked in the records of the detention centres referred to whether there was any trace of the presence of Faisal Baraket during the period in question, as well as that, in the same detention centre and at the same time, of the two persons mentioned by the author of the communication as having been present when Faisal Baraket died. It is not without relevance to note in this regard that in pursuance of principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 9 December 1988...a record must be left of every person detained.
>
> Next, the magistrate might have sought to identify the accused officials, examine them and arrange a confrontation between them and the witnesses mentioned, as well as the complainant.
>
> Lastly, in view of the major disparities in the findings of the forensic officials as to the causes of some of the lesions observed on the victim, the Committee considers that it would have been wise to order the exhumation of the body in order at least to confirm whether the victim had suffered fractures to the pelvis (confirming the accident hypothesis) or whether he had not (confirming the hypothesis that a foreign object had been introduced into his anus); this should have been done, as far as possible, in the presence of non-Tunisian experts, and more particularly those who have had occasion to express a view on this matter.

11.10 The Committee considers that the magistrate, by failing to investigate more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during his investigation, as did the Public Prosecutor when he failed to appeal against the decision to dismiss the case. In the Tunisian system the Minister of Justice has authority over the Public Prosecutor. It could therefore have ordered him to appeal, but failed to do so.

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12. Consequently, the State party breached its obligation under articles 12 and 13 of the Convention to proceed to an impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.