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III. JURISPRUDENCE

ICCPR

- *Perdomo v. Uruguay* (8/1977)(R.2/8), ICCPR, A/35/40 (3 April 1980) 111 at paras. 14 and 16.

...

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

- Alcides Lanza Perdomo was arrested for investigation on 2 February 1976 and detained under the prompt security measures as stated by the Government. He was kept *incommunicado* for many months. It is not in dispute that he was kept in detention for nearly eight months without charges, and later for another 13 months, on the charge of "subversive associations" apparently on no other basis than his political views and connexions. Then, after nearly 21 months in detention, he was sentenced for that offence by a military judge to three years severe imprisonment, less the period already spent in detention. Throughout his period of detention and during his trial he had no effective access to legal assistance. Although he had served his sentence on 2 February 1979, he was not released until 1 July 1979...

- Beatriz Weismann de Lanza was arrested for investigation on 17 February 1976 and detained under the prompt security measures, as stated by the Government. She was kept *incommunicado* for many months. It is not in dispute that she was kept in detention for more than seven months without charges, and later, according to the information provided by the Government, she was kept in detention for over 18 months (28 September 1976 to April 1978) on the charge of "assisting a subversive association", apparently on similar grounds to those in the case of her husband. She was tried and sentenced in April 1978 by a military judge at which time her offence was deemed to be purged by the period spent in custody pending trial. She was, however, kept in detention until 11 February 1979. Throughout her period of detention and during her trial she had no effective access to legal assistance...

...

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

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See also:

- *Massera v. Uruguay* (R.1/5), ICCPR, A/34/40 (15 August 1979) 124 at paras. 9(e)(i), 9(e)(ii), 10(i) and 10(ii).

- *Weinberger v. Uruguay* (28/1978)(R.7/28), ICCPR, A/36/40 (29 October 1980) 114 at paras. 12 and 16.

...

12. The Committee...decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation: Ismael Weinberger Weisz was arrested at his home in Montevideo, Uruguay, on 25 February 1976 without any warrant of arrest. He was held *incommunicado* at the prison of "La Paloma" in Montevideo for more than 100 days and could be visited by family members only 10 months after his arrest...

Ismael Weinberger was first brought before a judge and charged on 16 December 1976, almost 10 months after his arrest. On 14 August 1979, three and a half years after his arrest, he was sentenced to eight years of imprisonment by the Military judge of the Court of First Instance for "subversive association" (art. 60 (V) of the Military Penal Code) with aggravating circumstances of conspiracy against the Constitution. The concrete factual basis of this offence has not been explained by the Government of Uruguay, although the author of the communication claims that the true reasons were that his brother had contributed information on trade-union activities to a newspaper opposed to the Government and his membership in a political party which had lawfully existed while the membership lasted. The Committee further notes in this connection that the State party did not comply with the Committee's request to enclose copies of any court orders or decisions of relevance to the matter under consideration. Ismael Weinberger was not granted the assistance of counsel during the first 10 months of his detention. Neither the alleged victim nor his counsel had the right to be present at the trial, the proceedings being conducted in writing. The judgement handed down against him was not made public...

...

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

...

Article 14 (1), because he had no fair and public hearing and because the judgement rendered against him was not made public;

Article 14 (3), because he did not have access to legal assistance during the first 10 months

of his detention and was not tried in his presence...

See also:

- *Pietraroia v. Uruguay* (44/1979) (R.10/44), ICCPR, A/36/40 (27 March 1981) 153 at paras. 13.1, 13.2 and 17.

- *Pinkney v. Canada* (27/1978) (R.7/27), ICCPR, A/37/40 (29 October 1981) 101 at paras. 10, 20 and 21.

...

10. From the information submitted to the Committee it appears that Mr. Pinkney was convicted by the County Court of British Columbia on a charge of extortion on 9 December 1976. The sentence of five years' imprisonment was pronounced on 7 January 1977. On 8 February 1977, he sought leave to appeal against his conviction and his sentence to the British Columbia Court of Appeal. He argued that he had not been able to make full answer and defence to the charge of extortion before the trial court because of alleged inability of the authorities to produce the missing briefcase...

...

20. As regards the allegedly missing evidence, it has been established that the question whether it existed, and, if so, whether it would be relevant, was considered by both the trial judge and the Court of Appeal. It is true that in the absence of the allegedly missing material itself, the Court's findings depended on an assessment of the information before them. However, it is not the function of the Committee to examine whether this assessment by the Courts was based on errors of fact, or to review their application of Canadian law, but only to determine whether it was made in circumstances indicating that the provisions of the Covenant were not observed.

21. The Committee recalls that Mr. Pinkney was unable to convince the courts that such evidence would in any way have assisted his defence. Such a point is normally one on which the assessment of the domestic courts must be decisive. But in any event the Committee has not, in all the information before it, found any support for the allegation that material evidence was withheld by the Canadian authorities, depriving Mr. Pinkney of a fair hearing or adequate facilities for his defence.

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- *Tourón v. Uruguay* (32/1978) (R.7/32), ICCPR, A/36/40 (31 March 1981) 120 at paras. 8, 11 and 12.

...

8. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties...decides to base its views on the following facts which have either been essentially confirmed by the State party, or are unrefuted: Luis Touron was arrested on 21 January 1976 and was detained incommunicado from the date of arrest until August 1976 when he was brought before a judge and formally charged with the offence of "subversive association" and "conspiracy to overthrow the Constitution followed by preparatory acts". It was not until then that he was afforded the right to have the assistance of counsel. He was not allowed to be present at his trial or to defend himself in person. There was no public hearing, and judgement was not delivered in public. On 29 September 1977 he was sentenced by a military court of first instance to 14 years' imprisonment. On 17 May 1979 a final judgement was passed by a court of second instance, upholding the previous judgement. He has been deprived of all his political rights, including the right to vote, for 15 years.

...

11. The Human Rights Committee is aware that under the legislation of many countries criminal offenders may be deprived of certain political rights. However, article 25 of the Covenant permits only reasonable restrictions. The Committee notes that Mr. Tourón has been sentenced to 14 years' imprisonment for "subversive association" and "conspiracy to overthrow the Constitution followed by preparatory acts". The State party has not responded to the Committee's request that it should be furnished with copies of any court orders or decisions relevant to the matter. The Committee is gravely concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. This tends to suggest that judgements, even of extreme gravity, as in the present case, are not handed down in writing. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept either that the proceedings against Luis Tourón amounted to a fair trial or that the severity of the sentence imposed or the deprivation of political rights for 15 years were justified.

12. ...[T]he Human Rights Committee...is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into Force for Uruguay), disclose violations of the International Covenant on Civil and Political Rights, in particular of:

> ...
> Article 14 (1), because he had no public hearing and because the judgement rendered against him was not made public;

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

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

...
16.2 ...In July 1980, [Raúl Sendic Antonaccio] was sentenced to 30 years' imprisonment plus 15 years of special security measures. He was not informed of the charges brought against him. He was never able to contact the lawyer assigned to him, Mr. Almicar Perrea. His trial was held in camera and in his absence ant he was not allowed to present witnesses in support of his case. In September 1980 and in April and May 1981, it was publicly announced that his sentence was to be reviewed by the Supreme Military Tribunal.
...
20. The Human Rights Committee...is of the view that the facts as found by the Committee...disclose violations of the International Covenant on Civil and Political Rights, particularly:

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

- *Gonzalez v. Uruguay* (R.2/10), ICCPR, A/37/40 (29 March 1982) 122 at paras. 13.5 and 15.

...
13.5 In operative paragraph 5 of its decision of 29 October 1980 the Committee requested the State party to furnish specific and detailed responses to each and every allegation made by the authors. The Committee observes that the State party's submission under article 4 (2) of the Optional Protocol, dated 21 August 1981, does not constitute sufficient refutation with regard to various of the allegations made by the authors. The State party's general statements that "the trial was held with all due guarantees" and that Alberto Altesor had "counsel as required by law" are insufficient to rebut the allegations that the accused was not promptly informed of the charges against him, that he was not allowed to defend himself in person, that there was no public hearing, and that defence witnesses were not examined under the same

conditions as witnesses against him. The State party has not responded to the Committee's request that it should be furnished with copies of any court orders or decisions relevant to the matter. The Committee is seriously concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept the State party's contention that Alberto Altesor had a fair trial.

...

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

...

of article 14 (1) and (3), because he did not have a fair and public hearing...

- *Simones v. Uruguay* (R.17/70), ICCPR, A/37/40 (1 April 1982) 174 at paras. 11.1, 11.2 and 12.

...

11.1 The Committee decides to base its views on the following facts which nave either been confirmed by the State party or are uncontested, except for denials or a general character offering no particular information or explanation:

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

12. Accordingly, the Human Rights Committee...is of the view that the facts as found by

it...disclose the following violations of the Covenant, in particular:

...

of article 14 (1), because she did not have a fair and public hearing;

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

of article 14 (3) (d), because she was not tried in her presence.

- *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.

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

...

14.1 ...According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14

presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art.14(3) (a)). Judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).

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

...

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

(a) With respect to Daniel Monguya Mbenge:

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

- *Estrella v. Uruguay* (74/1980) (R.18/74), ICCPR, A/38/40 (29 March 1983) 150 at paras. 8.3, 8.6 and 10.

...

8.3 On 15 December 1977...[the author]...and his friend, Luis Bracony, were kidnapped at his home in Montevideo by some 15 strongly armed individuals in civilian clothes. They were brought blindfolded to a place where he recognized the voices of Raquel Odasso and Luisana Olivera. There the author was subjected to severe physical and psychological torture, including the threat that the author's hands would be cut off by an electric saw, in an effort

to force him to admit subversive activities...

...

8.6 The author was brought before a military court on three occasions (23 and 26 December 1977 and 15 March 1978). On 23 December 1977, he recognized several of the individuals who had abducted him and who took part in the torture. That day also, he was given the possibility to choose an officially appointed lawyer, either Mr. Severino Barbe or Colonel Alfredo Ramirez. He opted for Mr. Barbe whom he saw that day and on 31 May 1978, 14 November 1978 and 12 February 1980. On 29 August 1979, the author was told by an official at Libertad prison that he had "been sentenced to four and a half years of imprisonment at a trial that was held in camera on grounds of "conspiracy to subvert, action to upset the Constitution and criminal preparations". On 12 February 1980, he was brought before the Military Supreme Tribunal where he was informed by the military judge that the charge of attempt to upset the Constitution could not be confirmed, that he had served his sentence and that he would be expelled from Uruguay. On 15 February 1980, Miguel Angel Estrella was taken to the airport and he left Uruguay.

...

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

> ...
> of article 14 (1), because he was tried without a public hearing and no reason has been given by the State party to justify this in accordance with the Covenant;
>
> of article 14 (3) (b) and (d), because he was unable to have the assistance of counsel of his own choosing to represent him and to prepare and present his defence...

- *Vasilskis v. Uruguay* (80/1980) (R.20/80), ICCPR, A/38/40 (31 March 1983) 173 at paras. 9.2, 9.3 and 11.

...

9.2 Events prior to the entry into force of the Covenant: Elena Beatriz Vasilskis was arrested on 4 June 1972 on the charge of being a member of the Tupamaros National Liberation Movement. She was held *incommunicado* for three months and her case was not submitted to the military courts until September 1972.

9.3 Events subsequent to the entry into force of the Covenant: Judgement was pronounced by the court of first instance on 14 December 1977. She was sentenced to 28 years of rigorous imprisonment and 9 to 12 years of precautionary detention. The trial on appeal took

place in May 1980 and the sentence was raised to 30 years and 5 to 10 additional years of precautionary detention (*medidas eliminatives de seguridad*). The Military Court appointed Colonel Otto Gilomen as defence counsel, although he was not a lawyer. The trial took place in secrecy and not even the closest relatives of the accused were present.

...

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

> ...
>
> article 14, paragraph 1, because there was no public hearing of her case;
>
> article 14, paragraph 3 (b) and (d) , because she did not have adequate legal assistance for the preparation of her defence...

- *C. A. v. Italy* (127/1982), ICCPR, A/38/40 (31 March 1983) 237 at para. 6.

...

6. ...[A]ccording to the author's own submission, it was open to him to pursue his case by means of proceedings before domestic courts. Instead, he chose to avail himself of the procedure by way of appeal to the President of the Republic. In these circumstances, the author cannot validly claim to have been deprived of the right guaranteed under article 14(1) of the Covenant to have the determination of "rights...in a suit at law" made by a competent, independent and impartial tribunal...

- *O. F. v. Norway* (158/1983), ICCPR, A/40/40 (26 October 1984) 204 at paras. 1.2, 1.3, 5.5, 5.6 and 7.

...

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

of the court to deal in one case with two totally unrelated charges unjustly affected his possibilities to defend himself.

1.3 By a judgement of the court delivered on 29 October 1982, O. F. was found guilty on both charges and sentenced to a fine of NKr 1,000 or 10 days' imprisonment. He was also sentenced to pay the costs of the case, NKr 1,000. O. F. appealed to the Supreme Court, which rejected the appeal on 17 December 1982. He maintains that a request for a renewed handling of the case was also rejected. O. F. also states that by a letter from the Supreme Court dated 26 November 1982, he was informed that "a suspected person does not have a legal right to borrow case documents".

...

5.5 With regard to article 14, paragraph 3 (b), the submissions indicate that from 26 August to the date of the hearing on 21 October 1982, the author could have examined, personally or through his lawyer, documents relevant to his case at the police station. He chose not to do so, but requested that copies of all documents be sent to him. The Committee notes that the Covenant does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." Even if all the allegations of the author were to be accepted as proven, there would be no ground for asserting that a violation of article 14, paragraph 3 (b), occurred.

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

...

7. The Human Rights Committee therefore decides:

The communication is inadmissible.

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

...

9.2 Hiber Conteris was arrested without a warrant by the Security Police on 2 December 1976, at the Carrasco airport and taken to the intelligence service headquarters in the city. He was later transferred to different military establishments, including the establishment known as “El Infierno” and the Sixth Calvary Headquarters. From 2 December 1976 to 4 March

1977, he was held *incommunicado*, and his relatives were not informed of his place of detention...He was not granted a public hearing at which he could defend himself and he had no opportunity to consult with his court appointed lawyer in preparation for his defence. He was tried and sentenced by a military court of first instance to 15 years' imprisonment and, it appears, to one to five years of precautionary detention. His own statements to the military court of first instance were ignored and not entered into the court records. Without the assistance of legal counsel, he appealed to the Supreme Military Tribunal in August 1980, which upheld the conviction and sentenced him to 15 years' imprisonment and 5 to 8 years' of precautionary detention for "criminal conspiracy", "conspiracy to undermine the Constitution followed by criminal preparations", "usurpation of functions" and "theft and co-perpetration of kidnapping, with a combination of principal and secondary offences". After the change of Government in Uruguay Mr. Conteris was released on 10 March 1985 pursuant to the Law of Amnesty of 8 March 1985.

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

...

- of article 14, paragraph 1, because he had no fair and public hearing;

- of article 14, paragraph 3(b), because he had no effective access to legal counsel for the preparation of his defence;

...

- of article 14, paragraph 3(d), because he was not tried in his presence and could not defend himself in person or through legal counsel of his own choosing...

- *Mpandanjila v. Zaire* (138/1983), ICCPR, A/41/40 (26 March 1986) 121 at paras. 8.2 and 10.

...

8.2 The authors are eight former Zairian parliamentarians and one Zairian businessman. In December 1980, they were subjected to measures of arrest, banishment or house arrest on account of the publication of an "open letter" to Zairian President Mobutu...Although they were covered by an amnesty decree of 17 January 1981, they were not released from detention or internal exile until 4 December 1981. They were subsequently brought to trial before the State Security Court on 28 June 1982 on charges of plotting to overthrow the régime and planning the creation of a political party, and of secreting documents concerning the establishment of said party. The trial was not held in public; no summonses were served on two of the accused; and in three cases the accused were not heard at the pre-trial stage. The accused were sentenced to 15 years' imprisonment with the exception of the businessman,

who was sentenced to 5 years' imprisonment...

...

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

...

Article 14, paragraph 1, because they were denied a fair and public hearing...

- *Y. L. v. Canada* (112/1981), ICCPR, A/41/40 (8 April 1986) 145 at paras. 9.1-9.5 and 10.

...

9.1 With regard to the alleged violation of the guarantees of "a fair and public hearing by a competent, independent and impartial tribunal established by law," contained in article 14, paragraph 1, of the Covenant, it is correct to state that those guarantees are limited to criminal proceedings and to any "suit at law." The latter expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

9.2 The *travaux préparatoires* do not resolve the apparent discrepancy in the various language texts. In the view of the Committee the concept of a "suit at law" or its equivalent in other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.

9.3 In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated.

9.4 ...It is clear from the observations made by the State party on the author's communication that the Canadian legal system subjects the proceedings in those various bodies to judicial supervision and control, because the Federal Court Act does provide the possibility of judicial review in unsuccessful claims of this nature. It would be hazardous to speculate on whether that Court would or would not have, first, quashed the decision of the Board on the grounds advanced by the author and, secondly, directed the Board to give the author a fair hearing on his claim. The fact that the author was not advised that he could have resorted to judicial review is irrelevant in determining the question whether the claim of the author was of a kind

subject to judicial supervision and control. It has not been claimed by the author that this remedy would not have complied with the guarantees provided in article 14, paragraph 1, of the Covenant. Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

9.5 In the view of the Committee, therefore, it would appear that the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

10. The Committee therefore concludes that...

The communication is inadmissible.

For dissenting opinion in this context, see Y. L. v. Canada (112/1981), ICCPR, A/41/40 (8 April 1986) 145 at Individual opinion (dissenting in part) submitted by Messrs. Bernhard Graefrath, Fausto Pocar and Christian Tomuschat, 150 at paras. 2 and 3.

- *Cariboni v. Uruguay* (159/1983), ICCPR, A/43/40 (27 October 1987) 184 at paras. 9.2 and 10.

...
9.2 Raúl Cariboni was arrested on 23 March 1973, charged with "subversive association" and "attempts against the Constitution in the degree of conspiracy, followed by preparatory acts". He was forced to make a confession, which was later used as evidence in the military penal proceedings against him. Proceedings against him lasted six years. Although the prosecutor requested a sentence of nine years' imprisonment, he was sentenced in 1979 to 15 years' imprisonment by the Supreme Military Court, partly on the basis of his forced confessions...

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

...
Article 14, paragraph 1, paragraph 3 (c) and paragraph 3 (g), because he was compelled to testify against himself and was denied a fair and public hearing, without undue delay, by an independent and impartial tribunal.

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- *Muñoz v. Peru* (203/1986), ICCPR, A/44/40 (4 November 1988) 200 at paras. 11.3, 12 and Individual Opinion by Messrs. Joseph A. Cooray, Vojin Dimitrjevic and Rajsoomer Lallah, 206 at para. 3.

...

11.3 With respect to the requirement of a fair hearing as stipulated in article 14, paragraph 1, of the Covenant, the Committee notes that the concept of a fair hearing necessarily entails that justice be rendered without undue delay. In this connection the Committee observes that the administrative review in the Muñoz case was kept pending for seven years and that it ended with a decision against the author based on the ground that he had started judicial proceedings. A delay of seven years constitutes unreasonable delay. Furthermore, with respect to judicial review, the Committee notes that the Tribunal of Constitutional Guarantees decided in favour of the author in 1986...However, the delays in implementation have continued and two and a half years after the judgement of the Tribunal of Constitutional Guarantees, the author has still not been reinstated to his post. This delay, which the State party has not explained, constitutes a further aggravation of the violation of the principle of a fair hearing. The Committee further notes that on 24 September 1987 the Cuzco Civil Chamber, in pursuance of the decision of the Tribunal of Constitutional Guarantees, ordered that the author be reinstated; subsequently, in a written opinion dated 7 March 1988, the Public Prosecutor declared that the decision of the Cuzco Civil Chamber was valid and that the author's action of *amparo* was well founded. But even after these clear decisions, the Government of Peru has failed to reinstate the author. Instead, yet another special appeal, this time granted *ex officio* in "Defence of the State" (para. 9.1), has been allowed, which resulted in a contradictory decision by the Supreme Court of Peru on 15 April 1988, declaring that the author's action of *amparo* had not been lodged timely and was therefore inadmissible. This procedural issue, however, had already been adjudicated by the Tribunal of Constitutional Guarantees in 1986, before which the author's action is again pending. Such seemingly endless sequence of instances and the repeated failure to implement decisions are [in]compatible with the principle of a fair hearing.

12. The Human Rights Committee...is of the view that the events of this case...disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

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...

3. The principles of a fair hearing, known in some systems as the rules of natural justice, and guaranteed under article 14, paragraph 1 of the Covenant, include the concept of *audi alteram partem*. Those principles were violated because it would appear that the author was deprived of a hearing both by the administrative authorities, which were responsible for the decisions to suspend him and, later, to discharge him, and by the Supreme Court, when it

reversed the earlier decision which had been favourable to him. Furthermore, as observed in paragraph 2 (c) above, the apparent absence of criminal or disciplinary proceedings establishing his guilt ran counter to the presumption of innocence embodied in article 14, paragraph 2, of the Covenant and was equally at variance with the administrative consequence that normally follow from that presumption.

See also:

- *Bolaños v. Ecuador* (238/1987), ICCPR, A/44/40 (26 July 1989) 246 at para. 8.4.

- *R. M. v. Finland* (301/1988), ICCPR, A/44/40 (23 March 1989) 300 at paras. 6.4 and 7.

...

6.4 The Committee...reiterates the view that the assessment of evidentiary material is essentially a matter for the courts and authorities of the State party concerned. The Committee further observes that it is not an appellate court and that allegations that a domestic court has committed errors of fact or law do not in themselves raise questions under the Covenant unless it also appears that some of the requirements of article 14 may not have been complied with...The Committee believes that the absence of oral hearings in the appellate proceedings raises no issue under article 14 of the Covenant.

...

7. The Human Rights Committee therefore decides:

(a) that the Communication is inadmissible...

See also:

- *J. H. v. Finland* (300/1988), ICCPR, A/44/40 (23 March 1989) 298 at para. 6.4.

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

...

10.3 The main question before the Committee is whether a State party is under an obligation itself to make provision for effective representation by counsel in a case concerning a capital offence, should the counsel selected by the author for whatever reason decline to appear. The Committee, noting that article 14, paragraph 3 (d) stipulates that everyone "shall have legal assistance assigned to him, in any case where the interests of justice so require," believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the

unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted unfair trial.

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

...

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

- *H. C. M. A. v. The Netherlands* (213/1986), ICCPR, A/44/40 (30 March 1989) 267 at paras. 2.3 and 11.6.

...

2.3 The author...claims that article 14 of the Covenant has been violated because he has been unable to prosecute a police officer falling under exclusive military jurisdiction. Moreover, he maintains that the existing complaints procedure against members of the police is unjust, since police officers themselves investigate such complaints and exercise discretionary powers in their own favour. He alleges that an independent system of control does not exist in the Netherlands legal system.

...

11.6 With respect to the author's allegation of a violation of article 14, paragraph 1, of the Covenant, the Committee observes that the Covenant does not provide for the right to see another person criminally prosecuted. Accordingly, it finds that this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

- *Morael v. France* (207/1986), ICCPR, A/44/40 (28 July 1989) 210 at paras. 9.3-9.5 and 9.7.

...

9.3 The first question before the Committee is whether the author is victim of a violation of Article 14 (1) of the Covenant because, as he alleges, his case did not get a fair hearing within the meaning of that paragraph. The Committee notes...that the paragraph in question applies not only to criminal matters but also to litigation concerning rights and obligations of a civil

nature. Although article 14 does not explain what is meant by a "fair hearing" in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus* (*ex officio* correction worsening an earlier verdict), and expeditious procedure. The facts of the case should accordingly be tested against those criteria.

9.4 At issue is the application of the third paragraph of the article of the Bankruptcy Law of 13 July 1967 that established a presumption of fault on the part of managers of companies placed under judicial supervision, by requiring them to prove that they had devoted all due energy and diligence to the management of the company's affairs, failing which they could be held liable for the company's losses. The author claims in this regard that the Court of Cassation had given too severe an interpretation of due diligence, one that amounted to denying him any possibility of demonstrating that he had exercised it. It is not for the Committee, however, to pass judgement on the validity of the evidence of diligence produced by the author or to question the court's discretionary power to decide whether such evidence was sufficient to absolve him of any liability. As regards respect for the principle of adversary proceedings, the Committee notes that to its knowledge there is nothing in the facts to show that the author did not have the possibility of presenting evidence at his disposal or that the court based its decision on evidence admitted without being open to challenge by the parties. As to the author's complaint that the principle of adversary proceedings had been ignored in that the Court of Appeal had increased the amount to be paid by the author, although the change had not been requested by the court-appointed administrator and had not been submitted to the parties for argument, the Committee notes that the Court of Appeal fixed the amounts to be paid by the author on the basis of the liabilities resulting from the operations of the procedure, as the court of first instance had decided; that such verification of the statement of liabilities had not been contested by the parties; and that the definitive amount, while equal to approximately 10 per cent of the company's indebtedness, had been charged to the author individually, whereas the court of first instance had ordered payment jointly with other managers, which might have required the author to pay 40 per cent of the company's indebtedness in case it proved impossible to recover the shares due from his co-debtors. In view of the above, it is to be doubted that there was an increase in the amount charged to the author or that the principle of adversary proceedings and preclusion of *ex officio reformatio in pejus* were ignored. With respect to the author's assertion that his case was not heard within a reasonable time, the Committee is of the opinion that, in the circumstances and given the complexity of a bankruptcy case, the time taken by the domestic courts to deal with it cannot be considered excessive.

9.5 As to the complaint that the action for coverage of liabilities brought against the author violated the principle of presumption of innocence laid down in article 14 (2) of the Covenant,

the Committee points out that the provision is applicable only to persons charged with a criminal offence...The object of article 99 of the Bankruptcy Act was to compensate creditors but it also entailed other penalties which, however, were civil-law and not criminal-law penalties. The provision concerning the presumption of innocence in article 14 (2) cannot therefore be applied in the case under consideration. That conclusion cannot be affected by the allegation that the provision of article 99 of the Bankruptcy Act was subsequently modified by elimination of the presumption of fault, considered unjust from the point of view of the material settlement of liability, for this circumstance does not of itself imply that the earlier provision contravened the above-mentioned provisions of the Convention.

...

9.7 The Human Rights Committee...is of the view that the facts which have been put before it do not disclose any violations of paragraphs 1 and 2 of article 14 of the Covenant.

- *van Meurs v. The Netherlands* (215/1986), ICCPR, A/45/40 vol. II (13 July 1990) 55 at paras. 6.1, 6.2, 7.1 and 9.

...

6.1 With respect to the author's claim related to the publicity of the sub-district court hearing, the Committee considers that if labor disputes are argued in oral hearing before a court, they fall within the requirement, in article 14, paragraph 1, that suits at law be held in public. That is a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish. In the instant case, the Committee notes that while the old article 1639w of the Civil Code of the Netherlands was silent on the question of the public or non-public nature of the proceedings, it appears that in practice the public did not attend. It is far from clear in this case whether the hearing was or was not held *in camera*. The author's communication does not state that he or his counsel formally requested that the proceedings be held in public, or that the sub-district court made any determination that they be held *in camera*. On the basis of the information before it, the Committee is unable to find that the proceedings in the author's case were incompatible with the requirement of a "public hearing" within the meaning of article 14, paragraph 1.

6.2 The Committee observes that courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.

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7.1 With respect to the author's claims that the hearing of his case was not fair, the Committee refers to its constant jurisprudence that it is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation. It is generally for appellate courts of States parties to the Covenant to evaluate the facts and the evidence in a particular case unless it can be ascertained that the proceedings before the domestic courts were clearly arbitrary or amounted to a denial of justice.

...

9. The Human Rights Committee...is of the view that the facts as submitted do not disclose a violation of any article of the Covenant on Civil and Political Rights.

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

...

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.

- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at paras. 11.1-11.5, 12.1 and 12.2-13.

...

11.1 With respect to the alleged violation of article 14, three principal issues are before the Committee: (a) whether the alleged inadequacy of the judge's summing-up to the jury in the trial before the Home Circuit Court amounted to a denial of a fair trial; (b) whether the author had adequate time and facilities for the preparation of his defence and (c) whether the author's representation before the Court of Appeal by an attorney not of his choosing constituted a violation of article 14, paragraph 3 (d).

11.2 Concerning the first issue under article 14, the Committee reaffirms that it is generally for the appellate courts of States parties to evaluate the facts and the 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 a denial of justice...

11.3 The Committee notes that the State party has not denied the author's claim that the court failed to grant counsel sufficient minimum time to prepare his examination of witnesses. This amounts to a violation of article 14, paragraph 3 (b), of the Covenant.

11.4 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings...What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal...indicated that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no merit in the author's appeal and was not prepared to advance arguments in favour of it being granted, thus effectively leaving him without legal representation. In the circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

11.5 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if not further appeal against the sentence is available, a violation of article 6 of the Covenant...

...

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

12.2 It is the view of the Committee that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative. The Committee is of the view that Mr. Carlton Reid, a victim of a violation of articles 6 and 14, paragraph 3 (b) and (d), is entitled to a remedy entailing his release.

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

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Notes

...

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

- *Guesdon v. France* (219/1986), ICCPR, A/45/40 vol. II (25 July 1990) 61 at paras. 10.2-10.4 and 11.

...

10.2 The Committee has noted the author's claim that the notion of a "fair trial", within the meaning of article 14 of the Covenant, implies that the accused be allowed, in criminal proceedings, to express himself in the language in which he normally expresses himself, and that the denial of an interpreter for himself and his witnesses constitutes a violation of article 14, paragraphs 3 (e) and (f). The Committee observes, as it has done on a previous occasion, c/ that article 14 is concerned with procedural equality; it enshrines, *inter alia*, the principle of equality of arms in criminal proceedings. The provision for the use of *one* official court language by States parties to the Covenant does not, in the Committee's opinion, violate article 14. Nor does the requirement of a fair hearing mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.

10.3 On the basis of the information before it, the Committee finds that the French court complied with the obligations under article 14, paragraph 1 in conjunction with paragraphs 3 (e) and (f). The author has not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French. In this context, the Committee notes that the notion of fair trial in article 14, paragraph 1, *juncto* paragraph 3(f), does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speak with a maximum of ease. If the court is certain...that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language.

10.4 French law does not, as such, give everyone a right to speak his own language in court. Those unable to speak or understand French are provided with the services of an interpreter. This service would have been available to the author had the facts required it; as they did not, he suffered no discrimination under article 26 on the ground of his language.

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11. The Human Rights Committee...is of the view that the facts as submitted do not sustain the author's claim that he is a victim of a violation of article 14, paragraph 1 and 3 (e) and (f), or of article 26 of the Covenant.

Notes

...

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

- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241(CCPR/C/41/D/253/1987) at paras. 5.9, 5.10, 5.14, 6 and 7.

...

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

5.10 As to the issue of the author's representation, in particular before the Court of Appeal, the Committee recalls that it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all the stages of the judicial proceedings...The Committee is of the opinion that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.

...

5.14 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant...

...

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

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

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

See also:

- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at para. 8.2.
- *Blaine v. Jamaica* (696/1996), ICCPR, A/52/40 vol. II (17 July 1997) 216 (CCPR/C/60/D/696/1996) at paras. 6.5 and 8.3.

- *Sawyers v. Jamaica* (226/1987 and 256/1987), ICCPR, A/46/40 (11 April 1991) 226 (CCPR/C/41/D/226/1987) at paras. 13.5-13.7 and 14.

...

13.5 ...The Committee recalls its established jurisprudence c/ that it is generally for the appellate courts of States parties to evaluate the facts and the 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 a denial of justice, or that the judge manifestly violated his obligation of impartiality. The Committee finds no evidence that the trial judge's instructions suffered from such defects. Accordingly the Committee finds no violation of article 14, paragraph 1.

13.6 As to the author's claims relating to article 14, paragraphs 3 (b) and (e), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the circumstances of each case. While it is uncontested that none of the accused met with their lawyers more than twice before the trial, the Committee cannot conclude that the lawyers were placed in a situation where they were

unable properly to prepare the case for the defence. In particular, the material before the Committee does not reveal that an adjournment of the case was requested on grounds of insufficient time for the preparation of the defence; nor has it been argued that the judge would have denied such an adjournment, had it been requested. The Committee is not in a position either to ascertain whether the alleged failure of the representatives to call witnesses who might have corroborated the authors' testimony was a matter of professional judgement or of negligence.

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

...

14. The Human Rights Committee...is of the view that the facts before the Committee do not disclose any violation of the provisions of the Covenant.

Notes

...

c/ See, for example, the Committee's views in communication No. 250/1987 *(Carlton Reid v. Jamaica*), adopted on 20 July 1990, paras. 11.3 and 11.4.

See also:

- *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.
- *Allen v. Jamaica* (332/1988), ICCPR, A/49/40 vol. II (31 March 1994) 31 (CCPR/C/50/D/332/1988) at paras. 8.4 and 8.5.
- *Morrison and Graham v. Jamaica* (461/1991), ICCPR, A/51/40 vol. II (25 March 1996) 43 (CCPR/C/52/D/461/1991) at para. 5.4.
- *Steadman v. Jamaica* (528/1993), ICCPR, A/52/40 vol. II (2 April 1997) 22 (CCPR/C/59/D/528/1993) at para. 6.4.
- *Williams v. Jamaica* (561/1993), ICCPR, A/52/40 vol. II (8 April 1997) 147 (CCPR/C/59/D/561/1993) at para. 6.2.
- *Richards v. Jamaica* (639/1995), ICCPR, A/52/40 vol. II (28 July 1997) 183 (CCPR/C/60/D/639/1995) at para. 6.3.
- *Whyte v. Jamaica* (732/1997), ICCPR, A/53/40 vol. II (27 July 1998) 195 (CCPR/C/63/D/732/1997) at para. 7.6.
- *Perkins v. Jamaica* (733/1997), ICCPR, A/53/40 vol. II (30 July 1998) 205 (CCPR/C/63/D/733/1997) at paras. 7.3 and 11.5.

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- *Leslie v. Jamaica* (564/1993), ICCPR, A/53/40 vol. II (31 July 1998) 21 (CCPR/C/63/D/564/1993) at para. 6.5.
- *Morrison v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 6.4.

- *Z. P. v. Canada* (341/1988), ICCPR, A/46/40 (11 April 1991) 297 (CCPR/C/41/D/341/1988) at paras. 5.2 and 5.5.

  ...
  5.2 ...The Committee observes that it is generally for the appellate courts of State parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review alleged errors by the judge in the conduct of a trial unless it can be ascertained that the conduct of the trial was clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author has not shown that the conduct of the trial in question suffered from such defects...
  ...
  5.5 As to the alleged violation of article 14, paragraph 3(b), the Committee notes that the first time the author complained about the unavailability of the trial transcript was over two months after being denied leave to appeal by the Supreme Court. In the circumstances, he is estopped from invoking an *ex post facto* violation of his right to adequate time and facilities for the preparation of his defence. The Committee concludes that this part of the communication is inadmissible as an abuse of the right of submission...

See also:

- *Bullock v. Trinidad and Tobago* (553/1993), ICCPR, A/50/40 vol. II (19 July 1995) 168 (CCPR/C/54/D/553/1993) at para. 7.4.
- *Blaine v. Jamaica* (696/1996), ICCPR, A/52/40 vol. II (17 July 1997) 216 (CCPR/C/60/D/696/1996) at para. 6.6.
- *Perel v. Latvia* (650/1995), ICCPR, A/53/40 vol. II (30 March 1998) 128 (CCPR/C/62/D/650/1995) at para. 12.2.
- *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.
- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at para. 6.3.

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- *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...the 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-fifth Session], Supplement No. 40, annex IX, sect. J, Communication No. 250/1987 (*Carlton Reid v. Jamaica*), views adopted on 20 July 1990, para. 13, 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.

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 of Ms. Christine Chanet, Mr. Kurt Herndl, Mr. Francisco José Aguilar Urbina and Mr. Bertil Wennergren, 239.

- *Little v. Jamaica* (283/1988), ICCPR, A/47/40 (1 November 1991) 268 (CCPR/C/43/D/283/1988) at paras. 8.3, 8.4, 8.6 and 10.

...

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

8.4 On the basis of the material placed before it, and bearing in mind particularly that this is a capital punishment case and that the author was unable to review the statements of the prosecution's witnesses with counsel, the Committee considers that the time for consultation was insufficient to ensure adequate preparation of the defence, in respect of both trial and appeal, and that the requirements of article 14, paragraph 3 (b), were not met. As a result, article 14, paragraph 3 (e) was also violated, since the author was unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him. On the other hand, the material before the Committee does not suffice for a

finding of a violation of article 14, paragraph 3 (d), in respect of the conduct of the appeal: this provision does not entitle the accused to choose counsel provided to him free of charge, and while counsel must ensure effective representation in the interests of justice, there is no evidence that the author's counsel acted negligently in the conduct of the appeal itself.

...

8.6 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal." f/ In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

...

10. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Aston Little, a victim of violations of article 14, and consequently of article 6, is entitled...to an effective remedy, in this case entailing his release...

Notes

...

f/ See [Official Records of the General Assembly], Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 7.

- *Wolf v. Panama* (289/1988), ICCPR, A/47/40 (26 March 1992) 277 at paras. 6.5, 6.6 and 7.

...

6.5 The author claims that the State party has violated his right to be tried in his presence, protected by article 14, paragraph 3 (d). The Committee notes that the State party has denied this allegation but failed to adduce any evidence to the contrary, such as a copy of the trial transcript, and finds that this provision has been violated.

6.6 The author claims that he was denied a fair trial; the State party has denied this allegation by generally affirming that the proceedings against Mr. Wolf complied with domestic procedural guarantees. It has not, however, contested the allegation that the author was not heard in any of the cases pending against him, nor that he was never served a properly

motivated indictment. The Committee recalls that the concept of a "fair trial" within the meaning of article 14, paragraph 1, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings.c/ These requirements are not respected where, as in the present case, the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative. In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment. In the circumstances of the case, the Committee concludes that the author's right under article 14, paragraph 1, was not respected.

...

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

Notes

...

c/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex 10, sect. E, Communication No. 207/1986 (*Morael v. France*), views adopted on 28 July 1989, para. 9.3.

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at paras. 6.2 and 6.5.

...

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...

...

6.5 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his

counsel to prepare the defence for the trial. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. The author also contends he was unable to secure the attendance of witnesses on his behalf. The Committee notes, however, that the material before it does not reveal that either counsel or the author complained to the trial judge that the time or facilities were inadequate. The Committee therefore finds no violation of article 3(b) and (e).

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

- *Thomas v. Jamaica* (272/1988), ICCPR, A/47/40 (31 March 1992) 253 at paras. 11.3-11.5 and 13.

...

11.3 ...[T]he Committee notes that while the author alleges that the jury was biased because of the presence of acquaintances and "in-laws" of the deceased, his counsel did not raise any objections. The Committee finds therefore that this allegation has not been substantiated.

11.4 ...[T]he Committee recalls that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. Sufficient time and facilities must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time and facilities" requires an assessment of the individual circumstances of each case. In the instant case, it is uncontested that the author's defence was prepared on the first day of the trial. The Committee can not ascertain, however, whether the Court actually denied counsel adequate time for the preparation of the defence. Similarly, the material before the Committee does not disclose whether either the author or his counsel complained to the trial judge that the time or facilities were inadequate. The Committee therefore finds no violation of article 14, paragraph 3 (b), of the Covenant during the trial of first instance.

11.5 ...In respect of the third claim concerning the author's representation before the Court of Appeal, it is uncontested that the author was only informed about the date of the hearing after it had taken place. He was therefore unable to communicate with his representative with regard to the appeal. Taking into account the combination of circumstances in the in the

instant case, the Committee is of the opinion that the appeal proceedings did not meet the requirements of a fair trial, under article 14, paragraph 1, of the Covenant.

...

13. It is the view of the Committee that, in cases in which a capital sentence may be pronounced, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the opinion that Mr. Alrick Thomas is entitled to an appropriate remedy.

- *Hibbert v. Jamaica* (293/1988), ICCPR, A/47/40 (27 July 1992) 284 (CCPR/C/45/D/293/1988) at para. 7.4.

...

7.4 ...[T]he Committee notes that the right an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. The Committee notes that the author benefited from senior counsel, who chose not to request a delay for further preparation of the defence. The Committee is not in a position to ascertain whether the alleged failure of the representatives either to introduce the police station diary as evidence or to call other witnesses on the author's behalf was a matter of professional judgement or negligence. Accordingly, the material before the Committee does not justify a finding of a violation of article 14, paragraph 3 (b) and (e).

- *Wright v. Jamaica* (349/1989), ICCPR, A/47/40 (27 July 1992) 300 (CCPR/C/45/D/349/1989) at paras. 8.2-8.4.

...

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.

8.4 The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. There was considerable pressure to start the trial as scheduled...moreover, it is uncontested that Mr. Wright's counsel was instructed only on the very morning the trial was scheduled to start and, accordingly had less than one day to prepare Mr. Wright's defence and the cross-examination of witnesses. However, it is equally uncontested that no adjournment of the trial was requested by either of Mr. Wright's counsel. The Committee therefore does not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party; if counsel felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial. Accordingly, the Committee finds no violation of article 14, paragraph 3 (b).

- *Simmonds v. Jamaica* (338/1988), ICCPR, A/48/40 vol. II (23 October 1992) 78 (CCPR/C/46/D/338/1988) at paras. 8.2-8.4.

...
8.2 ...[T]he Committee must determine whether the fact that the author was not in a position to properly prepare his appeal and that he was represented by counsel not of his choosing amounts to a violation of article 14, paragraph 3(b) and (d), of the Covenant.

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

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

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Notes

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

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For dissenting opinion in this context, see Simmonds v. Jamaica (338/1988), ICCPR, A/48/40 vol. II (23 October 1992) 78 (CCPR/C/46/D/338/1988) at Individual Opinion by Mr. Julio Prado Vallejo, Mr. Waleed Sadi and Mr. Bertil Wennergren (dissenting in part), 84.

- *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.

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

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/40/D/263/1987) at para. 5.2.

...
5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judges involved in the case had referred to its political implications (see paragraph 2.7 above) 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. The Committee is further of the view that the delays in the workings of the judicial system in respect of the author since 1985 violate his right, under article 14, paragraph 1, to a fair trial. In this connection, the Committee observes that no decision at first instance in this case had been reached by the autumn of 1992.

- *Gordon v. Jamaica* (237/1987), ICCPR, A/48/40 vol. II (5 November 1992) 5 (CCPR/C/46/D/237/1987) at paras. 6.2, 6.4 and 6.5.

...
6.2 In respect of the author's claim of a violation of article 14, paragraph 3(b) and (d), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes

"adequate time" depends on an assessment of the particular circumstances of each case. On the basis of the material before it, however, the Committee cannot conclude that the author's two lawyers were unable to properly prepare the case for the defence, nor that they displayed lack of professional judgment or negligence in the conduct of the defence. The author also claims that he was not present at the hearing of his appeal before the Court of Appeal. However, the written judgment of the Court of Appeal reveals that the author was indeed represented before the Court by three lawyers, and there is no evidence that author's counsel acted negligently in the conduct of the appeal. The Committee therefore finds no violation of article 14, paragraph 3(b) and (d).

...

6.4 There remains one final issue to be determined by the Committee: whether the directions to the jury by the trial judge were arbitrary or manifestly unfair, in violation of article 14, paragraph 1, of the Covenant. The Committee recalls that the judge denied the jury the possibility to arrive at a verdict of manslaughter, by instructing it that the issue of provocation did not arise in the case, thereby only leaving open the verdicts of "guilty of murder" or "not guilty of murder". It further observes that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts as well as the instructions by the jury. It is not in principle for the Committee to review the evidence and the judge's instructions, unless it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality.

6.5 The Committee has carefully examined whether the judge acted arbitrarily by withdrawing the possibility of a manslaughter verdict from the jury. It observes that this matter was put before, and dismissed by, the Court of Appeal of Jamaica. The Court of Appeal, it is true, did not examine the question of whether a verdict of manslaughter should, as a matter of Jamaican law, have been left open to the jury. The Committee considers, however, that it would have been incumbent upon author's counsel to raise this matter on appeal. In the circumstances, the Committee makes no finding of a violation of article 14, paragraph 1, of the Covenant.

- *Griffiths v. Jamaica* (274/1988), ICCPR, A/48/40 vol. II (24 March 1993) 22 (CCPR/C/47/D/274/1988) at paras. 7.2 and 7.3.

...

7.2 With respect to the author's claim under article 14, paragraph 1, the Committee recalls that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts. It is not in principle for the Committee to review the evidence and the judge's instructions to the jury, unless it is clear that the instructions were manifestly

arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality. On the basis of the information before it, the Committee cannot conclude that the judge's instructions to the jury were arbitrary or biased, in particular with regard to the issue of legal provocation, where the judge directed the jury in a manner that has not been shown to be inconsistent with the applicable Jamaican law. The Committee, therefore, cannot find that the judge's instructions reveal a violation of article 14, paragraph 1, of the Covenant.

7.3 In respect of the author's claim concerning irregularities in the trial, including his allegation that two prosecution witnesses sought to influence members of the jury, the Committee notes that these allegations have not been substantiated as to lead the Committee to conclude that the author was denied the right to a fair trial. Moreover, it is to be noted that this latter allegation was not, on the basis of the information available to the Committee, placed before the Jamaican courts or any other competent judicial instance. In the circumstances, the Committee finds no violation of article 14.

- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at paras. 8.2-8.4.

...

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

8.3 Finally, because of the absence of a written judgement of the Court of Appeal, the author has been unable to effectively petition the Judicial Committee of the Privy Council. This, in the Committee's opinion, entails a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be. c/

8.4 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, while a petition for special leave to appeal is in theory still available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol...Accordingly, it must be concluded that the final sentence of death was passed without having met the requirements of article 14, and that as a result, the right protected by article 6 of the Covenant has been violated.

Notes

...

c/ See views on Communication No. 253/1987 (*Paul Kelly v. Jamaica*), adopted on 8 April 1991, para. 5.12.

- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993) 28 (CCPR/C/47/D/282/1988) at paras. 10.2 and 10.4.

...

10.2 ...The Committee reaffirms its jurisprudence that it is in principle for the courts of States 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 or the judge's conduct of the trial are clearly arbitrary or amount to a denial of justice. Having reviewed the trial transcript, the Committee notes that the medical evidence strongly suggested that the deceased was shot from a very close range. This medical evidence was brought to the attention of the jury by the judge, and the jury chose not to take this evidence into account. The Committee therefore does not consider that the guarantees of a fair trial were violated in this regard.

...

10.4 As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. d/ The determination of what constitutes "adequate time" requires an assessment of the

circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3(b), of the Covenant.

Notes

...

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

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

...

11.1 In respect of the authors' claims under article 14, paragraphs 3(b) and (d), the Committee reiterates that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. The material before the Committee discloses that neither leading or junior counsel, nor the authors complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. The Committee notes that if the authors or counsel had felt that they were improperly prepared, it would have been incumbent upon them to request an adjournment of the trial. Moreover, the Committee cannot conclude, on the basis of the available material, that the authors' representatives were unable to adequately represent them, nor that they displayed lack of professional judgment in the conduct of the defence of their clients. The same is true for the appeal. The written judgment of the Court of Appeal reveals that each

of the authors was represented before the Court by different counsel, and there is no evidence that their lawyers were unable to properly prepare the cases for the appeal. The Committee therefore finds no violation of article 14, paragraphs 3(b) and (d).

See also:

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at para. 8.4.
- *Morrison v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at para. 6.3.

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

...

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

See also:

- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at para. 9.8.
- *Shaw v. Jamaica* (704/1996), ICCPR, A/53/40 vol. II (2 April 1998) 164 (CCPR/C/62/D/704/1996) at para. 7.6.
- *P. Taylor v. Jamaica* (707/1996), ICCPR, A/52/40 vol. II (18 July 1997) 234 (CCPR/C/60/D/707/1996) at para. 8.2.
- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998) 174 (CCPR/C/62/D/705/1996) at para. 7.3.

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- *Berry v. Jamaica* (330/1988), ICCPR, A/49/40 vol. II (7 April 1994) 20 (CCPR/C/50/D/330/1988) at paras. 11.3 and 11.4.

...

11.3 As to the author's claim that he did not receive a fair trial, under article 14 of the Covenant, because of the presence in the jury of an allegedly biased person, and the use of evidence against him which was allegedly obtained under duress, the Committee observes that these issues were not raised during the trial. Furthermore, the written judgement of the Court of Appeal reveals that the issue of self-incrimination without prior cautioning by the police was raised during the trial, when N.W. testified that the author had made his statement after police cautioning. Neither counsel nor the author contended at the trial that he had not been cautioned. The Committee is of the opinion that the failure of the author's representative to bring these issues to the attention of the trial judge, which purportedly resulted in the negative outcome of the trial, cannot be attributed to the State party, since the lawyer was privately retained. The Committee therefore finds no violation of article 14, paragraph 1, of the Covenant in this respect.

11.4 The right of an accused person to have adequate time and facilities for the preparation of his defence at trial is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. In cases in which a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case...The Committee notes...that the material before it does not reveal that either counsel or the author himself complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. If counsel or the author felt that they were not properly prepared, it was incumbent upon them to request an adjournment. Furthermore, there is no indication that counsel's decision not to call other witnesses was not based on the exercise of his professional judgement...Accordingly, there is no basis for a finding of a violation of article 14, paragraph 3 (b) and (e), in respect of the trial.

See also:

- *Leslie v. Jamaica* (564/1993), ICCPR, A/53/40 vol. II (31 July 1998) 21 (CCPR/C/63/D/564/1993) at para. 9.5.

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

...

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

- *Harward v. Norway* (451/1991), ICCPR, A/49/40 vol. II (15 July 1994) 146 (CCPR/C/51/D/451/1991) at paras. 9.4 and 9.5.

...

9.4 Article 14 of the Covenant protects the right to a fair trial. An essential element of this right is that an accused must have adequate time and facilities to prepare his defence, as is reflected in paragraph 3(b) of article 14. Article 14, however, does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial against him in a language he can understand. The question before the Committee is whether, in the specific circumstances of the author's case, the failure of the State party to provide written translations of all the documents used in the preparation of the trial has violated Mr. Harward's right to a fair trial, more specifically his right under article 14, paragraph 3(b), to have adequate facilities to prepare his defence.

9.5 In the opinion of the Committee, it is important for the guarantee of fair trial that the defence has the opportunity to familiarize itself with the documentary evidence against an accused. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. The Committee notes that Mr. Harward was represented by a Norwegian lawyer of his choice, who had access to the entire file, and that the lawyer had the assistance of an interpreter in his meetings with Mr. Harward. Defence counsel therefore had opportunity to familiarize himself with the file and, if he thought it necessary, to read out Norwegian documents to Mr. Harward during their meetings, so that Mr. Harward could take note of its contents through interpretation. If counsel would have deemed the time available to prepare the defence (just over six weeks) inadequate to familiarize himself with the entire file, he could have requested a postponement of the trial, which he did not do. The Committee concludes that, in the particular circumstances of the case, Mr. Harward's right to a fair trial, more specifically his right to have adequate facilities to prepare his defence, was not violated.

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- *Casanovas v. France* (441/1990), ICCPR, A/49/40 vol. II (19 July 1994) 131 (CCPR/C/51/D/441/1990) at paras. 7.2-7.4.

...
7.2 The Committee notes that the issue before it is whether the duration of the proceedings before the Administrative Tribunal of Nancy concerning the author's second dismissal of 23 March 1989 violated the author's right to a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

7.3 The Committee recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the courts must be conducted expeditiously. b/ The Committee notes that in the instant case, the author, on 30 March 1989, initiated proceedings against his dismissal before the Administrative Tribunal of Nancy, and that the Tribunal, after having concluded the preliminary enquiry on 19 October 1989, rendered its judgment in the case on 20 December 1991.

7.4 The Committee notes that the author obtained a favourable decision from the Administrative Tribunal of Nancy and that he was reinstated to his post. Bearing in mind the fact that the Tribunal did consider whether the author's case should have priority over other cases, the Committee finds that the period of time that has elapsed from the submission of the complaint of irregular dismissal to the decision of reinstatement, does not constitute a violation of article 14, paragraph 1, of the Covenant.

Notes

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b/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40, (A/44/40), annex X.E, Communication No. 207/1986 (*Yves Morael v. France*), views adopted on 28 July 1989, para. 9.3.

- *Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994) 171 (CCPR/C/51/D/485/1991) at para. 9.5.

...
9.5 The author has claimed a violation of article 14 although in the first case (1988-1989), the charges against him were withdrawn, and in the second case (1990), he was acquitted. It is implicit in the State party's submission that in the light of these events, it considers the complaint under article 14 moot. The Committee notes that in the first case, it was the Assistant Minister of Defence and thus a government official who ordered the closure of the

proceedings against the author on 4 May 1989. In the second case, the author was formally acquitted. However, although there is evidence, in the first case, that government officials intervened in the proceedings, it cannot be said that the author's rights under article 14 were disrespected. Similar considerations apply to the second case. The author has also claimed, and the State party refuted, a violation of article 14, paragraph 3(a) and (b). The Committee has carefully examined the material provided by the parties, and concludes that in the instant case, the author's right to a fair trial has not been violated.

- *Poongavanam v. Mauritius* (567/1993), ICCPR, A/49/40 vol. II (26 July 1994) 362 (CCPR/C/51/D/567/1993) at paras. 4.3 and 4.4.

...
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.

4.4 Concerning the author's other claims of unfair trial, the Committee notes that they relate primarily to the evaluation of the evidence by the trial judge and the Assizes Court. The Committee recalls that it is primarily for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence placed before the domestic courts; similarly, it is for the appellate courts and not for the Committee to review instructions to the jury by the judge, unless it is apparent that these instructions were clearly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality. The material before the Committee does not show that the author's trial and the appeal suffered from such defects; this applies equally to the alleged absence of shorthand writers during the trial, which the author has not shown to have prejudiced the trial in one of the ways indicated above. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

- *Griffin v. Spain* (493/1992), ICCPR, A/50/40 vol. II (4 April 1995) 47 (CCPR/C/53/D/493/1992) at paras. 9.5, 9.7 and 9.8.

...
9.5 The Committee notes that the author claims that he did not receive a fair trial because of the incompetence of the court interpreter and the judge's failure to intervene in this respect,

and that he was convicted because of poor translation of a question, as a result of which his statement during the trial differed from his original statement to the examining magistrate. The Committee notes, however, that the author did not complain about the competence of the court interpreter to the judge, although he could have done so. In the circumstances, the Committee finds no violation of article 14, paragraph 3 (f), of the Covenant.

...

9.7 The Committee notes that the author was assisted by a lawyer and interpreter when he made the statement to the examining magistrate...It further notes that the author has signed the statement, which makes no reference to the fact that he was often left behind by R. L. and the other Canadian and that they once returned with a different camper. Furthermore, it transpires from the Acta del Juicio that the author merely stated during the trial hearing that he had no knowledge of the drugs concealed in the camper, and that, as submitted by the State party, R. L. testified that the author accompanied him during the whole trip. In the Committee's opinion, the author's claim that he was not allowed to give evidence or that he had inadequate interpretation during the hearing is not sufficiently substantiated. He was given the opportunity to make a statement, and it was R. L. and not the author himself who made the disputed affirmation.

9.8 As to the author's complaint about inadequate preparation and conduct of his defence at trial, the Committee notes that the barrister was privately retained by R. L. and the author, who granted power of attorney to her on 26 April 1991. It further notes from the information submitted by the author, that he was in constant contact with his lawyer in Canada and with the Canadian Embassy in Madrid, and that he had been assigned an attorney for the purpose of the preliminary hearing. If the author was dissatisfied with the performance of the barrister, he could have requested the judicial authorities to assign a lawyer to him, or he could have requested his Canadian lawyer to assist him in obtaining the services of another lawyer. Instead, the author continued to retain the services of the said barrister after his trial and conviction, until 8 November 1991. The Committee considers that, in the circumstances, any complaints, whether verified or not, about the author's barrister's conduct prior to or during the trial cannot be attributed to the State party. Accordingly, the Committee finds no violation of article 14 of the Covenant in this respect.

- *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at paras. 8.4-8.7.

...

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1...includes other elements. Among these, as the Committee has had the opportunity to point out, 22/ are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of

equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has failed to address this point, and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments before judgement was given was incompatible with the principle of adversary proceedings, and thus contrary to article 14, paragraph 1, of the Covenant.

8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

Notes

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22/ Views on Communications Nos. 203/1986 (*Muñoz v. Peru*), para. 11.3; and 207/1986 (*Morael v. France*), para. 9.3.

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- *G. Peart and A. Peart v. Jamaica* (464/1991 and 482/1991), ICCPR, A/50/40 vol. II (19 July 1995) 32 (CCPR/C/54/D/464/1991) at paras. 11.4 and 11.5.

...

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand, and that he did not mention Garfield Peart's participation or presence during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3(e), of the Covenant.

- *Marriott v. Jamaica* (519/1992), ICCPR, A/51/40 vol. II (27 October 1995) 67 (CCPR/C/55/D/519/1992) at para. 10.2.

...

10.2 The Human Rights Committee notes that the trial transcript shows that counsel informed the judge that he had been unaware that the prosecution was going to call a third witness until the morning of the hearing, when a summary of the evidence was given to the defence; he did not request an adjournment. The record further shows that, immediately after the third witness was sworn, the judge adjourned the trial, at 3.38 p.m., for other reasons. The trial resumed the next day at 10 a.m. with the examination of the third witness and then counsel proceeded to cross-examine her, without requesting a further adjournment. The author himself gave his statement from the dock later that day. In the circumstances, the Committee finds that the facts before it do not show that the author's right to adequate time and facilities for the preparation of his defence and his right to have examined the witnesses against him have been violated.

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- *Fuenzalida v. Ecuador* (480/1991), ICCPR, A/51/40 vol. II (12 July 1996) 50 (CCPR/C/57/D/480/1991) at paras. 3.4, 3.5 and 9.5.

...
3.4 The author further claims that his trial was unfair and in violation of article 14 of the Covenant. In this respect, counsel contends that the accused was convicted notwithstanding the contradictory evidence contained in the statement given by the victim herself, who described her assailant as being very tall and having a pock-marked face. The author, whom the victim identified, is short, measuring only 1.50 metres, and has no pock-marks on his face.

3.5 The author also claims that - in view of the submission by the victim of a laboratory report on samples (blood and semen) taken from her and samples of blood and hair taken from him against his will and showing the existence of an enzyme which the author does not have in his blood - he requested the court to order an examination of his own blood and semen, a request which the court denied.
...
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.

- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/536/1993) at para. 9.6.

...
9.6 The author contends that article 14, paragraph 1, was violated, as the trial judge failed to intervene when police officers present in the court room during the trial sought to influence the testimony of a defence witness. None of the court or other documents made available to the Committee indicate, however, that any attempts to influence the defence witness were ever brought to the attention of the court, or that the matter was raised as a ground of appeal. It would have been incumbent upon defence counsel, or the author himself, to raise a matter of such importance with the trial judge. In these circumstances, the Committee finds no violation of article 14, paragraph 1.

- *Richards v. Jamaica* (535/1993), ICCPR, A/52/40 vol. II (31 March 1997) 38 (CCPR/C/59/D/535/1993) at para. 7.2.

...
7.2 The author has claimed that his trial was unfair because the prosecution entered a *nolle prosequi* plea after the author had pleaded guilty to a charge of manslaughter. The author claims that the extent of media publicity given to his guilty plea negated his right to presumption of innocence and thus denied him the right to a fair trial. The Court of Appeal of Jamaica acknowledged the possibility of disadvantage to author at presenting his defence at the trial, but observed that "nothing shows that the convicting jury was aware of this". The entry of a *nolle prosequi* was found by the Jamaican courts and the Judicial Committee of the Privy Council to be legally permissible, as under Jamaican law the author had not been finally convicted until sentence was passed. The question for the Committee is not, however, whether it was lawful, but whether its use was compatible with the guarantees of fair trial enshrined in the Covenant in the particular circumstances of the case. *Nolle prosequi* is a procedure which allows the Director of Public Prosecutions to discontinue a criminal prosecution. The State party has argued that it may be used in the interests of justice and that it was used in the present case to prevent a miscarriage of justice. The Committee observes, however, that the Prosecutor in the instant case was fully aware of the circumstances of Mr. Richards' case and had agreed to accept his manslaughter plea. The *nolle prosequi* was used not to discontinue proceedings against the author but to enable a fresh prosecution against the author to be initiated immediately, on exactly the same charge in respect of which he had already entered a plea of guilty to manslaughter, a plea which had been accepted. Thus, its purpose and effect were to circumvent the consequences of that plea, which was entered in accordance with the law and practice of Jamaica. In the Committee's opinion, the resort to a *nolle prosequi* in such circumstances, and the initiation of a further charge against the author, was incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant.

For dissenting opinions in this context, see Richards v. Jamaica (535/1993), ICCPR, A/52/40 vol. II (31 March 1997) 38 (CCPR/C/59/D/535/1993) at Individual Opinion by Nisuke Ando, 45 and Individual Opinion by David Kretzmer, 46.

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

...
14.1 With regard to the right of everyone charged with a criminal offence to have adequate time and facilities for the preparation of his defence, the authors have stated that they had little time with their legal aid lawyer and that when the latter visited them for only 20 minutes two days before the trial, he did not have the case file or any paper for taking notes. The Committee notes that the State party contests this allegation and points out that the authors

had counsel of their own choosing. Moreover, in order to allow the legal aid lawyer to prepare the case, the hearing was adjourned. The authors have also alleged that even though they do not speak Spanish, the State party failed to provide them with translations of many documents that would have helped them to better understand the charges against them and to organize their defence. The Committee refers to its prior jurisprudence 2/ and recalls that the right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. Based on the records, the Committee finds that the facts do not reveal a violation of article 14, paragraph 3(b), of the Covenant.

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

...

2/ Views in Communication No. 451/1991, *Harward v. Norway*, adopted on 15 July 1994, paras. 9.4 and 9.5.

For dissenting opinion in this context, see Hill v. Spain (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at Individual Opinion by Eckhart Klein, 20.

- *Reynolds v. Jamaica* (587/1994), ICCPR, A/52/40 vol. II (3 April 1997) 235 (CCPR/C/59/D/587/1994) at paras. 6.2 and 6.3.

...

6.2 ...The Committee reaffirms that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and the 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 a denial of justice, or that the judge manifestly violated his obligation of impartiality.

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...

- *McLawrence v. Jamaica* (702/1996), ICCPR, A/52/40 vol. II (18 July 1997) 225 (CCPR/C/60/D/702/1996) at paras. 5.8 and 5.10.

...
5.8 The author has claimed a violation of article 14, paragraph 1, since a witness deemed to be crucial, Horace Beckford, was unavailable at trial, and because the judge failed to make a ruling on the voluntariness of the alleged confession statement and gave inadequate directions on the admissibility of fingerprint evidence. The right to a fair trial before an independent and impartial tribunal does not encompass an absolute right to have a certain witness testify in court on trial; it may not necessarily amount to a violation of due process if all possible steps are taken, unsuccessfully, to secure the presence of a witness in court, though this may depend on the nature of the evidence. In the instant case, counsel concedes

that "repeated efforts" were made to secure the attendance of Horace Beckford. As to the issue of the voluntariness of the alleged confession statement and the admissibility of fingerprint evidence, the Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate all the facts and evidence in a given case. It is not for the Committee to question the evaluation of such evidence by the courts unless it can be ascertained that the evaluation was arbitrary or otherwise amounted to a denial of justice; neither is discernible in the present case. The Committee does not consider that the author has established a violation of article 14, paragraph 1.

...

5.10 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the guarantee of a fair trial and an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defence. The determination of what constitutes adequate time requires an assessment of the individual circumstances of each case. The author also contends that he was unable to obtain the attendance of two potential alibi witnesses. The Committee notes, however, that the material before it does not reveal that either counsel or the author complained to the trial judge that the time for the preparation of the defence had been inadequate. If counsel or the author felt that they were inadequately prepared, it was incumbent upon them to request an adjournment. Furthermore, there are inconsistencies in the author's own version of this issue: whereas, in communications to his representative before the Committee, he claims that his trial lawyer had no time to prepare the defence, he argues, in a letter to the Committee dated 1 October 1996, that his representation on trial had been "excellent". Finally, there is no indication that counsel's decision not to call two potential alibi witnesses was not based on the exercise of his professional judgement or that, if a request to call the two witnesses to testify had been made, the judge would have disallowed it. Accordingly, there is no basis for finding a violation of article 14, paragraph 3 (b) and (e).

- *Richards v. Jamaica* (639/1995), ICCPR, A/52/40 vol. II (28 July 1997) 183 (CCPR/C/60/D/639/1995) at para. 6.7.

...

6.7 With regard to the authors' allegations that they were ill-treated and forced to confess, the Committee notes that this issue was the subject of a trial within a trial, to determine whether the authors' statements were admissible in evidence. In this connection the Committee refers to its prior jurisprudence and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case; it notes that the Jamaican courts examined the authors' allegations and found that the statements had not been procured under duress. In the absence of clear evidence of bias or misconduct by the judge, the Committee cannot reevaluate the facts and evidence underlying the judge's findings.

Accordingly this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

See also:

- *Perkins v. Jamaica* (733/1997), ICCPR, A/53/40 vol. II (30 July 1998) 205 (CCPR/C/63/D/733/1997) at para. 11.2.

- *A. R. J. v. Australia* (692/1996), ICCPR, A/52/40 vol. II (28 July 1997) 205 (CCPR/C/60/D/692/1996) at paras. 6.10 and 6.15.

...

6.10 With respect to possible violations by Australia of articles 6, 7 and 14 of the Covenant by its decision to deport the author to Iran, three related questions arise:

...

(c) Do the fair trial guarantees of article 14 prohibit Australia from deporting the author to Iran if deportation exposes him to the necessary and foreseeable consequence of violations of due process guarantees laid down in article 14?

...

6.15 ...[I]n respect of the alleged violation of article 14, paragraphs 1 and 3, the Committee has taken note of the State party's contention that its obligation in relation to future violations of human rights by another State only arises in cases involving violations of the most fundamental rights and not in relation of possible violations of due process guarantees. In the Committee's opinion, the author has failed to provide material evidence in substantiation of his claim that if deported, the Iranian judicial authorities would be likely to violate his rights under article 14, paragraphs 1 and 3, and that he would have no opportunity to challenge such violations. In this connection, the Committee notes the information provided by the State party that there is provision for legal representation before the tribunals which would be competent to examine the author's case in Iran, and that there is provision for review of conviction and sentence handed down by these courts by a higher tribunal. The Committee recalls that there is no evidence that Mr. J. would be prosecuted if returned to Iran. It cannot therefore be said that a violation of his rights under article 14, paragraphs 1 and 3, of the Covenant would be the necessary and foreseeable consequence of his deportation to Iran.

- *Arhuacos v. Colombia* (612/1995), ICCPR, A/52/40 vol. II (29 July 1997) 173 (CCPR/C/60/D/612/1995) at para. 8.7.

...

8.7 Counsel has claimed a violation of article 14 of the Covenant in connection with the

interrogation of the Villafañe brothers by members of the armed forces and by a civilian with military authorization without the presence of a lawyer and with total disregard for the rules of due process. As no charges were brought against the Villafañe brothers, the Committee considers it appropriate to speak of arbitrary detention rather than unfair trial or unfair proceedings within the meaning of article 14. The Committee accordingly concludes that José Vicente and Amado Villafañe were arbitrarily detained, in violation of article 9 of the Covenant.

- *Singh v. Canada* (761/1997), ICCPR, A/52/40 vol. II (29 July 1997) 348 (CCPR/C/60/D/761/1997) at paras. 4.2, 4.3 and 5.

...

4.2 The Committee notes that the majority of the author's claims relate to the evaluation of facts and evidence in his case by the authorities of the University of Western Ontario and the Canadian courts, which were seized of the author's grievances. It recalls that it is primarily for the courts of States parties to the Covenant and the appellate instances of States parties to the Covenant to evaluate the fact and evidence in any particular case. It is not for the Committee to review such evaluation of facts and evidence by the domestic tribunals, unless it can be ascertained that the domestic judges manifestly violated their obligation of impartiality or otherwise acted arbitrarily, or that the courts' verdict(s) amounted to a denial of justice. On the basis of the material before the Committee, there is no indication that the State party's tribunal seized of the case acted in any way that would have been contrary to article 14. Both the Supreme Court of Ontario and the Court of Appeal for Ontario, as well as the Court of Queen's Bench of Alberta, heard the author's grievances in some detail and dismissed them as without merits, giving reasoned decisions. The fact that these decisions went against the author and that the author continues to express dissatisfaction with them does not, *per se*, raise an issue under the Covenant. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant.

4.3 The author claims that the decisions against him taken by the University of Western Ontario and the Canadian judiciary amount to violations of articles...14, paragraph 2 and subparagraph 3(a)...of the Covenant. The Committee considers that on the basis of the material submitted by the author, no issues under these provisions arise in the instant case...[S]ince the author was never implicated with any criminal offence, there can be no question of a violation of the presumption of innocence and of the guarantees of the defence protected by article 14, paragraph 3. Finally, the Committee observes that the conduct of judicial proceedings in accordance with the requirements of article 14 does not raise issues under article 17 of the Covenant...

5. The Human Rights Committee therefore decides that:

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(a) The communication is inadmissible...

- *Young v. Jamaica* (615/1995), ICCPR, A/53/40 vol. II (4 November 1997) 69 (CCPR/C/61/D/615/1995) at para. 5.4 and Individual Opinion by Mr. Prafullachandra N. Bhagwati, 76.

...
5.4 The Committee observes that issue of the judge's summing up to the jury and his emphasis that the jury reach a unanimous verdict was examined by the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, and that both instances found the instructions to be acceptable. It is not for the Committee to review the findings of these bodies in the absence of any indication that their conclusions were arbitrary or otherwise amounted to a denial of justice...There is no indication in the present case that the trial itself was unfair, or that jurors made any objection, at the conclusion of the trial, to the instructions which the judge gave the jury at around 4:30 p.m., on 25 April 1990; nor did the jurors object to the jury foreman's announcement that the jury had arrived at a unanimous verdict of "guilty". As these possibilities would have been available, the Committee cannot find that the refusal of the Judicial Committee of the Privy Council to reconsider its conclusions in the case of *Nanan v. The State* would constitute a violation of article 14 of the Covenant, although the Committee is in no way bound by a State party's jurisprudence.
...

Individual Opinion by Mr. Prafullachandra N. Bhagwati

I am in agreement with the Views expressed by the Committee but I would like to add my own reasons to what has been stated in the Views expressed by the Committee.

The verdict of the jury was announced by the foreman on 25 April 1990. The foreman announced that the jury had reached a unanimous verdict of guilty against all the accused. Neither of the two jurors, who subsequently made affidavits stating that in their view the accused were not guilty and that they were not party to the guilty verdict, got up and contradicted the foreman when he said that the verdict was unanimous. If their subsequent version in the affidavits was correct, there is no reason why they should not have told the judge that what the foreman was saying was not correct and that the jury had not reached a unanimous verdict. The only reason given by the two jurors for not contradicting the foreman was that they were pressurised by the foreman and they wanted to go home as it was getting late. This reason can hardly carry conviction. The jurors have to take oath when they are empanelled and it is difficult to believe that the two jurors in question could have violated their oath and allowed the foreman to announce that all the jurors including them had reached

the verdict of guilty when in fact they had not, for the only reason that they were pressurised and wanted to go home. In any event, how can the Committee believe the affidavits of persons who were prepared to sanction death penalty for the accused, though in their view the accused were not guilty, merely because they were getting late and wanted to go home. It is therefore not possible for me to accept the affidavits of the two jurors and no reliance can be placed on these affidavits.

It was however contended in the submission made by counsel for the author, that since the State did not file an affidavit disputing the correctness of the affidavits of the two jurors, what was stated in those affidavits must be accepted as correct. In the first place, under the law of Jamaica which is the same as the law in England and the other common law countries where there is jury trial, the jurors cannot be required to disclose which way they voted in the verdict. There is an obligation of confidentiality on them. The State could not have therefore enquired from the other jurors as to what was their verdict and filed an affidavit on the basis of such information. No reference can therefore be drawn from the fact that the State did not file an affidavit contradicting the statements in the affidavits of the two jurors. Moreover, as pointed out by me above, even in the absence of an affidavit from the State, the affidavits of the two jurors are, on account of their inherent infirmity, unacceptable and the Committee cannot place any reliance on them.

I may point out that according to the domestic law of Jamaica as laid down by the Judicial Committee of the Privy Council in Nanan's case, the Court cannot enter the jury box and enquire into the deliberations of the jurors. The Court cannot go behind the verdict as announced by the foreman on behalf of the jurors. The decision in Nanan's case is however not binding on the Committee nor is the Committee governed by the domestic law of Jamaica. The Committee has to test the validity of the verdict on the anvil of article 14 of the Covenant and examine whether the trial was fair and in accordance with the standards and norms laid down in article 14. But, if the affidavits of the two jurors cannot be relied upon, there is nothing on record to show that the trial was unfair or not in compliance with the requirements of article 14.

The reasons given by me in this individual opinion for reaching the conclusion that there was no violation of article 14 are by way elaboration of the reasons set out in the Views expressed by the Committee to which I fully subscribe.

- *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.

See also:

- *Arredondo v. Peru* (688/1996), ICCPR, A/55/40 vol. II (27 July 2000) 51 at paras. 10.5, 11 and 12.

- *Perel v. Latvia* (650/1995), ICCPR, A/53/40 vol. II (30 March 1998) 128 (CCPR/C/62/D/650/1995) at para. 12.3.

...

12.3 With regard to the authors' argument that the State party's failure to reopen the case against Mr. Perel constitutes a violation of the Covenant, the Committee notes from the materials presented to it that the statements by Mr. Lokshinsky, revoking the evidence he gave at trial, were examined by the competent authorities, and that Mr. Perel's counsel was given an opportunity to present observations and arguments. In the circumstances, the Committee considers that there is no substantiation for the contention that the decision not to reopen the case was manifestly arbitrary or amounted to a denial of justice.

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- *Yasseen and Thomas v. Guyana* (676/1996), ICCPR, A/53/40 vol. II (30 March 1998) 151 (CCPR/C/62/D/676/1996) at para. 7.10.

...
7.10 With regard to the missing diaries and notebooks, the Committee notes that the authors claim that these may have contained exculpatory evidence. The State party has failed to address this allegation. In the absence of any explanation by the State party, the Committee considers that due weight must be given to the authors' allegations, and that the failure to produce at the last trial (1992) police documents which were produced at the first trial (1988) and which may have contained evidence in favour of the authors, constitutes a violation of article 14, paragraph 3, (b) and (e), since it may have impeded the authors in preparation of their defence.

- *McLeod v. Jamaica* (734/1997), ICCPR, A/53/40 vol. II (31 March 1998) 213 (CCPR/C/62/D/734/1997) at paras. 6.2 and 6.3.

...
6.2 The author alleges that there were irregularities in the court proceedings, improper instructions from the judge to the jury on the issues of joint enterprise, medical evidence to corroborate a confession, 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, 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 suggest that the issues raised by the author may have pointed to deficiencies in the evidence. On examination, however, it does not appear to the Committee that any of these alleged deficiencies were arbitrary or that they violated the obligation of impartiality.

6.3 With regard to the author's claim of deficient representation on appeal, he claims that although consulted before the appeal he was not aware that his legal aid representative would argue no grounds of appeal and that this was not in accordance with his instructions to counsel. The State party does not refute this claim but contends that it is not accountable for the actions of counsel. The Committee notes from the information before it that the Court of Appeal examined the case even though counsel had conceded he could find no grounds to argue. The Committee is of the view, however, that the requirements of fair trial and of representation require that the author be informed that his counsel does not intend to put arguments to the Court and that he have an opportunity to seek alternative representation, in order that his concerns may be ventilated at appeal level. In the present case, it does not

appear that the Appeal Court took any steps to ensure that this right was respected. In these circumstances, the Committee finds that the author's rights under article 14, paragraph 3 (b) and (d), have been violated.

- *McTaggart v. Jamaica* (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at paras. 6.3 and 8.4.

...

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.

...

8.4 The author has claimed that he was denied a fair trial due to the extensive media coverage given to his case, which allegedly reached Canada. The Committee notes that from the material before it the coverage the case received in Canada was generated in Canada, since it referred primarily to the author having been arrested at Toronto airport trying to enter the country on false documents. Counsel has failed to provide the Committee with any material relating to media coverage in Jamaica. In the circumstances of the present case, and as far as concerns the possible effects of the media coverage of the trial, the Committee considers that there has been no violation of article 14, paragraph 1, of the Covenant.

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

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

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...

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

Notes

...

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

- *Chung v. Jamaica* (591/1994), ICCPR, A/53/40 vol. II (9 April 1998) 55 (CCPR/C/55/D/591/1994) at para. 8.3.

...

8.3 As to the claim that the trial judge's refusal to change the venue of the trial deprived Mr. Chung of a fair trial and of his right to be presumed innocent, the Committee notes that the request for a change of venue was examined in detail by the judge at the start of the trial... The judge heard both Mr. Chung's representative and the Deputy Director of Public Prosecutions on the issue; she noted that the author's fears related to expressions of hostility towards him which well preceded the trial, and that the author was the only one, out of five co-accused, to have requested a change in venue. After hearing the parties' submissions and having satisfied herself that the jurors had been selected properly, she exercised her discretion and allowed the trial to proceed in the parish of Manchester. The Committee does not consider, in these circumstances, that the judge's decision not to change the venue deprived the author of his right to a fair trial or to be presumed innocent until found guilty. An element of discretion is necessary in decisions such as the judge's on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision, the Committee is not in a

position to substitute its findings for those of the trial judge. Accordingly, there has been no violation of articles 14, paragraphs 1 and 2, of the Covenant.

- *Deidrick v. Jamaica* (619/1995), ICCPR, A/53/40 vol. II (9 April 1998) 87 (CCPR/C/62/D/619/1995) at para. 9.4.

...
9.4 The author has alleged a violation of article 14, paragraphs 1 and 2, in that statements given by two witnesses to the police were not submitted in court or provided to the accused. This is said to have denied him the possibility of cross-examining other witnesses on the same terms as the prosecution, and thus denied him adequate facilities for the preparation of his defence. Without prior knowledge of the statements, counsel's cross examination of other witnesses was not as effective as it should have been, and the defence was unable to rebut the witness's allegations. The State party has investigated the matter and informed the Committee that the statements were in fact made available to counsel for the defence. The Committee notes, from the information before it, that counsel for the defence had access to the statements, consequently it considers that the State party cannot be held responsible for counsel's actions. Accordingly the Committee finds that there has been no violation of article 14 of the Covenant.

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

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

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- *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 paras. 10.1 and 10.2.

...

10.1 The authors have claimed that they did not receive a fair trial because of (a) the pre-trial publicity, and (b) the process of jury selection. The Committee notes that the pre-trial publicity was extensive, and that for this reason the State party amended the law so as to allow examination of prospective jurors by the defence with the aim of determining whether the pre-trial publicity had affected them to the extent of being biased. The jury selection occupied 14 days and the defence successfully challenged 169 potential jurors for cause. In the end, twelve jurors were sworn. The Committee is of the opinion that, in the circumstances, the State party took proper measures to prevent the pre-trial publicity from rendering the trial unfair. That not all challenges for cause by the defence were allowed does not indicate that the judge did not discharge his duty properly. With regard to the process of jury selection through conduct of a tales, the Committee refers to its jurisprudence that it is for the courts of States parties, and not for the Committee, to review the application of domestic law, unless it is evident that the application was manifestly arbitrary or amounted to a denial of justice. This not being so in the instant case, the Committee finds that the facts before it do not reveal a breach of article 14 of the Covenant.

10.2 With regard to the authors' additional claim that their appeal has been expedited in order to ensure their execution, in violation of articles 6, 7, and 14 of the Covenant, the Committee has taken note of the statistics provided by both counsel and the State party in this respect. In this context, the Committee recalls that the State party is under an obligation, under article 14 (3)(c) and (5) of the Covenant, to ensure that appeals are heard without undue delay. The Committee should nevertheless examine whether the period of time between conviction and the hearing of the appeal is sufficient for the defence to prepare the appeal. After having examined the information before it, the Committee considers that it has not been shown that the period of time in the instant case was insufficient to prepare the appeal by defence counsel. The Committee concludes therefore that the facts before it do not show that articles 6, 7 and 14 have been violated in this respect.

For dissenting opinion in this context, see 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 Individual Opinion by Mr. Martin Scheinin, 254 at paras. 7-10.

- *Morrisson v. Jamaica* (611/1995), ICCPR, A/53/40 vol. II (31 July 1998) 268 (CCPR/C/63/D/611/1995) at para. 6.3.

...

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6.3 With regard to the allegation that the author did not have a fair trial, in violation of article 14, paragraph 1, the Committee notes that the author was tried for murder by a judge and jury under regular procedures of the Jamaican legal system. He was found guilty by the jury who heard and assessed the evidence against him, and the case was reviewed by the Court of Appeal. The fact that he was joined by "a voluntary bill of indictment", after the preliminary enquiry had already taken place for the rest of the co-accused, following an established procedure, would not necessarily invalidate the fairness of the trial. 5/ Furthermore, this matter was never raised before the Courts, either on trial or on appeal. The Committee finds that in this respect, the author has no claim under article 2 of the Optional Protocol.

Notes

...

5/ See Communication No 749/1997, *McTaggart v. Jamaica*, Views adopted on 31 March 1998.

- *Phillip v. Trinidad and Tobago* (594/1992), ICCPR, A/54/40 vol. II (20 October 1998) 30 (CCPR/C/64/D/594/1992) at paras. 6.5 and 7.2.

...

6.5 With regard to that part of the author's communication relating to the evaluation of evidence and to the instructions given by the judge to the jury, in particular, the failure to instruct the jury on the possibility of manslaughter, the Committee referred to its established jurisprudence that it was, in principle, for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case. As to the author's allegation that he had not made any admission to the police and that the identification by the main prosecution witness was faulty, the Committee noted that these matters were the subject of a *voir dire*, at which the facts and evidence were evaluated. Similarly, it was not for the Committee to review specific instructions to the jury by the judge, unless it could 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 material before the Committee did not reflect that the trial judge's instructions or the conduct of the trial suffered from such defects. This part of the communication was therefore inadmissible under article 3 of the Optional Protocol.

...

7.2 The Committee notes that the information before it shows that the author's counsel

requested the court to allow him an adjournment or to withdraw from the case, because he was unprepared to defend it, since he had been assigned the case on Friday 10 June 1988 and the trial began on Monday 13 June 1988. The judge refused to grant the request allegedly because he felt the author would be unable to afford counsel of his own choice. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice. The Committee considers that in a capital case, when counsel for the accused who was not experienced in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee is of the opinion that in the instant case, Mr. Phillip's counsel should have been granted an adjournment. In the circumstances, the Committee finds that Mr. Phillip was not effectively represented on trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

See also:

- *Brown and Parish v. Jamaica* (665/1995), ICCPR, A/54/40 vol. II (29 July 1999) 157 (CCPR/C/D/665/1995) at para. 6.2.

- *Lindon v. Australia* (646/1995), ICCPR, A/54/40 (20 October 1998) 285 at paras. 3.3 and 6.4.

...

3.3 The author also alleges a violation of his right to a fair trial as provided for in article 14, on the grounds that the State party's claim for costs in the domestic proceedings and the decisions by the courts to affirm these claims constitute an unreasonable burden on the author as a private individual involved in human rights litigation. Reference is made to the principle in article 14, paragraph 3(d), which contains the right for anyone facing a criminal charge to have assigned legal assistance without payment if he does not have sufficient means.

...

6.4 As to the author's claim of a violation of article 14, paragraph 1, because the State party claimed costs and the courts affirmed these claims, the Committee notes that if administrative, prosecutoral or judicial authorities of a State party laid such a cost burden on an individual that his access to court *de facto* would be prevented, then this might give rise to issues under article 14, paragraph 1. However, the Committee is of the opinion that in the present case the author, for purposes of admissibility, has failed to substantiate such a claim. The costs imposed on him originate mainly from legal proceedings initiated by the author himself, with no direct relationship to the author's defence against the trespassing charge. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

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- *Levy v. Jamaica* (719/1996), ICCPR, A/54/40 vol. II (3 November 1998) 208 (CCPR/C/64/D/719/1996) at paras. 6.3 and 7.1.

...

6.3 As to the author's claim that, in violation of article 14, paragraph 3(b) and 3(d), he only met his lawyer on the day of the trial, and that he therefore had no time to prepare his defence properly, including giving counsel instructions as to witnesses he wanted to be called in his defence, the Committee notes that the trial transcripts show, as opposed to what was explicitly stated by counsel, that the author's legal aid counsel at the trial in fact asked for and was granted an adjournment for two days, in order to interview two possible witnesses of whom he knew the identity. In these circumstances, the Committee finds this claim inadmissible as an abuse of the right to submission...

...

7.1 As to the author's claim that the reclassification of his offence as capital murder by the single judge violated article 14, the Committee notes that pursuant to the Offences against the Persons (Amendment) Act 1992, the State party adopted a procedure to reclassify established murder convictions expeditiously by entrusting the initial review of each case to a single judge, enabling him to promptly give a decision in favour of a prisoner who in his opinion had committed a non-capital offence, and thus removing rapidly any uncertainty as to whether he was still at risk of being executed. If the single judge on the other hand found that the offence was of capital nature, the convict was notified and was granted the right to appeal the decision to a three judge-panel, which would address the matter in a public hearing. The Committee notes that it is not disputed that all procedural safeguards contained in article 14 applied in the proceedings before the three judge-panel. The author's complaint is solely directed at the first stage of the reclassification procedure, i.e. the single judge's handling of the matter, of which the author was not notified and in which there was no public hearing where the author could comment on the relevant issues or be represented. The Committee is of the opinion that the reclassification of an offence for a convict already subject to a death sentence is not a "determination of a criminal charge" within the meaning of article 14 of the Covenant, and consequently the provisions in article 14, paragraph 3, do not apply. The Committee considers however, that the safeguards contained in article 14, paragraph 1, should apply also to the reclassification procedure. The Committee notes that the system for reclassification allowed the convicts a fair and public hearing by the three judge-panel. The fact that this hearing was preceded by a screening exercise performed by a single judge in order to expedite the reclassification, does not constitute a violation of article 14.

- *Marshall v. Jamaica* (730/1996), ICCPR, A/54/40 vol. II (3 November 1998) 228 (CCPR/C/64/D/730/1996) at paras. 6.2-6.4 and 6.6.

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...

6.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented on the first day of the preliminary hearing. In its jurisprudence 116/, the Committee has held that legal assistance must be made available to an accused faced with a capital crime not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case. In the present case, the Committee notes that it is not disputed that the author was unrepresented on the first day of the preliminary hearing, and, notwithstanding that it is unclear whether the author explicitly requested legal aid, it finds that the facts disclose a violation of the Covenant. As previously held by the Committee 117/, it is axiomatic that legal assistance be available at all stages of the proceedings in capital cases. The Committee therefore finds that article 14, paragraph 3(d), was violated when the court commenced and proceeded through a whole day of the preliminary hearing without informing the author of his right to legal representation.

6.3 With regard to the alleged violation of article 14, paragraphs 1 and 3(d), on the ground that the author's counsel on two occasions during the trial was absent from the courtroom, the Committee again reiterates the importance of adequate, legal representation at all stages of the legal proceedings in capital cases. However, the Committee is of the opinion that the mere absence of defence counsel at some limited time during the proceedings does not in itself constitute a violation of the Covenant, but that it must be assessed on a case-by-case basis whether counsel's absence was incompatible with the interests of justice. With regard to the first occasion counsel was missing, the Committee notes from the trial transcripts that counsel was not present at the beginning of the prosecution's examination of Sergeant Clauchar (who had arrested the author on the day after the murders, and merely testified as to the circumstances of arrest) at 1:20 p.m. on 6 February 1992, but that he was present at 1:25 p.m. and that he at that time in fact performed a cross-examination. With regard to the second incident, the transcript shows that the judge started his summing up on 7 February 1992 with defence counsel present, but that he was absent when the proceedings resumed on 10 February 1992. Although defence counsel's absence during the summing up is a matter of some concern, the Committee notes that all the major legal issues had been dealt with on 7 February and that the judge during counsel's absence merely summarized the facts. Moreover, counsel conveyed a message to the court that he had no objections to the judge's continuing. The Committee therefore holds that the facts before it do not reveal a violation of the Covenant on this ground.

6.4 The author also alleges a violation of article 14, paragraphs 3(b), 3(d) and 3(e), on the ground of lack of opportunity to communicate with his counsel before and during the trial, with the result that no investigation was initiated on his behalf, that no witnesses were called and no depositions were taken on behalf of the author, and that counsel was not in a position to adequately cross-examine the prosecution's witnesses. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused,

it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense. The Committee notes that the author's legal aid counsel was assigned in due time for the trial. Furthermore, neither counsel nor the author actively requested an adjournment, and there is nothing else in the trial transcript which can suggest that the State party denied the author and his counsel opportunities to prepare for the trial or that it should have been manifest to the court that the defence team was inadequately prepared. Similarly, as to counsel's failure to call witnesses and to provide medical and ballistic evidence on behalf of the author, the Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

...

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

Notes

...

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

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

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

...

7.5 Counsel has claimed that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant. The State party has challenged this

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

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

Notes

...

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

- *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.

- *Gonzalez v. Trinidad and Tobago* (673/1995), ICCPR, A/54/40 vol. II (23 March 1999) 305 at paras. 3.1 and 5.2.

...

3.1 Counsel claims that the author is a victim of a violation of article 14 paragraph 1, because the Court of Appeal failed to remedy the trial judge's misdirections to the jury on several issues:

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(a) The trial judge directed the jury that in assessing whether the author had been provoked into losing his self-control they should consider whether the provocation was sufficient to make a reasonable man do as he did, and should take into account everything said or done. However, he failed to direct them that the "reasonable man" with whom the author should be compared was also someone who would have the same personality disorder and racial characteristics of the author.

(b) The trial judge erred when he admitted into evidence part of the author's statement which referred to the author returning to the deceased's house and setting the curtains alight. Counsel states that the prejudicial effect of this outweighed its probative value.

(c) The trial judge erred in his comments regarding counsel's suggestion that corporal Ramdath had omitted part of the author's statement under caution. The judge told the jury that the author had chosen to give un unsworn statement from the dock rather than a sworn statement and be cross-examined. The trial judge made reference to the possible sanctions which would befall Corporal Ramdath if the author's allegations were true. This is said to have unfairly influenced the jury into believing Corporal Ramdath in detriment of the author.

...

5.2 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were manifestly arbitrary or amounted to a denial of justice. 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.

- *S. Thomas v. Jamaica* (614/1995), ICCPR, A/54/40 vol. II (31 March 1999) 62 (CCPR/C/65/D/614/1995) at para. 9.4.

...

9.4 The issue before the Committee in respect to article 14 is whether the judge's insistence that the jury must reach a unanimous verdict and the alleged material irregularities in the jury's deliberations constituted a violation of the Covenant. The Committee observes that the issue of the judge's summing up to the jury and his emphasis that the jury reach a unanimous verdict was examined by the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, and that both instances found the instructions to be acceptable. It is not for the Committee to review the findings of these bodies in the absence of any indication that their

conclusions were arbitrary or otherwise amounted to a denial of justice. Consequently, there has been no violation of article 14 of the Covenant.

For dissenting opinion in this context, see S. Thomas v. Jamaica (614/1995), ICCPR, A/54/40 vol. II (31 March 1999) 62 (CCPR/C/65/D/614/1995) at Individual Opinion by Hipólito Solari Yrigoyen, 70.

- *Fraser and Fisher v. Jamaica* (722/1996), ICCPR, A/54/40 vol. II (31 March 1999) 224 (CCPR/C/65/D/722/1996) at paras. 3.1-3.4, 6.3-6.5 and 7.

...

3.1 The authors claim to be victims of a violation of article 14, paragraph 1, submitting that because of the poor quality of and the inconsistencies in the prosecution's evidence, it could not warrant a conviction. It is stated that the lighting around the scene of the murder was weak as there was no electricity after hurricane Gilbert had hit the island just before. The only light came from two "bottle torches". It is also stated that the scene of the murder was extremely confused. Furthermore, counsel states that Annette Small, another witness, attested that Ms. McPherson was an accomplice to the murder, that she ran to fetch salt to rub into the deceased's wounds, and refused to fetch him water to drink. It is stated that the testimony of Annette Small contradicts that of Ms. McPherson who held that this was done by Mr. Fisher. Counsel claims that also the witness Mr. Deans was partial, as he bore a personal grudge to Mr. Fraser and because he himself had been arrested and detained for 10 days in connection with the same murder and therefore "had an interest in casting blame on others". Furthermore, counsel makes reference to an episode in Mr. Deans' testimony in which, as opposed to what he had held at the preliminary hearing, he claimed that he had seen the authors attacking the deceased *before* he entered a nearby shop, and not after. Counsel also points out the "irreconcilable inconsistency" between Ms. McPherson's testimony and that of Mr. Deans, as only the latter placed Mr. Fraser on the scene of the crime.

3.2 The authors also claim that their right to a fair trial, as provided for in article 14, was violated because the trial judge's instructions to the jury were inadequate. In particular, it is stated that the jury were not duly warned to treat the testimonies of Ms. McPherson and Mr. Deans with caution, considering that both witnesses were possible accomplices, and that the latter's evidence was also uncorroborated.

3.3 The authors allege to be victims of a violation of article 14 on the ground that defence counsel at the trial were denied access to Mr. Deans' police statement, despite requests both to the prosecution and the trial judge. It is submitted that the police statement was essential for the defence of Mr. Fraser, in particular, and Mr. Fisher because it would have exposed Mr. Deans' partiality in the proceedings as he both bore a grudge against Mr. Fraser and had

been arrested in connection with the same case himself.

3.4 Mr. Fraser also claims to be a victim of a violation of article 14, paragraph 3(b) and (d), on the ground that he was inadequately represented by his counsel, as they were given at most one hour to consult prior to the trial.

...

6.3 With regard to the alleged violation of article 14 on the ground that the identification evidence contained serious inconsistencies and that the convictions therefore were wrongful, 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. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the authors have failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 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. With regard to the alleged violations of article 14 on the ground of improper instructions from the trial judge, the Committee can therefore merely 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. However, 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 any such defects either. Accordingly, also this part of the communication is inadmissible as the authors have failed to forward a claim within the meaning of article 2 of the Optional Protocol.

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

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...

7. The authors' claim that they were denied access to the police statement of one of the prosecution's witnesses is raised under the general provisions of article 14, paragraph 1; taking account of the course of the trial (in which the police statement did not form part of the prosecution's case) and the conduct of the authors' defense by their counsel in relation to this matter throughout the legal proceedings, the Committee finds that the authors have not substantiated any denial of a fair trial in the determination of the criminal charges against them.

- *Smith and Stewart v. Jamaica* (668/1995), ICCPR, A/54/40 vol. II (8 April 1999) 163 (CCPR/C65/D/668/1995) at paras. 7.2 and 7.3.

...

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

7.3 Mr. Smith has also claimed to be a victim of article 14, paragraphs 3(d) and 5, on the ground that his lawyer failed to argue his case before the Court of Appeal, and instead asked the co-defendant's lawyer to convey to the court that he had found nothing on which he could base an application for leave to appeal. On the basis of this message, the Court of Appeal refused Mr. Smith's application without further consideration. The State party does not dispute these facts, but contends that it is not responsible for counsel's conduct of the case. The Committee recalls its jurisprudence 74/ that the right to representation under article 14, paragraph 3(d) entails that the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question

counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel has informed the accused. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. In the present case, it does not appear that the Court of Appeal ascertained that the author was duly informed, and the Committee concludes that there has been a violation of article 14, paragraphs 3(d) and 5, on this ground.

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Notes

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74/ See, *inter alia*, the Committee's Views in Communications No. 537/1993, (*Paul Anthony Nelly v. Jamaica*), adopted on 17 July 1996, para. 9.5; 734/1997, (*Anthony McLeod v. Jamaica*), adopted on 31 March 1998, para. 6.3; 750/1997, (*Silbert Daley v. Jamaica*), adopted on 31 July 1998, para 7.5.

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See also:

- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998) 174 (CCPR/C/62/D/705/1996) at para. 6.2.

- *Ajaz and Jamil v. Republic of Korea* (644/1995), ICCPR, A/54/40 vol. II (13 July 1999) 111 at paras. 2.1, 3.1, 12.6, 14.2 and 15.

...

2.1 The authors state that they were convicted of murdering one Mokhter Ahmed (Vicky) and one Ahsan Zuber (Nana), two fellow Pakistani citizens, in Songnam City on 24 March 1992. The authors were tried and sentenced to death on 29 September 1992, after having pleaded not guilty to the charges.

...

3.1 The authors state that, during the trial, both Zubi and Zahid testified that the police forced them to sign statements which implicated the authors. The authors also claim that no evidence was brought against them at trial. They state that the murder weapons were never found, that evidence of a "racketeering and criminal ring" in which they were allegedly involved was never substantiated and that after a witness testified to being present while the authors were being beaten by the police, the court was cleared of all defendants, following which, upon their return, the witness retracted his statement on record. They also complain about errors in the translation of their statements.

...

12.6 The State party provides copies of English translations of the Courts' judgements. From

the judgements, it appears that the District Court considered the voluntariness of the statements made by the defendants, but that in the light of the testimonies it found no sustainable reason to doubt the voluntariness of the statements. On appeal, the High Court examined the authors' grounds of appeal that the statements made by the defendants were not trustworthy because of mistakes in the translation and interpretation, and because of threats and violence used against the defendants. The High Court found however that the interpreters were capable of interpreting in Pakistani and Korean, and did so correctly. It also noted that the police officer in charge of the investigation had made detailed and elaborate reports on the investigation process and that no evidence was found to prove that he had treated the accused harshly in any way or that he fabricated testimony. The Court concluded that the defendants had not been forced to testify, nor tortured. The Supreme Court rejected the authors' appeal on the basis that no misinterpretation of facts in the use of evidence occurred which would cause a violation of the law.

...

14.2 The Committee notes that the authors' claims that there was not enough evidence to convict them, that they had been tortured in order to force them to confess and that mistakes occurred in the translations of their statements were examined by both the court of first instance and the court of appeal, which rejected their claims. The Committee refers to its jurisprudence that it is not for the Committee, but for the courts of States parties, to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee regrets that the State party did not provide a copy of the trial transcript which has prevented the Committee from examining fully the conduct of the trial. Nevertheless, the Committee has considered the judgements of the District Court and the High Court. Having regard to the content of these judgments and in particular their evaluation of the authors' claims subsequently made to the Committee, the Committee does not find that those evaluations were arbitrary or amounted to a denial of justice or that the authors have raised before the Committee any issues beyond those so evaluated.

...

15. The Human Rights Committee ... is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

- *Maleki v. Italy* (699/1996), ICCPR, A/54/40 vol. II (15 July 1999) 180 at paras 2.1, 9.2-9.5, 10 and 11.

...

2.1 The author, a truck driver for over 40 years who transported consignments between Iran and Italy, was tried and sentenced, *in absentia,* on 21 November 1988 to 10 years imprisonment for having imported and sold narcotic drugs in Italy. His sentence was confirmed by the Court of Appeal on 16 October 1989.

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...
9.2 The State party's argument is that its declaration concerning article 14, paragraph 3 (d) is a reservation that precludes the Committee examining the author's argument that his trial *in absentia* was not fair. However, that declaration deals only with article 14, paragraph 3 (d), and does not relate to the requirements of article 14, paragraph 1. The State party itself has argued that its legal provisions regarding trial *in absentia* are compatible with article 14, paragraph 1. Under this provision, basic requirements of a fair trial must be maintained, even when a trial *in absentia*, is not, *ipso facto*, a violation of a State party's undertakings. These requirements include summoning the accused in a timely manner and informing him of the proceedings against him.

9.3 The Committee has held in the past that a trial *in absentia* is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him. 87/ In order for the State party to comply with the requirements of a fair trial when trying a person *in absentia* it must show that these principles were respected.

9.4 The State party has not denied that Mr. Maleki was tried *in absentia*. However, it has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him. It merely states that it "assumes" that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused *in absentia*. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial *in absentia*. Failing evidence that the court did so, the Committee is of the opinion that the author's right to be tried in his presence was violated.

9.5 In this regard the Committee wishes to add that the violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy. The State party described its law regarding the right of an accused who has been tried *in absentia* to apply for a retrial. It failed, however, to respond to the letter from an Italian lawyer, submitted by the author, according to which in the circumstances of the present case the author was not entitled to a retrial. The legal opinion presented in that letter must therefore be given due weight. The existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided the author with a potential remedy in the face of unrefuted evidence that these provisions do not apply to the author's case.

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

11. ... [T]he State party is under an obligation to provide Mr. Maleki with an effective

remedy, which must entail his immediate release or retrial in his presence. The State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

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87/ Committee's Views on communication No. 16/79 (*Mbenge v. Zaire*).

- *A. v. New Zealand* (754/1997), ICCPR, A/54/40 vol. II (15 July 1999) 245 at paras. 3.1, 3.2 and 7.2-7.4, 8 and Individual Opinion by Fausto Pocar and Martin Scheinin (partly dissenting), 255.

...

3.1 The author claims that his original detention under the Mental Health Act was unlawful, and that judge Unwin, not being convinced that he was mentally disordered, acted arbitrarily and unlawfully in not discharging him.

3.2 He further contends that the yearly review hearings by a panel of psychiatrists were unfair, in that he had no access to the documents they based themselves on and could not call any witnesses on his behalf. In his opinion, the hearings were orchestrated to continue his unlawful detention.

...

7.2 The main issue before the Committee is whether the author's detention under the Mental Health Act from 1984 to 1993 constituted a violation of the Covenant, in particular of article 9. The Committee notes that the author's assessment under the Mental Health Act followed threatening and aggressive behaviour on the author's part, and that the committal order was issued according to law, based on an opinion of three psychiatrists. Further, a panel of psychiatrists continued to review the author's situation periodically. The Committee is therefore of the opinion that the deprivation of the author's liberty was neither unlawful nor arbitrary and thus not in violation of article 9, paragraph 1, of the Covenant.

7.3 The Committee further notes that the author's continued detention was regularly reviewed by the Courts and that the facts of the communication thus do not disclose a violation of article 9, paragraph 4, of the Covenant. In this context, the Committee has noted the author's argument that the decision by Unwin J not to dismiss him from compulsory status

was arbitrary. The Committee observes, however, that this decision and the author's continued detention were reviewed by other courts, which confirmed Unwin J's findings and the necessity of continuation of compulsory status for the author. The Committee refers to its constant jurisprudence, that it is for the courts of States parties concerned to review the evaluation of the facts as well as the application of the law in a particular case, and not for the Committee, unless the Courts' decisions are manifestly arbitrary or amount to a denial of justice. On the basis of the material before it, the Committee finds that the Courts' reviews of the author's compulsory status under the Mental Health Act did not suffer from such defects.

7.4 As a consequence of the above findings, the author's claim under article 9, paragraph 5, is without merit.

8. The Human Rights Committee ... is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

Individual Opinion by Fausto Pocar and Martin Scheinin

We associate ourselves with the general points of departure taken by the Committee. Treatment in a psychiatric institution against the will of the patient is a form of deprivation of liberty that falls under the terms of article 9 of the Covenant. In an individual case there might well be a legitimate ground for such detention, and domestic law should prescribe both the criteria and procedures for assigning a person to compulsory psychiatric treatment. As a consequence, such treatment can be seen as a legitimate deprivation of liberty under the terms of article 9, paragraph 1.

The special nature of compulsory psychiatric treatment as a form of deprivation of liberty lies in the fact that the treatment is legitimate only as long as the medical criteria necessitating it exist. In order to avoid compulsory psychiatric treatment from becoming arbitrary detention prohibited by article 9, paragraph 1, there must be a system of mandatory and periodic review of the medical-scientific grounds for continuing the detention.

In the present case we are satisfied that the law of New Zealand, as applied in the case, met with the requirements of article 9, paragraph 1. The author was subject to a system of periodic expert review by a board of psychiatrists. Although the periodicity of one year appears to be rather infrequent, the facts of the case do not support a conclusion that this in itself resulted in a violation of the Covenant.

- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at paras. 6.4, 7.1 and 7.5.

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...

6.4 ...[I]t 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. With regard to the alleged violations of article 14 on the ground of improper instructions from the trial judge on the issue of identification evidence and on the ground that he allowed a "no case to answer" submission to be heard in front of the jury, the Committee can therefore only 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. However, 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 any such defects either. Accordingly, this part of the communication is also inadmissible...

...

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

...

7.5 The author further claims that his rights under article 14, paragraph 1, were violated in the reclassification procedure in which the author's offence was classified as non-capital under section 7 of the Offenses Against the Person (Amendment) Act 1992 and the non-parole period was set to 20 years. It is submitted that the author was not provided with any reasons for the length of the non-parole period and was not given the opportunity to make any contribution to the procedure before the single judge. Even though a life sentence is prescribed by law for offences reclassified as non-capital, the Committee notes that the judge when fixing the non-parole period exercises discretionary power conferred on him by the Amendment Act 1992 and makes a decision which is separate from the decision on pardon

and forms an essential part of the determination of a criminal charge. The Committee notes that the State party has not contested that the author was not afforded the opportunity to make any submissions prior to the decision of the judge. In the circumstances, the Committee finds that article 14, paragraphs 1 and 3(d), were violated.

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. 7.2.

- *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.

  ...
  6.3 With regard to the author's allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of identification evidence, in particular that the identification warning given to the jury by the judge was inadequate and that the indication of the weakness in the evidence was unclear and unsatisfactory, 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. Gallimore's trial suffered from such defects. In particular, it is not apparent that the judge's instructions on how to interpret identification evidence, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible...

- *Hankle v. Jamaica* (710/1996), ICCPR, A/54/40 vol. II (28 July 1999) 196 (CCPR/C/66/D/710/1996) at paras. 6.4 and 6.5.

  ...
  6.4 The author has alleged a violation of article 14 on the ground of inconsistencies in the prosecution's case and that the judge erred in not withdrawing the case from the jury on account of 1) the failure of the arresting officer to take a statement from the witnesses until a week after the shooting, 2) the fact that the three eye witnesses did not positively disclose

the identity of the murderer until almost a year after the murder, and 3) that the circumstances on the night of the murder were such that it was not possible to make a precise identification. It is also submitted that the judge erred in deciding that the question of legal provocation need not be left to the jury, because there was evidence that the deceased had borrowed a knife from a third party to wound the author. The Committee notes that all these allegations relate to the courts' evaluation of the facts and evidence of the criminal case, and 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. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible...

6.5 With regard to the alleged violation of article 14 on the ground of the judge's decision not to dismiss the jurors after they heard the prosecutor ask for an adjournment as the prosecution witnesses allegedly had been threatened and the subsequent instructions from the judge to the jury on this point, the Committee reiterates that it is generally 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. The Committee can therefore only examine whether the judge's decision and instructions were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. However, 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 any such defects either. Accordingly, also this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

- *Bech v. Norway* (882/1999), ICCPR A/55/40 vol. II (15 March 2000) 242 at paras. 2.1, 2.2, 2.4 and 4.2.

...
2.1 On 9 November 1995, the Oslo City Court found the author guilty of fraud and sentenced him to five years' imprisonment. The author appealed the judgement to the Borgarting High Court. A hearing was held from 15 January to 6 February 1997. Prior to the hearing, on 23 December 1996, the author was involved in a car accident ...

2.2 Due to the author's state of health, the defence requested that the hearing of the appeal be postponed. On the first day of the hearing, on 15 January 1997, after consulting with the specialist treating the author as well as with his general practitioner, the Court rejected the request. It decided, however, that the hearings would be of shorter duration than usual, and that short breaks would be permitted at hourly intervals, and that an armchair would be made

available to the author.

...

2.4 The next day, the author's condition deteriorated and on 17 January 1997, the Court decided to interrupt his testimony due to his condition. It was agreed that the author would see a doctor and do a blood test. The opinion by the National Institute of Forensic Toxicology of 21 January 1997 was that the blood test showed that it was likely that the author was influenced by the medication ... [T]he Court rejected the author's appeal and sentenced him to five years' imprisonment.

...

4.2 The author's allegation of unfair trial is based on his claim that his medical condition impaired his functioning in such a way as to impede the presentation of his appeal. The Committee notes that this claim was brought before the Courts, both at the time of the hearing and on appeal to the Supreme Court, and that the Courts rejected the author's claim after having heard medical expert testimony. The Committee recalls that it is generally not for the Committee but for the Courts of States parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, his claim that the Court's evaluation of his medical condition was arbitrary or amounted to a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at paras. 3.4 and 9.4.

...

3.4 Counsel alleges that the trial judge's instructions to the jury and his failure to exclude certain evidence amount to a denial of justice, which, according to the Committee's jurisprudence, constitutes a violation of article 14, paragraphs 1 and 2. As to the trial judge's instructions to the jury, counsel submits that the trial judge prejudiced the author's case in the following respects:

> the judge failed to remind the jury that the fact that no objection was made to the confession statement being admitted into evidence was irrelevant to the issue the jury had to decide, namely whether the statement was forged or not
>
> the judge failed to direct the jury upon the law regarding self-defence as to the facts allegedly admitted by the author, notwithstanding that the author relied upon a defence of alibi in the trial
>
> the judge failed to remind the jury of the description of the assailant given by

> Victoria Lee and Audley Wilson (Victoria Lee testified that the black man who she saw stabbing the deceased was wearing a blue shirt, or at least a shirt with blue in it, whilst the shirt that was seized by the police was white and black. Audley Wilson, another eye witness to the struggle, testified that the assailant was 5'8"-5'9", which is the author's height, but in the cross-examination it was made clear that he at the preliminary hearing had claimed that the assailant was "about 5' and a little".)

...

9.4 With regard to the author's allegation of violations of article 14, paragraphs 1...on the ground of improper instructions from the trial judge to the jury on the issues set out in para. 3.4 supra, and the admission of the confession statement and the police officers' testimony into evidence, 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 both parties also have pointed out, 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 any 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.

- *Ben Said v. Norway* (767/1997), ICCPR, A/55/40 vol. II (29 March 2000) 161 at paras. 11.2 and 11.3.

...

11.2 It has been confirmed by the author and the State party that the author appeared, on 12 January 1997 at the airport of Oslo, intending to participate in a court hearing at the Oslo City Court in a child custody and visiting rights case, scheduled for 14 January, to which he had received a convocation. It is likewise undisputed that the author was prevented by the administrative authorities of the State party from attending the hearing or from directly contacting the judge. He was, however, able to meet with his lawyer who participated in the hearing held on 14 January while the author had already been deported from Norway.

11.3 The right to a fair trial in a suit at law, guaranteed under article 14, paragraph 1, may require that an individual be able to participate in person in court proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of article 14, paragraph 1, were met in the present case, the Committee notes that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author

to participate in person; nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author at the airport and subsequently presented by the lawyer to the judge at the hearing of the child custody case. In these circumstances, the Committee is of the view that it did not constitute a violation by the State party of article 14, paragraph 1, that the Oslo City Court did not on its own initiative, postpone the hearing in the case until the author could be present in person.

- *Gridin v. Russian Federation* (770/1997), ICCPR, A/55/40 vol. II (20 July 2000) 172 at paras. 8.2, 8.4 and 10.

...
8.2 With regard to the author's claim that he was denied a fair trial in violation of article 14, paragraph 1, in particular because of the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence, the Committee notes that the Supreme Court referred to this issue, but failed to specifically address it when it heard the author's appeal. The Committee considers that the conduct of the trial, as described above, violated the author's right to a fair trial within the meaning of article 14, paragraph 1.
...
8.4 ...[T]he Committee notes that the Supreme Court addressed the specific allegations by the author that, the evidence was tampered with, that he was not properly identified by the witnesses and that there were discrepancies between the trial and its records. However, the rejection by the court of these specific allegations did not address the fairness of the trial as a whole and therefore does not affect the Committee's finding that article 14, paragraph 1, of the Covenant was violated.
...
10. ...[T]he State party is under an obligation to provide Mr. Gridin with an effective remedy, entailing compensation and his immediate release. The State party is under an obligation to ensure that similar violations do not occur in the future.

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at para. 10.9.

...
10.9 The authors have claimed that they were forced to use English during the proceedings in court, although this is not their mother tongue. In the instant case, the Committee considers that the authors have not shown how the use of English during the court proceedings has affected their right to a fair hearing. The Committee is therefore of the

opinion that the facts before it do not reveal a violation of article 14, paragraph 1.

- *Piandiong et al. v. The Philippines* (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at para. 7.2.

...
7.2 Counsel has claimed that the identification of Messrs. Piandiong and Morallos by eyewitnesses during the police line-up was irregular, since the first time around none of the eyewitnesses recognized them, upon which they were put aside in a room and policemen directed the eyewitnesses to point them out. The Court rejected their claim in this respect, as it was uncorroborated by any disinterested and reliable witness. Moreover, the Court considered that the accused were identified in Court by the eyewitnesses and that this identification was sufficient. The Committee recalls its jurisprudence that it is generally for the courts of States parties, and not for the Committee, to evaluate the facts and evidence in a particular case. This rule also applies to questions as to the lawfulness and credibility of an identification. Furthermore, the Court of Appeal, in addressing the argument about the irregularity of the line-up identification, held that the identification of the accused at the trial had been based on in-court identification by the witnesses and that the line-up identification had been irrelevant. In these circumstances, the Committee finds there is no basis for holding that the in-court identification of the accused was incompatible with their rights under article 14 of the Covenant.

- *Mahuika et al. v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at paras. 5.1, 5.3-5.8, 5.10-5.12, 6.4, 9.10 and 9.11.

...
5.1 The Maori people of New Zealand number approximately 500,000, 70% of whom are affiliated to one or more of 81 iwi. 1/ The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown, signed the Treaty of Waitangi, which affirmed the rights of Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to Maori:

> "The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..." 2/

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given

force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal. 3/ ...

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the Government amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights contrary to section 88(2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50% of all New Zealand commercial fisheries. In 1989, after negotiation and as an interim measure, Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10% of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Under the Act, Maori can also apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a source of food or for spiritual reasons.

5.5 ... The Maori Fisheries Negotiators and the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50% of the major New Zealand fishing company, Sealords, which owned

26% of the then available quota. In return, Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing...

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum of understanding... On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and on 23 September1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well... The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. Paragraph 5.1 of the Deed reads:

> "Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

> "The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights."

The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their

fisheries guaranteed by the Treaty of Waitangi.

5.8 According to the authors the contents of the Memorandum of Understanding were not always adequately disclosed or explained to tribes and sub-tribes...

...

5.10 Following the signing of the Deed of Settlement, the authors and others initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued *inter alia* that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990.8/ The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

5.12 ... With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognise and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil proceedings and shall not provide a defence to any criminal, regulatory or other proceeding, except to the extent that such rights or interests are provided for in regulations. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

...

6.4 Some of the authors claim that no Notices of Discontinuance were signed on behalf of

their tribes or sub-tribes in respect of fisheries claims that were pending before the courts and that these proceedings were statutorily discontinued without their tribes' or sub-tribes' consent by s 11(2)(g) and (i) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This is said to constitute a violation of their right under article 14(1) of the Covenant, to have access to court for the determination of their rights and obligations in a suit at law. In this context, the authors submit that Maori fishing rights are clearly "rights and obligations in a suit at law" within the meaning of article 14(1) of the Covenant because they are proprietary in nature. Prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Maori filed numerous fishing claims in the courts. The authors submit that article 14(1) of the Covenant guarantees the authors, and their tribes or sub-tribes, the right to have these disputes determined by a tribunal which complies with all of the requirements of article 14. In this context, it is submitted that although customary and aboriginal rights or interests can still be considered by the Waitangi Tribunal in the light of the principles of the Treaty of Waitangi, the Waitangi Tribunal's powers remain recommendatory only.

...

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14(1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only to the extent that s 88(2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of

the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

Notes

1/ Iwi: tribe, incorporating a number of constituent hapu (sub-tribes).

2/ Counsel submits that the Maori text contains a broader guarantee than is apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.

3/ The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered inter alia to inquire into certain claims in relation to the principles of the Treaty of Waitangi.

...

8/ Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).

For dissenting opinion in this context, see Mahuika et al. v. New Zealand (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at Individual Opinion by Mr. Martin Scheinin (partly dissenting), 29.

- *Jansen-Gielen v. The Netherlands* (846/1999), ICCPR, A/56/40 vol. II (3 April 2001) 158 at paras. 2.1-2.6, 8.2 and Individual Opinion by David Kretzmer and Martin Scheinin (concurring in part), 164.

...

2.1 The author used to work as a teacher at the Roman Catholic primary school Budschop in Nederweert. She was employed by a private association.

2.2 On 20 December 1989, the Director of the General Civil Pension Scheme (Algemeen

Burgerlijk Pensioenfonds), which is a private scheme, declared the author 80 per cent disabled. This decision was based on a psychiatrist's report established in November 1989.

2.3 The author appealed this decision, but her appeal was dismissed by the District Court of the Hague on 24 September 1992. From the Court's decision, it appears that the author was frequently absent from work for reasons of health, from October 1987 to October 1988, and as of October 1988, did not report to work at all. The psychiatric report showed that her absence was caused by a serious work conflict, with which she could not cope.

2.4 The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), the highest instance in pension cases. In September 1994, she changed counsel. By letter of 26 September 1994, received by the Tribunal on 27 September 1994, the new counsel addressed to the Tribunal a psychological report, refuting the conclusions of the first expert report. The hearing at the Central Appeals Tribunal took place as scheduled on 29 September 1994. In its judgement of 20 October 1994, the Central Appeals Tribunal dismissed the author's appeal. It considered that it could not take into account the expert report submitted by the author because of its late presentation. It appears from the judgement that the Tribunal considered that the defending party would be unreasonably hindered in its defence if the document were to be allowed. In reaching its decision the Tribunal also referred to the provisions of article 8:58 of the (new) General Administrative Law.

2.5 According to the author, the General Administrative Law came into force on 1 January 1994, but, pursuant to article 1(3) of the law, does not apply to the author's case, since she appealed before 1 January 1998 1/. According to the old administrative procedure, no deadline for the submission of a report existed, and the report should thus have been considered as having been presented in time.

2.6 The author moreover points out that, in the summons for the hearing of 29 September 1994, the Tribunal did not advise her that she could submit new documents only up to ten days before the date of the hearing. Further, it is argued that in practice even under the new law, late submission of documents is accepted as long as it does not seriously affect the other party's rights.

...

8.2 The author has claimed that the failure of the Central Appeals Tribunal to append the psychological report, submitted by her counsel, to the case file two days before the hearing, constitutes a violation of her right to a fair hearing. The Committee has noted the State party's argument that the Court found that admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. However, the Committee notes that the procedural law applicable to the hearing of the case did not provide for a time limit for the submission of documents. Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party

could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant.

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Notes

1/ The Central Appeals Tribunal, at the beginning of its judgement of 20 October 1994, indicates that the appeal has been considered on the basis of the legal provisions in force before the entry into force of the General Administrative Law.

_____

Individual Opinion by David Kretzmer and Martin Scheinin

While we agree with the Committee's conclusion, as set out in paragraph 8.2 of its Views, that there was a violation of article 14, paragraph 1, in the present case, we differ in the reasons for this decision.

It is generally for the domestic courts to decide on admissibility of documents in court proceedings and the procedure for their submission. While at the time of the author's case before the domestic courts there was no provision in the law setting time-limits for the submission of documents, the State party has argued that under the domestic law of administrative procedure no documents could be submitted in proceedings unless the other party would be afforded an opportunity to take note of them within reasonable time. This has not been contested by the author. However, the State party has offered no explanation why, given the centrality of the report to the author's case, the court did not take measures to allow consideration of the report by the other party rather than simply ignoring it. In these particular circumstances, we agree that the author's right to a fair determination of her rights in a suit of law, protected under article14, paragraph 1, of the Covenant, was violated.

- *Kavanagh v. Ireland* (819/1998), ICCPR, A/56/40 vol. II (4 April 2001) 122 at paras. 2.1-2.3, 3.2, 3.3, 10.1, 10.3, 10.4, 12 and Individual Opinion by Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga, Ahmed Tawfik Khalil and Patrick Vella (concurring), 136 at paras. 1-2.

...

2.1 Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order". On 26 May 1972, the Government exercised its

power to make a proclamation pursuant to Section 35(2) of the Offences Against the State Act 1939 (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35(4) and (5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

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

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

...

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

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

...

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial

unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

...

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

10.4 The author contends that his right to a public hearing under article 14, paragraph 1, was violated in that he was not heard by the DPP on the decision to convene a Special Criminal Court. The Committee considers that the right to public hearing applies to the trial. It does not apply to pre-trial decisions made by prosecutors and public authorities. It is not disputed that the author's trial and appeal were openly and publicly conducted. The Committee therefore is of the view that there was no violation of the right to a public hearing. The Committee considers also that the decision to try the author before the Special Criminal Court did not, of itself, violate the presumption of innocence contained in article 14, paragraph 2.

...

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future: it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

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

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

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of Article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally,

the prohibition against double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

- *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone* (839/1998, 840/1998, 841/1998), ICCPR, A/56/40 vol. II (16 July 2001) 153 at paras. 2.2, 5.6, 6.1 and 6.3.

...

2.2 The authors are all members or former members of the armed forces of the Republic of Sierra Leone. The authors were charged with, *inter alia*, treason and failure to suppress a mutiny, were convicted before a court martial in Freetown, and were sentenced to death on 12 October 1998.1/ There was no right of appeal.

...

5.6 The Committee notes the authors' contention that the State party has breached article 14, paragraph 5, of the Covenant in not providing for a right of appeal from a conviction by a court martial *a fortiori* in a capital case. The Committee notes that the State party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were executed only several days after their conviction. The Committee considers, therefore, that the State party has violated article 14, paragraph 5, of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication. The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed *inter alia* only, when all guarantees of a fair trial including the right to appeal have been observed.

6.1 The Human Rights Committee ... is of the view that the facts as found by the Committee reveal a violation by Sierra Leone of articles 6 and 14, paragraph 5 of the Covenant.

...

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra

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Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

Notes

1/ This is the only information provided by counsel on the convictions.

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

...

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

...

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

...

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

LEGAL RIGHTS - RIGHT TO A FAIR AND PUBLIC HEARING

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

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

Notes

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

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

- *Henry v. Jamaica* (230/1987), ICCPR, A/47/40 (1 November 1991) 210 (CCPR/C/43/D/230/1987) at para. 8.2. For text of communication, see **LEGAL RIGHTS-** CRIMINAL - Right to Counsel or Consular Assistance.

CAT

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

...
11.5 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA [the Basque

separatist movement], had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their *incommunicado* detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, l/ without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

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

Notes

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