LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

III. JURISPRUDENCE

ICCPR

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

...
16.2 ...His trial was held in camera and in his absence and 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) (e) because he was denied the opportunity to obtain the attendance and examination of witnesses on his behalf.

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

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

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

...

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

(a) With respect to Daniel Monguya Mbenge:

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

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

...

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

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at para. 11.3.

  ...
  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.

See also:

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

- *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at para. 8.5.

  ...
  8.5 As to the author's claim of a violation of article 14, paragraph 3 (e), the Committee notes that at least two witnesses who would have been willing to testify on the author's behalf were present in the courtroom during the retrial. Notwithstanding the author's repeated requests, they were not called. As author's counsel had been privately retained, his decision not to call these witnesses cannot, however, be attributed to the State party. In the view of the Committee, counsel's failure to call defence witnesses did not violate the author's right under article 14, paragraph 3 (e).

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

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

- *Prince v. Jamaica* (269/1987), ICCPR, A/47/40 (30 March 1992) 242 at para. 8.2.

...
8.2 As to the author's claims relating to article 14, paragraph 3 (e)...The Committee is not in a position to ascertain whether the failure of the defence to call witnesses on the author's behalf was a matter of counsel's professional judgement or the result of intimidation. The material before the Committee does not disclose whether either counsel or author complained to the trial judge that potential defence witnesses were subjected to intimidation. Similarly, the Committee is unable to conclude, from the information before it, if the defence was actually denied the opportunity to call witnesses. The Committee therefore finds no violation of article 14, paragraph 3 (e), of the Covenant.

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. 8.1.
- *Young v. Jamaica* (615/1995), ICCPR, A/53/40 vol. II (4 November 1997) 69 (CCPR/C/61/D/615/1995) at para. 5.5.

- *Párkányi v. Hungary* (410/1990), ICCPR, A/47/40 (27 July 1992) 317 (CCPR/C/45/D/410/1990) at para. 8.5.

...
8.5 As to the author's...claim that the Court failed to call a certain witness who was of importance to his defence, the Committee notes that the State party has argued that the Court had decided that it was not necessary to hear that witness. The author of the communication has not provided evidence which would justify concluding that the Court's refusal, upheld by the Court of Appeal, was such as to infringe the equality of arms between the prosecution

and defence and that the circumstances under which defence witnesses were heard were different from those under which the prosecution witnesses were heard. Consequently, the Committee is not able...to find that there has been a violation of article 14, paragraph 3 (e).

- *Gordon v. Jamaica* (237/1987), ICCPR, A/48/40 vol. II (5 November 1992) 5 (CCPR/C/46/D/237/2987) at para. 6.3.

...
6.3 As to the author's allegation that he was unable to have witnesses testify on his behalf, although one, Corporal Afflick, would have been readily available, it is to be noted that the Court of Appeal, as is shown in its written judgment, considered that the trial judge rightly refused to admit Corporal Afflick's evidence, since it was not part of the *res gestae*. The Committee observes that article 14, paragraph 3 (e), does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel. It is not apparent from the information before the Committee that the court's refusal to hear Corporal Afflick was such as to infringe the equality of arms between the prosecution and the defence. In the circumstances, the Committee is unable to conclude that article 14, paragraph 3(e), has been violated.

- *Campbell v. Jamaica* (307/1988), ICCPR, A/48/40 vol. II (24 March 1993) 41 (CCPR/C/47/D/307/1988) at para. 6.4 and Individual Opinion by Mr. Bertil Wennergren, 46.

...
6.4 Article 14 of the Covenant gives everyone the right to a fair and public hearing in the determination of a criminal charge against him; an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence. The Committee observes that the detention of witnesses in view of obtaining their testimony is an exceptional measure, which must be regulated by strict criteria in law and in practice. It is not apparent from the information before the Committee that special circumstances existed to justify the detention of the author's minor child. Moreover, in the light of his retraction, serious questions arise about possible intimidation and about the reliability of the testimony obtained under these circumstances. The Committee therefore concludes that the author's right to a fair trial was violated.
...
Individual Opinion by Mr. Bertil Wennergren

...[M]y reasons for finding a violation of the author's right to a fair trial differ from those

explained by the Committee in paragraph 6.4 of the views.

Article 14, paragraph 1, of the Covenant entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law. Paragraph 3 of the same article contains further guarantees for those charged with a criminal offence. In the present context, one may recall article 14, paragraph 3 (e), which guarantees that an accused shall have the right, in full equality, to examine or have examined, the witnesses against him and to obtain the attendance and the examination of witnesses on his behalf under the same conditions as witnesses against him. In my opinion, however, the issue in this case is not whether the principle of equality of arms was violated with respect to hearing the author's son Wayne as a witness, but whether his examination was compatible with the principles of due process of law and fair trial. It must be recalled first that, when Wayne was heard as a witness by the court, he was merely 13 years of age, and he was expected to truthfully recount an event which had occurred nearly three years earlier, when he was 10, and which might seriously incriminate his father. Secondly, measures of coercion were employed against him to make him testify and otherwise comply with his obligations as a witness.

Although most legal systems provide for the possibility of hearing children as witnesses in court, it is generally understood that particular care must be exercised in view of the vulnerability of children. Measures must be taken to ensure that a child is stable and mature enough to withstand the pressures and the stress that witnesses in a criminal case may encounter. If a hearing is considered necessary and may be carried out without risk for the child's well-being, every effort must be made to conduct the hearing in as considerate and sympathetic a way as possible. In the same context, it should be recalled that article 24 of the Covenant entitles every child to such measures of protection as are required by his status as a minor.

...Some legal systems exempt individuals from the obligation to testify against close relatives, the rationale being that an obligation to testify would be inhuman and thus unacceptable. Due to the lack of a generally recognized principle in this respect, however, I cannot rule out as inadmissible the hearing of Wayne as a witness simply because he was the son of the accused.

...

Testimony in a court of law is civic duty and all legal systems provide for certain coercive measures to guarantee compliance with that duty. Subpoena and imprisonment are the most common coercive measures and should be used for the equal benefit of the prosecution and the defence, whenever deemed necessary for the presentation of evidence to the jury which, on the basis of such evidence, must determine guilt or innocence of the accused. In its views, the Committee observes that the detention of witnesses is an exceptional measure, which must be regulated by strict criteria in practice and in law, and that it is not apparent that

special circumstances existed in the author's case the detention of a 13-year old. For me, it is difficult to imagine circumstances that would justify a child's detention in order to compel him to testify against his father. In any event, this case in no way discloses such special circumstances; the judge therefore must be deemed to have violated the principle of due process of law, and the requirements of a fair hearing under article 14, paragraph 1. The violation was in fact the violation of the rights of a witness, but its negative impact on the conduct of the trial was such that it rendered it unfair within the meaning of article 14, paragraph 1, of the Covenant.

- *Compass v. Jamaica* (375/1989), ICCPR, A/49/40 vol. II (19 October 1993) 68 (CCPR/C/49/D/375/1989) at para. 10.3.

...
10.3 In respect of the author's claim that article 14, paragraph 3, was violated in his case, as he was not given the opportunity to cross-examine one of the main prosecution witnesses...the Committee notes that it is undisputed that the witness was unable to give evidence during the trial, because he had left Jamaica. The Committee notes, however, that it appears from the trial transcript that the author was present during the preliminary hearing, when McNab gave his statement under oath, and that counsel to the author cross-examined the witness on that occasion. The Committee observes that article 14, paragraph 3 (e), protects the equality of arms between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its entitlement to cross-examine a prosecution witness during the trial hearing. In any event, the Committee notes that Detective McNab was examined by the defence under the same conditions as by the prosecution at the preliminary hearing. In the circumstances of the case, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 3 (e).

- *Allen v. Jamaica* (332/1988), ICCPR, A/49/40 vol. II (31 March 1994) 31 (CCPR/C/50/D/332/1988) at para. 8.5.

...
8.5 The author alleges that the preparation and presentation of his defence were deficient, in that no witnesses were called on his behalf. More generally, he contends that legal assistance available to individuals charged with criminal offences in Jamaica is such that witnesses are rarely traced or subpoenaed...In respect of these claims, which were subsumed under article 14, paragraph 3(e), in the admissibility decision of 20 March 1992, the Committee notes that the material before it does not disclose that either the author or his counsel complained to the judge that facilities for the preparation of the defence had been

inadequate. Nor is there an indication counsel decided not to call witnesses on Mr. Allen's behalf other than in the exercise of his professional judgment, or that, if a request to call witnesses was made, the judge disallowed it or would have disallowed it. In the circumstances, the Committee finds no violation of article 14, paragraph 3(e).

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at para. 8.5.

...
8.5 The author also contends that he was unable to secure the attendance of witnesses on his behalf, in particular, the attendance of his girlfriend, P.D. The Committee notes from the trial transcript that the author's attorney did contact the girlfriend, and, on the second day of the trial, made a request to the judge to have P.D. called to court. The judge then instructed the police to contact this witness, who...had no means to attend. The Committee is of the opinion that, in the circumstances, and bearing in mind that this is a case involving the death penalty, the judge should have adjourned the trial and issued a subpoena to secure the attendance of P.D. in court. Furthermore, the Committee considers that the police should have made transportation available to her. To the extent that P.D.'s failure to appear in court was attributable to the State Party's authorities, the Committee finds that the criminal proceedings against the author were in violation of article 14, paragraphs 1 and 3 (e), of the Covenant.

- *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.

...
7.4 As regards the author's claim that the judge's refusal to admit the 1976 statement by the main prosecution witness in evidence or to allow cross-examination of this witness on the statement violated his rights under article 14, paragraphs 1 and 3(e), of the Covenant, the Committee considers that it is generally for the appellate courts of States parties, and not for the Committee, to review the judge's discretion in relation to the admission of evidence unless it can be ascertained that the exercise of the discretion was manifestly arbitrary or amounted to a denial of justice. Since no such defects have been shown in the instant case, this part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions 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.

- *Adams v. Jamaica* (607/1994), ICCPR, A/52/40 vol. II (30 October 1996) 163 (CCPR/C/58/D/607/1994) at paras. 8.3 and 8.4.

...
8.3 The author has alleged a violation of article 14, paragraphs 1, 2, 3 (b) and (e), in that the non-disclosure, by the prosecution, of the statement made by Mr. Wilson to the police, denied him the possibility of cross-examining witnesses on the same terms as the prosecution, and thus denied him adequate facilities for the preparation of his defence. The Committee, however, notes that even though counsel objected to its submission into evidence, from the record it appears that he did not request an adjournment or even ask for a copy of the statement. The Committee considers therefore that the claim has not been substantiated, and consequently there is no violation of the Covenant in this respect.

8.4 The author contends that he was unable to obtain the attendance and examination of witnesses on his behalf on equal terms as witnesses against him, as the witnesses were "warned off" by the police. The State party has not explained why statements were not taken from three potential alibi witnesses, who had on different occasions indicated their willingness to testify on behalf of the author, as attested to by affidavits signed by all three of them. However, the Committee considers that as the witnesses were available to the author, it was counsel's professional choice not to call them. The Committee reaffirms its standard jurisprudence where it has held that it is not for the Committee to question counsel's professional judgment, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement. In the circumstances,

the Committee finds that the facts before it do not reveal a violation of the Covenant.

See also:

- *Reynolds v. Jamaica* (587/1994), ICCPR, A/46/40 (3 April 1997) 235 (CCPR/C/59/D/587/1994) at para. 6.4.
- *McTaggart v. Jamaica* (749/1997), ICCPR, A/53/40 vol. II (31 March 1998) 221 (CCPR/C/62/D/749/1997) at para. 6.2.

- *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...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...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).

See also:

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

- *Thomas v. Jamaica* (532/1993), ICCPR, A/53/40 vol. II (3 November 1997) 1 (CCPR/C/61/D/532/1993) at para. 6.3.

...

6.3 The author contends that he was unable to obtain the attendance and examination of witnesses on his behalf on equal terms as witnesses against him. Reference is made in particular to the availability of the author's mother and sister, who were not called as alibi witnesses. However, the Committee considers that as defense witnesses were available to the author, and one alibi witness was in fact called, it was counsel's professional judgment not to call them. The Committee also observes that the material before it does not reveal that either counsel or the author himself ever complained to the trial judge that they were unable to examine the witnesses under the same conditions as witnesses for the prosecution, or unable to examine some witnesses at all. The Committee therefore finds no violation of article 14, paragraph 3(e), of the Covenant.

See also:

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

- *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. 7.9.

...

7.9 Counsel claims that the evidence against the authors was so thin as to turn their conviction and death sentence into a miscarriage of justice. Counsel claims in particular that the author was the victim of a violation of article 14, paragraph 3(e), because at the last trial (1992), a witness did not appear and certain police notebooks and diaries were missing. With regard to the witness, the Committee notes that it appears from the information before it that this witness gave evidence for the prosecution in the first trial (1988). The information before the Committee does not indicate how the absence of this witness at the last trial (1992) could have prejudiced the authors. In the circumstances, the Committee finds that counsel has not substantiated his claim that the failure to ensure the attendance of the witness

in the last trial (1992) deprived the authors of their right under article 14, paragraph 3(e).

- *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.

- *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.

...
9.5 The author has alleged a violation of article 14, paragraph 3 (b) and (e) since the lack of time and facilities for the preparation of the defence meant that a number of defence witnesses were not called to testify on the author's behalf. From the information before it the Committee finds that there is no indication that counsel's decision not to call witnesses was not based on the exercise of his professional judgment. If counsel or the author felt they were unprepared it was incumbent upon them to request an adjournment. Accordingly, there is no basis for finding a violation of article 14, paragraph 3 (b) and (e).

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

...
6.6 With regard to the author's representation at the preliminary hearing, the Committee notes that it appears from the trial transcript that the author's representative was absent during

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

Notes

...

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

- *Lumley v. Jamaica* (662/1995), ICCPR, A/54/40 vol. II (31 March 1999) 142 (CCPR/C/65/D/662/1995) at para. 7.2.

...

7.2 With regard to the author's complaint that he had no opportunity to examine witnesses on appeal, the Committee notes from the documents of the Court of Appeal that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". The Committee considers therefore that the facts before it do not show a violation of article 14, paragraph 3(e).

- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at paras. 7.1 and 7.3.

...

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.

...

7.3 With regard to the claim that the failure of the two subpoenaed witnesses to appear before the court should be attributed to the State party as a violation of article 14, paragraph 3(e), the Committee finds that the author has not substantiated his claim that the authorities, by failure to secure adequate arrangements for transportation, de facto denied the author an opportunity to obtain witnesses. In this context, the Committee also notes that this was not made a ground of appeal before the Court of Appeal. On the basis of the material before it, the Committee therefore concludes that there has been no violation of the Covenant in this regard.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at para. 9.5.

...

9.5 With regard to the alleged violation of article 14, paragraph 3(e), on the ground that two named witnesses were willing to give evidence before the Court of Appeal but declined because of police intimidation, the Committee notes that the State party has disputed the author's allegations and that the author has not adduced any evidence in support of them, nor has he made any claims as to what new evidence these witnesses would provide. Furthermore, the material before the Committee shows that the author's counsel before the Court of Appeal, Lord Gifford, was granted an adjournment of 10 months in order to interview one of the potential witnesses and to obtain any other new evidence. However, at the hearing, Lord Gifford did not mention any police intimidation of defence witnesses. In the circumstances, the Committee finds that the claim is inadmissible under article 2 of the Optional Protocol for lack of substantiation.

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

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

...

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.

- *Piandiong et al. v. The Philippines* (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at paras. 7.2 and 7.3.

...

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.

7.3 With regard to the other claims, concerning the alleged ill-treatment upon arrest, the

evidence against the accused, and the credibility of the eyewitnesses, the Committee notes that all these issues were before the domestic courts, which rejected them. The Committee reiterates that it is for the courts of States parties, and not for the Committee, to evaluate facts and evidence in a particular case, and to interpret the relevant domestic legislation. There is no information before the Committee to show that the decisions by the courts were arbitrary or that they amounted to denial of justice. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

For dissenting opinion in this context, see Piandiong et al. v. The Philippines (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at Individual Opinion by Ms. Elizabeth Evatt and Ms. Cecilia Medina Quiroga (partly dissenting), 189.

- *Boodlal Sooklal v. Trinidad and Tobago* (928/2000), ICCPR, A/57/40 vol. II (25 October 2001) 264 (CCPR/C/73/D/928/2000) at paras. 2.1, 2.2, 4.8 and 4.9.

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

2.2 In February 1997, the author was tried in the High Court, where he pleaded not guilty...He was convicted and sentenced to 12 strokes with the birch, as well as 50 years of concurrent sentences, equivalent to a sentence of 20 years after remission.
...
4.8 As to counsel's contention that the State party has violated article 14, paragraph 3 (c), as the author's trial was not held within a reasonable time after he was charged, the Committee notes that the author waited for a period of seven years and nine months from the time of his arrest to the date of his trial. The State party has provided no justification for this delay. In the circumstances, the Committee considers that this is an excessive period of time and, therefore, that the State party has violated article 14, paragraph 3 (c), of the Covenant.

4.9 The Committee notes counsel's contention that, because of the delay of seven years and nine months from the date of the author's arrest to his trial, the witnesses could not have been expected to testify accurately to events alleged to have taken place nine years previously, and that the fairness of the trial was seriously prejudiced. As it appears from the file that issues related to the credibility and assessment of the evidence were addressed by the High Court, the Committee takes the view that the effect of the delay on the credibility of the witnesses testimonies does not give rise to a finding of a violation of the Covenant that would be separate from the conclusion reached above under article 14, paragraph 3 (c).

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

- *Simpson v. Jamaica* (695/1996), ICCPR, A/57/40 vol. II (31 October 2001) 67 (CCPR/C/73/D/695/1996) at paras. 2.1-2.3, 2.5, 3.8, 6.3, 7.3, 8 and 9.

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

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

2.3 At trial the author was represented by three lawyers. The author only met one of the lawyers on one occasion for 15 minutes before the beginning of the trial. The lawyers did not sufficiently challenge the evidence against the author. In particular, the description given by one of the prosecution witnesses of the attacker, did not correspond with his physical characteristics, and this was not sufficiently pointed out by the author's lawyer. Consultations between the author and his lawyers during the trial were irregular.
...
2.5 On 6 November 1992, the author was convicted of two offences of capital murder and sentenced to death by the Home Circuit Court in Kingston.1/
...
3.8 It is...claimed that, prior to the preliminary hearing, the author had inadequate time and facilities to prepare his defence and communicate with his attorney, in violation of article 14, paragraph 3 (b), and an inadequate opportunity to examine or procure witnesses, in violation of article 14, paragraph 3 (e). In this context, counsel claims that the fact that the author did not meet with his lawyer prior to the preliminary hearing violates paragraph 3 (b), and his lawyer's failure to be present for the examination of two of the witnesses violates paragraph 3 (e). Counsel claims that as there was insufficient preparation for his preliminary hearing, this culminated in poor quality representation at the trial hearing 4/. Counsel also claims a violation of article 14, paragraph 3 (b) because of the lack of consultation he had with his lawyer prior to the hearing itself. He claims that the author was only allowed 15 minutes with his lawyer when the prison warden asked her to leave. In addition, counsel claims a violation of article 14, paragraph 3 (e) because of counsel's behaviour during the trial as described in paragraph 2.3 above.
...
6.3 With respect to the complaint that the author's representative did not properly cross examine the witnesses against him, the Committee recalled its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the

interests of justice.7/ The Committee were of the view that, in this instant case, there was no reason to believe that counsel at trial was not using her professional judgement in the interests of her client, and this part of the communication was thus considered inadmissible under article 2 of the Optional Protocol. (para. 3.8)

...

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

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

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

_____

Notes

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

...

4/ No further elaboration is provided by counsel or the author in relation to this issue.
...
7/ See *inter alia*, the Committee's decision in communication No. 536/1993, *Perera v. Australia*, declared inadmissible on 28 March 1995.
...
9/ See *inter alia*, the Committee's Views in respect of communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

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

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

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

2.6 On 17 June 1994, the Special Terrorism Division of the Lima High Court sentenced the author to 20 years' imprisonment; this sentence was subsequently confirmed by the Supreme

Court of Justice on 28 February 1995. The Special Terrorism Division's sentence stated that the author's criminal responsibility had been proved in the interview with Lázaro Gago, one of the co-defendants, who stated that he not only knew the author and his fiancée, but had also made his home available for them to leave the goods taken during the subversive attacks on the Bata shoe shop...

...

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

...

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

Notes

...

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

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

...

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

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

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

...

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

...

3.3 The author...states that he was deprived of the right to a public trial, with a public hearing and obligatory attendance by defence counsel and a representative of the public prosecutor's office, as provided for in the Code of Criminal Procedure which entered into force on 1 July 1992. He recalls the decision of the Human Rights Committee in the *Elsa Cubas v. Uruguay* and *Alberta Altesor v. Uruguay* cases,3/ where it found that in both cases there had been a violation of article 14, paragraph 1, of the Covenant because the trial had been conducted in camera, in the absence of the defendant, and the judgement had not been rendered in public.

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

...

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

...

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

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

_____

Notes

...

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

_____

- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at paras. 2.1, 2.2, 3.2, 3.3, 6.4, 6.5, 7 and 8.

...

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

2.2 On 5 February 1996, the author was sentenced to death by hanging by a trial court in West Demerara County. On 4 July 1997, the Court of Appeal confirmed his sentence.

...

3.2 The author further alleges that, as his lawyer was absent at one of the hearings of the "small" court, he was not permitted to cross-examine one witness during the trial.

3.3 The author claims that some statements of witnesses were not transmitted to his counsel and that the only reaction of the judge was to tell the prosecution that this should have been done.

...

6.4 As to the allegations according to which his lawyer was absent on one day at the "small" court, and that as a consequence he was denied the right to cross-examine one witness, the Committee notes from the information before it, that the author in fact refers to the preliminary hearing where his counsel was apparently absent at one stage and that this was not disputed by the State party. The Committee recalls its prior jurisprudence that, in capital cases, it is axiomatic that legal assistance be available at all stages of criminal proceedings. 3/ It also recalls its decision in communication No. 775/1997 (*Brown v. Jamaica*), adopted on 23 March 1999, in which it decided that a magistrate should not proceed with the deposition of witnesses during a preliminary hearing without allowing the author an opportunity to ensure the presence of his lawyer. Accordingly, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d) and (e) and, consequently, of article 6 of the Covenant.

6.5 As to the allegations according to which some of the witnesses' statements were not

transmitted to the author's counsel, raising possibly an issue under article 14, paragraph 3 (e) of the Covenant, the Committee notes that the trial transcript does not contain any indication in this respect and is therefore of the opinion that the author has not substantiated his claim of a violation of article 14, paragraph 3 (e), of the Covenant in this respect.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3 and 14, paragraph 3 (c), (d) and (e) and consequently of article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including commutation of sentence. The State party is also under an obligation to prevent similar violations in the future.

_____

Notes

...

3/ See *inter alia*, the Committee's Views in respect of communication No. 695/1996, *Devon Simpson v. Jamaica*, adopted on 31 October 2001, communication No. 730/1996 *Clarence Marshall v. Jamaica*, adopted on 3 November 1998, communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995, and communication No. 223/1987, *Frank Robinson v. Jamaica*, adopted on 30 March 1989.

_____

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

...

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

...

3.1 The author claims a violation of article 14, paragraph 3 (b), because he had inadequate time and facilities to prepare his defence at trial, and inadequate communication with counsel of his choice. He argues that his detention up until trial made it doubly important that he was able to give detailed instructions to counsel. However, prior to his preliminary hearing, he was only able to speak to his legal aid lawyer for half an hour. Moreover, he was unable to

have another audience with his lawyer before or after the trial. During the time of pre-trial detention, the legal aid lawyer never visited the author and did not review the case with him at all in preparation for the trial. As a consequence, no witnesses were called on his behalf at trial. He was only able to speak to his lawyer directly from the dock, while the trial was actually in progress, and many of his instructions were simply ignored. He was further unable to go through the prosecution statements with his lawyer, who failed to point out significant discrepancies in the prosecution's evidence. The author contends that at one point at trial he informed the judge that he was unsatisfied with his legal representation, but was told that the only alternative would be for him to represent himself.

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

...

7.2 As to the claim of a violation of article 14, paragraph 3 (b) and (e), in that the author had inadequate time and facilities to prepare his trial defence at trial and that counsel conducted his defence poorly, the Committee reiterates its jurisprudence that in such a situation, it would have been incumbent on the author or his counsel to request an adjournment at the beginning of the trial, if it was felt that they had not had sufficient opportunity to properly prepare a defence. The trial transcript does not disclose any such application. 9/ As to the issues raised by the author's objections to counsel's conduct of the trial, the Committee recalls that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.10/ The Committee is of the view that, in the present case, there is no indication that counsel's conduct of the trial was manifestly incompatible with his professional responsibilities. Accordingly, the Committee does not find a violation of the Covenant in respect of these issues.

Notes

...

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

...

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

2001.

10/ *Ibid.*

- *Semey v. Spain* (986/2001), ICCPR, A/58/40 vol. II (30 July 2003) 303 (CCPR/C/78/D/986/2001) at paras. 2.2, 3.6 and 8.7.

...

2.2 The author of the communication, Joseph Semey, states that he was detained in Madrid on 7 February 1992 and wrongly sentenced to 12 years' imprisonment by the Las Palmas Provincial Court in March 1995 for a supposed offence against public health which he had never committed. According to the author, he was implicated in the incident solely on the basis of verbal statements made by Ms. Isabel Pernas. He maintains that he was implicated on account of hostile relations between himself, Joseph Semey, and the family of Ms. Pernas' boyfriend, a man named Demetrio. He explains that he had previously been in prison for direct involvement in the killing of Demetrio's cousin and had just got out of jail when he was wrongly caught up in this incident.

...

3.6 The author says that his counsel requested a face-to-face meeting between him and Ms. Isabel Pernas on a number of occasions (28 September, 22 October and 6 November 1992) but this was refused by the examining magistrate in the case. What is more, Ms. Pernas was put on trial before the author and could not be questioned either by the court or by author's counsel. The author says that Ms. Pernas' counsel and the public prosecutor came to an arrangement under which she was tried and sentenced to three years in prison.

...

8.7 Concerning the allegation of a violation of article 14, paragraph 3 (e), of the Covenant, relating to the refusal to arrange a face-to-face meeting, the material before the Committee shows that the parties participated in an adversarial procedure and that the author's defence counsel had the opportunity to interrogate Ms. Isabel Pernas. Similarly, the information before the Committee does not show that the author raised this question before the national courts before he submitted it to the Committee. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

LEGAL RIGHTS - CRIMINAL - Right to Examine and Cross-Examine Witnesses

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

...

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

2.2 On 30 June 1995, Dugin and Egurnov were found guilty by the Orlov *oblastnoi* (regional) court of premeditated murder with aggravating circumstances. The judgement was based on the testimony of the author, his accomplice, several eyewitnesses and the victim, Chikin, several forensic reports and the crime scene report. Dugin and Egurnov were each sentenced to 12 years' imprisonment in a correctional labour colony.

...

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

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

...

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

that the courts did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice. Consequently, the Committee concludes that the author's rights under article 14 have been violated.

...

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

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

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 2.8, 6.5, 7 and 8.

...

2.8 The Supreme Court judge, S.K., allegedly acted in an accusatory manner. Mr. Khomidov's lawyer's requests were denied, particularly when he asked to call supplementary witnesses, and when he requested that a medical expert examine him to clarify whether he had sustained injuries as a result of the torture he was subjected to. The only witness of the crime was the 5-year old daughter of the neighbours, and she was the only one who identified Mr. Khomidov as the culprit. According to the author, the child's testimony was the consequence of the police "preparation" she was subjected to. As to the episode related to the hijacking of a car, the author alleges that the eyewitnesses could not recognize her son during an identification parade and in court.

...

6.5 The Committee has noted the author's claim that the trial of Mr. Khomidov was unfair, as the court did not fulfil its obligation of impartiality and independence... It has noted also the author's contention that her son's lawyer requested the court to call witnesses on his behalf, and to have Mr. Khomidov examined by a doctor to evaluate his injuries sustained as a result of the torture to which he was subjected to make him confess guilt. The judge denied his request without providing any reason. In the absence of any pertinent State party information on this claim, the Committee concludes that the facts before it disclose a violation of article 14, paragraphs 1, and 3 (e) and (g), of the Covenant.

...

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

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an

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

- *Rouse v. The Philippines* (1089/2002), ICCPR, A/60/40 vol. II (25 July 2005) 123 at paras. 2.1, 2.4-2.20, 7.2, 7.5, 8 and 9.

...
2.1 During a visit to the Philippines, the author was arrested, on 4 October 1995, for alleged sexual relations with a male minor and for a violation of the Child Abuse Law, which criminalizes sexual acts between an adult and a person under the age of 18. Although the police proposed bribes in return for dismissing the case, the author, claiming that he was innocent, chose to face trial.
...
2.4 The author was arrested without a warrant; he and Godfrey were taken to the police station, where Godfrey Domingo (hereafter referred to as the alleged victim) signed a sworn statement, witnessed by his parents, and filed a complaint against the author. He claimed that he was 15 years old and that the author had prompted him into sexual acts. In subsequent interviews, the alleged victim told the same story to Assistant City Prosecutor Aurelio, to one Dr. Caday, and two social workers.

2.5 Dr. Caday, who examined and interviewed the alleged victim after the incident, concluded in a medical certificate that the victim claimed to have been sodomized, but that the examination neither confirmed nor contradicted this statement.

2.6 On 11 October 1995, the alleged victim, assisted by his parents, signed an affidavit of desistance, confirming the version of the facts as related by the author, and admitted that he had been part of a set-up organized by police officers Augustin and Dancel. It transpires from the judgement of the Court of Appeal, that in this document, the alleged victim also stated that he was 18 years old when the author was arrested.

2.7 On 19 October, the author was charged with child abuse, under article III, section 5, paragraph b, of Republic Act 7610, otherwise known as "Special Protection of Children against Child Abuse, Exploitation and Discrimination Act". On 23 October, on arraignment, the author pleaded not guilty; that same day, he filed a petition for bail. On 10 November, the Regional Trial Court of Laoag City, Branch II (hereafter referred to as the Trial Court) ruled that "the petition for bail had been overtaken by the fact that the prosecution was about to terminate the presentation of its evidence".

2.8 Despite a subpoena order against the alleged victim and his parents, they did not appear in hearings on 31 October and 10 November 1995.

2.9 On 7 December 1995, the author filed a demurrer to the evidence, mainly based on the fact that the prosecution rested its case on the statements made to others by the alleged victim, who was the only eyewitness of the events and who, despite a subpoena order, was not present for cross-examination. The demurrer also pointed out the inconsistencies in the testimonies of the other witnesses and the illegality of the arrest, and invoked the principle of presumption of innocence. The Court was asked to dismiss the case for insufficiency of evidence.

2.10 On 22 January 1996, before the author had submitted his defence statement, the Trial Court issued a pretrial order dismissing the demurrer to evidence for lack of merit, and found that "the evidence for the prosecution [was] sufficient to prove the guilt of the accused beyond reasonable doubt of the crime charged against him." The prosecution had presented the following circumstantial evidence: 1. A 21-year-old witness had reported that he and the author had engaged in sexual activities the day before the arrest, and the Court found that, despite his age, "his physical appearance shows that he looks like a minor". The Trial Court based its order on such assessment of evidence, although it had not even been offered as evidence by the prosecution, and the author had no opportunity to defend himself against the charge. 2. The police had found the author and the alleged victim naked in the hotel room when entering it. 3. The alleged victim had told the same story consistently to two social workers, the medical officer who examined him, and the Assistant City Prosecutor. The Court considered that these accounts by the alleged victim, although made out of court, were not simple hearsay.

2.11 On 2 February, the author filed a motion for reconsideration, claiming that, in the absence of testimony of the alleged victim, the testimonies of the other prosecution witnesses constituted hearsay, and that there was no proof of the minor age of the victim.

2.12 On 11 March, the Trial Court dismissed the motion for reconsideration for lack of merit.

2.13 On 26 March, the author filed a petition for *certiorari* to the Court of Appeal, seeking to annul the order of the Trial Court, dismissing the demurrer to evidence of 22 January 1996, as well as the order of the same court of 11 March 1996, which denied the motion for reconsideration. The author based his petition on the deprivation of his right to confront or cross-examine witnesses against him and the alleged illegality of his arrest and of the search of his room, conducted without a warrant.

2.14 The author provides copies of the comments of the Solicitor General to the Appeal Brief, and his own reply to the Solicitor General's comments. In his comments, the Solicitor General argues that there was no need to prove the fact of actual sodomy of the alleged victim, as a different section of Act 7610, section 10 (b), article VI, penalizes "any person who shall keep or have in his company a minor, 12 years or under or who is 10 years or more his junior in any public or private place, hotel (…)". The Solicitor General argued that "the mere fact that the petitioner was found keeping in his company Domingo (…) who is younger than him by 24 years (…) raises the presumption that there was, at least, the commission of other acts of child abuse". The author recalls that he was charged for a violation of article III, section 5, paragraph b, of Act 7610, and not section 10 (b), article VI.

2.15 On 24 September 1996, the Court of Appeal dismissed the petition for certiorari, "which clearly suffered from procedural infirmity", as the author had not presented his contradicting evidence, and because the pretrial testimonies of the alleged victim were properly characterized as circumstantial evidence. The Court found that the evidence presented by the prosecution "may yet suffice to establish the lesser offence defined and penalized under section 10 (b) of the statute". The Court also found that the alleged illegality of the author's arrest only affected the admission into evidence of the pictures taken in the hotel room at the time of the arrest.

2.16 On 29 October 1996, the author filed a motion for reconsideration against the Court of Appeal's decision. He submits a copy of the comments of the Solicitor General, and his own reply to these comments.

2.17 On 12 February 1997, the Court of Appeal dismissed the author's motion for reconsideration.

2.18 On 20 March 1997, the author filed a Petition for Review in the Supreme Court, which dismissed it on 23 July 1997, for "failure by the petitioner to sufficiently show that the respondent court had committed any reversible error in rendering the questioned judgement".

2.19 On 12 January 1998, the Trial Court found that "the admission of Godfrey Domingo on what transpired between him and the accused which he repeatedly related to the different public officers immediately after the incident (…) cannot be overcome by the affidavit of desistance executed by Godfrey Domingo assisted by his parents", because the alleged victim was not in court to confirm the contents of the document. The Court ruled that the affidavit of desistance should be considered as hearsay, and had no probative value. It found the author guilty beyond reasonable doubt of the crime charged against him. He was sentenced to serve a penalty of 10 years, 2 months and 21 days, as a minimum, to 17 years, 4 months and 1 day maximum, of imprisonment.

2.20 The author appealed to the Court of Appeal which upheld the conviction on 18 August 1999. The Court of Appeal based its decision on the following grounds. On the issue of the age of the alleged victim, the Court of Appeal considered that "the trial court did not commit any error in not giving probative value to [the] affidavit of desistance because the well-known rule is that retractions are generally unreliable and are looked upon with considerable disfavour by the courts". On the issue that the alleged victim did not appear in court for cross-examination, the Court of Appeal considered that this case constituted an exception to the general rule of non admissibility of hearsay evidence, because the alleged victim's statements took place immediately after the alleged facts, and were therefore natural and spontaneous. On the contradicting versions of the facts and testimonies of witnesses of the prosecution and the defence, the Court ruled that the issue of credibility of witnesses was an issue under the competence of the trial court. As a result, the decision of the Trial Court was affirmed.

...

7.2 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. In the present case, the Committee notes that the judge convicted the author *inter alia* on evidence that the accounts made by the alleged victim, although made out of court, were not simple hearsay. In addition, the judge did not admit the affidavit of desistance of the alleged victim as evidence while she admitted his first statement, although both were equally confirmed by witnesses who did not have a personal knowledge of the facts. Finally, the author had to overcome doubtful evidence, and even evidence that was not presented in court (the youthful looks of the 21-year-old witness, as well as the minor age of the alleged victim). In the circumstances, the Committee finds that the court's choice of admissible evidence, in particular in the absence of any evidence confirmed by the alleged victim, as well as its evaluation thereof, were clearly arbitrary, in violation of article 14, paragraph 1 of the Covenant.

...

7.5 As to the claim that the author was deprived of his right to cross-examine a crucial prosecution witness, the Committee notes the State party's contention that he was afforded, and took advantage, of the possibility to cross-examine the public officers who had also filed a complaint against him. However, the Committee notes that although a subpoena order had been issued to bring the alleged victim to testify in court, neither the alleged victim nor his parents could allegedly be located. The Committee further recalls that considerable weight was given to that witness' out of court statement. Considering that the author was unable to cross-examine the alleged victim, although he was the sole eyewitness to the alleged crime,2/ the Committee concludes that the author was the victim of a violation of article 14, paragraph 3 (e).

...

LEGAL RIGHTS - CRIMINAL -
Right to Examine and Cross-Examine Witnesses

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 14, paragraphs 1 and 3 (c) and (e); 9, paragraph 1; and 7 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, inter alia for the time of his detention and imprisonment.

Notes

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2/ See communication No. 815/1998, *Dugin v. The Russian Federation*, Views adopted on 5 July 2004, para. 9.3.
