

International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions

APRIL 2013

REVIEW OF KEY JURISPRUDENCE on the right to effective criminal defence from the UN Human Rights Committee, applying Article 9 (right to liberty) and Article 14 (fair trial rights) of the International Covenant on Civil and Political Rights. Produced by lawyers at the Open Society Justice Initiative in order to bring the decisions of global human rights tribunals to the widest possible audience.

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How to Use this Digest

Each year millions of people around the world are arrested or detained by the police or other law enforcement agents. The International Covenant on Civil and Political Rights (“ICCPR”) sets out minimum guarantees to ensure that all people can defend themselves and be treated fairly. However, there is enormous variation across countries in terms of recognition and implementation of these rights in practice. Many countries fail to provide for the essential components of effective criminal defence, leaving suspects and accused persons in a vulnerable position: without legal assistance, without information about the case against them, and without the ability to apply for pretrial release. This can have catastrophic impacts on a person’s life.

This digest covers all of the universal standards of effective criminal defence from the ICCPR and the key case law interpreting those standards from the Human Rights Committee. First, the digest sets out the legal framework, with excerpts from the ICCPR and the General Comments adopted by the Human Rights Committee. Next, the digest presents summaries of all of the key case law from the Human Rights Committee, headed by a short explanation of the holdings in a shaded text box. The digest covers all of the core procedural rights that underpin access to justice and a fair trial:

- the right to information about rights and charges, and access to evidence;
- the right to self-representation or legal assistance from the earliest stages of the investigation, and the right to have adequate time and facilities to prepare a defence;
- the right to legal aid;
- the right to be presumed innocent and the right to silence;
- the right to be released from custody pending trial;
- the right to participate in your trial, to be tried without undue delay, and to call witnesses;
- the rights to free interpretation and translation; and
- the right to appeal.

The digest is intended to be a reference for criminal lawyers, prosecutors, judges, and police – all those actors who play a role in ensuring that national justice systems are fair and uphold the minimum standards of the ICCPR. The Justice Initiative encourages use of the case law in this digest to advocate or litigate for reform on arrest rights, in the many countries where improvement is greatly needed.

The digest is a part of the *Arrest Rights Toolkit*, a package of resources to assist lawyers, police, and judges to advocate for reform of arrest rights in countries across Europe, available at osf.to/arrestrightstoolkit.

The Justice Initiative has gone to every effort to ensure our information is accurate. However, this digest is provided for information purposes only and does not constitute legal advice. If you have any questions or feedback about the digest or would like to keep the Justice Initiative informed about reforms in your country, please contact:

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1. Legal framework

1.1 International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, 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;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

1.2 General Comments adopted by the Human Rights Committee

1.2.1 General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14) (2007)

5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.
6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14. Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including

during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant

IV. Presumption of innocence

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.

V. Rights of persons charged with a criminal offence

[To be informed promptly and in detail in a language that they understand]

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.

[Adequate time and facilities]

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase. What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feels that the time for the preparation of the defense is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defense lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behavior was incompatible with the interests of justice. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defense is needed.

33. “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel.

[Right to a counsel]

34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.

[Time reasonableness of the trial]

35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages, whether in first instance or on appeal must take place “without undue delay.”

[The right to defend oneself in person]

37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defense which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the

Covenant is clear in all official languages, in that it provides for a defense to be conducted in person “or” with legal assistance of one’s own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend them must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.

[Free assistance of an interpreter]

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

[The right not to be compelled to testify against oneself or to confess guilt]

41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.

1.2.2 General Comment No. 28: Equality of rights between men and women (Article 3)

18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, states parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, *Ato del Avellanal v. Peru*, Views of October 28, 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters.

1.2.3 General Comment No. 23: The rights of minorities (Article 27) (1994)

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression

protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.

1.2.4 General Comment No. 8: Right to liberty and security of (Article 9) (1982)

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

2. The right to information

People who have been arrested or questioned by the police on suspicion of involvement in a criminal activity often find themselves in a vulnerable position. This vulnerability is heightened when people are not given information about why they have been detained, what accusations and evidence exist against them, and what their rights are. Knowledge is power, and one of the key factors in ensuring fair proceedings is whether suspects have a sufficiently detailed understanding of their situation and their rights.

2.1 Information regarding rights

The ICCPR expressly mentions the importance of information on defence rights, focusing on the right to a lawyer. The *travaux préparatoires* of Article 14(3)(d) explain that the right to be informed of the right to legal assistance is “self-evident.” The person should be informed promptly about this right upon arrest. In addition, a violation of Article 14 can be found in situations where a suspect is not informed of his right to testify or not testify on his own behalf..

Dugin v. Russian Federation

5 July 2004, UNHRC, 815/1998

No violation of Article 14(3)(g)

The complainant alleged that he was not informed of his rights under Article 51 of the Constitution, which provides that an accused is not required to testify against himself. The Committee did not find a violation of Article 14(3)(g), because the complainant was nonetheless advised of the same rights under Article 46 of the Code of Criminal Procedure, i.e. the right of an accused to testify, or not to testify on the charges against him (para. 9.6).

Saidova v. Tajikistan

8 July 2004, UNHRC, 964/2001

Violation of Article 14(3)(b) and (d)

The complainant’s husband was arrested by the Tajik authorities on suspicion of participation in the so-called November events. He was not informed of his right to legal representation upon arrest (para. 2.3). The Supreme Court found Mr. Saidov guilty of banditism; participation in a criminal organization; usurpation of power with use of violence and other criminal offences and sentenced him to death (para. 2.10). The Committee found a violation of Article 14(3)(b) and (d) (para. 6.8).

Khoroshenko v. Russian Federation

29 March 2011, UNHRC, 1304/2004

Violation of Article 14(3)(d) and (g)

The complainant was arrested on suspicion of membership in a criminal gang involved in a series of armed attacks on drivers of motor vehicles during 1993. He was convicted and sentenced to death (para. 2.1). He submitted that upon the arrest he was not informed of his rights to have legal assistance and to remain silent. He was only informed of his defence rights 25 days after the arrest, when the charges were read out to him. Since the State party did not refute the claim, the Committee found a violation of Article 14(3)(d) and (g) (para. 9.8).

Butovenko v. Ukraine

19 July 2011, UNHRC, 1412/2005

Violation of Article 9(1)

The complainant was arrested on suspicion of having murdered two individuals in 1999. Shortly thereafter, he was interrogated by police officers in the absence of a lawyer and without having been informed of his rights. He was convicted on counts of robbery and murder and sentenced to life imprisonment (para. 2.22). The Committee found a violation of Article 9(1) (para. 7.6).

2.2 Information about arrest, the nature and cause of the accusation, and charge

All people have the right to be informed of the reasons for their arrest and to be provided with details about the nature and cause of the accusations against them. This enables a detained individual to request a decision on the lawfulness of his or her detention by a competent judicial authority. Information must be sufficient to enable the suspect to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. Information must be provided at the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused.

Drescher Caldas v. Uruguay

21 July 1983, UNHRC, 43/1979

Violation of Article 9(2)

The author complained that her husband was not provided with the reasons for his arrest, only that “he was being arrested under the prompt security measures.” The Committee found that Article 9(2) required the state to provide sufficient information on the reasons for a person’s arrest in order to “to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded.” In the present case the authorities should have indicated the substance of the complaint upon which the arrest was based (para. 13,2).

Glenford Campbell v. Jamaica

30 March 1992, UNHRC, 248/1987

Violation of Article 9(2)

The complainant was detained for three months before he was formally charged with murder. The Committee observed that although the complainant’s arrest was not arbitrary within the meaning of Article 9(1), the delay from 12 December 1984 to 26 January 1985 amounted to a breach of the right to be ‘promptly’ informed of the charges. One of the most important reasons for this requirement is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority (para. 6.3).

Griffin v. Spain

11 October 1993, UNHRC, 493/1992

No violation of Article 9(2)

The Complainant, a Canadian travelling in Spain, was arrested and taken into custody after the police had, in his presence, searched his campervan and discovered drugs. The next day he was brought before the examining magistrate and, through an interpreter; was informed of the charges against him. The Committee disagreed that the complainant was unaware of the reasons for his

arrest.¹ It further noted that the complainant was promptly informed, in his own language, of the charges held against him (para. 9.2).

Grant v. Jamaica

22 March 1996, UNHRC, 597/1994

Violation of Article 9(2)

The complainant was arrested some weeks after the murder with which he was subsequently charged. He was not informed of the reasons for his arrest until seven days later. The State argued that he was aware of the reasons for the arrest. The Committee observed that “the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform someone of the reasons of his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them” (para. 8.1).

Hill and Hill v. Spain

2 April 1997, UNHRC, 526/1993

No violation of Article 9(2)

The complainants alleged that seven and eight hours respectively elapsed between their arrest and the time they were informed of the reasons for it. The Committee found that police formalities were suspended from 6 a.m. until 9 a.m., when the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel. Furthermore, the interpreter was an official interpreter appointed according to rules that should ensure her competence. In such circumstances no violation of the complainant's rights was found (para. 12.2).²

McLawrence v. Jamaica

18 July 1997, UNHRC, 702/1996

No violation of Article 14(3)(a)

The complainant contended that he was never formally informed of the charges against him, and that he first knew of the reasons for his arrest when he was taken to the preliminary hearing. The Committee held that the duty to inform the accused of the nature and cause of the charge against him under Article 14(3)(a) is more precise than that for arrested persons under Article 9(2). It further emphasized that “[s]o long as article 9, paragraph 3, is complied with, the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest” (para. 5.9).

Wilson v. the Philippines

30 October 2003, UNHRC, 868/1999

Violation of Article 9(2)

The complainant, a British national residing in Philippines, complained that his arrest on suspicion of rape violated Article 9 as it took place without a warrant and in violation of domestic law governing arrests. Moreover, at the time of the arrest he was not informed of the reasons for it in a

¹ See also: *Pennat v. Jamaica* (Communication no. 647/1995), at para. 8.1 and *Stephens v. Jamaica* (Communication no. 373/1989), at paras. 2.2 and 9.5.

² See also: *Borisenko v. Hungary* (Communication no. 852/1999), at para. 7.3.

language he could understand (para. 3.3). The Committee upheld the complaint and found a violation of Article 9(1), 9(2) and 9(3) (para. 7.5).

Marques de Morais v. Angola

29 March 2005, UNHRC, 1128/2002

Violation of Article 9(2)

The complainant was arrested at gunpoint by 20 armed members of the Rapid Intervention Police at his home in Luanda. He was not informed of the reasons for his arrest, and was only charged 40 days after his arrest. The Committee found that the chief investigator's statement, made on the day of the arrest, that the complainant was held as a UNITA prisoner, did not meet the requirements of Article 9(2) (para.6.2).

Wenga and Shandwe v. Democratic Republic of the Congo

17 March 2006, UNHRC, 1177/2003

Violation of Article 9(2)

The first applicant was arrested and taken to the Prosecutor's Office. After 48 hours in detention, he was informed that he had been arrested for breach of "State security" (para. 2.1). The Committee observed that it was not sufficient to simply inform the person that he was arrested for breach of State security without any indication of the substance of the reasons (para. 6.2).

Latifulin v. Kyrgyzstan

10 March 2010, UNHRC, 1312/2004

Violation of Article 9(2)

The complainant was detained as a suspect of assault, convicted of fraud, theft of property, and assault and sentenced to a total of 12 years imprisonment. He alleged that during the first ten days in detention he was not informed of the charges against him (para. 8.3).

Akwanga v. Cameroon

22 March 2011, UNHRC, 1813/2008

Violation of Article 9(2), 9(3) and 9(4)

The complainant was arrested without being informed about the charges against him. He was kept in the pre-trial detention, interrogated and tortured without being brought in front of a judge for two and a half years. The Committee did not accept the State's argument that the complainant knew why he was arrested. It also found that he was never afforded the opportunity to challenge the lawfulness of his arrest or detention contrary to Article 9(2), 9(3) and 9(4) (para. 7.4).

Khoroshenko v. Russian Federation

29 March 2011, UNHRC, 1304/2004

Violation of Article 9(2) and 14(3)(a)

On 21 November 1994, the complainant was arrested on a suspicion of a membership in a criminal gang involved in a series of armed attacks on drivers of motor vehicles. He was not informed about the reasons for his arrest and was detained without charges for 25 days (para. 9.6).

Bondar v. Uzbekistan

28 April 2011, UNHRC, 1769/2008

Violation of Article 9(2)

On 29 June 2005, the complainant's husband was arrested and taken to the pre-trial detention facility of the National Security Service without being provided information about the reasons for the arrest. It was only on 1 July 2005 that he was informed of the criminal charges. In the absence of any observation by the State, the Committee considered that the facts revealed a violation of Article 9(2) (para. 7.2).³

Traore v. Cote d'Ivoire

31 October 2011, UNHRC, 1759/2008

Violation of Article 9

The complainant was detained secretly at the premises of the Republican Security Company (CRS). He was not brought before a judge to be informed of the charges against him until three weeks after his arrest. In the absence of any pertinent explanations from the State party concerning the matter, the Committee concluded that there was a violation of Article 9 (para. 7.5).⁴

Aboufaied v. Libyan Arab Jamahiriya

21 March 2012, UNHRC, 1782/2008

Violation of Article 9

The first complainant was twice arrested without a warrant by agents of the State party, held in secret detention for approximately two months on each occasion, without being informed of the grounds for his arrest, and without being brought before a judicial authority. He was only informed of the charges against him when he was brought before a special tribunal. In the absence of any explanation from the State party, the Committee found violations of Article 9 of the Covenant with regard to both periods of detention of Idriss Aboufaied (para. 7.6).

2.3 Information regarding material evidence and the case file

Article 14(3)(b) requires that suspects be provided adequate facilities to prepare their defence. This includes access to documents and other evidence, and must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).

Article 14(1), which generally guarantees a right to a fair trial, does not in and of itself guarantee a defendant the right to his case file. However, if the file or document excluded is essential to the case or exculpatory, the more general rights under may be implicated.

³ See also: *Ashurov v. Tajikistan* (Communication No. 1348/2005), at para 6.4.

⁴ See also: *Medjnoune v. Algeria* (Communication No. 1297/2004), para. 8.5 and *Sharma v. Nepal* (Communication No. 1469/2006), at para. 7.3.

Marcke v. Belgium

7 July 2004, UNHRC, 904/2000

No violation of Article 14(1)

The complainant was found guilty of a forgery and a fraud. He argued that the report which had been produced by the tax authorities (fiscal file) two years before the Public Prosecutor launched a preliminary investigation into financial activities of complainant's company was not added to the criminal file (para. 3.2). The Committee observed that the right to a fair hearing contained under Article 14(1) did not in itself require the prosecution to bring before the court all information it reviewed in preparation of a criminal case, unless the failure to make the information available to the courts and the accused would amount to a denial of justice, as would be the case when withholding exonerating evidence. Since the fiscal file did not constitute the basis of the prosecutor's case before the courts and the complainant made no claim that anything contained in the fiscal file would have been exculpatory, the Committee found no violation of his right to a fair hearing (para. 8.3).

Aboussedra v. Libyan Arab Jamahiriya

25 October 2010, UNHRC, 1751/2008

Violation of Article 14(1), 14(3)(a) and (d)

The complainant brothers were arrested by the internal security forces in 1989, without being shown a warrant or being informed of the grounds for their arrest. One of the brothers was not tried until 15 years after his arrest and was sentenced to life imprisonment in a closed trial on a date unknown to his family. He was never given access to his criminal file, or to the charges against him, and never had the opportunity to appoint a lawyer of his choice to assist him (para. 7.8).

3. The right to defence

Article 14(3)(d) sets out the rights of all accused people to defend themselves in person or through a lawyer of their own choosing. These two rights are not mutually exclusive—suspects assisted by a lawyer retain the right to act on their own behalf, to be given a hearing, and to state their opinions on the facts of the case.

The right to legal assistance is a key aspect of the procedural rights of suspected and accused persons. A suspect who is assisted by an effective lawyer is in a better position with regards to the enforcement of all of their other rights, because they will be better informed of those rights, and because the lawyer is able to assist them in ensuring that their rights are respected.

3.1 The right to self-representation

The right to self-representation is not absolute and in some situations a lawyer may be assigned against the wishes of the accused. Any restriction of the accused’s wish to defend himself must have an objective and sufficiently serious purpose and must not go beyond what is necessary to uphold the interests of justice

Hill and Hill v. Spain

2 April 1997, UNHRC, 526/1993

Violation of Article 14(3)(d)

The first complainant was charged in Spain with arson and causing damage to a private property. He was assigned a legal aid lawyer, who “did not make much effort to prepare [his] defence” (para. 3.1). The complainant asked the court that he be allowed to defend himself, through an interpreter, but his request was denied. The Committee concluded that the complainant’s right to defend himself was not respected (para. 14.2).

Correia de Matos v. Portugal

28 March 2006, UNHRC, 1123/2002

Violation of Article 14(3)(d)

The complainant, a practicing lawyer, was accused of insulting a judge. Contrary to the complainant’s wishes, the investigating magistrate assigned a lawyer to represent him (para. 2.2). The Committee observed that persons assisted by a lawyer retained the right to act on their own behalf, to be given a hearing, and to state their opinions on the facts of the case. The right to conduct one’s own defense, which is a cornerstone of justice, may be undermined when a lawyer is imposed against the wishes of the accused (para. 7.3). It further noted that the right to defence without a lawyer was not absolute and in some situations a lawyer may be assigned against the wishes of the accused. However, any restriction of the accused’s wish to defend himself must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice (para. 7.4). In the present case the State party failed to provide any objective and sufficiently serious reason to explain why the absence of a court-appointed lawyer would have jeopardized the interests of justice; therefore a violation of Article 14(3)(d) was found (para. 7.5).

3.2 The right to legal assistance

Access to legal assistance is an important element of the guarantee of a fair trial and an application of the principle of the equality of arms. The right to communicate with a lawyer requires that the accused is granted prompt access to a lawyer. The Human Rights Committee has consistently held that people accused of criminal offences must be effectively assisted by a lawyer at all stages of criminal proceedings, and that a failure to allow access to a lawyer during the initial period of detention and during any interrogations will breach both Article 14(3)(b) and Article 14(3)(d) of the ICCPR.

Robinson v. Jamaica

30 March 1989, UNHRC, 223/1987

Violation of Article 14(3)(d)

The complainant was charged with a murder, convicted and sentenced to death (para. 2.1). Neither of the complainant's lawyers were present at the court, but the judge nevertheless ordered the trial to proceed (para. 10.2). The Committee found that the "interest of justice" test is met in every case concerning a capital offense, thus it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of a private lawyer is to a certain extent attributable to the accused himself, and even if the provision of legal assistance would entail an adjournment of proceedings. The absence of a lawyer thus constituted an unfair trial in violation of Article 14(3)(d) (para. 10.3).

Kelly v. Jamaica

17 July 1996, UNHRC, 537/1993

Violation of Article 14(3)(b)

The complainant alleged that after being arrested and brought to the police station, he told the police officers that he wanted to speak to his private lawyer, but the police officers ignored the request for five days. The State party promised to investigate the allegation but failed to report on its findings. The Committee concluded that the complainant's right under Article 14(3)(b)—to communicate with a lawyer of his choice—was violated (para. 9.2).

Gridin v. Russian Federation

20 July 2000, UNHRC, 770/1997

Violation of Article 14(3)(b)

The complainant was arrested and interrogated in the absence of a lawyer. He requested his lawyer to be informed about the interrogation, but the request was denied. The Committee stated that denying the complainant access to a lawyer for *five days* and interrogating him without a lawyer, constituted a violation of the complainant's rights under Article 14(3)(b) (para. 8.5).

Carranza Alegre v. Peru

28 October 2005, UNHRC, 1126/2002

Violation of Article 14

The complainant was not able to communicate with her lawyer for seven days. During that time she was held incommunicado, because Peru's Decree-Law established that a defence lawyer could only intervene as from when a detainee made a statement before the Public Prosecutor (paras. 3.7 and

7.5). The Committee concluded that this violated the complainant's right to prompt access to a lawyer.

Chikunova v Uzbekistan

16 March 2007, UNHRC, 1043/2002

Violation of Article 14(3)(b) and (d)

The complainant's son was executed pursuant to a death sentence. Although the complainant's son had a privately hired lawyer, that lawyer was allowed to act only after the preliminary investigation had ended. The Committee recalled that particularly in cases involving capital punishment, it was axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings and found a violation of Article 14(3)(b) and (d) (para. 7.4).

Kasimov v. Uzbekistan

30 July 2009, UNHRC, 1378/2005

Violation of Article 14(3)(b)

The complainant's brother was charged with the murder of their parents. During the first two weeks of the pre-trial investigation, a privately retained lawyer was not granted access to him. During that period the suspect confessed under duress; after meeting with the lawyer he immediately retracted his confession (paras. 2.1-2.3). The State party argued that although the access to a privately retained lawyer was restricted, the alleged victim had an opportunity to be assisted by the State lawyer throughout the investigation. The Committee nevertheless found a violation of Article 14(3)(b) based on the denial of access to a lawyer during pre-trial investigation (para. 9.6).

Lyashkevich v. Uzbekistan

23 March 2010, UNHRC, 1552/2007

Violation of Article 14(3)(b)

The complainant hired a lawyer for her son, who was under investigation for murder. On 11 August 2003 the son's privately retained lawyer was prevented from defending him, notwithstanding the fact that important investigation acts were conducted that day. Although, according to the case file, the suspect was assisted by the State-appointed lawyer during the interrogation, the Committee found that a denial of a lawyer of his own choice for one day amounted in a violation of complainant son's rights under Article 14(3)(b) (para. 9.4).

Toshev v. Tajikistan

30 March 2011, UNHRC, 1499/2006

Violation of Article 14(3)(b) and (d)

The complainant's brother was denied access to a lawyer of his choice in pre-trial detention for thirteen days. During this period of time investigative acts were conducted, including interrogating the brother as an accused of serious crimes (para. 6.7). Because the brother was denied access to a lawyer during police questioning in the course of pre-trial detention the Committee found that the brother's right to a lawyer had been violated.

Butovenko v. Ukraine

19 July 2011, UNHRC, 1412/2005

Violation of Article 9(1), 14(3)(b) and (d)

The complainant was detained in connection with murder, and held in poor conditions. He was denied a lawyer for the first three days, interrogated and repeatedly beaten, prevented from sleeping, and his family threatened. After three days, he was provided with a state-appointed lawyer who advised him to confess or the beatings would continue. Eventually, he signed a confession, though at trial, once he had an independent lawyer, he recanted. The court relied on the prior confession and sentenced the complainant to life imprisonment. The Committee found that a failure to provide a lawyer for three days and questioning during this period meant that the detention was unlawful under Article 9(1) (para. 7.6). The ineffective defence by the state appointed lawyer was in violation of Article 14(3)(b) and (d) (para. 7.8).

Levinov v. Belarus

26 July 2011, UNHRC, 1812/2008

No violation of Article 14(3)(b)

The complainant was taken into police custody under hooliganism charges. Immediately after his arrest, the police refused to allow one of his relatives present at the police station to act as his representative. He was also not given the opportunity to designate a lawyer. However, he was represented by a lawyer at his trial. Since no investigative acts were carried out in the pre-trial phase, the Committee found that the complainant's rights to defence were not violated (para. 8.3).

El Hagog v. Libya

19 March 2012, UNHCR, 1755/2008

Violation of Article 14

Libyan authorities arrested the complainant for premeditated murder and other crimes. After the trial, he was sentenced to death. The complainant claimed that he was granted access to a lawyer for the first time ten days after the beginning of the trial and more than one year after his arrest, and that he was never given an opportunity to speak to his lawyer freely. He further contended that he was forced to testify against himself through torture and that he was not assisted by a lawyer during interrogation and in preparation of the trial (para. 8.9). Recalling General Comment No. 32 the Committee emphasized the significance of the right to equality before the courts and tribunals. It concluded that an "accumulation of violations of the right to fair trial took place," in particular of the right to prepare one's own defense due to the lack of access to a lawyer (para. 8.10).

Aboufaied v. Libyan Arab Jamahiriya

21 March 2012, UNHRC, 1782/2008

Violation of Article 14(1), 14(3)(a) and (d)

The complainant's brother was sentenced to 25 years imprisonment. He was not provided with access to a lawyer during the pre-trial detention, nor was he informed about the charges. Although a lawyer was assigned to him before the trial, the complainant was not able to examine the case file or meet with his lawyer outside the courtroom; he also was not permitted to attend some of the court hearings (para. 7.9).

3.3 The right to private consultation with a lawyer

Lawyers should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Article 14(3)(b) and (d) of the ICCPR are violated where the suspect and his lawyer are not permitted to meet in private during the preliminary investigations.

Engo v. Cameroon

22 July 2009, UNHRC, 1397/2005

Violation of Article 14(3)(b) and (d)

The complainant alleged that the State obstructed his preparation of defence, because his accusers asked the Ambassador of Cameroon in Paris to stop two of his French lawyers from travelling to Cameroon to assist him. That prompted his Cameroonian lawyers to refuse to represent the complainant in court. The Committee observed that persons charged with a criminal offence have the right to communicate with a lawyer of their own choosing. The fact that the complainant encountered considerable obstacles in his efforts to communicate with these lawyers amounted in a violation of the procedural guarantees provided for in Article 14(3)(b) and (d) (para. 7.8).

Sirageva v. Uzbekistan

18 July 2011, UNHRC, 907/2000

Violation of Article 14(3)(b)

The complainant's son was arrested in Moscow following a warrant issued by the Uzbek authorities for murder and robbery. The suspect and his lawyer were only permitted to meet in the presence of an investigator during the preliminary investigations, and the lawyer was denied access to the court's records. The Committee found that by denying the son private access to his lawyer, the State party violated the son's right to properly prepare his defence guaranteed under Article 14(3)(b) (para. 6.3).

3.4 The right to have adequate time and facilities to prepare the defence

Accused persons must have adequate time and facilities for the preparation of their defense and to communicate with their lawyer. This is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. "Adequate time and facilities" must include access to documents and other evidence, and timely notification of the charges. An accused should also be adequately notified about the date of a hearing in order to prepare his arguments and consult with a lawyer. When a State appoints a lawyer, the person should be informed about such arrangement in advance and have sufficient time to discuss a defence strategy.

Simmonds v. Jamaica

23 October 1992, UNHRC, 338/1988

Violation of Article 14(3)(b) and (d)

The complainant contended that he was not informed about either the date or outcome of his appeal until two days after it had been dismissed (para. 3.3). The Court's registry ignored his wish to be present during the appeal hearing and to represent himself. The Committee noted that the complainant was not notified sufficiently in advance about the date of the hearing, thus the State jeopardized his opportunities to prepare his arguments and to consult with his court-appointed

lawyer, whose identity he did not know until the day of the hearing itself. In addition the application for leave to appeal was treated at the hearing of the appeal itself (para. 8.4).

Hill and Hill v. Spain

2 April 1997, UNHRC, 526/1993

No violation of Article 14(3)(b)

The complainants alleged a violation of his right to adequate time and facilities for the preparation of the defense, because they had only one 20-minute consultation with their legal aid lawyer prior to the trial. The Committee found that the hearing was adjourned to allow the lawyer to prepare for the defence and thus the complainants' rights were not violated (para. 14.1).

Perkins v. Jamaica

30 July 1998, UNHRC, 733/1997

No violation of Article 14(3)(b) and (d)

The complainant was convicted on two charges of capital murder and sentenced to death. He claimed that he did not have enough time to prepare his defense, since he did not meet a legal aid lawyer until the third preliminary hearing and only once before the trial. The Committee reiterated its jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence was an important aspect of the principle of equality of arms, but found no violation of Article 14(3)(b) and (d). The Committee reasoned that the lawyer met the complainant on at least two occasions before the trial, and neither a lawyer nor the complainant ever complained to the trial judge that the time for preparation of the defense was inadequate or requested an adjournment (para. 11.5).

Rayos v. the Philippines

27 July 2004, UNHRC, 1167/2003

Violation of Article 14(3)(b)

The complainant was sentenced to death for rape and murder. During the pre-trial investigation he was forced to sign an extra-judicial confession. A lawyer – not of the author's own choosing – was present “to assist [him] in giving a written confession” (para. 2.4). He did not have a lawyer prior to the confession. For the trial, the complainant had a different lawyer with whom he was only able to communicate for a few minutes at a time each day during the trial court proceedings (para. 2.4). In the Committee's view, the complainant was not granted sufficient time to prepare his defence and communicate with a lawyer in violation of his rights under Article 14(3)(b) (para. 7.3).

Ndong Bee and MicAbogo v. Equatorial Guinea

31 October 2005, UNHRC, 1152/2003 and 1190/2003

Violation of Article 14(1) and 14(3)(a), (b), (d) and (g)

The complainants were supposedly linked to the Fuerza Demócrata Republicana (FDR), an unofficial political party in opposition to the Government, and detained in Black Beach Prison, Malabo, between the end of February and March 2002 (para. 2.1). The authorities failed to notify them of the charges against them until two days before the trial when the indictment was read out. The Committee ruled that the late notification deprived the complainants of sufficient time to prepare their defence and made it impossible to select their defence lawyers (para. 6.3).

Osiyuk v. Belarus

30 July 2009, UNHRC, 1311/2004

Violation of Article 14(3)(b), (d) and (e)

The complainant alleged that the judge initially assigned to the case was subsequently replaced and the newly appointed judge failed to inform him of the date of the hearing. As a result, neither the complainant himself nor any witnesses on his behalf were ever heard by the District Court. Acknowledging that there must be certain limits to the efforts that can reasonably be expected of the competent authorities with a view towards establishing contact with the accused, the Committee found that in the present case the State party failed to make sufficient efforts to inform the complainant about the hearing and therefore prevented him from preparing his defense or otherwise participating in the proceedings (para. 8.3).

Khoroshenko v. Russian Federation

29 March 2011, UNHRC, 1304/2004

Violation of Article 14(3)(b)

The complainant was not given the opportunity to privately meet with his lawyer during the pre-trial proceedings. He did not receive a copy of the trial records immediately after the first instance verdict was issued. Despite numerous requests, he was not provided with some documents that he considered relevant for his defence, and he was even limited in the amount of paper he was given to prepare his appeal (para. 9.7).

3.5 The role, independence and standards of lawyers

According to General Comment 32, lawyers should be able to advise and represent persons charged with a criminal offence in accordance with generally recognized professional ethics, without restrictions, influence, pressure or undue interference from any quarter. With respect to the issue of quality, the Human Rights Committee has held that the State cannot be held responsible for the actions or failures of a privately retained lawyer.

Henry v. Jamaica

1 November 1991, UNHRC, 230/1987

No violation of Article 14(3)(d)

The complainant was convicted and sentenced to death. He alleged that he was denied an opportunity to attend the appeal hearing. The author did not wish to be represented before the Court of Appeal by a court-appointed lawyer, but by a lawyer of his own choice. His private lawyer represented him at the hearing. The Committee considered that “once the author opted for representation by counsel of his choice, any decision by this counsel relating to the conduct of the appeal, including a decision to send a substitute to the hearing and not to arrange for the author to be present, cannot be attributed to the State party but instead lies within the author's responsibility” (para. 8.3).

Rastorguev v. Poland

28 March 2011, UNHRC, 1517/2006

No violation of Article 14(3)(b)

The complainant's nephew was charged on suspicion of robbery and murder and subsequently sentenced to 25 years' imprisonment. The appellate courts upheld the sentence (para 2.1-2.4). When the legal aid lawyer refused to file a cassation appeal, he hired a private lawyer. He

complained that a private lawyer did not meet him prior to the submission. The Committee found that the actions of privately retained lawyers are not a matter of State responsibility (para. 9.4).

4. The right to legal aid

One of the fundamental procedural rights of all people accused or suspected of crimes, is the right to legal assistance at all stages of the criminal process. But it is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied in practice. Accordingly, people charged with crimes should have access to free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves. This ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied their right to a fair trial because of their financial circumstances.

4.1 Scope of the right to legal aid

Article 14(13)(d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice.”

Lindon v. Australia

20 October 1998, UNHRC, 646/1995

Claim under Article 14(3)(d) inadmissible

The complainant requested a legal aid lawyer to assist with his defence against a trespassing charge where the penalty was a fine. The Committee found the complaint under Article 14(3)(d) inadmissible as the complainant failed to show that the interests of justice required the assignment of a legal aid lawyer (para. 6.5).

Evans v. Trinidad and Tobago

21 March 2003, UNHRC, 908/2000

No violation of Article 14(1)

The complainant was not provided with legal aid to bring a constitutional challenge on the issue of the length of the sentence imposed upon commutation. The Committee specified that the Covenant did not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interest of justice so required. The State party was not expressly required to provide legal aid outside the context of a criminal trial (para. 6.6).

4.2 Legal aid at various stages of the proceedings

Legal aid must be provided from the outset of investigation, throughout the trial and during any appeal. Particular considerations arise during the preliminary investigation, and during appeals and constitutional motions.

4.2.1 Pretrial detention and preliminary investigation

Legal aid must be provided from the outset of investigation. This right is of ultimate importance in the capital punishment cases and in cases where the suspect is in a vulnerable position, such as a minor. A failure to provide a lawyer during preliminary investigations and questioning during this period renders the detention unlawful. In cases of capital crimes, if the suspect appears at the preliminary hearing without a legal representative, it is incumbent upon the investigating authorities to inform him of his right to have legal representation, to ensure legal representation for the complainant, if he so wishes, and to provide that representation free of charge if the complainant cannot otherwise afford it.

Levy v. Jamaica

3 November 1998, UNHRC, 719/1996

Violation of Article 14(3)(d)

The complainant was charged with capital murder. He was not provided with a lawyer in the preliminary hearing. The Committee specified that legal assistance must be made available free of charge to an accused charged with a capital crime. This applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case. Notwithstanding the State party's contention that the complainant had the opportunity to apply for legal aid, the Committee found a violation of Article 14(3)(d) (para. 7.2).

Johnson v. Jamaica

25 November 1998, UNHRC, 592/1994

Violation of Article 14(3)(d)

The complainant, a minor, was held in custody for over 18 months before being granted access to a lawyer. He was not provided with a defense lawyer at the preliminary hearing (para. 3.3). The complainant was convicted and sentenced to death. The State party observed that the complainant had not requested a lawyer at the preliminary hearing. The Committee affirmed that legal assistance and aid must be made available to an accused who is charged with a capital crime. When the complainant appeared at the preliminary hearing without a legal representative, "it would have been incumbent upon the investigating magistrate to inform him of his right to have legal representation and to ensure legal representation for the complainant, if he so wished" (para. 10.2).

Krasnova v. Kyrgyzstan

29 March 2011, UNHRC, 1402/2005

Violation of Article 14(3)(b)

The complainant submitted on behalf of her son, who was arrested and convicted when he was 14 in connection with death of another minor. During the investigation, all main investigative steps (seizure of evidence, confrontations) were conducted in the absence of a lawyer. Allegedly the complainant's son was subjected to psychological pressure. Acknowledging a particularly vulnerable situation of a minor, the Committee found a violation of his rights under Article 14(3)(b) (para. 8.6).

4.2.2 Appeal proceedings

Legal aid should also be provided during the appellate stages. Although the ICCPR does not compel the States to set up courts of appeal or of cassation, a state with such courts is under obligation to ensure that persons had an effective access to them.

Reid v. Jamaica

20 July 1990, UNHRC, 250/1987

Violation of Article 14(3)(d)

The complainant was convicted of murder and sentenced to death. The assigned legal aid lawyer, against the complainant's wish, informed the appellate court that there was no merit for the appeal (para. 2.5). The Committee reaffirmed that legal assistance and aid must be made available to a convicted prisoner under sentence of death and that this applied also to the appellate proceedings. The Committee considered that the State party should have appointed another lawyer for the complainant's defence or allowed him to represent himself at the appeal proceedings.⁵ To the extent that he was denied effective representation at the appeal proceedings, the requirements of Article 14(3)(d) had not been met (para. 11.4).

Wright and Harvey v. Jamaica

27 October 1995, UNHRC, 459/1991

Violation of Article 14(3)(b) and (d)

The complainants were sentenced to death for murder. The second complainant was informed by the legal aid lawyer that he was not able to represent him before the appellate court. After his appeal was dismissed it appeared that the lawyer had represented him at the hearing, despite his earlier statement that he would not, and had conceded that he could not support the appeal (para. 3.5). The Committee considered that in a capital case, when a lawyer for the accused conceded that there is no merit in the appeal, the Court should have ascertained whether the lawyer has consulted with the accused and informed him accordingly. If not, the court must ensure that the accused is so informed and given an opportunity to engage—for free if necessary—another lawyer (para. 10.5).

Thomas v. Jamaica

3 November 1997, UNHRC, 532/1993

Violation of Article 14(3)(d) and Article 2(3)

The complainant was convicted of murder and sentenced to death. He was not provided with legal aid to prepare a special leave for appeal, which in turn prevented him from making an enquiry into the alleged confession statement of his fellow inmate which would exonerate the complainant. The Committee found that the failure to provide the complainant with legal aid denied him an opportunity to pursue further investigation and to have his case reviewed (para. 6.4).

Bailey v. Jamaica

17 September 1999, UNHRC, 709/1996

No violation of Article 14(3)(b) and (d)

The complainant alleged a violation of his right to be effectively represented on appeal because the legal aid lawyer did not to pursue some of the grounds for appeal. In finding that no violation of the claimant's rights had occurred, the Committee distinguished this situation from other cases in which lawyers abandoned all grounds of appeal against the wishes of the client. In the present case the legal aid lawyer argued some of the grounds of appeal and nothing in the file suggested that the

⁵ See also: *McLeod v. Jamaica* (Communication no. 734/1997), at paras. 6.1 and 6.3.

lawyer was not merely exercising his professional judgment when choosing not to argue the other grounds (para. 7.2).

Sooklal v. Trinidad and Tobago

25 October 2001, UNHRC, 928/2000

Violation of Article 14(3)(d)

The complainant was convicted for the offences of sexual intercourse and serious indecency with minors and sentenced to 20 years of imprisonment (para. 2.2). The legal aid lawyer found no grounds for the appeal. According to the Committee, the requirements of a fair trial and of representation require that the complainant be informed that his lawyer does not intend to put arguments to the court and that he have an opportunity to seek alternative, free representation, in order that his concerns may be properly aired at the appeal level. The Appeal Court did not take any steps to ensure that this right was respected thus violating the complainant's rights under Article 14(3)(d) (para. 4.10).

Berry v. Jamaica

7 April 2004, UNHRC, 330/1988

No violation of Article 14(3)(b) and (d)

The complainant was represented by a legal aid lawyer during the preliminary hearing and on appeal. He did not have the opportunity to instruct his lawyer prior to the appeal hearing, and thus the lawyer failed to raise several issues, such as the complainant's alleged ill-treatment by the police. The Committee found no violation of Article 14(3) (b) and (d), because the complainant "would not have been allowed, unless special circumstances could be shown, to raise issues on appeal that had not previously been raised by the lawyer in the course of the trial" (para. 3.9).

4.2.3 Constitutional motions

Effective access to the courts encompasses a right to legal aid, where a person seeking, for example constitutional review, does not have sufficient means to meet the costs of legal assistance and where the interest of justice require that free legal assistance is provided to him. When determining whether access to constitutional review is required by the interest of justice, the Committee will consider whether constitutional review of a decision is an inherent aspect of the decision's appeal process. When the criminal courts provide adequate avenues to appeal, the Committee has been reluctant to find that providing legal aid for a further constitutional appeal is strictly necessary.

Douglas, Gentles and Kerr v. Jamaica

19 October 1993, UNHRC, 352/1989

No violation of Article 14(5)

The complainants claimed that due to the non-availability of legal aid, they were denied effective access to the Supreme (Constitutional) Court of Jamaica. The Committee reaffirmed that State parties were not required to provide multiple levels of appeal, but the words "according to law" in Article 14(5) meant that if domestic law provided for further instances of appeal, then the convicted person must have effective access to each of them. The Committee observed that the State party had provided the complainants with the necessary means to appeal the criminal conviction and sentence to the Court of Appeal and to the Judicial Committee of the Privy Council. Although Jamaican law also provided for the possibility of recourse to the Constitutional Court, such an appeal was not, as such, a part of the criminal appeal process and so the State's failure to

provide legal aid for this further appeal was not a violation of the complainant's Article 14(5) rights (para. 11.2).

Currie v. Jamaica

29 March 1994, UNHRC, 377/1989

Violation of Article 14(1) and Article 2(3)

The complainant asserted that the State failed to provide him with legal aid for constitutional motions and since no attorney was willing to represent him *pro bono*, he was denied effective access to the Supreme (Constitutional) Court (para. 5.2). The Committee ruled that although the role of the Constitutional Court was not to determine the criminal charge itself, its task was to ensure that the complainants received a fair trial, both in criminal and civil cases. Under Article 2(3) the State party had to make constitutional remedies available and effective (para. 13.3). Where a convicted person seeking constitutional review of irregularities in a criminal trial does not have sufficient means to meet the costs of the necessary legal assistance and where the interests of justice so require, the legal assistance should be provided to him. The Committee found a violation of Article 14(1) and Article 2(3) since the absence of legal aid had denied the complainant the opportunity to review his criminal trial (para. 13.4).

Evans v. Trinidad and Tobago

21 March 2003, UNHRC, 908/2000

No violation of Article 14(1)

The complainant was not provided with legal aid to make a constitutional challenge on the issue of the length of the sentence imposed upon commutation. The Committee specified that the Covenant did not contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interest of justice so required. The State party was not expressly required to provide legal aid outside the context of a criminal trial (para. 6.6).

4.3 Quality of legal aid

While Article 14 (3)(d) does not entitle the accused to choose a lawyer provided to him free of charge, the State must take measures to ensure that a lawyer, once assigned, provides effective representation in the interest of justice. The State will be held accountable for poor quality of the legal aid lawyer if it was manifest to the State that the lawyer's conduct was incompatible with the interests of justice.

Campbell v. Jamaica

30 March 1992, UNHRC, 248/1987

Violation of Article 14(3)(d)

The complainant submitted that in spite of his instructions the defence lawyer failed to raise objections to the confessional evidence. Although the complainant had specifically indicated that he wished to be present during the appeal hearing, he was not only absent but also could not instruct his legal representative. In light of the circumstances of the case and bearing in mind that the complainant was sentenced to death, the Committee concluded that the State party should have allowed the complainant to either instruct his lawyer regarding the appeal, or to represent himself at the appeal proceedings (para. 6.6).

Collins v. Jamaica

25 March 1993, UNHRC, 356/1989

Violation of Article 14(3)(d)

The complainant was found guilty of murder and sentenced to death. He submitted that the defence lawyer refused to file an appeal on his behalf thus leaving him without legal representation. The Committee reaffirmed that it is axiomatic that legal assistance be made available to a convicted prisoner under the sentence of death. While Article 14(3)(d) did not entitle the accused to choose the lawyer provided to him free of charge, measures must be taken to ensure that a lawyer, 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. In the present case the lawyer should have continued to represent the complainant or, alternatively, the complainant should have had an opportunity to retain a lawyer at his own expense (para. 8.2).

Whyte v. Jamaica

27 July 1998, UNHRC, 732/1997

No violation of Article 14(3)(b), (d) and (e)

The complainant argued that his right to effective legal representation was violated because he was represented by an inexperienced junior lawyer, who failed to call alibi witnesses and to take sworn evidence from the complainant. The Committee reaffirmed that the State party could not be held accountable for alleged errors made by a defense lawyer, unless it was or should have been manifest to the judge that the lawyer's behavior was incompatible with the interests of justice. The Committee found that the defence pursued by the legal aid lawyer was based on his professional judgment and therefore Article 14 was not violated (para. 9.2).

Forbes v. Jamaica

20 October 1998, UNHRC, 649/1995

No violation of Article 14(3)(b) and (d)

The complainant alleged a violation of Article 14, because the examination of some witnesses and the closing argument were conducted by a junior lawyer. The Committee found that information in the file did not support an allegation that the junior lawyer was not qualified to give effective, legal representation. The junior lawyer had worked closely with a senior lawyer in preparing the case, and had already examined witnesses earlier in the proceedings. As such, no violation was found (para. 7.1).

Smith and Stewart v. Jamaica

8 April 1999, UNHRC, 668/1995

No violation of Article 14

The complainants were convicted for murder and sentenced to death. They complained that their legal aid lawyers failed to challenge the prosecution's case in an appropriate manner as they failed to call any witnesses or otherwise object to the inaudibility of the prosecution's main witness. According to the Committee, the State party cannot be held accountable for lack of preparation or

alleged errors made by defence lawyers unless it has denied the complainant and his lawyer time to prepare the defence or it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. Neither of the complainants nor their lawyers requested an adjournment or otherwise manifested to the court that the lawyers' conduct was incompatible with the interests of justice, therefore no breach of Article 14 was found (para. 7.2).

Bailey v. Jamaica

17 September 1999, UNHRC, 709/1996

No violation of Article 14(3)(d) and 14(5)

The complainant brought two claims before the Committee. He first alleged that he was not afforded sufficient time with his legal aid lawyers to prepare for trial. In particular, he submitted that the legal aid lawyer failed to include in the defence important evidence brought to his attention by the complainant and refused to call witnesses on the complainant's behalf even when asked to do so. He further complained that his right to be effectively represented on appeal was violated because the appeals lawyer decided not to pursue some of the grounds for appeal. The Committee recalled that sufficient time must be granted to the accused and his lawyer to prepare the defence, but that the State party could not be held accountable for lack of preparation or alleged errors made by defence lawyers unless it had denied the complainant and his lawyer 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. Regarding the complainant's second claim, the Committee distinguished this case from its previous jurisprudence in which the lawyers did not argue on appeal at all and where the accused was not duly informed; in the present case, the Committee found that the legal aid lawyer merely exercised his professional judgment when choosing to argue some but not all of the grounds for appeal (paras. 7.1-7.2).

Borisenko v. Hungary

14 October 2002, UNHRC, 852/1999

Violation of Article 14(3)(d)

Even though the State assigned the complainant a free lawyer, the lawyer failed to appear at the interrogation or at the detention hearing. The Committee stated that it was incumbent upon the state party to ensure that legal representation was effective when the appointed lawyer had so obviously failed to perform her duties (para. 7.5).

Saidova v. Tajikistan

8 July 2004, UNHRC, 964/2001

Violation of Article 14(3)(b) and (d)

The complainant's husband was arrested, convicted and sentenced to death. According to the complainant, her husband was legally represented only towards the end of the investigation and not by lawyer of his own choice. The assigned lawyer was not available for consultations and was frequently absent during the trial. The Committee reiterated that while Article 14(3)(d) did not entitle an accused to choose a lawyer free of charge, the State had to take the steps to ensure that a lawyer, once assigned, provides effective representation in the interest of justice (para. 6.8).

Rastorguev v. Poland

28 March 2011, UNHRC, 1517/2006

No violation of Article 14(3)(b)

The complainant's nephew was charged on suspicion of robbery and murder and subsequently sentenced to 25 years' imprisonment. The appellate courts and the Supreme Court upheld the sentence (para 2.1-2.4). It was alleged in the complaint that the State-appointed lawyer failed to consult him before filing the appeal with the Appellate Court and refused to lodge a cassation appeal. The Committee held that "although it is incumbent on the State party to provide effective legal aid representation, it is not for the Committee to determine how this should have been ensured, unless it is apparent that there has been a miscarriage of justice." It further concluded that in light of the circumstances of the present case, the legal aid lawyer's conduct was in line with the "interests of justice" (para. 9.3). Although the State appointed lawyer refused to lodge a cassation appeal, the complainant's nephew was "duly informed" and was advised to hire his own defense lawyer (para. 9.4).

Butovenko v. Ukraine

19 July 2011, UNHRC, 1412/2005

Violation of Article 9(1), 14(3)(b) and (d)

The complainant was detained in connection with murder, and held in poor conditions. He was denied a lawyer for the first three days, interrogated and repeatedly beaten, prevented from sleeping, and his family threatened. After three days, he was provided with a state-appointed lawyer who advised him to confess or the beatings would continue. Eventually, he signed a confession, though at trial, once he had an independent lawyer, he recanted. The court relied on the prior confession and sentenced the complainant to life imprisonment. The Committee found that ineffective defence by the state appointed lawyer was in violation of Article 14(3)(b) and (d) (para. 7.8).

5. The right to be presumed innocent and the right to silence

A defendant's right to be presumed innocent is one of the cornerstones of the right to a fair trial. In essence it means that a person charged with a criminal offence must be treated and considered as not having committed an offence until found guilty with a definitive verdict by an independent and impartial tribunal. The prohibition of compulsion to testify against oneself or confess guilt is closely related to the prohibition of torture and inhuman, cruel or degrading treatment. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both Article 7 and Article 14(3)(g) of the ICCPR.

5.1 The presumption of innocence

Article 14(2)'s right to be presumed innocent ensures that the accused has the benefit of the doubt and that the prosecution bears the burden of proving all charges. All public authorities are obliged to refrain from prejudging the outcome of a trial. Defendants should normally not be shackled or kept behind bars at trial or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail does not affect the presumption of innocence.

Gridin v. Russian Federation

18 July 2000, UNHRC, 770/1997

Violation of Article 14(2)

The complainant was arrested for rape and assault. Prior to the trial, high ranking law enforcement officials made statements portraying him as guilty. The statements received wide media coverage (para. 3.5). The Committee held that the presumption of innocence “ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle” (General Comment No 13), and “therefore, [the] duty for all public authorities was to refrain from prejudging the outcome of [the] trial”. In this case authorities failed to exercise the necessary restraint, in violation of the complainant's rights under Article 14(2) (para. 8.3).

Cagas, Butin and Astillero v. the Philippines

23 October 2001, UNHRC, 788/1997

Violation of Article 14(2)

The complainants were charged with a capital offence carrying a severe penalty (para. 5.3). They spent more than nine years in pre-trial detention and were denied bail. The Committee held that although denial of bail did not in and of itself affect the right to be presumed innocent, an excessive period of pretrial detention did affect the right to be presumed innocent in violation of Article 14(2) (para. 7.3).

Saidova v. Tajikistan

8 July 2004, UNHRC, 964/2001

Violation of Article 14(2)

The complainant's husband was convicted and sentenced to death. During the investigation state directed national media portrayed the complainant and his co-charged as criminals. The Committee found that the State's media coverage contributed to a negative public opinion and later, during the trial, this resulted in the judge's accusatory approach. Thus the violation of the the principle of the presumption of innocence was found (para. 3.5).

Larranaga v. the Philippines

24 July 2006, UNHRC, 1421/2005

Violation of Article 14(2)

During the complainant's trial the judge excluded several witnesses offered by the defence and put a number of leading questions to the main prosecution witness. The Committee observed that the court failed to show sufficient latitude in permitting the defendant to prove his defence. Although some States require that an alibi defence must be raised by the defendant, the criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and the prosecution bears the burden of dispelling such doubt. In finding that the complainant's right to be presumed innocent had been violated, the Committee also denounced public statements made by a 'powerful social group' and senior government officials, portraying the complainant as guilty, which received extensive media coverage prior to the trial (para. 7.4).

Karimov and Nursatov v. Tajikistan

27 March 2007, UNHRC, 1108/2002 and 1121/2002

Violation of Article 14(2)

During the trial, the complainants were placed in a metal cage and handcuffed. During the hearing, a high ranked official stated that their handcuffs could not be removed because they were all dangerous criminals and might escape (para. 2(9)(a)) (para. 7.4).

Mwamba v. Zambia

30 April 2010, UNHRC, 1520/2006

Violation of Article 14(2)

The complainant was charged with murder, attempted murder and aggravated robbery. On several occasions, prior to the court's final judgment, police officers announced in the media that the complainant was guilty (para. 3.2). The Committee reiterated that public authorities should refrain from prejudging the outcome of a trial and observed that the media should avoid news coverage undermining the presumption of innocence (para. 6.5).

J.O. v. France

23 March 2011, UNHRC, 1620/2007

Violation of Article 14(2)

The complainant was convicted of fraud for making false statements in order to obtain unemployment benefits. The criminal court stated that the complainant had failed to prove that he had not violated specific Articles of the French Labour Code, without offering any evidence in support of this accusation. The presumption of innocence imposes the burden of proving a charge on the prosecution. In light of the limited opportunity for defense, in this case, the domestic courts placed a disproportionate burden of proof on the complainant and did not prove beyond a reasonable doubt that he was guilty. Accordingly, the Committee found a violation of the complainant's right to be presumed innocent (para. 9.6).

Levinov v. Belarus

26 July 2011, UNHRC, 1812/2008

Claim under Article 14(2) inadmissible as insufficiently substantiated

The complainant was found guilty of minor hooliganism and fined. The trial transcript, as signed by the judge, designated him as “the offender” and not as an accused (para. 3.4). The Committee held that there was no indication that the transcript would have affected the complainant’s right to be presumed innocent, and considered the claim under Article 14(2) inadmissible as insufficiently substantiated (para. 7.6).

5.2 The privilege against self-incrimination and the right to silence

A person cannot be compelled to testify against himself or to confess guilt. It is implicit in this principle that no direct or indirect physical or psychological coercion can be used by the investigating authorities in order to obtain a confession of guilt. If there are well-founded allegations of forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will.

Singarasa v. Sri Lanka

23 August 2004, UNHRC, 1033/2001

Violation of Article 14(2) and 14(3)(g)

According to Sri Lankan evidence admissibility rules, the accused bore the burden of proving that a confession was not made voluntarily. The Committee specified that Article 14(3)(g) required that no direct or indirect physical or psychological coercion be used by the investigating authorities in order to obtain a confession of guilt.⁶ It is implicit in this principle that the prosecution prove that the confession was made without duress. By placing the burden on the complainant to prove that his confession was made under duress, the State party violated Article 14(2) and 14(3)(g) (para. 7.4).

Dunaev v. Tajikistan

30 March 2009, UNHRC, 1195/2003

Violation of Article 7 and 14(3)(g)

The complainant was subject to ill-treatment by police officers and investigators while being held in police custody and was forced to confess to committing a crime. The State party did not provide a copy of the report made by a medical expert which allegedly proved that the complainant’s body showed no sign of injury. Since the State party did not provide further explanations, the Committee found a violation of Article 7 and Article 14(3)(g) (para. 7.3).

Koreba v. Belarus

25 October 2010, UNHRC, 1390/2005

Violation of Article 2(3) read in conjunction with Articles 7 and 14(3)(g)

The complainant’s son was arrested on suspicion of murder. He was transferred to a temporary detention ward, where he was kept in “the cage” (which forced him to remain in a squatting

⁶ See also: *Kelly v. Jamaica* (Communication no. 253/1987), at para. 5.5.

position), beaten by the officers and pressured to confess (para. 2.3). Under the influence of alcohol the complainant's son signed a confession written by a police officer in the absence of a lawyer (para. 2.6). The Committee recalled that Article 14(3)(g) must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities. In the cases of forced confessions, the burden is on the State to prove that statements made by the accused have been given of their own free will. Since the State party failed to submit sufficient information in its response, the Committee found a violation of Article 2(3) read in conjunction with Articles 7 and 14(3)(g) (para. 7.3).⁷

⁷ See also: *Deolall v. Guyana* (Communication No. 330/1988), at para. 5.1.

6. Procedural rights at trial

During the trial and appeals stage of criminal proceedings, the principles of a fair trial and due process require defendants to have access to effective criminal defence, which involves a series of interconnected procedural rights. Those rights include, but are not limited to: a right to be released from custody pending trial; a right to appear in person before the court and to bring evidence and examine witnesses; a right not to be tried without undue delay; and a right to appeal an unfavorable judgment.

6.1 The right to release from custody pending trial

A person charged with an offence should be released pending trial unless the State can show that there are relevant and sufficient reasons to justify his continued detention. These circumstances include where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. However, a mere assumption that the accused would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in Article 9(3) of the ICCPR. The authorities need to provide the grounds the concern is based on and why it could not be addressed by setting an appropriate sum of bail or other conditions of release.

Hill and Hill v. Spain

2 April 1997, UNHRC, 526/1993

Violation of Article 9(3)

The complainants were denied bail as the State party believed they would leave Spain's territory if released. The Committee reaffirmed that pre-trial detention should be the exception and that bail should be granted—except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses, or flee from the jurisdiction of the State. A mere concern of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9(3). A state would need to provide grounds for the concern and explain why they could not be addressed by setting an appropriate sum of bail and other conditions of release (para. 12.3).

Smantser v. Belarus

23 October 2008, UNHRC, 1178/2003

Violation of Article 9(3)

The complainant's requests for release on bail were repeatedly denied by the prosecutor and the court. He spent 22 months in custody before his final conviction. The Committee stated that pretrial detention should remain the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party. It added that the mere assumption by the State party that the accused would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in Article 9(3) (para. 10.3).

Levinov v. Belarus

25 August 2011, UNHRC, 1812/2008

Claim under Article 9 inadmissible as insufficiently substantiated

The complainant was taken into police custody under hooliganism charges. He claimed that his right to bail was denied because he requested to be released on a Saturday but his release was not ordered until Monday, when he was brought before a court. The Committee found his complaint inadmissible (para. 7.5).

6.2 The right to be tried in presence and participate in process

In order to guarantee the rights of the defence enshrined in Article 14(3) defendants should be able to appear in person during their criminal proceedings and participate in the process. Article 14(10) requires that a defendant be given an opportunity equal to that of the prosecution in the adjudication of a hearing. If that is not the case, it is for the authorities to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the complainant.

In absentia proceedings can be permissible under Article 14(3) in some circumstances. Sometimes the interest of the proper administration of justice may require trying a person without his or her presence. To comply with fair trial standards, a judgment *in absentia* requires that, notwithstanding the absence of the accused, all due notifications were made to inform him or the family of the date and place of his trial and to request his attendance. Hearings should be open to the public, and if not should be closed for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.

Dudko v. Australia

23 July 2007, UNHRC, 1347/2005

Violation of Article 14(1)

The complainant was deprived of the opportunity to participate in a hearing of the appellate court and present her position, which she had prepared without the assistance of a lawyer. In contrast, the lawyer for the State was allowed to address the court directly. The court ruled to deny the defendant leave to appeal (para. 2.3). The Committee observed that when a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the complainant. The State party failed to offer any plausible reasons why the underrepresented defendant was treated less favorably than a lawyer of the State; the Committee thus found a breach of Article 14(1)'s guarantee of equality before the courts (para. 7.4).

Salikh v. Uzbekistan

30 March 2009, UNHRC, 1382/2005

Violation of Article 14(3)(a), (b), (d) and (e)

On 17 November 2000, the complainant was sentenced *in absentia* to 15,5 years' imprisonment, on charges related to the terrorist bombings in Tashkent (para. 2.1). The Committee observed that Article 14(3) did not render proceedings *in absentia* impermissible under all circumstances: sometimes interests of proper administration of justice may require trying a person without his or her presence. For example when a person, "although informed of the proceedings sufficiently in advance, declines to exercise his right to be present." However, the Committee stressed that

judgment *in absentia* requires that all due notifications be made to inform him or his family of the date and place of his trial and to request his attendance (para. 9.4). In the present case, the State party failed to notify complainant's family about the criminal proceedings and to take steps to transmit to the complainant the summonses for his appearance in the court. The Committee concluded that the complainant was therefore prevented from preparing his defence (para. 9.5).⁸

Guerra de la Espriella v. Colombia

18 March 2010, UNHRC, 1623/2007

Violation of Article 14

The complainant was placed in a pretrial detention for the offences of illicit enrichment, forging of a private document and fraud (para. 2.2). Throughout the pretrial hearing he was questioned "in darkened rooms, in front of one-way mirrors concealing the person, who spoke with a distorted voice and questioned him through a loudspeaker, while he had to reply into a microphone" (para. 2.3). According to the complainant, the trial was handled by a "faceless judge," whom he was not able to see at any moment during the trial, and there was no public hearing (para. 2.5). The Committee reiterated that, in order to guarantee the rights of the defence enshrined in Article 14(3), all criminal proceedings must provide the accused with the right to an oral hearing, at which he or she may appear in person or be represented by a lawyer and may bring evidence and examine witnesses. A violation of Article 14 was found, since the complainant did not have such a hearing "during the proceedings that culminated in his convictions and sentencing, together with the manner in which the interrogations were conducted, without observing the minimum guarantees" (para. 9.3).

Khoroshenko v. Russian Federation

29 March 2011, UNHRC, 1304/2004

Violation of Article 14(1)

The complainant was convicted of multiple murders, banditry and armed robbery and sentenced to death. He submitted that during the trial hearing the judge ordered the complainant's relatives to leave the court room, and they were only readmitted when the verdict was read out (para. 2.6). The Committee recalled that all trials in criminal matters must in principle be conducted orally and publicly and that the publicity of hearings ensured the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Article 14(1) allows courts to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. The Committee observed that no such justifications was brought forward by the State party in the instant case (para. 9.11).⁹

Jessop v. New Zealand

29 March 2011, UNHRC, 1758/2008

No violation of Article 14(1)

The complainant, an immigrant to New Zealand, was sentenced to four years in prison for an aggravated robbery at age of 15. She argued a violation of her rights under Article 14, because the Supreme Court dismissed her leave for appeal without an oral hearing. The Committee observed

⁸ See also: *Mbenge v. Zaire* (Communication No. 16/1977), at para 14.1.

⁹ See also: *Van Meurs v. The Netherlands* (Communication No. 215/1986), at paras 6.1- 6.2.

that it was not disputed that the complainant's trial and appeal were openly and publicly conducted, and recalled that the disposition of an appeal does not necessarily require an oral hearing (para. 8.7).¹⁰

6.3 The right to be tried without undue delay

The right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate, but also to serve the interests of justice. In particular, if bail is denied because the accused is charged with a serious offence, he or she must be tried as expeditiously as possible. The meaning of a trial "within a reasonable time" and "without undue delay" must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. Only exceptional reasons can justify a delay. Moreover, this right relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal is given.

The right to be tried without undue delay protected under Article 14(3)(c) overlaps with the right to trial within a reasonable time or to release under Article 9(3), however the latter applies specifically to periods of pretrial detention, that is, detention between the time of arrest and the time of judgment at first instance.

Sooklal v. Trinidad and Tobago

25 October 2001, UNHRC, 928/2000

Violation of Article 9(3) and 14(3)(c)

The complainant was held in detention for three years prior to his trial and waited for a period of seven years and nine months from the time of his arrest to the date of his trial. The Committee found a violation of Article 9(3) in respect to detention for an unreasonable time prior to his trial and a violation of Article 14(3)(c) as the complainant's trial was not held within a reasonable time after he was charged (paras. 4.7 and 4.8).

Martinez Munoz v. Spain

30 August 2003, UNHRC, 1006/2001

Violation of Article 14(3)(c)

On 21 September 1990, the complainant was arrested for writing pintadas (graffiti) in favour of the right to refuse to perform military service. The first hearing took place on 14 June 1995 (para. 2.2). The Committee held that a delay of almost five years in a case of low complexity requiring minimal police investigation was not justified. The Committee recalled that exceptional reasons must be shown to justify delays. In the absence of any justification advanced by the State party, a violation of Article 14(3)(c) was found (para. 7.1).

Lobban v. Jamaica

16 March 2004, UNHRC, 797/1998

Violation of Article 9(3)

¹⁰ See also: *R.M. v. Finland* (Communication no. 301/1988), at para. 6.4 and *Kavanagh v. Ireland* (Communication no. 819/1998), at para. 10.4.

The complainant was brought before the judge eleven days after his arrest. Since the State failed to submit “any plausible justification for a delay,” the Committee found a violation of Article 9(3) (para. 8.3).

Smirnova v. Russian Federation

5 July 2004, UNHRC, 712/1996

No violation of Article 14(3)(c)

On 5 February 1993, criminal proceedings were initiated against the complainant, in relation to allegations that she had defrauded a Moscow bank. As of the date of her first communication, no trial date had been set; the domestic Court had announced that the case would not be scheduled until September 1996 (para. 2.5). The Committee found that although the period before initiation of the proceedings and the trial date exceeded three years, the complainant evaded the authorities for much of this time (para. 10.4).

Smantser v. Belarus

23 October 2008, UNHRC, 1178/2003

Violation of Article 9(3)

The complainant spent 22 months in custody before his final conviction; his requests for release on bail were repeatedly denied by the prosecutor and the court. The Committee held that “if bail is denied because the accused is charged with a serious offence, he or she must be tried as expeditiously as possible.” The burden of proof for justifying any delay and showing that a case was particularly complex rests with the State party. In the present case none of the delays could be attributed to the applicant. The Committee dismissed the State party’s arguments that the delay was due to the size of the complainant’s criminal case file and because “it required a long time for the prosecution to compile evidence and for it to be examined and evaluated by the judicial authorities” (para. 10.4).¹¹

Engo v. Cameroon

22 July 2009, UNHRC, 1397/2005

No violation of Article 9, violation of Article 9(3)

The complainant was placed in pre-trial detention on 3 September 1999 following “a complaint accompanied by the lodging of an application for criminal indemnification, the initiation of a judicial inquiry and questioning.” He was in detention during the first trial from 3 September 1999 to 23 June 2006. The Committee considered that no violation of Article 9 occurred in respect to the allegations of arbitrary detention, as initially the complainant was deprived of liberty in accordance with the procedure set out in the law. However, a deprivation of liberty for almost seven years pending the trial constituted a violation of Article 9(3) (para. 7.2).

Sobhraj v. Nepal

27 May 2010, UNHRC, 1870/2009

Violation of Article 14(3)(c)

The complainant was accused of murder and of being in possession of false documents and was

¹¹ See also: *Sextus v. Trinidad and Tobago* (Communication no. 818/1998), at para. 7.2.

sentenced to life imprisonment (para. 2.1). From 26 March 2006 until 23 April 2010, 41 hearings were scheduled to review his appeal. Most court hearings were allegedly cancelled or postponed at the last minute and without reasons being provided. The proceedings before the Supreme Court started in 2005 and were still ongoing in 2010. The Committee relied on its jurisprudence and stated that the right of the accused to be tried without undue delay related not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. The length of the proceedings before the Supreme Court and most importantly the high number of postponements and cancellations of the hearings could not be justified under the present circumstances and thus amounted to undue delay (para. 7.4).¹²

Krasnova v. Kyrgyzstan

29 March 2011, UNHRC, 1402/2005

Violation of Article 14(3)(c)

Complainant submitted on behalf of her son, who was arrested and convicted when he was 14 in connection with death of another minor. Proceedings between formal charging and final conviction by Supreme Court took almost five years, during which the applicant's son was acquitted three times and found guilty three times on the basis of the same evidence (witness statements and testimonies of the co-accused). The Committee stated that the right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In the present case none of the delays could be attributed to the complainant's son or to his lawyers. In the absence of State's explanation, the Committee found a violation of Article 14(3)(c) (para. 8.7).

6.4 The right to equality of arms in calling and examining witnesses

Article 14(3)(e) is an application of the principle of equality of arms that ensures an effective defense by the accused and his lawyer. It guarantees the accused the same legal powers that the prosecution has: of compelling the attendance of witnesses and of examining or cross-examining any witnesses. However, it does not provide an unlimited right to obtain the attendance of all witnesses, but only those who are relevant for the defence.

Dugin v. Russian Federation

5 July 2004, UNHRC, 815/1998

Violation of Article 14

The complainant did not have the opportunity to cross-examine the prosecution's main witness, because the witness could not be located. The domestic court, without providing any reason, rejected the complainant's further requests to summon an expert witness and to call additional witnesses. The Committee concluded that the domestic courts had not respected the requirement of equality between the prosecution and the defense in producing evidence (para. 9.3).

¹² See also: *Taright et al. v. Algeria* (Communication no. 1085/2002), at para. 8.5.

Rouse v. the Philippines

25 July 2005, UNHRC, 1089/2002

Violation of Article 14(3)(e)

During a visit to the Philippines, the complainant was arrested, on 4 October 1995, for alleged sexual relations with a male minor. The prosecution rested its case on the statements made to others by the alleged victim, who, despite a subpoena order, was not present for cross-examination (para. 2.9). The Committee noted that considerable weight was given to that witness' out of court statement. Because the complainant was unable to cross-examine the alleged victim, even though he was the sole eyewitness to the alleged crime, the Committee found a violation of Article 14(3)(e) (para. 7.5)

Larranaga v. the Philippines

24 July 2006, UNHRC, 1421/2005

Violation of Article 14(3)(e)

Trial court repeatedly refused to allow cross-examination of the main prosecution witness and to hear certain defense witnesses. The Committee reaffirmed that it was for the national courts to evaluate facts and evidence in a particular case. However, the trial court refused to hear defence witnesses without giving any justification other than that the evidence was "irrelevant and immaterial" and the time constraints. At the same time, the number of witnesses for the prosecution was not similarly restricted. Bearing in mind the severity of the charges against the complainant, namely rape and homicide, the court's justifications for excluding defence witnesses failed to meet the requirements of Article 14(3)(e) (para. 7.7).

Khuseynova and Butaeva v. Tajikistan

20 October 2008, UNHRC, 1263/2004 and 1264/2004

Violation of Article 14(3)(e)

The domestic court, without providing reasons, denied the motion of the complainant's son's lawyer to summon and examine witnesses against his client (para. 3.8). The Committee observed that Article 14(3)(e) is an application of the principle of equality of arms that ensures an effective defense by the accused and his lawyer. It guarantees the accused the same legal powers that the prosecution has: of compelling the attendance of witnesses and of examining or cross-examining any witnesses. However, it does not provide an unlimited right to obtain the attendance of any witness, but only of those who are relevant for the defence. The Committee observed that most of the requested witnesses and the requested forensic expert were relevant to the defence because they could have provided information relevant to the accused's claim of being forced to confess under duress. Denial of these requests therefore breached the equality of arms principle (para. 8.5)

Koreba v. Belarus

25 October 2010, UNHRC, 1390/2005

Violation of Article 14(3)(e)

The complainant's son was charged with murder. On the last day of court hearings, the prosecution asked to examine as a witness an undercover agent and the complainant. The complainant's son and his social worker were asked to leave the court room while the undercover agent, who wore a mask, testified. After being allowed to return to the court room, the complainant's son was not given an opportunity to question the witness (para. 2.8.i). The Committee recalled that, as an application of the principle of equality of arms, it was important to the accused to have the same legal power of

compelling the attendance of witnesses relevant for the defence and of examining or cross-examining any witnesses that are available to the prosecution. The State party did not provide an explanation as to why the complainant's son could not be present in the court room during the questioning (para. 7.5).

Toshev v. Tajikistan

30 March 2011, UNHRC, 1499/2006

Violation of Article 14(1) and 14(3) (e) and (g)

The complainant's brother was kept unlawfully isolated at the premises of the Ministry of Security and confessed guilt under threats of physical reprisals in the absence of a lawyer. In the beginning of the court trial, he retracted his confession and explained that he had initially confessed guilt under the threat of violence. He complained of being unlawfully deprived of liberty, of being forced to confess under duress and that the domestic court disregarded both his motions to summon and examine important witnesses and his objections to the content of the trial transcript. The Committee concluded that the facts as presented amounted to a violation of Article 14(1) and 14(3) (e) and (g) (para. 6.6).

Litvin v. Ukraine

19 July 2011, UNHRC, 1535/2006

Violation of Article 14(3)(e)

The domestic court ignored the request of the complainant's son to call and examine several key witnesses that could confirm his alibi. His motion to conduct additional forensic examinations was also denied. The Committee stressed that the principle of equality of arms was important for ensuring an effective defence by the accused and his lawyer. This principle guaranteed the accused the same legal powers of compelling the attendance of witnesses relevant for the defence and of examining or cross-examining any witnesses as were available to the prosecution. The State party failed to provide any reasons for denial of the motions of the complainant's son (para. 10.4).

6.5 The right to appeal

Article 14(5) of the ICCPR does not mandate that a retrial or a fresh hearing should be available in all circumstances. Even if a system of appeal is not automatic in a domestic legal system, the ICCPR right to appeal imposes on domestic authorities a duty to substantially review, both on the basis of sufficiency of the evidence and of the law, a conviction and sentence.

Saidova v. Tajikistan

8 July 2004, UNHRC, 964/2001

Violation of Article 14(5)

The complainant's husband was unable to appeal his conviction and sentence because he was tried and found guilty by the Military Chamber of the Supreme Court, whose judgments are not subject to ordinary appeal. The only possible appeal was an extraordinary one that depended on the discretionary power of the President of the Supreme Court or the Prosecutor General. Extraordinary review, if granted, was, as a rule, conducted without a hearing and covered only the matters of law (para. 3.7). The Committee stated that even if a system of appeal is not automatic in a domestic

legal system, the right to appeal imposed on the State party a duty to substantially review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence (para. 6.5).¹³

Gayoso Martinez v. Spain

19 October 2009, UNHRC, 1363/2005

Violation of Article 14(5)

The complainant was convicted for drug trafficking. On the appeal in cassation he sought to challenge the veracity of the documentary evidence against him, including police statements and telephone calls. The Supreme Court found, however that a review of the evidence is a matter of fact that fell outside the scope of the remedy of cassation (para. 9.2). The Committee reiterated that although Article 14(5) did not require a retrial or a fresh hearing, the court conducting the review should be able to examine the facts of the case. The review performed by the Supreme Court was limited to verifying the validity of the evidence, as assessed by the trial court, without reconsidering whether it was sufficient to justify the conviction and sentence based on the facts and therefore violated the complainant's right to appeal (paras. 9.3 and 10).¹⁴

J.O. v. France

23 March 2011, UNHRC, 1620/2007

Violation of Article 14(5)

The complainant was convicted of fraud for making a false statement in order to obtain unemployment benefits. He claimed a violation of his right to appeal, insofar as neither the Appeal Court nor the Court of Cassation afforded him the opportunity to air his grievances (para. 3.5). The Committee considered that the failure to notify the complainant of the ruling in the first instance, when he had not been represented by his appointed lawyer, amounted to a violation of Article 14(5) (para. 9.7).

Kamoyo v. Zambia

23 March 2012, UNHRC, 1859/2009

Violation of Article 14(3)(c) and 14(5)

The complainant was convicted of murder. Thirteen years after conviction, he was still waiting for his appeal to be considered by the Supreme Court. Recalling the General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, the Committee held that the rights contained in Article 14(3)(c) read together with Article 14(5) "confer a right to review of a conviction without delay, and that the right of appeal is of particular importance in death penalty cases". It concluded that the delay in the instance case violated the author's right to review without delay (para. 6.3).

¹³ See also: *Lumley v. Jamaica* (Communication No. 662/1995), at para. 7.3.

¹⁴ See also: *Rolando v. Philippines* (Communication no. 1110/2002), at para. 4.5; *Juma v. Australia*, (Communication no. 984/2001), at para 7.5; *Perera v. Australia* (Communication no. 536/1993), at para. 6.4.

7. The right to free interpretation and translation of documents

The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court enshrines the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the proceedings. An accused who does not understand the language used in Court, does not have the right to have all the documents relevant to a criminal investigation translated, provided that the relevant documents were made available to his lawyer.

Guesdon v. France

25 July 1990, UNHRC, 219/1986

No violation of Article 14(1) and 14(3)(f)

The complainant was charged of having damaged public property by defacing road signs. The court proceedings were held in French and, although the complainant requested assistance of the interpreter because “his mother tongue [was] Breton”, he was not provided one. The Committee observed that the requirement of a fair hearing did not mandate the State 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 (para. 10.2). In the Committee’s view, the complainant had not shown that he was unable to address the tribunal in simple but adequate French and noted that Article 14(1) in conjunction with 14(3)(f) did not imply that that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease (para. 10.3).

Hill and Hill v. Spain

2 April 1997, UNHRC, 526/1993

No violation of Article 14(3)(b)

The complainants complained that the State party failed to provide them with translations of a number of documents that would have helped them to better understand the charges and to organize their defence. The Committee observed that the right to a fair trial did not mean 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 were made available to his lawyer. Since the complainants’ were represented in all stages of the proceedings either by the privately retained lawyers or by ones appointed under the legal aid scheme and these lawyers had access to the relevant documents, the Committee did not find any violation of Article 14(3)(b) (para. 14.1).

Sobhraj v. Nepal

27 May 2010, UNHRC, 1870/2009

Violation of Article 14(3)(a), (b) and (d)

The complainant, a French national, was arrested by Nepalese police and accused of murder and of being in possession of false documents (para. 2.1). He was detained for 25 days without the assistance of a lawyer. Although he did not understand Nepalese, he was not afforded the free assistance of an interpreter during the court’s proceedings or when the judgment was handed down. The complainant was subsequently convicted and sentenced to life imprisonment. The Committee observed that “the right to a fair trial implies that the accused be allowed, in criminal proceedings to express himself in the language in which he normally expresses himself”. The complainant’s lack

of access to an interpreter from the time of arrest and during the District Court hearings, as well as the lack of access to a lawyer at the initial phase of the procedure violated Article 14(3)(a), (b) and (d) (para. 7.2).

Bozbey v. Turkmenistan

27 October 2010, UNHRC, 1530/2006

Violation of Article 14(1) and with Article 14(3)(f)

Turkmenistan courts found the complainant, a Turkish national, guilty of several economic offences and sentenced him to 14 years of imprisonment (para. 2.3). The complainant claimed that all the court proceedings were conducted and the verdict was delivered in the Turkmen language, which he did not understand. Both during the trial and after he started serving his sentence, the complainant unsuccessfully complained to the courts regarding the violation of his right to have an interpreter during the proceedings (para. 2.4). The Committee found that not providing the complainant with an interpreter when he could not understand or speak the language used in court, constituted a violation of his Article 14 rights (para. 2.4).

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