HUMAN RIGHTS COMMITTEE

E. Johnson v. Jamaica

Communication No. 588/1994

22 March 1996

CCPR/C/56/D/588/1994

VIEWS

Submitted by: Errol Johnson [represented by counsel]

Victim: The author

State party: Jamaica

Date of communication: 11 January 1994 (initial submission)

Date of decision on admissibility and of adoption of Views: 22 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 March 1996,

Having concluded its consideration of communication No. 588/1994, submitted to the Committee by Mr. Errol Johnson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Errol Johnson, a Jamaican citizen who, at the time of submission of his communication, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 10, paragraph 1,

and 14, paragraphs 1, 3 (c), (g) and 5, of the International Covenant on Civil and Political Rights. The author is represented by counsel. In early 1995, the offence of which the author was convicted was classified as non-capital murder, and his death sentence was commuted to life imprisonment on 16 March 1995.

The facts as presented by the author

2.1 The author was, together with a co-defendant, Irvine Reynolds, convicted of the murder of one Reginald Campbell and sentenced to death on 15 December 1983 in the Clarendon Circuit Court. His application for leave to appeal was dismissed by the Court of Appeal on 29 February 1988; a reasoned appeal judgement was issued on 14 March 1988. On 9 July 1992, at separate hearings, the Judicial Committee of the Privy Council dismissed the petitions for special leave to appeal of the author and of Mr. Reynolds.

2.2 Reginald Campbell, a shopkeeper, was found dead in his shop at around 9.00 a.m. on 31 October 1982. The post-mortem evidence showed that he died from stab wounds to the neck. A witness for the prosecution testified that, earlier in the morning at approximately 6.00 a.m., he had seen Mr. Campbell in his garden, as well as two men who were waiting in the vicinity of the shop. At an identification parade held on 11 November 1982, this witness identified Mr. Reynolds but not the author as one of the men who had been waiting near the shop. Another prosecution witness testified that about one hour later on the same morning, he met Irvine Reynolds, whom he knew, and the author, whom he identified at an identification parade, coming from the direction of Campbell's shop. He walked with them for about two miles, observing that Reynolds played with a knife, that both men were carrying travel bags, and that both were behaving in a suspicious way. Thus, when a mini-bus was approaching them from the opposite direction, Reynolds scurried up the road embankment, as if trying to hide.

2.3 The prosecution further relied on evidence discovered by the police during a search of the rooms in which the author and Mr. Reynolds were living, in particular four cheques signed by Mr. Campbell, as well as items (running shoes, detergent, etc.) similar to those stolen from the shop. Furthermore, a caution statement allegedly made by Mr. Johnson to the police on 12 November 1982 was admitted into evidence after the voir dire; in it, the author declared that Reynolds had walked into the store to buy cigarettes, while he was waiting outside. He then heard a noise, went into the shop and saw Mr. Campbell bleeding on the ground, with Reynolds carrying a knife standing aside.

2.4 During the trial, the author and Reynolds presented an alibi defence. During the voir dire, the author denied under oath that he had dictated the above-mentioned statement to the police and claimed that he had been forced to sign a prepared statement. He further testified that, after he had told the investigating officer that he refused to sign the statement until his legal representative had seen it, he was taken to the guards' room. There, an investigating officer, Inspector B., hit him four times on his knees with a baton; when he bent over, he was kicked in the stomach and hit on his head. He stated that blood was trickling down his ear when he signed the statement. This evidence was corroborated by Reynolds who, in an unsworn statement from the dock, noted that he had seen the author with blood running

down the side of his head when walking past the guards' room. The investigating officers were cross-examined on the issue of ill-treatment by the defence during the voir dire, as well as in the presence of the jury.

2.5 At the close of the prosecution's case, the author's lawyer, a Queen's Counsel, argued that there was no case to answer, as the evidence went no further than showing that Errol Johnson had been present in the vicinity of the shop at the time of the murder. The judge rejected the no-case submission.

2.6 On appeal, the author's lawyer argued that the judge had failed to adequately direct the jury on the caution statement, so that the possibility of reaching a verdict of manslaughter was not left for its consideration. In counsel's opinion, the caution statement showed that, while the author was present at the scene, he was not a party to the crime. The Court of Appeal dismissed the argument, stating that "[t]he value of the statement was to rebut his alibi and to put him on the scene of the crime".

2.7 The main grounds on which the author's further petition for special leave to appeal to the Judicial Committee of the Privy Council was based were that:

- the trial judge erred in law in rejecting the "no case to answer" submission, where evidence produced by the prosecution was not capable of proving either that the author had himself committed the murder, or that he had participated in a joint enterprise which would have made him guilty of murder or manslaughter; and

- the direction of the judge on the nature of joint enterprise was confused, and that he failed to direct the jury properly as to which findings of fact arising in the case could give rise to a verdict of manslaughter.

2.8 Counsel notes that the author did not apply to the Supreme (Constitutional) Court of Jamaica for constitutional redress, as a constitutional motion would fail in the light of the precedents in the case law of the Judicial Committee, notably in the cases of D.P.P. v. Nasralla 2 All E.R. 161 (1967) and Riley et al. v. Attorney-General of Jamaica, 2 All E.R. 469 (1982) where it held that the Constitution of Jamaica intended to prevent the enactment of unjust laws and not merely, as claimed by the applicants, unfair treatment under the law. Furthermore, even if it were considered that a constitutional remedy were available to the author in theory, it would be unavailable to him in practice since he lacks the resources to secure private legal representation, and no legal aid is made available for the purpose of constitutional motions. Reference is made in this context to the established jurisprudence of the Committee.

The complaint

3.1 It is argued that the author was detained on death row for over 10 years, and that if he were to be executed after such a delay, this would amount to cruel and degrading treatment and/or punishment, in violation of article 7 of the Covenant. In substantiation of his claim, counsel refers to the findings of the Judicial Committee of the Privy Council in Pratt and

Morgan v. Attorney-General of Jamaica and of the Supreme Court of Zimbabwe in a recent case. The fact that the author was held on death row for so long under the appalling conditions of detention at St. Catherine District Prison is said to amount in itself to a violation of article 7.

3.2 Counsel contends that the beatings to which his client was subjected during police interrogation amount to a violation of articles 7 and 10, paragraph 1, of the Covenant. He recalls that the author did inform his lawyer about the beatings, that the lawyer raised the issue during the trial, that the author himself repeated his claim in a sworn and an unsworn statement during the trial, and that his co-defendant corroborated his version. By reference to the Committee's jurisprudence [1] counsel argues that the physical and psychological pressure exercised by the investigating officers on the author, with a view to obtaining a confession of guilt, violates article 14, paragraph 3 (g), of the Covenant.

3.3 Counsel further alleges that the delay of 51 months between the author's trial and the dismissal of his appeal constituted a violation of article 14, paragraphs 3 (c) and 5, of the Covenant, and refers to the Committee's jurisprudence on this issue. E.g. Views on case No. 230/1987 (Henry v. Jamaica), adopted 1 November 1991, para. 8.4; case No. 282/1988 (Leaford Smith v. Jamaica), Views adopted 31 March 1993, para. 10.5; and case No. 203/1986 (Muñoz Hermosa v. Peru), Views adopted 4 November 1988, para. 11.3. He forwards a copy of a letter from the author's lawyer in Jamaica, who indicates that there was a long delay in the preparation of the trial transcript. It further transpires from correspondence between the author and the Jamaica Council for Human Rights that the Council was informed on 26 June 1986 that the author's appeal was still pending. On 10 June 1987, the Council asked the Registrar of the Court of Appeal to forward the Notes of Evidence in the case. This request was reiterated in November and in December 1987. On 23 February 1988, the Council informed the author that it was unable to assist him, as it had still not received the trial transcript. The delays encountered in making available to the author the trial transcript and a reasoned summing up of the judge are said to have effectively denied him his right to have conviction and sentence reviewed by a higher tribunal according to law.

3.4 It is further submitted that the trial judge's failure to direct the jury adequately as to which findings of facts arising in the case might have allowed a verdict of manslaughter, amounted to a violation of article 14, paragraph 1, of the Covenant.

3.5 Finally, counsel argues that the imposition of a capital sentence upon completion of a trial in which the provisions of the Covenant were violated amounts to a violation of article 6, paragraph 2, of the Covenant, if no further appeal against the sentence is available.

The State party's information and observations and counsel's comments thereon

4.1 In its observations of 13 February 1995, the State party does not formulate objections to the admissibility of the case and offers, "in the interest of expedition and in the spirit of cooperation", comments on the merits of the communication.

4.2 With regard to the claim that the length of time spent on death row constitutes a violation of article 7, the State party contends that the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in Pratt and Morgan v. Attorney-General of Jamaica is not necessarily dispositive of all other cases where a prisoner has been held on death row for over five years. Rather, each case must be considered on its merits. In support of its argument, the State party refers to the Committee's Views in the case of Pratt and Morgan, where it was held that delays in the judicial proceedings did not per se constitute cruel, inhuman and degrading treatment within the meaning of article 7.

4.3 The State party notes that it is investigating the author's allegations of ill-treatment during interrogation and promises to transmit its findings "as soon as the investigations are complete". As of 16 October 1995, the results of said investigations had not been forwarded to the Committee.

4.4 As to the delay of 51 months between the author's trial and the dismissal of his appeal, the State party equally states that it is investigating the reasons for the delay. As of 16 October 1995, it had not forwarded to the Committee the result of said investigations.

4.5 The State party denies a violation of article 14, paragraph 1, on account of the inadequacy of the judge's instructions to the jury, and contends that this allegation relates to questions of facts and evidence in the case the examination of which, under the Committee's own jurisprudence, is not generally within its competence. It further denies a violation of article 6, paragraph 2, without giving reasons.

5.1 In his comments on the State party's submission, counsel agrees to the joint examination of the admissibility and the merits of the case. He reaffirms that his client is a victim of a violation of articles 7 and 10 (1), because of the length of time he remained confined to death row. He claims that the judgement of the Judicial Committee of the Privy Council of 2 November 1993 in Pratt and Morgan does constitute a relevant judicial precedent.

5.2 In the latter context, counsel submits that any execution that would take place more than five years after conviction would undoubtedly raise the "strong grounds" adduced by the Judicial Committee for believing that the delay would amount to inhuman and degrading treatment and punishment. He argues that on the basis of the Guidelines developed by the Judicial Committee, after a period of 3 to 5 years from conviction, an assessment of the circumstances of each case, with reference to the length of delay, the prison conditions and the age and mental state of the applicant, could amount to inhuman and degrading treatment. He further contends that incarceration on death row for over five years would per se constitute cruel and degrading treatment.

Admissibility considerations and examination of merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in July 1992, the author has exhausted domestic remedies for purposes of the Optional Protocol. The Committee notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits so as to expedite the procedure. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes. [2] The Committee further notes that counsel for the author has agreed to the examination of the case on the merits at this stage.

7. The Committee, accordingly, decides that the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee first has to determine whether the length of the author's detention on death row since December 1983, i.e. over 11 years, amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has alleged a violation of these articles merely by reference to the length of time Mr. Johnson has spent confined to the death row section of St. Catherine District Prison. While a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of articles 7 and 10 (1) of the Covenant in the absence of some further compelling circumstances. The Committee is aware that its jurisprudence has given rise to controversy and wishes to set out its position in detail.

8.2 The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered:

(a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant.

(b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable".

[3] Reducing recourse to the death penalty may therefore be seen as one of the objects and purposes of the Covenant.

(c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.

8.3 In light of these factors, we must examine the implications of holding the length of detention on death row, per se, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, per se, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.

8.4 The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed. It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However,

the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.

8.5 Finally, to hold that prolonged detention on death row does not, per se, constitute a violation of articles 7 and 10, does not imply that other circumstances connected with detention on death row may not turn that detention into cruel, inhuman and degrading treatment or punishment. The jurisprudence of the Committee has been that where compelling circumstances of the detention are substantiated, that detention may constitute a violation of the Covenant. This jurisprudence should be maintained in future cases.

8.6 In the present case, neither the author nor his counsel have pointed to any compelling circumstances, over and above the length of the detention on death row, that would turn Mr. Johnson's detention into a violation of articles 7 and 10. The Committee therefore concludes that there has been no violation of these provisions.

8.7 Regarding the claim under articles 7 and 14, paragraph 3 (g) - i.e. that the author was beaten during police interrogation with a view to extracting a confession of guilt - the Committee reiterates that the wording of article 14, paragraph 3 (g), namely that no one shall "be compelled to testify against himself or to confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. E.g. Views on communication No. 248/1987 (G. Campbell v. Jamaica), adopted 30 March 1992, paragraph 6.7. Although the author's claim has not been refuted by the State party, which promised to investigate the allegation but failed to forward its findings to the Committee, the Committee observes that the author's contention was challenged by the prosecution during the trial and his confession statement admitted by the judge. The Committee recalls that it must consider allegations of violations of the Covenant in the light of all the written information made available to it by the parties (art. 5, para. 1, of the Optional Protocol); in the instant case, this material includes the trial transcript. The latter reveals that the author's allegation was thoroughly examined by the court in a voir dire, 28 pages of the trial transcript being devoted to this issue, and that his statement was subsequently admitted by the judge after careful weighing of the evidence; similarly, the jury concluded to the voluntariness of the statement, thereby endorsing the judge's ruling that the author had not been ill-treated. There is no element in the file which allows the Committee to question the decision of the judge and the jury. It must further be noted that on appeal, author's counsel accepted the voluntariness of Mr. Johnson's statement and used it to secure a reduction of the charge against his client from murder to manslaughter. On the basis of the above, the Committee concludes that there has been no violation of articles 7 and 14, paragraph 3 (g).

8.8 The author has alleged a violation of article 14, paragraphs 3 (c) and 5, because of an unreasonably long delay of 51 months between his conviction and the dismissal of his appeal. The State party has promised to investigate the reasons for this delay but failed to forward to the Committee its findings. In particular, it has not shown that the delay was attributable to the author or to his legal representative. Rather, author's counsel has provided information which indicates that the author sought actively to pursue his appeal, and that responsibility for the delay in hearing the appeal must be attributed to the State party. In the Committee's opinion, a delay of four years and three months in hearing an appeal in a capital case is, barring exceptional circumstances, unreasonably long and incompatible with article 14, paragraph 3 (c), of the Covenant. No exceptional circumstances which would justify the

delay are discernible in the present case. Accordingly, there has been a violation of article 14, paragraphs 3 (c) and 5, inasmuch as the delay in making the trial transcript available to the author prevented him from having his appeal determined expeditiously.

8.9 The Committee reiterates that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed ...". Since the final sentence of death in the instant case was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 14, paragraphs 3 (c) and 5, and consequently of article 6, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. Aware of the commutation of the author's death sentence on 16 March 1995, the Committee considers that a further measure of clemency would be appropriate. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Notes

*/ Made public by decision of the Human Rights Committee.

*/ Pursuant to rule 85 of the Committee's rules of procedure, Mr. Laurel Francis did not participate in the adoption of the Views.

**/ Three individual opinions signed by six members of the Committee are appended to the present document.

1/ See Views on communication No. 253/1987 (Paul Kelly v. Jamaica), adopted on 8 April

1991.

2/ See Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, paragraph 7.4.

3/ (See General Comment 6 [16] of 27 July 1982; also see Preamble to the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty.)

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

A. Individual opinion by Committee member Christine Chanet

The development of the Committee's jurisprudence by a majority of its members in connection with the present communication prompts me not only to

maintain the position I expressed in the Barrett and Sutcliffe case (Nos. 270 and 271/1988) through my individual opinion but also to explain it in greater detail.

The Views adopted in the Errol Johnson case (No. 588/1994) have led the Committee, which wishes to remain consistent, to conclude that death row does not in itself constitute a violation of article 7; in other words, it does not constitute cruel, inhuman or degrading treatment - irrespective of the length of time spent awaiting execution of the sentence, which may be 15 to 20 years or more.

There is nothing in the grounds for the decision that would enable the Commission, short of a complete reversal of its jurisprudence, to reach a different conclusion concerning an indefinite wait or a wait of several years.

The factors adduced in support of this position are as follows:

- The Covenant does not prohibit the death penalty;

- If the Covenant does not prohibit the death penalty, execution of this penalty cannot be prohibited;

- Before the execution can be carried out, some time must be allowed to elapse, in the interests of the convicted prisoner, who must have the opportunity to exhaust the relevant remedies;

- For the Committee to set a limit on this length of time would be to run the risk of

provoking hasty execution. The Committee even goes so far as to state that life on death row is preferable to death.

However, the Committee, conscious of the risks of maximalist application of such a view by States, recognizes that keeping a person under death sentence on death row for a number of years is not a good way of treating him.

The position is very debatable for the following reasons:

- It is true that the Covenant does not prohibit the death penalty;

- It logically follows from this that execution of the penalty is also not forbidden and that the existence of a death row, i.e. a certain period of time prior to execution, is in this sense inevitable.

On the other hand, one cannot rule out the conclusion that no time-lag can constitute cruel, inhuman or degrading treatment by postulating that awaiting death is preferable to death itself and that any sign to the contrary emanating from the Committee would encourage the State to proceed with a hasty execution.

This reasoning may be considered excessively subjective on two counts. In an analysis of human behaviour, it is not exceptional to find that a person suffering from an incurable illness, for example, prefers to take his own life rather than await the inevitably fatal outcome, thereby opting for immediate death rather than the psychological torture of a death foretold.

As to the "message" which the Committee refuses to send to States lest the setting of a time-limit provoke hasty execution, this again is a subjective analysis in that the Committee is anticipating a supposed reaction by the State.

In my view, we should revert to basic considerations of humanity and bring the discussion back to the strictly legal level of the Covenant itself.

There is no point in trying to find what is preferable in this area. Unquestionably, the fact of knowing that one is to undergo the death penalty constitutes psychological torture. But is that a violation of article 7 of the Covenant? Is death row in itself cruel, inhuman or degrading treatment?

Some authors maintain that it is. However, this argument comes up against the fact that the death penalty is not prohibited in the Covenant, even though the Covenant's silence on this point can give rise to interpretations which are excluded under the European Convention on Human Rights, article 2, paragraph 1, of which explicitly provides for capital punishment as an admissible derogation from the right to life. The very existence of the Optional Protocol contradicts this argument.

I therefore believe that being on death row cannot in itself be considered as cruel, inhuman

or degrading treatment. However, it must be assumed that the psychological torture inherent in this type of waiting must, if it is not to constitute a violation of article 7 of the Covenant, be reduced by the State to the minimum length of time necessary for the exercise of remedies.

Consequently, the State must:

- Institute remedies;

- Prescribe reasonable time-limits for exercising and examining them;

- Execution can only be concomitant with exhaustion of the last remedy; thus, in the system obtaining in France before the Act of 9 October 1981 abolishing the death penalty, the announcement of the execution was conveyed to the convicted prisoner at the actual time of execution, when he was told "Your application for pardon has been refused".

This is not some kind of formula, since I believe there is no good way in which a State can deliberately end the life of a human being, coldly, and when that human being is aware of the fact. However, since the Covenant does not prohibit capital punishment, its imposition cannot be prohibited, but it is

incumbent on the Human Rights Committee to ensure that the provisions of the Covenant as a whole are not violated on the occasion of the execution of the sentence.

Inevitably, each case must be judged on its merits: the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the State's behaviour in respect of articles 7 and 10 of the Covenant. Similarly, the judicial procedure and the remedies available must meet the requirements of article 14 of the Covenant. Lastly, in the particular case, the State's legislation and behaviour and the conduct of the prisoner are elements providing a basis for determining whether or not the time-lag between sentencing and execution is of a reasonable character.

These are the limits to the subjectivity available to the Committee when exercising its control functions under the Covenant and the Optional Protocol, excluding factors such as what is preferable from the supposed standpoint of the prisoner, death or awaiting death, or fear of a possible misinterpretation by the State of the message contained in the Committee's decisions.

(Signed) C. Chanet

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

B. Individual opinion by Committee members Prafullachandra N. Bhagwati,

Marco T. Bruni Celli, Fausto Pocar and Julio Prado Vallejo

The development in the jurisprudence of the Committee with regard to the present communication obliges us to express views dissenting from those of the Committee majority. In several cases, the Committee decided that prolonged detention on death row does not per se constitute a violation of article 7 of the Covenant, and we could accept these decisions in the light of the specific circumstances of each communication under consideration.

The Views adopted by the Committee in the present case reveal, however, a lack of flexibility that would not allow to examine any more the circumstances of each case, so as to determine whether, in a given case, prolonged detention on death row constitutes cruel, inhuman or degrading treatment within the meaning of article 7 of the Covenant. The need of a case-by-case appreciation leads us to dissociate ourselves from the position of the majority, and to associate ourselves to the opinion of other members of the Committee who were not able to accept the majority views, in particular to the individual opinion formulated by Ms. Chanet.

(Signed)	(Signed)	(Signed)	(Signed)
P. Bhagwati	M. Bruni Celli	J. Prado Vallejo	F. Pocar

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

C. Individual opinion by Committee member

Francisco José Aguilar Urbina

The majority opinion on the communication submitted by Errol Johnson against Jamaica (No. 588/1994) obliges me to express my individual opinion. The Human Rights Committee has established in its jurisprudence that the death row phenomenon does not, per se, constitute a violation of article 7 of the International Covenant on Civil and Political Rights. The Committee has repeatedly maintained that the mere fact of being sentenced to death does not constitute cruel, inhuman or degrading treatment or punishment. On some occasions, I have agreed with this position, subject to the proviso that, as I also wish to make clear in this individual opinion, I believe that capital punishment in itself constitutes inhuman, cruel and degrading punishment.

In my opinion, the Committee is wrong to seek inflexibly to maintain its jurisprudence without clarifying, analysing and appraising the facts before it on a case-by-case basis. In the communication concerned (Johnson v. Jamaica), the Human Rights Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row is not in any case contrary to article 7 of the Covenant.

The majority opinion seems to be based on the supposition that only a total reversal of the Committee's jurisprudence would allow it to decide that an excessively long stay on death row could entail a violation of that provision. In arriving at that conclusion, the majority made a number of assumptions:

1. That the International Covenant on Civil and Political Rights does not prohibit the death penalty, though it subjects its use to severe restrictions;

2. That detention on "death row" is a necessary consequence of imposing the death penalty and that, no matter how cruel, degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant;

3. That, while the Covenant does not prohibit the death penalty, it refers to its abolition in terms which strongly suggest that abolition is desirable;

4. That the provisions of the Covenant must be interpreted in the light of the objects and purposes of that instrument and that, as one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation that may encourage a State to make use of that penalty should be avoided.

On the basis of these assumptions, a majority of the members of the Human Rights Committee have arrived at certain conclusions which entail, in their opinion, a finding that there has been no violation of articles 7 and 10 of the Covenant on the part of the State that is the subject of the communication:

1. That a State party which executes a condemned person after he has spent a certain period of time awaiting execution would not be in violation of the provisions of the Covenant, whereas one which does not execute the prisoner would violate those provisions. This implies that the problem of length of detention on death row can be dealt with only by setting a cut-off date after which the Covenant would have been violated;

2. That making the time factor the one that determines a violation of the Covenant conveys a message to States parties that they should carry out a death sentence as expeditiously as possible after it is imposed;

3. That to hold that prolonged detention on death row does not, per se, constitute a violation of articles 7 and 10 of the Covenant does not imply that other circumstances connected with such detention may not turn it into cruel, inhuman or degrading punishment.

While subscribing to several of the arguments put forward by the majority, I agree with only the last of their conclusions. I consider the majority opinion debatable:

1. I agree that, while the International Covenant on Civil and Political Rights does not prohibit the death penalty, it does subject its use to severe restrictions;

2. I also agree that, since capital punishment is not prohibited, States parties which still

include it among their penalties are not prevented from applying it - within the strict limits set by the Covenant - and that the existence of "death row" (in other words, a certain period of time between the handing down of a death sentence and the execution of the condemned person) is, therefore, inevitable;

3. I also consider that there is no doubt that the Covenant suggests that abolition of the death penalty is desirable;

4. In any event, it cannot be denied that the provisions of the Covenant should be interpreted in the light of the object and purpose of this treaty. However, while I agree that one of the objects and purposes of the Covenant is to reduce the use of the death penalty, I believe that that is precisely as a consequence of a greater purpose, which is to limit the grounds for death sentences and, ultimately, to abolish the death penalty.

In the case of the present communication, and of the many which have been submitted against Jamaica during the last decade, it is regrettable that the State party, by refusing for the past 10 years to comply with its obligation to report to the Human Rights Committee under article 40 of the Covenant, has denied the Committee the opportunity to pronounce on the application of the death penalty in Jamaica as part of the procedure for consideration of reports. Jamaica was to have submitted its second periodic report on 1 August 1986 and 3 August 1991.

This means that, for 15 years, the Human Rights Committee has been prevented from considering whether the death penalty is imposed in Jamaica in accordance with the strict limits imposed by the Covenant.

I do not, however, agree with the conclusion, at which the majority have arrived, that it is, therefore, preferable for a condemned person to endure being on death row, regardless in any case of the length of time spent there. The arguments of the majority are, in any case, subjective and do not represent an objective analysis of treaty norms.

In the first place, it is stated as a basic assumption that awaiting execution is preferable to execution itself. This argument cannot be valid since, as I have said, communications such as the one under consideration can be viewed only in the light of the attendant circumstances; in other words, they can be decided only on a case-by-case basis.

Furthermore, a claim such as that of the majority is completely subjective. It represents an analysis of human behaviour which expresses the feelings of the members of the Committee, but which cannot be applied across the board. For example, it would not be surprising if a person condemned to death who was suffering from a terminal or degenerative illness preferred to be executed rather than remain on death row. It is not surprising that some people commit murder for the purpose of having the death penalty imposed on them; for them, every day spent on death row constitutes real torture.

5. I also disagree with the position that, in this case, to rule that the excessive length of time which Errol Johnson spent on death row constitutes a violation of the Covenant would be to convey a "message" to States parties that they should execute those condemned to death expeditiously. This, again, is a subjective opinion of the majority and represents the feelings of the Committee members rather than a legal analysis. Moreover, it presents the additional problem of defining a priori how States parties will behave.

In that regard, I also regret that the State party has not allowed the Committee to weigh its position on the imposition of the death penalty. Indeed, this is one of the facts which leads me to dissent from the majority opinion:

(a) I do not believe that it is possible to project the future behaviour of a State which has repeatedly refused to comply with its obligations under article 40 (submission of periodic reports), since the Committee has been unable to question the Government authorities on that specific point;

(b) The ultimate result has been to benefit a State which, for at least a decade, has refused to comply with its treaty obligations, giving it the benefit of the doubt with regard to behaviour which should have been clarified under the procedure set forth in article 40.

The Committee is not competent to decide what would be preferable in cases like that of the communication under consideration. Neither should it transform this communication into a mere hypothetical case in order to induce unspecified State officials to behave in a particular manner. Any opinion should be based on the concrete circumstances of Mr. Johnson's imprisonment.

Furthermore, any decision regarding this communication should be taken on a strictly legal basis. There is no doubt that the certainty of death constitutes torture for the majority of people; the majority of those sentenced to death are in a similar position. Independently of the fact that it is my philosophical conviction that the death penalty, and therefore its corollaries (being sentenced to death and awaiting execution) constitute inhuman, cruel and degrading punishment, I must ask myself whether those facts - and, in a case such as this one, the phenomenon of death row - are in violation of the International Covenant on Civil and Political Rights.

Any opinion comes up against the fact that the Covenant does not prohibit the death penalty. It cannot, therefore, be maintained that the death row phenomenon, per se, constitutes cruel, inhuman or degrading treatment. Nor can implementation of the death penalty be prohibited.

However, all States parties must minimize the psychological torture involved in awaiting execution. This means that the State must guarantee that the suffering to be endured by those awaiting execution will be reduced to the necessary minimum.

In that regard, the following guarantees are required:

1. The legal proceedings establishing the guilt of the person condemned to death must meet

all the requirements laid down by article 14 of the Covenant;

2. The accused must have effective access to all necessary remedies until his guilt has been demonstrated beyond a doubt;

3. Reasonable time-limits must be set for the exercise of these remedies and for their review by independent courts;

4. Execution cannot take place until the condemned person's last remedy has been exhausted and until the death sentence has acquired final binding effect;

5. While awaiting execution, the condemned person must at all times be duly accorded humane treatment; inter alia, he must not be subjected unnecessarily to the torture entailed by the fact of awaiting death.

The Human Rights Committee is responsible for ensuring that the provisions of the International Covenant on Civil and Political Rights are not violated as a consequence of the execution of a sentence. I therefore emphasize that the Committee must examine the circumstances on a case-by-case basis. The Committee must establish the physical and psychological conditions to which the condemned person has been subjected in order to determine whether the behaviour of the Government authorities is in accordance with the provisions of articles 7 and 10 of the Covenant.

The Committee must therefore establish whether the laws and actions of the State, and the behaviour and conditions of the condemned person, make it possible to determine whether the time elapsed between sentencing and execution is reasonable and, on that basis, that it does not constitute a violation of the Covenant. These are the limits of the Human Rights

Committee's competence to determine whether there has been compliance with, or violation of, the provisions of the International Covenant on Civil and Political Rights.

(Signed) F. Aguilar Urbina

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]