LIFE - RIGHT TO - DEATH PENALTY

III. JURISPRUDENCE

ICCPR

- *Mbenge v. Zaire* (16/1977) (R.3/16), ICCPR, A/38/40 (25 March 1983) 134 at paras. 13 and 17.

  ...
  13. Daniel Monguya Mbenge, a Zairian citizen and former Governor of the province of Shaba, who had left Zaire in 1974 and is at present living in Brussels, was twice sentenced to capital punishment by Zairian tribunals. The first death sentence was pronounced against him by judgement of 17 August 1977, in particular for his alleged involvement in the invasion of the province of Shaba by the so-called Katangan gendarmes in March 1977. The second judgement is dated 16 March 1978. It pronounces the death sentence for "treason" and "conspiracy" without providing facts to establish these charges. Daniel Monguya Mbenge, learned about the trials through the press. He had not been duly summoned at his residence in Belgium to appear before the tribunals. An amnesty decree of 28 June 1978 (Act 78-023 of 29 December 1978) covering offences "against the external or internal security of the State or any other offence against the laws and regulations of the Republic of Zaire", committed by Zairians having sought refuge abroad, was restricted to persons returning to Zaire before 30 June 1979.
  ...
  17. Daniel Monguya Mbenge also alleges a breach of article 6 of the Covenant. Paragraph 2 of that article provides that sentence of death may be imposed only "in accordance with the law [of the State party] in force at the time of the commission of the crime and not contrary to the provisions of the Covenant". This requires that both the substantive and procedural law in the application of which the death penalty was imposed was not contrary to the provisions of the Covenant and also that the death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant. Consequently, the failure of the State party to respect the relevant requirements of article 14(3) leads to the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6(2).

- *Robinson v. Jamaica* (223/1987), ICCPR, A/44/40 (30 March 1989) 241 at paras. 10.3, 10.4 and 12.

  ...
  10.3 The main question before the Committee is whether a State party is under an obligation itself to make provision for effective representation by counsel in a case concerning a capital

offence, should the counsel selected by the author for whatever reason decline to appear. The Committee, noting that article 14, paragraph 3 (d) stipulates that everyone shall have "legal assistance assigned to him, in any case where the interests of justice so require", believes that it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted unfair trial.

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

...

12. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy the violations suffered by the author, through his release, and to ensure that similar violations do not occur in the future.

- *Pratt and Morgan v. Jamaica* (210/1986 and 225/1987), ICCPR, A/44/40 (6 April 1989) 222 at paras. 13.6, 13.7, 14 and 15.

...

13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but "cruel, inhuman and degrading treatment". The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment as an assessment of the circumstances of each case would be necessary. In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for executing and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to the individual concerned. In the authors' case, death warrants were issued twice by the Governor General, first on 13 February 1987 and again on 23 February 1988.

LIFE - RIGHT TO - DEATH PENALTY

It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 20 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7.

14. The Human Rights Committee...is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

> (a) Article 7, because Mr. Pratt and Mr. Morgan were not notified of a stay of execution granted them on 23 February 1987 until 45 minutes before their scheduled execution on 24 February 1987...

...

15. It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence.

See also:

- *Simms v. Jamaica* (541/1993), ICCPR, A/50/40 vol. II (3 April 1995) 164 (CCPR/C/53/D/541/1993) at para. 6.5.
- *Rogers v. Jamaica* (494/1992), ICCPR, A/50/40 vol. II (4 April 1995) 149 (CCPR/C/53/D/494/1992) at para. 6.2.
- *Chaplin v. Jamaica* (596/1994), ICCPR, A/51/40 vol. II (2 November 1995) 197 (CCPR/C/55/D/596/1994) at para. 8.1.
- *P. Taylor v. Jamaica* (707/1996), ICCPR, A/52/40 vol. II (18 July 1997) 234 (CCPR/C/60/D/707/1996) at paras. 8.5 and 10.

- *Pinto v. Trinidad and Tobago* (232/1987), ICCPR, A/45/40 vol. II (20 July 1990) 69 at paras. 12.6 and 13.1.

...

12.6 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant.

LIFE - RIGHT TO - DEATH PENALTY

As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal." In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

...

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

For dissenting opinion in this context see, Pinto v. Trinidad and Tobago (232/1987), ICCPR, A/45/40 vol. II (20 July 1990) 69 at Individual Opinion by Mr. Bertil Wennergren, 75.

See also:

- *Henry v. Jamaica* (230/1987), ICCPR, A/47/40 (1 November 1991) 210 (CCPR/C/43/D/230/1987).
- *E. Johnson v. Jamaica* (588/1994), ICCPR, A/51/40 vol. II (22 March 1996) 174 (CCPR/C/56/588/1994) at paras. 8.7, 8.9 and 9.
- *Morrisson and Graham v. Jamaica* (461/1991), ICCPR, A/51/40 vol. II (25 March 1996) 43 (CCPR/C/56/D/461/1991) at paras. 5.13 and 10.6.
- *Kelly v. Jamaica* (537/1993), ICCPR, A/51/40 vol. II (17 July 1996) 98 (CCPR/C/57/D/537/1993) at para. 9.8.
- *Burrell v. Jamaica* (546/1993), ICCPR, A/51/40 vol. II (18 July 1996) 121 (CCPR/C/57/D/546/1993) at paras. 9.4, 9.5 and 10.

- *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at paras. 11.4-11.6, 12.2 and 13.

...

11.4 ...[T]he Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings...What is at issue is whether the author had a right to contest the choice of his court-appointed attorney, and whether he should have been afforded an opportunity to be present during the hearing of the appeal. The author's application for leave to appeal...indicated that that he wished to be present for the hearing of his appeal. However, the State party did not offer this opportunity, since legal aid counsel had been assigned to him. Subsequently, his counsel considered that there was no

merit in the author's appeal and was not prepared to advance arguments in favour of it being granted, thus effectively leaving him without legal representation. In the circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have appointed another lawyer for his defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3 (d), have not been met.

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

11.6 As to the allegations that the delays in the execution of the sentence passed on the author amount to a violation of article 7 of the Covenant, and that the author's execution after the delays encountered would amount to an arbitrary deprivation of life, the Committee reaffirms its earlier jurisprudence pursuant to which prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for convicted prisoners. However, the situation my be different in cases involving capital punishment, although an assessment of the circumstances of each case would be necessary. c/ In the present case the Committee does not find that the author has sufficiently substantiated his claim that delay in judicial proceedings constituted for him cruel, inhuman and degrading treatment under article 7.

...

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

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

Notes

...

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

c/ See Communication Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*), final Views adopted 6 April 1989, para. 13.6.

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See also:

- *Steadman v. Jamaica* (528/1993), ICCPR, A/52/40 vol. II (2 April 1997) 22 (CCPR/C/59/D/528/1993) at paras. 10.3 and 10.4.
- *Yasseen and Thomas v. Guyana* (676/1996), ICCPR, A/53/40 vol. II (30 March 1998) 151 (CCPR/C/62/D/676/1996) at para. 7.8.

- *Kelly v. Jamaica* (253/1987), ICCPR, A/46/40 (8 April 1991) 241 (CCPR/C/41/D/253/1987) at paras. 3.8, 5.4 and 5.7.

...

3.8 ...[T]he author affirms that he is the victim of a violation of article 10 of the Covenant, since the treatment he is subjected to on death row is incompatible with the respect for the inherent dignity of the human person. In this context, he encloses a copy of a report about the conditions of detention on death row at St. Catherine Prison, prepared by a United States non-governmental organization, which describes the deplorable living conditions prevailing on death row. More particularly, the author claims that theses conditions put his health at considerable risk, adding that he receives insufficient food, of very low nutritional value, that the has no access whatsoever to recreational or sporting facilities and that he is locked in his cell virtually 24 hours a day. It is further submitted that the prison authorities do not provide for even basic hygienic facilities, adequate diet, medical or dental care, or any type of educational services. Taken together, these conditions are said to constitute a breach of article 10 of the Covenant. The author refers to the Committee's jurisprudence in this regard.a/

...

5.4 As to the substance of the author's allegations of violations of the Covenant, the Committee notes with concern that several requests for clarifications notwithstanding, the State party has confined itself to the observation that the facts as submitted seek to raise issues of facts and evidence that the Committee is not competent to evaluate; it has not addressed the author's specific allegations under articles...10...of the Covenant. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, in general terms, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been sufficiently substantiated.

...

LIFE - RIGHT TO - DEATH PENALTY

5.7 Inasmuch as the author's claim under article 10 is concerned, the Committee reaffirms that the obligation to treat individuals with respect for the inherent dignity of the human person encompasses the provision of *inter alia*, adequate medical care during detention. a/ The provision of basic sanitary facilities to detained persons equally falls within the ambit of article 10. The Committee further considers that the provision of inadequate food to detained individuals and the total absence of recreational facilities does not, save under exceptional circumstances, meet the requirements of article 10. In the author's case, the State party has not refuted the author's allegation that he contracted health problems as a result of a lack of basic medical care, and that he is only allowed out of his cell for 30 minutes each day. As a result, his right under article 10, paragraph 1, of the Covenant has been violated.

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Notes

a/ See final views in para. 12.7 of Communication No.232/1987 (*Daniel Pinto v. Trinidad and Tobago*), adopted on 20 July 1990.

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See also:

- *Henry v. Jamaica* (610/1995), ICCPR, A/54/40 vol. II (20 October 1998) 45 (CCPR/C/64/D/610/1995) at para. 7.3.

- *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at para. 7.6.

...

7.6 ...A remedy is not "available" within the meaning of the Optional Protocol where, as in the instant case, no legal aid is made available in respect of constitutional motions, and no lawyer is willing to represent the author on a *pro bono* basis. The Committee further reiterates that in capital punishment cases, legal aid should not only be made available; it should also enable counsel to prepare his client's defence in circumstances that can ensure justice. c/

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Notes

...

c/ See [Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), vol. II], annex IX, sect. J, Communication No.250/1987 (*Carlton Reid v. Jamaica*), Views adopted on 20 July 1990, para. 13.

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LIFE - RIGHT TO - DEATH PENALTY

See also:

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at para. 5.4.

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

...

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

8.4 On the basis of the material placed before it, and bearing in mind particularly that this is a capital punishment case and that the author was unable to review the statements of the prosecution's witnesses with counsel, the Committee considers that the time for consultation was insufficient to ensure adequate preparation of the defence, in respect of both trial and appeal, and that the requirements of article 14, paragraph 3(b), were not met. As a result, article 14, paragraph 3(e), was also violated, since the author was unable to obtain the testimony of a witness on his behalf under the same conditions as testimony of witnesses against him. On the other hand, the material before the Committee does not suffice for a finding of a violation of article 14, paragraph 3(d), in respect of the conduct of the appeal: this provision does not entitle the accused to choose counsel provided to him free of charge, and while counsel must ensure effective representation in the interests of justice, there is no evidence that author's counsel acted negligently in the conduct of the appeal itself.

...

8.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction

and sentence by a higher tribunal". 7/ In the present case, since the final sentence of death 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.

...

10. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Aston Little, a victim of violations of article 14, and consequently of article 6, is entitled, according to article 2, paragraph 3(a), of the Covenant, to an effective remedy, in this case entailing his release; the State party is under an obligation to take measures to ensure that similar violations do not occur in the future.

See also:

- *Campbell v. Jamaica* (307/1988), ICCPR, A/48/40 vol. II (24 March 1993) 41 (CCPR/C/47/D/307/1988) at paras. 6.5 and 8.

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at paras. 5.4-5.6, 6.6, 6.9 and 8.

...

5.4 The Committee observes that domestic remedies within the meaning of the Optional Protocol must be both available and effective. It recalls that by submission of 10 October 1991 concerning a different case, the State party indicated that legal aid is not provided in respect of constitutional motions. d/ It is further uncontested that no lawyer in Jamaica is willing to represent the author for this purpose on a pro bono basis. In this context, the Committee observes that it is not the author's indigence that absolves him from pursuing constitutional remedies, but the State party's inability or unwillingness to provide legal aid for that purpose.

5.5 The State party has claimed, again in respect of different cases involving capital punishment, that it has no obligation under the Covenant to make legal aid available in respect of constitutional motions, as such motions do not involve the determination of a criminal charge, as required by article 14, paragraph 3 (d), of the Covenant. This issue before the Committee has not, however, been raised in the context of article 14, paragraph 3 (d), but in the context of whether domestic remedies have been exhausted.

5.6 For the above reasons, the Committee maintains that a constitutional motion does not constitute a remedy that is both available and effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. Accordingly, there is no reason to reverse its decision on admissibility of 30 March 1989.

...

6.6 Concerning the adequacy of the author's legal representation, both on trial and on appeal, the Committee recalls that it is axiomatic that legal assistance be made available to individuals facing a capital sentence. In the present case, it is uncontested that the author instructed his lawyer to raise objections to the confessional evidence, as he claimed this was obtained through maltreatment; this was not done. This failure had a clear incidence on the conduct of the appeal; the written judgement of the Court of Appeal of 19 June 1987 emphasizes that no objections were raised by the defence in respect of the confessional evidence. Furthermore, although the author had specifically indicated that he wished to be present during the hearing of the appeal, he was not only absent when the appeal was heard but, moreover, could not instruct his representative for the appeal, despite his wish to do so. Taking into account the combined effect of the above-mentioned circumstance, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have allowed the author to instruct his lawyer for the appeal, or to represent himself at the appeal proceedings. To the extent that the author was denied effective representation in the judicial proceedings and in particular as far as his appeal is concerned, the requirements of article 14, paragraph 3 (d), have not been met.

...

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

...

8. In capital punishment cases, the obligation of State parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Glenford Campbell is entitled, according to article 2, paragraph 3 (a), of the Covenant, to an effective remedy, in this case entailing his release. The State party is under an obligation to take measures to ensure that similar violations do not occur in the future.

Notes

...

d/ See... communication No. 283/1988 (*Aston Little v. Jamaica*), Committee's views adopted on 1 November 1991, [A/47/40 (1992) 268 at] paras. 7.3 and 7.4.

See also:

- *Little v. Jamaica* (283/1988), ICCPR, A/47/40 (1 November 1991) 268 (CCPR/C/43/D/283/1988) at paras. 7.3-7.6.
- *Simmonds v. Jamaica* (338/1988), ICCPR, A/48/40 vol. II (23 October 1992) 78 (CCPR/C/46/D/338/1988) at para. 7.2.
- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at paras 8.4 and 10.

- *Barrett and Sutcliffe v. Jamaica* (270/1988 and 271/1988), ICCPR, A/47/40 (30 March 1992) 246 at para. 8.4.

...

8.4 The authors have claimed a violation of article 7 on account of their prolonged detention on death row. The Committee starts by noting that this question was not placed before the Jamaican courts, nor before the Judicial Committee of the Privy Council. It further reiterates that prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons. This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of 10 years between the judgement of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal rapidly produced its written judgement and that the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors.

For dissenting opinion in this context, see Barrett and Sutcliffe v. Jamaica (270/1988 and 271/1988), ICCPR, A/47/40 (30 March 1992) 246, Individual Opinion by Ms. Christine Chanet, 252.

LIFE - RIGHT TO - DEATH PENALTY

- *Simmonds v. Jamaica* (338/1988), ICCPR, A/48/40 vol. II (23 October 1992) 78 (CCPR/C/46/D/338/1988) at paras. 8.2-8.5, 10 and Individual Opinion by Mr. Julio Prado Vallejo, Mr. Waleed Sadi and Mr. Bertil Wennergren.

...

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

8.3 In this connection, the Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings. In Mr. Simmonds' case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether he should have been notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing of the appeal, and whether he should have been afforded an opportunity to be present during the hearing of the appeal.

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

8.5 The Committee considers that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, as the final sentence of death was passed without having met

the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

...

10. The Committee is of the view that Mr. Leroy Simmonds is entitled to a remedy entailing his release. It requests the State party to provide information, within ninety days, on any relevant measures taken in respect of the Committee's views.

Notes

...

b/ Communication No. 272/1988 (*Alrick Thomas v. Jamaica*), views adopted on 31 March 1992, para. 11.4.

Individual Opinion by Mr. Julio Prado Vallejo, Mr. Waleed Sadi and Mr. Bertil Wennergren

...

The author's complaint centres on the proposition that the Court of Appeal of Jamaica failed to provide him with a fair trial.

The violations of article 14, paragraph 3 (b) and (d), and in consequence of article 6, of the Covenant are well substantiated. Where we differ is in respect of the remedy suggested to the State party by the Committee. The Committee proposes the release of the author; we do not agree with this remedy, in the light of the nature of and the circumstances under which the offence had occurred, and which were neither refuted nor confirmed because of the deficiencies in the judicial proceedings. Accordingly, the most appropriate way of remedying what occurred would be to see to it that the author will be afforded another opportunity to obtain a fair trial. This result can be obtained by assisting the author in pursuing constitutional remedies.

It should be noted in this context that it is correct that constitutional motions have been deemed by the Committee not to provide an available and effective remedy which an author must first exhaust, but that this has been the case only where the authors have had no means of their own and have not been entitled to obtain legal aid from the State party. Therefore, if the author is given such assistance ex gratia in the case, he will be in a position to seek a review of his grievances under the constitutional motions procedure, thereby making this remedy available and effective.

We thus are of the opinion that the author should be afforded the possibility of pursuing a constitutional motion by assigning to him legal aid for the purpose, so as to enable him to seek effective redress for the violations suffered.

LIFE - RIGHT TO - DEATH PENALTY

- *Francis v. Jamaica* (320/1988), ICCPR, A/48/40 vol. II (24 March 1993) 62 (CCPR/C/47/D/320/1988) at paras. 12.3, 13 and 14.

...

12.3 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". d/ In the present case, the final sentence of death was passed without there having been any possibility of appeal. Accordingly, there has also been a violation of article 6.

...

13. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, article 14, paragraphs 3 (c) and 5, and consequently article 6, of the International Covenant on Civil and Political Rights.

14. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide a right of appeal in accordance with article 14, paragraph 5, means that Mr. Francis did not receive a fair trial within the meaning of the Covenant. He is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails his release...The State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

...

d/ See CCPR/C.21/Rev.1, General Comment 6 [16], para. 7.

See also:

- *Henry v. Jamaica* (230/1987), ICCPR, A/47/40 (1 November 1991) 210 (CCPR/C/43/D/230/1987).
- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993) 28 (CCPR/C/47/D/282/1988) at paras. 10.6 and 12.
- *Hamilton v. Jamaica* (333/1988), ICCPR, A/49/40 vol. II (23 March 1994) 37 (CCPR/C/50/D/333/1988) at paras. 9.2 and 10.
- *Currie v. Jamaica* (377/1989), ICCPR, A/49/40 vol. II (29 March 1994) 73

(CCPR/C/50/D/377/1989) at paras. 13.6 and 15.

- *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988)at paras. 8.7 and 10.
- *Berry v. Jamaica* (330/1988), ICCPR, A/49/40 vol. II (7 April 1994) 20 (CCPR/C/50/D/330/1988) at paras. 12 and 14.
- *Champagnie v. Jamaica* (445/1991), ICCPR, A/49/40 vol. II (18 July 1994) 136 (CCPR/C/51/D/445/1991) at paras. 7.4 and 9.
- *G. Peart and A. Peart v. Jamaica* (464 and 482/1991), ICCPR, A/50/40 vol. II (19 July 1995) 32 (CCPR/C/54/D/464/1991) at paras. 11.8 and 13.
- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995) 35 (CCPR/C/55/D/459/1991) at paras. 10.6 and 12.

- *Collins v. Jamaica* (356/1989), ICCPR, A/48/40 vol. II (25 March 1993) 85 (CCPR/C/47/D/356/1989) at paras. 8.2 and 8.3.

...

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

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

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Notes

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

- *Smith v. Jamaica* (282/1988), ICCPR, A/48/40 vol. II (31 March 1993) 28 (CCPR/C/47/D/282/1988) at paras. 10.4 and 10.5.

...

10.4 As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms.d/ The determination of what constitutes "adequate time" requires an assessment of the circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court-appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3 (b), of the Covenant.

...

10.5 It remains for the Committee to decide whether the failure of the Court of Appeal to issue a reasoned judgement violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". e/ For the effective exercise of this right, a convicted person must have the opportunity to obtain, within a reasonable time, access to duly reasoned judgements, for every available instance of appeal. The Committee observes that the Judicial Committee of the Privy Council dismissed the author's first petition for special leave to appeal because of the absence of a written judgement of the Jamaican Court of Appeal. It further observes that over four years after the dismissal of the author's appeal in September 1984 and his petitions for leave to

appeal by the Judicial Committee in February and December 1987, no reasoned judgement had been issued, which once more deprived the author of the possibility to effectively petition the Judicial Committee. The Committee therefore finds that Mr. Smith's rights under article 14, paragraph 3 (c) and article 14, paragraph 5, of the Covenant, have been violated.

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Notes

...

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

e/ See communication Nos. 230/1987 (*R. Henry v. Jamaica*), views adopted on 1 November 1991, para. 8.4.

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- *Kindler v. Canada* (470/1991), ICCPR, A/48/40 vol. II (30 July 1993) 138 (CCPR/C/48/D/470/1991) at paras. 6.2, 6.4, 6.5, 6.7, 6.8, 13.1, 13.2, 14.1-14.6,15.1-15.3, 16 and Individual Opinion by Mr. Kurt Hendl and Mr. Waleed Sadi (concurring in part), 154 at paras. 6-9.

...

6.2 ...Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

...

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met...

LIFE - RIGHT TO - DEATH PENALTY

6.5 The Committee observed further that article 6 provides a limited authorization to States to order capital punishment within their own jurisdiction. It decided to examine on the merits the question whether the scope of the authorization permitted under article 6 extends also to allowing foreseeable loss of life by capital punishment in another State, even one with full procedural guarantees.

...

6.7 ...Canadian law does not provide for the death penalty, except in military cases. Canada may by virtue of article 6 of the Extradition Treaty seek assurances from the other State which retains the death penalty, that a capital sentence shall not be imposed. It may also, under the Treaty, refuse to extradite a person when such an assurance is not received. While the seeking of such assurances and the determination as to whether or not to extradite in their absence is discretionary under the Treaty and Canadian law, these decisions may raise issues under the Covenant. In particular, the Committee considered that it might be relevant to know whether the State party satisfied itself, before deciding not to invoke article 6 of the Treaty, that this would not involve for the author a necessary and foreseeable violation of his rights under the Covenant.

6.8 The Committee also found that the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under article 7.

...

13.1 ...[W]hat is at issue is not whether Mr. Kindler's rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

13.2 If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

14.1 With regard to a possible violation by Canada of article 6 the Covenant by its decision to extradite the author, two related questions arise:

> (a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life

in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

14.2 As to (a), the Committee recalls its General Comment on Article 6, k/ which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of article 6 also point to the desirability of abolition of the death penalty. This is an object towards which ratifying parties should strive: "All measures of abolition should be considered as progress in the enjoyment of the right to life". Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, many of them do not exercise it in practice.

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

14.4 Moreover, the Committee observes that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian Courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition.

14.5 The Committee notes that Canada has itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to question (b), namely whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility.

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

...

15.1 As regards the author's claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.

15.2 As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies." 1/ The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

15.3 In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v. United Kingdom* case m/. It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania, or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

...

16. Accordingly, the Committee concludes that the facts as submitted in the instant case do not reveal a violation of article 6 of the Covenant by Canada...

Notes

...

k/ General Comment No. 6[16] of 27 July 1982, para. 6.

l/ *Howard Martin v. Jamaica*, No. 317/1988, Views adopted on 24 March 1993, para. 12.2.

m/ European Court of Human Rights, judgement of 7 July 1989.

A. Individual Opinion by Mr. Kurt Hendl and Mr. Waleed Sadi

...

6. ...A careful examination of the material submitted by author's counsel in his initial submission and in his comments on the State party's submission reveals that this is essentially a case where a deliberate attempt is made to avoid application of the death penalty, which still remains a legal punishment under the Covenant. Here the author has not substantiated his claim that his rights under the Covenant would, with a reasonable degree of probability, be violated by his extradition to the United States.

7. As for the issues the author alleges may arise under article 6, the Committee concedes that the Covenant does not prohibit the imposition of the death penalty for the most serious crimes. Indeed, if it did prohibit it, the Second Optional Protocol on the Abolition of the Death Penalty would be superfluous. Since neither Canada nor the United States is a party to the Second Optional Protocol, it cannot be expected of either State that they ask for or that

they give assurances that the death penalty will not be imposed. The question whether article 6, paragraph 2, read in conjunction with article 6, paragraph 1, could lead to a different conclusion is, at best, academic and not a proper matter for examination under the Optional Protocol.

8. As for the issues that may allegedly arise under article 7 of the Covenant, we agree with the Committee's reference to its jurisprudence in the views on Communications Nos. 210/1986 and 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) and Nos. 270 and 271/1988 (*Barrett and Sutcliffe v. Jamaica*), in which the Committee decided that the so-called 'death row phenomenon' does not *per se* constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners. In this connection it is important to note that the prolonged periods of detention on death row are a result of the convicted person's recourse to appellate remedies. In the instant case the author has not submitted any arguments that would justify the Committee's departure from its established jurisprudence.

9. A second issue allegedly arising under article 7 is whether the method of execution - in the State of Pennsylvania by lethal injection - could be deemed as constituting cruel, inhuman or degrading treatment. Of course, any and every form of capital punishment can be seen as entailing a denial of human dignity; any and every form of execution can be perceived as cruel and degrading. But, since capital punishment is not prohibited by the Covenant, article 7 must be interpreted in the light of article 6, and cannot be invoked against it. The only conceivable exception would be if the method of execution were deliberately cruel. There is, however, no indication that execution by lethal injection inflicts more pain or suffering than other accepted methods of execution. Thus, the author has not made a *prima facie* case that execution by lethal injection may raise an issue under article 7.

For dissenting opinions in this context, see Kindler v. Canada (470/1991), ICCPR, A/48/40 vol. II (30 July 1993) 138 (CCPR/C/48/D/470/1991), Individual Opinion by Mr. Bertil Wennergren, 157, Individual Opinion by Mr. Rajsoomer Lallah, 160, Individual Opinion by Mr. Fausto Pocar, 163, Individual Opinion by Mrs. Christine Chanet, 164, Individual Opinion by Mr. Francisco Jose Aguilar Urbina, 167 at paras. 1-4 and 9-25, and Individual Opinion by Mr. Kurt Hendl and Mr. Waleed Sadi, 154 at paras. 4, 5 and 10.

See also:

- *Ng v. Canada* (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991) at paras. 6.1, 6.2, 14.1, 14.2,15.1, 15.2 and 15.4-15.7.
- *Cox v. Canada* (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at paras. 16.2-16.4 and 17.3.

LIFE - RIGHT TO - DEATH PENALTY

- *Ng v. Canada* (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991) at paras. 13.5, 15.3, 16.1-16.5, 17 and Individual Opinion by Mr. Fausto Pocar (concurring in part), 208.

...

13.5 It remains for the Committee to examine the author's claim that he is a "victim" within the meaning of the Optional Protocol because he was extradited to California on capital charges pending trial, without the assurances provided for in Article 6 of the Extradition Treaty between Canada and the United States. In this connection, it is to be recalled that (a) California had sought the author's extradition on charges which, if proven, carry the death penalty; (b) the United States requested Mr. Ng's extradition on those capital charges; (c) the extradition warrant documents the existence of a *prima facie* case against the author; (d) United States prosecutors involved in the case have stated that they would ask for the death penalty to be imposed; and (e) the State of California, when intervening before the Supreme Court of Canada, did not disavow the prosecutors' position. The Committee considers that these facts raise questions with regard to the scope of articles 6 and 7, in relation to which, on issues of admissibility alone, the Committee's jurisprudence is not dispositive. As indicated in the case of *Kindler v. Canada*, m/ only an examination on the merits of the claims will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face the death penalty.

...

15.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada did not itself charge Mr. Ng with capital offences, but extradited him to the United States, where he faces capital charges and the possible [and foreseeable] imposition of the death penalty. If Mr. Ng had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, this would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, under circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes. He was over eighteen years when the crimes of which he stands accused were committed. Finally, while the author has claimed before the Supreme Court of Canada and before the Committee that his right to a fair trial would not be guaranteed in the judicial process in California, because of racial bias in the jury selection process and in the imposition of the death penalty, these claims have been advanced in respect of purely hypothetical events, and nothing in the file supports the contention that the author's trial in

the Calaveras County Court would not meet the requirements of article 14 of the Covenant.
...
16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contented that execution by gas asphyxiation is contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. The Committee begins by noting that whereas article 6, paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7.

16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. None the less, the Committee reaffirms, as it did in its General Comment 20(44) on article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering". n/

16.3 In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, "it would be interfering to an unwarranted degree with the internal laws and practices of the United States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

16.5 The Committee need not pronounce itself on the compatibility with article 7 of methods

of execution other than that which is at issue in this case.

17. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of article 7 of the Covenant.

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Notes

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m/ See Communication No. 470/1991, Views adopted on 30 July 1993, para. 12.3.

n/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI.A, General Comment 20 (44), para. 6.

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A. Individual Opinion by Mr. Fausto Pocar

...

Regarding the claim under article 7, I agree with the Committee that there has been a violation of the Covenant, but on different grounds. I subscribe to the observation of the Committee that "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant". Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that I conclude in the present case that there has been a violation of article 7 of the Covenant.

For dissenting opinions in this context, see Ng v. Canada (469/1991), ICCPR, A/49/40 vol. II (5 November 1993) 189 (CCPR/C/49/D/469/1991), Individual Opinion by Messrs. A. Mavrommatis and W. Sadi, 209, Individual Opinion by Mr. Rajsoomer Lallah, 209, Individual Opinion by Mr. Bertil Wennergren, 209, Individual Opinion by Mr. Kurt Herndl, 210 at paras. 1-21, 23 and 24, Individual Opinion by Mr. Nisuke Ando, 215, Individual Opinion by Mr. Francisco José Aguilar Urbina, 216 at paras. 6-11 and 14, and Individual Opinion by Ms. Christine Chanet, 220.

- *Cox v. Canada* (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993) at paras. 16.1, 16.5, 17.1, 17.2, 18, and Individual Opinion by Messrs. Kurt Hendl and Waleed Sadi (concurring), 121.

...

16.1 With regard to a potential violation by Canada of article 6 of the Covenant if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its Views on Communications Nos. 470/1991

(*Kindler v. Canada*) and 469/1991 (*Chitat Ng v. Canada*). Namely, for States that have abolished capital punishment and are called to extradite a person to a country where that person may face the imposition of the death penalty, the extraditing State must ensure that the person is not exposed to a real risk of a violation of his rights under article 6 in the receiving State. In other words, if a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. In this context, the Committee also recalls its General Comment on Article 6, 35/ which provides that while States parties are not obliged to abolish the death penalty, they are obliged to limit its use.

...

16.5 While States parties must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee finds that Canada's decision to extradite without assurances was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances.

...

17.1 The Committee has further considered whether in the specific circumstances of this case, being held on death row would constitute a violation of Mr. Cox's rights under article 7 of the Covenant. While confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition have been brought to the attention of the Committee. The Committee notes also that Canada has submitted specific information about the current state of prisons in Pennsylvania, in particular with regard to the facilities housing inmates under sentences of death, which would not appear to violate article 7 of the Covenant.

17.2 As to the period of detention on death row in reference to article 7, the Committee notes that Mr. Cox has not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox is also charged did not end with sentences of death but rather of life imprisonment. Under the jurisprudence of the Committee, 36/ on the one hand, every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal, and, on the other hand, the State party must ensure that the possibilities for appeal are made available to the condemned prisoner within a reasonable time. Canada has submitted specific information showing that persons under sentence of death in the state of Pennsylvania are given every opportunity to avail themselves of several appeal instances, as well as opportunities to seek pardon or clemency. The author has not adduced evidence to show that these procedures are not made available within a reasonable time, or that there are unreasonable delays which would be imputable to the State. In these circumstances, the Committee finds that the extradition of Mr. Cox to the United States would not entail a violation of article 7 of the Covenant.

...

LIFE - RIGHT TO - DEATH PENALTY

18. The Committee...finds that the facts before it do not sustain a finding that the extradition of Mr. Cox to face trial for a capital offence in the United States would constitute a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

Notes

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35/ General Comment No. 6/16 of 27 July 1982, para. 6.

36/ Views in Communication No. 210/1986 and Communication No. 225/1987, *Earl Pratt and Ivan Morgan v. Jamaica*, para. 13.6; Communication No. 250/1987, *Carlton Reid v. Jamaica*, para. 11.6; Communication No. 270/1988 and Communication No. 271/1988, *Randolph Barrett and Clyde Sutcliffe v. Jamaica*, para. 8.4; Communication No. 274/1988, *Loxley Griffith v. Jamaica*, para. 7.4; Communication No. 317/1988, *Howard Martin v. Jamaica* , para. 12.1; and Communication No. 470/1991, *Kindler v. Canada*, para. 15.2.

Individual Opinion by Messrs. Kurt Herndl and Waleed Sadi

We concur with the Committee's finding that the facts of the instant case do not reveal a violation of either article 6 or 7 of the Covenant.

In our opinion, however, it would have been more consistent with the Committee's jurisprudence to set aside the decision on admissibility of 3 November 1993 and to declare the communication inadmissible under articles 1 and 2 of the Optional Protocol, on grounds that the author does not meet the "victim" test established by the Committee. Bearing in mind that Mr. Cox has not been tried, let alone convicted or sentenced to death, the hypothetical violations alleged appear quite remote for the purpose of considering this communication admissible.

However, since the Committee has proceeded to an examination of the merits, we would like to submit the following considerations on the scope of articles 6 and 7 of the Covenant and their application in the case of Mr. Keith Cox.

Article 6

As a starting point, we would note that article 6 does not expressly prohibit extradition to face capital punishment. Nevertheless, it is appropriate to consider whether a prohibition would follow as a necessary implication of article 6.

In applying article 6, paragraph 1, of the Covenant, the Committee must, pursuant to article 31 of the Vienna Convention on the Law of Treaties, interpret this provision *in good faith*

in accordance with the ordinary meaning to be given to the terms in their context. As to the ordinary meaning of the words, a prohibition of extradition is not apparent. As to the context of the provision, we believe that article 6, paragraph 1, must be read in conjunction with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; part of the context to be considered is also the fact that a large majority of States -- at the time of the drafting of the Covenant and still today -- retain the death penalty. One may not like this objective context, it must not be disregarded.

Moreover, the notion *in good faith* entails that the intention of the parties to a treaty should be ascertained and carried out. There is a general principle of international law according to which no State can be bound without its consent. States parties to the Covenant gave consent to certain specific obligations under article 6 of the Covenant. The fact that this provision does not address the link between the protection of the right to life and the established practice of States in the field of extradition is not without significance.

Had the drafters of article 6 intended to preclude all extradition to face the death penalty, they could have done so. Considering that article 6 consists of six paragraphs, it is unlikely that such an important matter would have been left for future interpretation. Nevertheless, an issue under article 6 could still arise if extradition were granted for the imposition of the death penalty in breach of article 6, paragraphs 2 and 5. While this has been recognized by the Committee in its jurisprudence (see the Committee's Views in Communication No. 469/1991 (*Ng v. Canada*) and No. 470/1990 (*Kindler v. Canada*)), the yardstick with which a possible breach of article 6, paragraphs 2 and 5, has to be measured, remains a restrictive one. Thus, the extraditing State may be deemed to be in violation of the Covenant only if the necessary and foreseeable consequence of its decision to extradite is that the Covenant rights of the extradited person will be violated in another jurisdiction.

In this context, reference may be made to the Second Optional Protocol, which similarly does not address the issue of extradition. This fact is significant and lends further support to the proposition that under international law extradition to face the death penalty is not prohibited under all circumstances. Otherwise the drafters of this new instrument would surely have included a provision reflecting this understanding.

An obligation not to extradite, as a matter of principle, without seeking assurances is a substantial obligation that entails considerable consequences, both domestically and internationally. Such consequences cannot be presumed without some indication that the parties intended them. If the Covenant does not expressly impose these obligations, States cannot be deemed to have assumed them. Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain. 37/

Admittedly, since the primary beneficiaries of human rights treaties are not States or governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties, where, as a general rule, the "meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." 38/ Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in article 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*. Indeed, a study of the drafting history of the Covenant reveals that when the drafters discussed the issue of extradition, they decided not to include any specific provision in the Covenant, so as to avoid conflict or undue delay in the performance of existing extradition treaties (E/CN.4/SR.154, paras. 26-57).

It has been suggested that extraditing a person to face the possible imposition of the death sentence is tantamount, for a State that has abolished capital punishment, to reintroducing it. While article 6 of the Covenant is silent on the issue of reintroduction of capital punishment, it is worth recalling, by way of comparison, that an express prohibition of reintroduction of the death penalty is provided for in article 4(3) of the American Convention on Human Rights, and that Protocol 6 to the European Convention does not allow for derogation. A commitment not to reintroduce the death penalty is a laudable one, and surely in the spirit of article 6, paragraph 6, of the Covenant. But certainly this is a matter for States parties to consider before they assume a binding obligation. Such obligation may be read into the Second Optional Protocol, which is not subject to derogation. But, as of November 1994, only 22 countries have become parties -- Canada has not signed or ratified it. Regardless, granting a request to extradite a foreign national to face capital punishment in another jurisdiction cannot be equated to the reintroduction of the death penalty.

Moreover, we recall that Canada is not itself imposing the death penalty, but merely observing an obligation under international law pursuant to a valid extradition treaty. Failure to fulfil a treaty obligation engages State responsibility for an internationally wrongful act, giving rise to consequences in international law for the State in breach of its obligation. By extraditing Mr. Cox, with or without assurances, Canada is merely complying with its obligation pursuant to the Canada-U.S. Extradition Treaty of 1976, which is, we would note, compatible with the United Nations Model Extradition Treaty.

Finally, it has been suggested that Canada may have restricted or derogated from article 6 in contravention of article 5 (2) of the Covenant (the "savings clause", see Manfred Nowak's CCPR Commentary, 1993, pp. 100 et seq.). This is not so, because the rights of persons under Canadian jurisdiction facing extradition to the United States were not necessarily broader under any norm of Canadian law than in the Covenant and had not been finally

determined until the Supreme Court of Canada issued its 1991 judgments in the *Kindler* and *Ng* cases. Moreover, this determination was not predicated on the Covenant, but rather on the Canadian Charter of Rights and Freedoms.

Article 7

The Committee has pronounced itself in numerous cases on the issue of the "death row phenomenon" and has held that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons." 39/ We concur with the Committee's reaffirmation and elaboration of this holding in the instant decision. Furthermore we consider that prolonged imprisonment under sentence of death could raise an issue under article 7 of the Covenant if the prolongation were unreasonable and attributable primarily to the State, as when the State is responsible for delays in the handling of the appeals or fails to issue necessary documents or written judgments. However, in the specific circumstances of the Cox case, we agree that the author has not shown that, if he were sentenced to death, his detention on death row would be unreasonably prolonged for reasons imputable to the State.

We further believe that imposing rigid time limits for the conclusion of all appeals and requests for clemency is dangerous and may actually work against the person on death row by accelerating the execution of the sentence of death. It is generally in the interest of the petitioner to remain alive for as long as possible. Indeed, while avenues of appeal remain open, there is hope, and most petitioners will avail themselves of these possibilities, even if doing so entails continued uncertainty. This is a dilemma inherent in the administration of justice within all those societies that have not yet abolished capital punishment.

Notes

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37/ Oppenheim, International Law, 1992 edition, Vol. 1, p. 1271.

38/ This corresponds to the principle of interpretation known as *in dubio mitius*. Ibid., p. 1278.

39/ Views on Communication No. 210/1986 and Communication No. 225/1987 (*Earl Pratt and Ivan Morgan v. Jamaica*) adopted on 6 April 1989, paragraph 13.6. This holding has been reaffirmed in some ten subsequent cases, including Communication No. 270/1988 and Communication No. 271/1988 (*Randolph Barrett & Clyde Sutcliffe v. Jamaica*), adopted on 30 March 1992, paragraph 8.4, and Communication No. 470/1991 (*Kindler v. Canada*), adopted on 30 July 1993, paragraph 15.2.

LIFE - RIGHT TO - DEATH PENALTY

For dissenting opinions in this context, see Cox v. Canada (539/1993), ICCPR, A/50/40 vol. II (31 October 1994) 105 (CCPR/C/52/D/539/1993), Individual Opinion by Mrs. Rosalyn Higgins, 119, Individual Opinion by Mrs. Elizabeth Evatt, 120, Individual Opinion by Mr. Tamar Ban (dissenting in part), 124, Individual Opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar, 126, Individual Opinion by Mr. Rajsoomer Lallah, 128, and Individual Opinion by Mr. Bertil Wennergren, 129.

- *Francis v. Jamaica* (606/1994), ICCPR, A/50/40 vol. II (25 July 1995) 130 (CCPR/C/54/D/606/1994) at paras. 9.1 and 9.2.

  ...
  9.1 The Committee must determine whether the author's treatment in prison, particularly during the nearly 12 years that he spent on death row following his conviction on 26 January 1981 until the commutation of his death sentence on 29 December 1992 entailed violations of articles 7 and 10 of the Covenant. With regard to the "death row phenomenon", the Committee reaffirms its well established jurisprudence that prolonged delays in the execution of a sentence of death do not *per se* constitute cruel, inhuman or degrading treatment. On the other hand, each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.

  9.2 In the instant case, the Committee finds that the failure of the Jamaican Court of Appeal to issue a written judgment over a period of more than 13 years, despite repeated requests on Mr. Francis' behalf, must be attributed to the State party. Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author's confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author's description of the prison conditions, including his allegations about regular beatings inflicted upon him by warders, as well as the ridicule and strain to which he was subjected during the five days he spent in the death cell awaiting execution in February 1988, which the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica's obligations under articles 7 and 10, paragraph 1, of the Covenant.

LIFE - RIGHT TO - DEATH PENALTY

- *Lubuto v. Zambia* (390/1990), ICCPR, A/51/40 vol. II (31 October 1995) 11 (CCPR/C/55/D/390/1990) at para. 7.2 and Individual Opinion by Nisuke Ando (concurring), 16.

...
7.2 The Committee notes that the author was convicted and sentenced to death under a law that provides for the imposition of the death penalty for aggravated robbery in which firearms are used. The issue that must accordingly be decided is whether the sentence in the instant case is compatible with article 6, paragraph 2, of the Covenant, which allows for the imposition of the death penalty only "for the most serious crimes". Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2 , of the Covenant.

Individual Opinion by Nisuke Ando

I do not oppose the Committee's Views in the present case. However, with respect to the statement in the Views that "use of firearms did not produce the death or wounding of any person", I would like to add the following:

Certain categories of acts are classified as "crimes" because they create a grave danger which may result in death or irreparable harm to many and unspecified persons. Such crimes include bombing of busy quarters, destruction of reservoirs, poisoning of drinking water, gassing in subway stations and probably espionage in war-time. In my view, the imposition of the severest punishment, including death penalty where applicable, could be justified against these crimes, even if they do not result for one reason or another in the death of or injury to any person.

- *E. Johnson v. Jamaica* (588/1994), ICCPR, A/51/40 vol. II (22 March 1996) 174 (CCPR/C/56/588/1994) at paras. 8.1-8.7, 8.9 and 9.

...
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". d/ 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. That 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.

Notes

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d/ [See Official Records of the General Assembly,] Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, General Comment No. 6 (16), para. 6; see also preamble to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (General Assembly resolution 44/128 of 15 December 1989).

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For dissenting opinions in this context, see E. Johnson v. Jamaica (588/1994), ICCPR, A/51/40 vol. II (22 March 1996) 174 (CCPR/C/56/588/1994), Individual Opinion by Christine Chanet, 183, Individual Opinion by Prafullachandra Natwarlal Bhagwati, Marco Tulio Bruni Celli, Fausto Pocar and Julio Prado Vallejo, 186 and Individual Opinion by Francisco José Aguilar Urbina, 187.

See also:

- *Hylton v. Jamaica* (600/1994), ICCPR, A/51/40 vol. II (16 July 1996) 224 (CCPR/C/57/D/600/1994) at para. 8 and Individual Opinion by Francisco José Aguilar Urbina (dissenting), 230.
- *Lewis v. Jamaica* (527/1993), ICCPR, A/51/40 vol. II (18 July 1996) 89 (CCPR/C/57/D/527/1993) at paras. 2.4, 6.9, 10.2 and Individual Opinion by Francisco José Aguilar Urbina (concurring), 97.
- *Spence v. Jamaica* (599/1994), ICCPR, A/51/40 vol. II (18 July 1996) 219 (CCPR/C/57/D/599/1994) at para. 7.1 and Individual Opinion by Francisco José Aguilar Urbina (dissenting in part), 223.
- *Sterling v. Jamaica* (598/1994), ICCPR, A/51/40 vol. II (22 July 1996) 214 (CCPR/C/57/D/598/1994) at para. 8.1.
- *Adams v. Jamaica* (607/1994), ICCPR, A/52/40 vol. II (30 October 1996) 163 (CCPR/C/58/D/607/1994) at paras. 8.1 and 8.2.
- *McLawrence v. Jamaica* (702/1996), ICCPR, A/52/40 vol. II (18 July 1997) 225 (CCPR/C/60/D/702/1996) at paras. 5.3 and 5.4.
- *Edwards v. Jamaica* (529/1993), ICCPR, A/52/40 vol. II (28 July 1997) 28 (CCPR/C/60/D/529/1993) at para. 8.2.
- *LaVende v. Trinidad and Tobago* (554/1993), ICCPR, A/53/40 vol. II (29 October 1997) 8 (CCPR/C/61/D/554/1993) at paras. 5.2-5.7 and Individual Opinion by Fausto Pocar, by Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Pilar Gaitan de Pombo and Mr. Julio Prado Vallejo and Mr. Maxwell Yalden (dissenting), 14.
- *Bickeroo v. Trinidad and Tobago* (555/1993), ICCPR, A/53/40 vol. II (29 October 1997) 15 (CCPR/C/61/D/555/1993) at paras. 5.2-5.7 and Individual Opinion by F. Pocar, P. N. Bhagwati, C. Chanet, P. Gaitan de Pombo, J. Prado Vallejo and M. Yalden (dissenting), 20.
- *Henry v. Jamaica* (610/1995), ICCPR, A/54/40 vol. II (20 October 1998) 45 (CCPR/C/64/D/610/1995) at paras. 7.1-7.3.
- *Forbes v. Jamaica* (649/1995), ICCPR, A/54/40 vol. II (20 October 1998) 127 (CCPR/C/64/D/649/1995) at paras. 7.3-7.5.

LIFE - RIGHT TO - DEATH PENALTY

- *Colin Johnson v. Jamaica* (653/1995), ICCPR, A/54/40 vol. II (20 October 1998) 135 (CCPR/C/64/D/653/1995) at para. 8.1.
- *Amore v. Jamaica* (634/1995), ICCPR, A/54/40 vol. II (23 March 1999) 281 at para. 6.3.
- *Gonzalez v. Trinidad and Tobago* (673/1995), ICCPR, A/54/40 vol. II (23 March 1999) 305 at para. 5.3.

- *Morrisson and Graham v. Jamaica* (461/1991), ICCPR, A/51/40 vol. II (25 March 1996) 43 (CCPR/C/56/D/461/1991) at para. 5.10.

...

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

See also:

- *Campbell v. Jamaica* (248/1987), ICCPR, A/47/40 (30 March 1992) 232 at para. 6.5.
- *Thomas v. Jamaica* (272/1988), ICCPR, A/47/40 (31 March 1992) 253 at para. 11.4.
- *Wright v. Jamaica* (349/1989), ICCPR, A/47/40 (27 July 1992) 300 (CCPR/C/45/D/349/1989) at para. 8.4.

LIFE - RIGHT TO - DEATH PENALTY

- *Price v. Jamaica* (572/1994), ICCPR, A/52/40 vol. II (6 November 1996) 153 (CCPR/C/58/D/572/1994) at para. 9.3.

...

9.3 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant...In the present case, since the final sentence of death was passed without having observed the requirement of effective representation on appeal as set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated. The Committee notes that the State party has commuted the author's death sentence and considers that this constitutes sufficient remedy for the violation of article 6, paragraph 2, in this case.

See also:

- *Richards v. Jamaica* (535/1993), ICCPR, A/52/40 vol. II (31 March 1997) 38 (CCPR/C/59/D/535/1993) at paras. 7.5 and 9.
- *Aliev v. Ukraine* (781/1997), ICCPR, A/58/40 vol. II (7 August 2003) 52 (CCPR/C/78/D/781/1997) at para. 7.4.

- *A. R. J. v. Australia* (692/1996), ICCPR, A/52/40 vol. II (28 July 1997) 205 (CCPR/C/60/D/692/1996) at paras. 6.8-6.13, 6.15 and 7.

...

6.8 What is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

6.9 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

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

(a) Does the requirement under article 6, paragraph 1, to protect the author's

right to life and Australia's accession to the Second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of deportation to Iran?

(b) Do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to Iran?

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

6.11 The Committee notes that article 6, paragraph 1, of the Covenant must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Australia has not charged the author with a capital offence but intends to deport him to Iran, a State which retains capital punishment. If the author is exposed to a real risk of a violation of article 6, paragraph 2, in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1.

6.12 In the instant case, the Committee observes that Mr. J.'s allegation that his deportation to Iran would expose him to the "necessary and foreseeable consequence" of a violation of article 6 has been refuted by the evidence which has been provided by the State party. Firstly and most importantly, the State party has argued that the offence of which he was convicted in Australia does not carry the death penalty under Iranian criminal law; the maximum prison sentence for trafficking the amount of cannabis the author was convicted of in Australia would be five years in Iran, i.e. less than in Australia. Secondly, the State party has informed the Committee that Iran has manifested no intention to arrest and prosecute the author on capital charges, and that no arrest warrant against Mr. J. is outstanding in Iran. Thirdly, the State party has plausibly argued that there are no precedents in which an individual in a situation similar to the author's has faced capital charges and been sentenced to death.

6.13 While States parties must be mindful of their obligations to protect the right to life of individuals subject to their jurisdiction when exercising discretion as to whether or not to deport said individuals, the Committee does not consider that the terms of article 6 necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment. The evidence before the Committee reveals that both the judicial and immigration instances seized of the case heard extensive arguments as to whether the author's deportation to Iran would expose him to a real risk of violation of article 6. In the light of these circumstances, and especially bearing in mind the considerations in paragraph 6.12

above, the Committee considers that Australia would not violate the author's rights under article 6 if the decision to deport him to Iran is implemented.

...

6.15 ...In the Committee's opinion, the author has failed to provide material evidence in substantiation of his claim that if deported, the Iranian judicial authorities would be likely to violate his rights under article 14, paragraphs 1 and 3, and that he would have no opportunity to challenge such violations. In this connection, the Committee notes the information provided by the State party that there is provision for legal representation before the tribunals which would be competent to examine the author's case in Iran, and that there is provision for review of conviction and sentence handed down by these courts by a higher tribunal. The Committee recalls that there is no evidence that Mr. J. would be prosecuted if returned to Iran. It cannot therefore be said that a violation of his rights under article 14, paragraphs 1 and 3, of the Covenant would be the necessary and foreseeable consequence of his deportation to Iran.

7. The Human Rights Committee...is of the view that the facts as found by the Committee do not reveal a violation by Australia of any of the provisions of the Covenant.

- *Williams v. Jamaica* (609/1995), ICCPR, A/53/40 vol. II (4 November 1997) 63 (CCPR/C/61/D/609/1995) at paras. 6.2 and 6.4.

...

6.2 As to counsel's claim that the execution of a mentally disturbed individual like Mr. Williams would constitute a violation of articles 6 and 7 of the Covenant, the Committee considers that this has become moot with the commutation of the death sentence.

...

6.4 Counsel has claimed a violation of articles 7 and 10, paragraph 1, because of the length of the author's detention on death row, which, at the time of submission of the communication was six years and by the time of commutation of the sentence nearly seven years. The Committee reiterates its jurisprudence that prolonged detention on death row does not *per se* amount to a violation of articles 7 and 10, paragraph 1, of the Covenant in the absence of further compelling circumstances. On the other hand, each case must be considered on its own merits, bearing in mind the psychological impact of detention on death row on the convicted prisoner. 6/

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Notes

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6/ See Committee's Views on Communication No. 606/1994 (*Clement Francis v. Jamaica*), adopted on 25 July 1995, paragraph 9.1.

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LIFE - RIGHT TO - DEATH PENALTY

- *G. T. v. Australia* (706/1996), ICCPR, A/53/40 vol. II (4 November 1997) 184 (CCPR/C/61/D/706/1996) at paras. 8.1-8.5 and 9.

...

8.1 What is at issue in this case is whether by deporting T. to Malaysia, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

8.2 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

8.3 The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol , to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.

8.4 In cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases. The Australian Government is deporting T. from its territory because he has no entitlement to remain in Australia; Malaysia has not requested T.'s return. Although the Committee considers that the "assurances" given by the Malaysian Government do not as such preclude the possibility of T.'s prosecution for exporting or possessing drugs, nothing in the information before the Committee points to any intention on the part of Malaysian authorities to prosecute T. The State party itself has made investigations into the possibility of the imposition of the death sentence for T. and has been informed that in similar cases no prosecution has occurred. In the circumstances, it cannot be concluded that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death.

8.5 The Committee therefore concludes that Australia would not violate T.'s rights under article 6 of the Covenant and article 1 of the Second Optional Protocol if the decision to deport him were to be implemented.

...

9. The Human Rights Committee...is of the view that the facts before it do not reveal a violation by Australia of any of the provisions of the Covenant.

For dissenting opinion in this context, see G.T. v. Australia (706/1996), ICCPR, A/53/40 vol. II (4 November 1997) 184 (CCPR/C/61/D/706/1996), Individual Opinion by Eckart Klein and David Kretzmer, 193 at paras. 1-6.

- *McLeod v. Jamaica* (734/1997), ICCPR, A/53/40 vol. II (31 March 1998) 213 (CCPR/C/62/D/734/1997) at paras. 6.5, 7, 8 and Individual Opinion by Mr. Martin Scheinin (concurring), 219.

...

6.5 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In this case, the author was denied an opportunity to appeal his case since his counsel did not inform him that he was not going to forward any grounds of appeal. This means that the final sentence of death in Mr. McLeod's case was passed without having met the requirements for a fair trial set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

7. The Human Rights Committee...is of the view that the facts before it disclose violations of article 10, paragraph 1; and 14 paragraph 3(b) and (d), and consequently of article 6 of the Covenant.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing a new appeal or should the State party not be in a position to comply with this recommendation, his release.

Individual Opinion by Mr. Martin Scheinin

While I associate myself with the Committee's views as regards all the findings on violations of the substantive articles of the Covenant, I wish to clarify an issue related to the obligation of the State party to remedy the violations of the Covenant to the author.

...

In death penalty cases the Committee has after finding a violation of the Covenant often, but not always, recommended either commutation or release as an effective remedy. Both of these remedies make it clear that when a person has been sentenced to death in violation of the Covenant or treated contrary to the provisions of the Covenant while awaiting execution,

the remedy should include an irreversible decision not to implement the death penalty. The Committee has been particularly clear and consistent on this point when the requirements of a fair trial under article 14 have been found to be violated. In several cases, including the present one, the Committee has explicitly stated that the imposition of the death penalty after a procedure that does not meet the requirements of article 14 entails a violation of the right to life, i.e. article 6 of the Covenant.

In cases involving a violation of articles 7 and/or 10 of the Covenant in relation to persons on death row, the Committee has not been consistent in formulating its specific recommendations as to the remedy. This cannot, of course, alter the main rule that the victim is entitled to an effective remedy under article 2, paragraph 3, of the Covenant. In the final paragraph of the views in its most important case related to the death penalty, the case of *Earl Pratt and Ivan Morgan v. Jamaica* (Communication Nos. 210/1986 and 225/1987) the Committee gave a clear and convincing answer to the question what constitutes "effective remedy" to a person awaiting execution:

> "Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of *any of its obligations under the Covenant*. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 *are entitled to a remedy; the necessary prerequisite* in the particular circumstances is the commutation of the sentence." (italics added)

In the light of what has been said above the pronouncement in paragraph 8 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would mean either a new consideration of the appeal or the author's release. In the specific context of the present views being issued after Jamaica's withdrawal from the Optional Protocol procedure has taken effect in accordance with article 12 of the Optional Protocol, I would have seen it more appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new appeal or release. This would have made it more clear than the Committee's formulation of paragraph 8 of the views that an "effective remedy" in a case in which a violation of article 10, paragraph 1, article 14, paragraph 3 (b) and (d), and of article 6 is found must include, first and foremost, absolute protection of the victim against execution. As the Committee's views in *Pratt and Morgan* suggest, this must in my opinion be the understanding of what constitutes an effective remedy in every case where a violation of the Covenant is established in relation to a person awaiting execution. To a person on

death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.

- *Shaw v. Jamaica* (704/1996), ICCPR, A/53/40 vol. II (2 April 1998) 164 (CCPR/C/62/D/704/1996) at para. 7.2.

...
7.2 The author claims that his execution after a lengthy period on death row in conditions which amount to inhuman and degrading treatment would be contrary to article 7 of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case three and a half years - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however, constitute a violation of articles 7 or 10 of the Covenant. Mr. Shaw alleges that he is detained in particularly bad and insalubrious conditions on death row; the claim is supported by reports which are annexed to counsel's submission. There is a lack of sanitation, light, ventilation and bedding; confinement for 23 hours a day and inadequate health care. Counsel's submission takes up the main arguments of these reports and shows that the prison conditions affect Steve Shaw himself, as a condemned prisoner on death row. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Shaw directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1, of the Covenant.

See also:

- *Desmond Taylor v. Jamaica* (705/1996), ICCPR, A/53/40 vol. II (2 April 1998) 174 (CCPR/C/62/D/705/1996) at para. 7.4.
- *Marshall v. Jamaica* (730/1996), ICCPR, A/54/40 vol. II (3 November 1998) 228 (CCPR/C/64/D/730/1996) at para. 5.7.

- *Chadee et al. v. Trinidad and Tobago* (813/1998), ICCPR, A/53/40 vol. II (29 July 1998) 242 (CCPR/C/63/D/813/1998) at para. 10.2.

...
10.2 With regard to the authors' additional claim that their appeal has been expedited in order to ensure their execution, in violation of articles 6, 7, and 14 of the Covenant, the Committee has taken note of the statistics provided by both counsel and the State party in this respect. In this context, the Committee recalls that the State party is under an obligation, under article 14 (3)(c) and (5) of the Covenant, to ensure that appeals are heard without

undue delay. The Committee should nevertheless examine whether the period of time between conviction and the hearing of the appeal is sufficient for the defence to prepare the appeal. After having examined the information before it, the Committee considers that it has not been shown that the period of time in the instant case was insufficient to prepare the appeal by defence counsel. The Committee concludes therefore that the facts before it do not show that articles 6, 7 and 14 have been violated in this respect.

- *Perkins v. Jamaica* (733/1997), ICCPR, A/53/40 vol. II (30 July 1998) 205 (CCPR/C/63/D/733/1997) at para. 11.6.

...
11.6 The author has claimed that he was born in September 1976 and under 18 years of age when the crime for which he was convicted was committed, and that the imposition of the death sentence against him is therefore in violation of article 6, paragraph 2, of the Covenant. The Committee notes that the State party has furnished a birth certificate and a school admission record on which the date of birth of Andrew Perkins is recorded as September 1971. Counsel has challenged these documents and argues that they do not relate to the author. He has, however, not provided any document invalidating the State party's assertion that Andrew Perkins was born in 1971. In this connection, the Committee notes that counsel has not challenged the State party's statement that this is the birth certificate that the author himself sent to the Defence Force when applying to enlist therein. The only document indicating the author's date of birth as September 1976 is the application for legal aid, which was filled out by the author himself and, although showing the author's belief at the time, has no probative value. The Committee observes that it is incumbent on the State party to make enquiries if any doubt is raised as to whether the accused in a capital case is a minor. In the instant case, however, the Committee finds that the author was not under 18 years of age at the time of the offence and there is no basis to find a violation of article 6, paragraph 5, of the Covenant.

- *Daley v. Jamaica* (750/1997), ICCPR, A/53/40 vol. II (31 July 1998) 235 (CCPR/C/63/D/750/1997) at para. 7.6.

...
7.6 The author has claimed that his continued detention on death row in itself, as well the conditions of this detention, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee reaffirms its constant jurisprudence 6/ that detention on death row for a specific period - in this case two years and seven months after his first conviction, and two years and eight months after his second conviction - does not violate the Covenant in the absence of further compelling circumstances. The conditions of detention may, however,

constitute a violation of articles 7 and 10 of the Covenant. Mr. Daley alleges that he is detained in particularly bad and insalubrious conditions on death row; this claim is supported by reports which are annexed to counsel's submission. There is lack of sanitation, light, ventilation and bedding. Counsel's submission takes up the main elements of these reports and shows that the prison conditions affect Silbert Daley himself, as a prisoner on death row. Furthermore, the author has claimed that he has been assaulted regularly by other inmates, leading to his hospitalization, and that the State party has taken no measures to protect him. The author's claims have not been refuted by the State party, which remains silent on the issue. The Committee considers that the conditions of detention described by counsel and which affect Mr. Daley directly are such as to violate his right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

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Notes

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6/ See *inter alia*, the Committee's Views in cases Nos. 588/1994 (*Erroll Johnson v. Jamaica*), adopted 22 March 1996, paragraphs 8.1 to 8.6; 554/1993 (*Robinson Lavende v. Trinidad & Tobago*), adopted 29 October 1997, paragraphs 5.2 to 5.7; and 555/1993 (*Ramcharan Bickaroo v. Trinidad & Tobago*), adopted 29 October 1997, paragraphs 5.2 to 5.7.

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- *C. Johnson v. Jamaica* (592/1994), ICCPR, A/54/40 vol. II (20 October 1998) 20 (CCPR/C/64/D/592/1994) at paras. 10.3, 10.4, 11 and Individual Opinion by David Kretzmer (concurring), 29.

...

10.3 With regard to the author's death sentence, the Committee notes that the State party has not challenged the authenticity of the birth certificate presented by the author, and has not refuted that the author was under eighteen years of age when the crime for which he was convicted was committed. As a consequence, the imposition of the death sentence upon the author constituted a violation of article 6, paragraph 5, of the Covenant.

10.4 In the circumstances, since the author of this communication was sentenced to death in violation of article 6 (5) of the Covenant, and the imposition of the death sentence upon him was thus void *ab initio*, his detention on death row constituted a violation of article 7 of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 6, paragraph 5, 7, and 14, paragraph 3(d), of the Covenant.

LIFE - RIGHT TO - DEATH PENALTY

Individual Opinion by David Kretzmer

I concur in the view of the Committee that holding the author on death row in this case amounted to cruel and inhuman punishment. However, since the Committee has consistently held in the past that the time on death row does not of itself amount to a violation of article 7, I think is important to set out the grounds for the different result in this case.

The Committee's view that the mere length of time spent on death row by a person sentenced to death does not amount to cruel and inhuman punishment rests on the notion that holding otherwise would imply that a State party could avoid violating the Covenant by executing a condemned person. As the Covenant strongly suggests that abolition of the death penalty is desirable, the Committee could not accept an interpretation of the Covenant the implication of which was that the Covenant would be violated if a State party refrained from executing a person, but not if it executed him.

This view of the Committee obviously holds only when imposing and carrying out the death sentence are not of themselves a violation of the Covenant. The logic behind the view does not apply when the State party would violate the Covenant by imposing and carrying out the death sentence. In such a case the violation involved in imposing the death penalty is compounded by holding the condemned person on death row, during which time he suffers from the anxiety over his pending execution. This detention on death row may certainly amount to cruel and inhuman punishment, especially when that detention lasts longer than necessary for the domestic legal proceedings required to correct the error involved in imposing the death sentence.

In the present case, as the Committee has held in paragraph 10.4, imposition of the death penalty was inconsistent with the State party's obligation under article 6, paragraph 5 of the Covenant. The author subsequently spent almost eight years on death row, before his sentence was commuted to life imprisonment following reclassification of his offence as non-capital. In these circumstances the detention of the author on death row amounted to cruel and inhuman punishment, in violation of article 7 of the Covenant.

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

...
7.2 The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice. The Committee considers that in a capital case, when counsel for the accused who are was not experienced

in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee is of the opinion that in the instant case, Mr. Phillip's counsel should have been granted an adjournment. In the circumstances, the Committee finds that Mr. Phillip was not effectively represented on trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

- *Campbell v. Jamaica* (618/1995), ICCPR, A/54/40 vol. II (20 October 1998) 78 (CCPR/C/64/D/618/1995) at paras. 7.1 and 7.2.

...
7.1 The author has claimed that his continued detention on death row in itself, as well the conditions of this detention, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case for about five years before the sentence was commuted - does not violate the Covenant in the absence of further compelling circumstances.

7.2 Mr. Campbell also alleges that he is detained in particularly bad and insalubrious conditions on death row. There is lack of sanitation, light, ventilation and bedding. He is in his cell 22 hours a day, his cell is infested with rats and cockroaches, and he is isolated from others. Furthermore, the author has claimed that he has been threatened by warders and that the State party has taken no measures to protect him. The author's claims have not been refuted by the State party. The Committee considers that the conditions of detention described by the author and his counsel are such as to violate Mr. Campbell's right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

- *Morrison v. Jamaica* (663/1995), ICCPR, A/54/40 vol. II (3 November 1998) 148 (CCPR/C/64/D/663/1995) at paras. 8.6, 8.7 and 10.

...
8.6 With regard to the author's claim that he was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has 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 other counsel. The Committee

is of the opinion that in the instant case, the author should have been informed that legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him 10/. The Committee concludes that there has been a violation of article 14, paragraph 3 (d).

8.7 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In Mr. Morrison's case, the final sentence of death was passed without having met the requirements of a fair trial as set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6, paragraph 2, has also been violated.

...

10. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. McCordie Morrison with an effective remedy, including release and compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

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10/ See *inter alia* the Committee's Views on communications Nos. 461/1991 (*Morrison and Graham v. Jamaica*), adopted on 25 March 1996, paragraph 10.5, and 537/1993 (*Kelly v. Jamaica*), adopted on 17 July 1996, paragraph 9.5.

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- *Levy v. Jamaica* (719/1996), ICCPR, A/54/40 vol. II (3 November 1998) 208 (CCPR/C/64/D/719/1996) at paras. 7.1 and 7.2.

...

7.1 As to the author's claim that the reclassification of his offence as capital murder by the single judge violated article 14, the Committee notes that pursuant to the Offences against the Persons (Amendment) Act 1992, the State party adopted a procedure to reclassify established murder convictions expeditiously by entrusting the initial review of each case to a single judge, enabling him to promptly give a decision in favour of a prisoner who in his opinion had committed a non-capital offence, and thus removing rapidly any uncertainty as to whether he was still at risk of being executed. If the single judge on the other hand found that the offence was of capital nature, the convict was notified and was granted the right to appeal the decision to a three judge-panel, which would address the matter in a public hearing. The Committee notes that it is not disputed that all procedural safeguards contained in article 14 applied in the proceedings before the three judge-panel. The author's complaint is solely directed at the first stage of the reclassification procedure, i.e. the single judge's

handling of the matter, of which the author was not notified and in which there was no public hearing where the author could comment on the relevant issues or be represented. The Committee is of the opinion that the reclassification of an offence for a convict already subject to a death sentence is not a "determination of a criminal charge" within the meaning of article 14 of the Covenant, and consequently the provisions in article 14, paragraph 3, do not apply. The Committee considers however, that the safeguards contained in article 14, paragraph 1, should apply also to the reclassification procedure. The Committee notes that the system for reclassification allowed the convicts a fair and public hearing by the three judge-panel. The fact that this hearing was preceded by a screening exercise performed by a single judge in order to expedite the reclassification, does not constitute a violation of article 14.

7.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented in the preliminary hearing that was held prior to trial. In its jurisprudence, 102/ the Committee has held that the requirement that legal assistance must be made available to an accused faced with a capital crime applies not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case...As previously held by the Committee, 103/ it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings.

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Notes

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102/ See the Committtee's Views on Communication No. 459/1991, *Osbourne Wright and Eric Harvey v. Jamaica*, adopted on 27 October 1995.

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

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See also:

- *Wright and Harvey v. Jamaica* (459/1991), ICCPR, A/51/40 vol. II (27 October 1995) 35 (CCPR/C/55/D/459/1991).

- *Marshall v. Jamaica* (730/1996), ICCPR, A/54/40 vol. II (3 November 1998) 228 (CCPR/C/64/D/730/1996) at paras. 6.2, 6.6, 6.7 and 8.

...

6.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented on the first day of the preliminary hearing. In its jurisprudence 116/, the Committee has held that legal assistance must be made available to an accused faced with

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

...

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

6.7 As to the allegation of a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the author has made specific allegations. He states that the prison conditions are insanitary, with waste sewage and a constant smell pervading the prison, and complains of the degrading and unhygienic practice of using slop buckets which are filled with human waste and stagnant water and only are emptied in the morning. The author also contends that the running water in the prison is polluted with insects and human excrement, and that the inmates are required to share utensils which are not cleaned properly. He also claims that in December 1994 he was hit in the side by a warden to such an extent that he was taken before the prison surgeon. The author contends that the conditions have caused serious detriment to his health, and that he has never received any treatment despite repeated requests. The State party has not refuted these specific allegations, and has not forwarded any results of the announced investigation into the author's allegations that he has been denied necessary medical attention. The Committee finds that these circumstances disclose a violation of article 10, paragraph 1, of the Covenant.

...

8. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Marshall with an effective remedy, including compensation.

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Notes

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

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

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- *Brown v. Jamaica* (775/1997), ICCPR, A/54/40 vol. II (23 March 1999) 260 (CCPR/C/65/D/775/1997) at para. 6.12.

...

6.12 With regard to counsel's argument that the author's detention on death row constitutes cruel and inhuman treatment, in particular because he was moved away from death row after nine months, only to be returned after a year and nine months, after his retrial, the Committee refers to its jurisprudence 130/ that detention on death row for a specific period of time does not *per se* violate the Covenant, in the absence of further compelling circumstances. The Committee does not consider the fact that the author was placed back on death row after his retrial a compelling circumstance which would render the detention on death row cruel or inhuman. The Committee is thus of the opinion that the period of the author's detention on death row as of itself does not constitute a violation of the Covenant.

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130/ See Communication No. 558/1994 (*Errol Johnson v. Jamaica*), Views adopted on 22 March 1996.

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For dissenting opinion in this context, see Brown v. Jamaica (775/1997), ICCPR, A/54/40 vol. II (23 March 1999) 260 (CCPR/C/65/D/775/1997), Individual Opinion by Hipólito Solari Yrigoyen, 270.

See also:

- *P. Taylor v. Jamaica* (707/1996), ICCPR, A/52/40 vol. II (18 July 1997) 234 (CCPR/C/60/D/707/1996) at para. 6.3.
- *Arutyunyan v. Uzbekistan* (917/2000), ICCPR, A/59/40 vol. II (29 March 2004) 96 at para. 6.4.

LIFE - RIGHT TO - DEATH PENALTY

- *Bailey v. Jamaica* (709/1996), ICCPR, A/54/40 vol. II (21 July 1999) 185 (CCPR/C/66/D/709/1996) at para. 7.6.

...
7.6 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground that the time the author spent on death row (14 years) and the non-parole period of 20 years set by the judge together amount to cruel and inhuman punishment, the Committee recalls its constant jurisprudence that the period of time spent on death row does not *per se* constitute a violation of article 7. As to whether the combined effect of the 14 years on death row and the non-parole period of 20 years amounts to cruel and inhuman punishment, bearing in mind the nature of the offence, the Committee finds that there has been no violation of article 7 or 10 in this regard.

See also:

- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 7.3.

- *Gallimore v. Jamaica* (680/1996), ICCPR, A/54/40 vol. II (23 July 1999) 170 (CCPR/C/66/D/680/1996) at para. 12.7.

...
12.7 As to the author's allegations that he has been denied adequate medical care during his detention on death row, in particular in respect of ophthalmologic and dental treatment, the Committee notes, firstly, that these allegations were made at a late stage, after the communication, was declared admissible, as it stood on 18 July 1989, and , secondly, that these additional allegations have not been sufficiently corroborated, for instance by medical certificates, to justify a finding of a violation of article 10, paragraph 1 of the Covenant. The Committee reaffirms, however, that the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention, and that this obligation, obviously, extends to persons under the sentence of death.

- *Rawle Kennedy v. Trinidad and Tobago* (845/1999), ICCPR, A/55/40 vol. II (2 November 1999) 258 at paras. 1, 4.1, 4.2, 6.2, 6.4-6.8 and 7.

1. The author of the communication is Mr. Rawle Kennedy, a citizen of Trinidad and Tobago, awaiting execution in the State prison in Port of Spain...
...

LIFE - RIGHT TO - DEATH PENALTY

4.1 In its submission of 8 April 1999, the State party makes reference to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

> "...Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

...

6.2 On 26 May 1998, the Government of Trinidad and Tobago denounced the first Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it reacceded, including in its instrument of reaccession the reservation set out in paragraph 4.1 above.

...

6.4 As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

6.5 At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law,

reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

6.6 In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

> "The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to object and purpose of the first Optional Protocol, even if not of the Covenant" 11/ (emphasis added).

6.7 The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.

6.8 The Committee, noting that the State party has not challenged the admissibility of any of the author's claims on any other ground than its reservation, considers that the author's claims are sufficiently substantiated to be considered on the merits.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible ...

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Notes

...

11/ HRI/GEN/1/Rev.3, 15 August 1997, p. 46.

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For dissenting opinion in this context, see Rawle Kennedy v. Trinidad and Tobago (845/1999), ICCPR, A/55/40 vol. II (2 November 1999) 258 at Individual Opinion by Nisuke Ando, P.N. Bhagwati, Eckart Klein and David Kretzmer, 268 at paras. 7-12.

- *Robinson v. Jamaica* (731/1996), ICCPR, A/55/40 vol. II (29 March 2000) 116 at para. 9.3 and Individual Opinion by Louis Henkin (concurring), 132.

...

9.3 As to the claim that the author's detention on death row from 1992 to 1997 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence 12/ that detention on death row for any specific period of time does not per se constitute a violation of articles 7 and 10, paragraph 1, of the Covenant, in absence of further compelling circumstances. As neither the author nor his counsel have adduced any such circumstances, the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol...

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Notes

...

12/ See, *inter alia*, the Committee's Views on communication No. 588/1994, *Errol Johnson v. Jamaica*, adopted on 22 March 1996.

_____

Individual Opinion by Mr. Louis Henkin

I concur in the conclusion of the Committee (paragraph 9.3) that, according to the jurisprudence of the Committee as formulated in previous cases, the circumstances of this case do not constitute a violation by the State party of article 7 of the Covenant.

Like several of my colleagues, I continue to be troubled by the Committee's formulation of the relevant principles, but do not consider the present case to be an appropriate vehicle for re-examining and reformulating them.

LIFE - RIGHT TO - DEATH PENALTY

- *Thompson v. Saint Vincent and the Grenadines* (806/1998), ICCPR, A/56/40 vol. II (18 October 2000) 93 at paras. 2.1, 3.1, 3.2, 8.2-8.4, 9 and 10.

...

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere, a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January 1996...

...

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the convicted person the opportunity to make any comments on any information which the Governor-General may have received in this respect.1/ In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

...

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6 (1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the

executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation or article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6 (2), 7, 14 (5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6 (1).

8.4 The author has claimed that his conditions of detention are in violation of articles 7 and 10 (1) of the Covenant, and the State party has denied this claim in general terms and has referred to the judgement by the High Court, which rejected the author's claim. The Committee considers that, although it is in principle for the domestic courts of the State party to evaluate facts and evidence in a particular case, it is for the Committee to examine whether or not the facts as established by the Court constitute a violation of the Covenant. In this respect, the Committee notes that the author had claimed before the High Court that he was confined in a small cell, that he had been provided only with a blanket and a slop pail, that he slept on the floor, that an electric light was on day and night, and that he was allowed out of the cell into the yard one hour a day. The author has further alleged that he does not get any sunlight, and that he is at present detained in a moist and dark cell. The State party has not contested these claims. The Committee finds that the author's conditions of detention constitute a violation of article 10 (1) of the Covenant. Insofar as the author means to claim that the fact that he was taken to the gallows after a warrant for his execution had been issued and that he was removed only fifteen minutes before the scheduled execution constituted cruel, inhuman or degrading treatment, the Committee notes that nothing before the Committee indicates that the author was not removed from the gallows immediately after the stay of execution had been granted. The Committee therefore finds that the facts before it do not disclose a violation of article 7 of the Covenant in this respect.

9. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 6 (1) and 10 (1) of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

1/ Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the

Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

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For dissenting opinions in this context, see Thompson v. Saint Vincent and the Grenadines (806/1998), ICCPR, A/56/40 vol. II (18 October 2000) 93 at Individual Opinion by Lord Colville, 101, and Individual Opinion by Mr. David Kretzmer, co-signed by Messrs. Abdelfattah Amor, Maxwell Yalden and Abdallah Zakhia, 105.

- *Piandiong et al. v. The Philippines* (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at paras. 1.3, 1.5, 5.1-5.4, 7.4 and 8.

...

1.3 ...The State party was...requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against Messrs. Piandiong, Morallos and Bulan, while their case was under consideration by the Committee.

...

1.5 Counsel for Messrs. Piandiong, Morallos and Bulan filed a petition with the Supreme Court seeking an injunction, which was refused by the Court on 8 July 1999. Counsel also met personally with the Government's Justice Secretary and asked him not to carry out the death sentence in view of the Committee's request. In the afternoon of 8 July 1999, however, Messrs. Piandiong, Morallos and Bulan were executed by lethal injection.

...

5.1 By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

5.2 Quite apart, then, from any violation of the Covenant charged to a State party in a

communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In respect of the present communication, the authors allege that the alleged victims were denied rights under Articles 6 and 14 of the Covenant. Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its consideration and examination, and the formulation and communication of its Views. It is particularly inexcusable for the State to do so after the Committee has acted under its rule 86 to request that the State party refrain from doing so.

5.3 The Committee also expresses great concern about the State party's explanation for its action. The Committee cannot accept the State party's argument that it was inappropriate for counsel to submit a communication to the Human Rights Committee after they had applied for Presidential clemency and this application had been rejected. There is nothing in the Optional Protocol that restricts the right of an alleged victim of a violation of his or her rights under the Covenant from submitting a communication after a request for clemency or pardon has been rejected, and the State party may not unilaterally impose such a condition that limits both the competence of the Committee and the right of alleged victims to submit communications. Furthermore, the State party has not shown that by acceding to the Committee's request for interim measures the course of justice would have been obstructed.

5.4 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

...

7.4 The Committee has noted the claim made on behalf of Messrs. Piandiong, Morallos and Bulan before the domestic courts that the imposition of the death sentence was in violation of the Constitution of the Philippines. Whereas it is not for the Committee to examine issues of constitutionality, the substance of the claim appears to raise important questions relating to the imposition of the death penalty to Messrs. Piandiong, Morallos and Bulan, namely whether or not the crime for which they were convicted was a most serious crime as stipulated by article 6(2), and whether the re-introduction of the death penalty in the Philippines is in compliance with the State party's obligations under article 6(1) (2) and (6) of the Covenant. In the instant case, however, the Committee is not in a position to address these issues, since neither counsel nor the State party has made submissions in this respect.

8. The Human Rights Committee... is of the view that it cannot make a finding of a violation of any of the articles of the International Covenant on Civil and Political Rights. The

Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication.

For dissenting opinion in this context, see Piandiong et al. v. The Philippines (869/1999), ICCPR, A/56/40 vol. II (19 October 2000) 181 at paras. 1.2-1.6, 5.1-5.4, 7.2-8 and Individual Opinion by Mr. Martin Scheinin (partly dissenting), 190.

See also:

- *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone* (839/1998, 840/1998, 841/1998), ICCPR, A/56/40 vol. II (16 July 2001) 153 at paras. 5.1-5.3.

- *Mansaraj et al. v. Sierra Leone*, *Gborie et al. v. Sierra Leone*, and *Sesay et al. v. Sierra Leone* (839/1998, 840/1998, 841/1998), ICCPR, A/56/40 vol. II (16 July 2001) 153 at paras. 2.2-2.4, 5.6 and 6.1-6.3.

...

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

2.3 On 13 and 14 October 1998, the Committee's Special Rapporteur for New Communications requested the Government of Sierra Leone, under rule 86 of the Rules of Procedure, to stay the execution of all the authors while the communications were under consideration by the Committee.

2.4 On 4 November 1998, the Committee examined the State party's refusal to respect the rule 86 request by executing 12 of the authors. The Committee deplored the State party's failure to comply with the Committee's request and decided to continue the consideration of the communications in question under the Optional Protocol.2/

...

5.6 The Committee notes the authors' contention that the State party has breached article 14, paragraph 5, of the Covenant in not providing for a right of appeal from a conviction by a court martial *a fortiori* in a capital case. The Committee notes that the State party has neither refuted nor confirmed the authors' allegation but observes that 12 of the authors were executed only several days after their conviction. The Committee considers, therefore, that the State party has violated article 14, paragraph 5, of the Covenant, and consequently also article 6, which protects the right to life, with respect to all 18 authors of the communication.

LIFE - RIGHT TO - DEATH PENALTY

The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed *inter alia* only, when all guarantees of a fair trial including the right to appeal have been observed.

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

6.2 The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Optional Protocol by putting 12 of the authors to death before the Committee had concluded its consideration of the communication. 3/

6.3 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide, Anthony Mansaraj, Alpha Saba Kamara, Nelson Williams, Beresford R. Harleston, Bashiru Conteh and Arnold H. Bangura, with an effective remedy. These authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonian law provides for the possibility of fresh trials that do offer all the guarantees required by article 14 of the Covenant. The Committee also considers that the next of kin of Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Victor L. King, and Jim Kelly Jalloh should be afforded an appropriate remedy which should entail compensation.

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Notes

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

2/ Vol. 1, A/54/40, chap. 6, para. 420, annex X.

3/ *Piandiong, Morallos and Bulan v. The Philippines* (869/1999).

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- *Sahadeo v. Guyana* (728/1996), ICCPR, A/57/40 vol. II (1 November 2001) 81 (CCPR/C/73/D/728/1996) at paras. 2.2, 9.2, 10 and 11.

...

2.2 The author states that Mr. Sahadeo and his co-accused were convicted and sentenced to death on 8 November 1989, four years and two months after their arrest. Apparently, two prior trials, in June 1988 and February 1989, had been aborted. On appeal, heard in 1992, a retrial was ordered. On 26 May 1994, Mr. Sahadeo and his co-accused were again convicted

and sentenced to death. In 1996, their appeal was dismissed and the sentence confirmed.
...
9.2 With regard to the length of the proceedings, the Committee notes that the alleged victim was arrested on 18 September 1985 and remained in detention until he was first convicted and sentenced to death on 8 November 1989, four years and two months after his arrest. The Committee recalls that article 9, paragraph 3, of the Covenant entitles an arrested person to trial within a reasonable time or to release. Paragraph 3 (c) of article 14 provides that the accused shall be tried without undue delay. The Committee recalls that, if criminal charges are brought in cases of custody and pre-trial detention, the full protection of article 9, paragraph 3, as well as article 14, must be granted. With respect to the alleged other delays in the criminal process, the Committee notes that Mr. Sahadeo's appeal was heard from the end of April to the beginning of May 1992 and, upon retrial, the alleged victim was again convicted and sentenced to death on 26 May 1994, two years and one month after the judgment of the Court of Appeal. In 1996, the appeal against that decision was dismissed and the sentence confirmed. The Committee finds that, in the absence of a satisfactory explanation by the State party or other justification discernible from the file, the detention of the author awaiting trial constitutes a violation of article 9, paragraph 3, of the Covenant and a further separate violation of article 14, paragraph 3 (c).
...
10. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 9, paragraph 3; and 14, paragraph 3 (c), of the Covenant.

11. The Committee is of the view that Mr. Sahadeo is entitled, under article 2, paragraph 3 (a), to an effective remedy, in view of the prolonged pretrial detention in violation of article 9, paragraph 3, and the delay in the subsequent trial, in violation of article 14, paragraph 3 (c), entailing a commutation of the sentence of death and compensation under article 9, paragraph 5, of the Covenant. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

- *Ashby v. Trinidad and Tobago* (580/1994), ICCPR, A/57/40 vol. II (21 March 2002) (CCPR/C/74/D/580/1994) at paras. 1, 2.1-2.3, 3.1-3.4, 4.5, 6.3-6.6, 10.8-10.10, 11 and 12.

1. The communication was submitted on 6 July 1994 by Interights on behalf of Glenn Ashby, a Trinidadian citizen, at the time of submission awaiting execution at the State prison at Port-of-Spain, Trinidad and Tobago...
...
2.1 Mr. Ashby was arrested on 17 June 1988. He was convicted of murder and sentenced to death in the Port-of Spain Assizes Court on 20 July 1989. The Court of Appeal of Trinidad and Tobago dismissed his appeal on 20 January 1994. On 6 July 1994, the Judicial Committee of the Privy Council dismissed Mr. Ashby's subsequent application for special

leave to appeal. With this, it was argued, all available domestic remedies within the meaning of the Optional Protocol had been exhausted. While Mr. Ashby might have retained the right to file a constitutional motion in the Supreme (Constitutional) Court of Trinidad and Tobago, it is submitted that the State party's inability or unwillingness to provide legal aid for constitutional motions would have rendered this remedy illusory.

2.2 The prosecution's case rested mainly on the testimony of one S. Williams, who had driven Mr. Ashby and one R. Blackman to the house where the crime was committed. This witness testified that before entering the victim's house with Blackman, Mr. Ashby had held a penknife in his hand. Furthermore, he testified that Mr. Ashby, after having left the house with Blackman and having entered the car, had said he had "cut the man with the knife". This testimony was corroborated by evidence of the pathologist, who concluded that the cause of death had been a stab wound to the neck. In addition to that, Mr. Ashby himself allegedly made oral statements as well as written statements admitting that he had killed the victim.

2.3 The defence challenged the credibility of the testimony of S. Williams and maintained that Mr. Ashby was innocent. It submitted that there was clear evidence that Mr. Williams was himself an accomplice to the crime; that Mr. Ashby had not carried a penknife; that it was Blackman who had sought to involve Mr. Ashby in the crime and that he had been beaten by a police officer after his arrest and had made a subsequent statement only after being promised that he could return home if he gave the statement.

...

3.1 Mr. Ashby's communication under the Optional Protocol was received by the secretariat of the Human Rights Committee on 7 July 1994. On 13 July 1994, counsel submitted additional clarifications. On the same day, the Committee's Special Rapporteur on New Communications issued a decision under rules 86 and 91 of the Committee's rules of procedure to the Trinidad and Tobago authorities, requesting a stay of execution, pending the determination of the case by the Committee, and seeking information and observations on the question of the admissibility of the complaint.

3.2 The combined rule 86/rule 91 request was handed to the Permanent Mission of Trinidad and Tobago at Geneva at 4.05 p.m. Geneva time (10.05 a.m. Trinidad and Tobago time) on 13 July 1994. According to the Permanent Mission of Trinidad and Tobago, this request was transmitted by facsimile to the authorities in Port-of-Spain between 4.30 and 4.45 p.m. on the same day (10.30-10.45 a.m. Trinidad and Tobago time).

3.3 Efforts continued throughout the night of 13 to 14 July 1994 to obtain a stay of execution for Mr. Ashby, both before the Court of Appeal of Trinidad and Tobago and before the Judicial Committee of the Privy Council in London. When the Judicial Committee issued a stay order shortly after 11.30 a.m. London time (6.30 a.m. Trinidad and Tobago time) on

14 July, it transpired that Mr. Ashby had already been executed. At the time of his execution, the Court of Appeal of Trinidad and Tobago was also in session, deliberating on the issue of a stay order.

3.4 On 26 July 1994, the Committee adopted a public decision expressing its indignation over the State party's failure to comply with the Committee's request under rule 86; it decided to continue consideration of the Mr. Ashby's case under the Optional Protocol and strongly urged the State party to ensure, by all means at its disposal, that situations similar to that surrounding the execution of Mr. Ashby do not recur. The Committee's public decision was transmitted to the State party on 27 July 1994.

...

4.5 It is submitted that Mr. Ashby's execution violated his rights under the Covenant, because he was executed (1) after an assurance had been given to the Privy Council that he would not be executed before all his avenues of relief had been exhausted; (2) while his application for a stay of execution was still under consideration by the Court of Appeal in Trinidad and Tobago; and (3) just moments after the Privy Council heard and granted a stay. Moreover, Mr. Ashby was executed in violation of the Committee's rule 86 request.

...

6.3 On 13 July 1994, Mr. Ashby's lawyers in Trinidad filed a constitutional motion in the Trinidad and Tobago High Court, seeking a conservatory order staying the execution because of (1) delay in carrying out execution (pursuant to the Privy Council's judgement in *Pratt and Morgan*); (2) refusal of the Mercy Committee to consider the recommendations of the Human Rights Committee; (3) the unprecedented short interval between the reading of the warrant and the date of Mr. Ashby's execution. The respondents to the motion were the Attorney-General, the Commissioner of Prisons and the Prison Marshal. On 13 July, at approximately 3.30 p.m. London time, at a special sitting of the Privy Council, London counsel for Mr. Ashby sought a stay of execution on his behalf. The representative of the Attorney-General of Trinidad and Tobago then informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution, including applications to the Court of Appeal in Trinidad and Tobago and the Privy Council, had been exhausted. This was recorded in writing and signed by counsel for Mr. Ashby and counsel for the Attorney-General.

6.4 Also on 13 July, following a hearing in the High Court of Justice, Trinidad and Tobago, a stay of execution was refused. An appeal against the refusal was lodged immediately and its hearing started before the Court of Appeal in Trinidad and Tobago at 12.30 a.m. Trinidad and Tobago time, on the morning of 14 July. In the Court of Appeal, counsel for the respondents said that, notwithstanding any assurances given in the Privy Council, Glen Ashby would be hanged at 7 a.m. Trinidad and Tobago time (noon London time) unless the Court of Appeal granted a conservatory order. The Court of Appeal then proposed to adjourn until 11 a.m. Trinidad and Tobago time in order to seek clarification of what had taken place

before the Privy Council. Lawyers for Mr. Ashby asked for a conservatory order until 11 a.m., noting that the execution had been scheduled for 7 a.m. and that counsel for the respondents had made it clear that Mr. Ashby could not rely on the assurance given to the Privy Council. The Court expressed the view that, in the interim, Mr. Ashby could rely on the assurance given to the Privy Council, and declined to make a conservatory order. The Court instead decided to adjourn until 6 a.m. Lawyers for Mr. Ashby applied for an interim conservatory order until 6 a.m. but the Court denied this request. At no time did the lawyers for the State party indicate that the execution was scheduled to take place earlier than 7 a.m.

6.5 On 14 July, at 10.30 a.m. London time, at a special sitting of the Judicial Committee of the Privy Council, a document was signed by counsel for the Attorney-General of Trinidad and Tobago in London and countersigned by counsel for Mr. Ashby, recording what had happened, and what had been said in the Privy Council on 13 July. That document, consisting of three handwritten pages, was immediately sent by the Registrar of the Privy Council by facsimile to the Court of Appeal and to counsel for both sides in Trinidad and Tobago. Mr. Ashby's lawyers in Trinidad and Tobago received the document before 6 a.m. The Privy Council then asked for further clarification of the Attorney-General's position. As no clarifications were forthcoming, the Privy Council ordered a stay of execution at approximately 11.30 a.m. London time, directing that the sentence of death should not be carried out. At approximately the same time, 6.20 a.m. in Trinidad and Tobago, the Court of Appeal reconvened. At this time, lawyers for Mr. Ashby informed the Court that, at that moment, the Privy Council was in session in London. Counsel for Mr. Ashby also gave the Court the three-page document received by fax.

6.6 At around 6.40 a.m., the lawyers for Mr. Ashby again applied to the Court of Appeal in Trinidad and Tobago for a conservatory order. The order was denied; the Court again emphasizing that Mr. Ashby could rely on the assurance given to the Privy Council. At this point, one of Mr. Ashby's lawyers appeared in Court with a handwritten transcript of an order of the Privy Council staying the execution. The order had been read to him over the telephone, having been granted at approximately 6.30 a.m. Trinidad and Tobago time (11.30 a.m. London time). Shortly thereafter, it was announced that Mr. Ashby had been hanged at 6.40 a.m.

...

10.8 Counsel finally submits that Mr. Ashby was arbitrarily deprived of his life when the State party executed him in full knowledge of the fact that Mr. Ashby was still seeking remedies before the Courts of Appeal of the State party, the Judicial Committee of the Privy Council and the Human Rights Committee. The Committee finds that, in these circumstances (detailed above at 6.3 to 6.6), the State party committed a breach of its obligations under the Covenant. Moreover, having regard to the fact that the representative of the Attorney-General informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution had been exhausted, the carrying out of Mr. Ashby's sentence

notwithstanding that assurance constituted a breach of the principle of good faith which governs all States in their discharge of obligations under international treaties, including the Covenant. The carrying out of the execution of Mr. Ashby when the execution of the sentence was still under challenge constituted a violation of article 6, paragraphs 1 and 2, of the Covenant.

10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.8/ The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol.

10.10 The Committee finds that the State party breached its obligations under the Protocol, by proceeding to execute Mr. Ashby before the Committee could conclude its examination of the communication, and the formulation of its Views. It was particularly inexcusable for the State to do so after the Committee had acted under its Rule 86 requesting the State party to refrain from doing so. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim, undermines the protection of Covenant rights through the Optional Protocol.

11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 6, paragraphs 1 and 2 and 14, paragraphs 3 (c) and 5, of the Covenant.

12. Under article 2, paragraph 3, of the Covenant, Mr. Ashby would have been entitled to an effective remedy including, first and foremost, the preservation of his life. Adequate compensation must be granted to his surviving family.

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Notes

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8/ See Communication No. 707/1996, *Patrick Taylor v. Jamaica*, para. 8.5.

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- *Wanza v. Trinidad and Tobago* (683/1996), ICCPR, A/57/40 vol. II (26 March 2002) 55 (CCPR/C/74/D/683/1996) at para. 9.3.

...

9.3 With regard to the author's claim that his prolonged detention on death row constitutes

a violation of articles 7 and 10(1), the Committee notes that the author was kept on death row from his conviction on 28 February 1989 until 24 June 1996, when his sentence was commuted. The Committee refers to its previous jurisprudence 4/ that prolonged detention on death row per se does not constitute a violation of articles 7 and 10(1) of the Covenant, in the absence of further compelling circumstances. In the Committee's opinion, the facts before it do not show the existence of further compelling circumstances beyond the length of detention on death row. The Committee concludes that in this respect the facts do not reveal a violation of articles 7 and 10, paragraph 1 of the Covenant.

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Notes

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4/ See *inter alia* the Committee's Views in communication No. 558/1994, *Erroll Johnson v. Jamaica*, para. 8.2-8.5, Views adopted on 22 March 1996; CCPR/C/66/D/709/1996, *Everton Bailey v. Jamaica*, Views adopted on 21 July 1999, para. 7.6.

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- *Kennedy v. Trinidad and Tobago* (845/1998), ICCPR, A/57/40 vol. II (26 March 2002) 161 (CCPR/C/74/D/845/1998) at paras.3.3, 3.4, 3.6, 3.8, 7.3, 7.4, 8, 9 and Individual Opinion by Mr. David Kretzmer and Mr. Maxwell Yalden (concurring), 171.

...

3.3 The author claims violations of articles 6, 7, and 14, paragraph 1, on account of the mandatory nature of the death penalty for murder in Trinidad and Tobago. He recalls that the distinction between capital and non-capital murder, which exists in law in many other common law countries,2/ has never been applied in Trinidad and Tobago.3/ It is argued that the stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule in Trinidad and Tobago, under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death could possibly result from that robbery.

3.4 It is submitted that, given the wide variety of circumstances under which murder may be committed, a sentence indifferently imposed on every category of murder, does not retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment contrary to article 7 of the Covenant. It is similarly submitted that article 6 was violated, since to impose the death penalty irrespective of the circumstances of the crime constituted cruel, inhuman and

degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

...

3.6 The author claims to be a victim of a violation of article 6, paragraphs 2 and 4, on the ground that the State party has not provided him with the opportunity of a fair hearing in relation to the exercise of the prerogative of mercy. In Trinidad and Tobago, the President has the power to commute any sentence of death under Section 87 of the Constitution, but he must act in accordance with the advice of a Minister designated by him, who in turn acts pursuant to the advice of the Prime Minister. Under Section 88 of the Constitution, there shall be an Advisory Committee on the Power of Pardon, chaired by the designated Minister. Under Section 89, the Advisory Committee must take into account certain materials, such as the trial judge's report, before tendering its advice. Counsel submits that in the practice of Trinidad and Tobago, the Advisory Committee has the power to commute death sentences, and it is free to regulate its own procedure; but in doing so, it does not have to afford the prisoner a fair hearing or have regard to any other procedural protection for an applicant, such as a right to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision.4/

...

3.8 Counsel notes that in the author's case, the Advisory Committee may have met several times to consider the author's application without his knowledge, and may yet decide to reconvene, without notifying him, without giving him an opportunity to make representations and without supplying him with the material to be considered. Counsel argues that this constitutes a violation of article 6, paragraph 4, as well as article 6, paragraph 2, as the Advisory Committee can only make a reliable determination of which crimes constitute "the most serious crimes" if the prisoner is allowed to participate fully in the decision making process.

...

7.3 Counsel has claimed that the mandatory character of the death sentence, and its application in Mr. Kennedy's case, constitutes a violation of articles 6(1), 7 and 14(1) of the Covenant. The State party has not addressed this claim. The Committee notes that the mandatory imposition of the death penalty under the laws of Trinidad and Tobago is based solely on the particular category of crime of which the accused person is found guilty. Once that category has been found to apply, no room is left to consider the personal circumstances of the accused or the particular circumstances of the offence. In the case of Trinidad and Tobago, the Committee notes that the death penalty is mandatory for murder, and that it may be and in fact must be imposed in situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the

victim. The Committee considers that this system of mandatory capital punishment would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant.7/ The Committee accordingly is of the opinion that there has been a violation of article 6, paragraph 1, of the Covenant.

7.4 The Committee has noted counsel's claim that since Mr. Kennedy was at no stage heard in relation to his request for a pardon nor informed about the status of deliberations on this request, his right under article 6, paragraph 4, of the Covenant, was violated. In other words, counsel contends that the exercise of the right to seek pardon or commutation of sentence should be governed by the procedural guarantees of article 14 (see paragraph 3.8 above). The Committee observes, however, that the wording of article 6, paragraph 4, does not prescribe a particular procedure for the modalities of the exercise of the prerogative of mercy. Accordingly, States parties retain discretion for spelling out the modalities of the exercise of the rights under article 6, paragraph 4. It is not apparent that the procedure in place in Trinidad and Tobago and the modalities spelled out in Sections 87 to 89 of the Constitution are such as to effectively negate the right enshrined in article 6, paragraph 4. In the circumstances, the Committee finds no violation of this provision.

...

8. The Human Rights Committee...is of the view that the facts before it reveal violations by Trinidad and Tobago of articles 6, paragraph 1, 7, 9, paragraph 3, 10 paragraph 1, 14, paragraphs 3(c) and 5, and 14, paragraphs 1 and 3(d), the latter in conjunction with article 2, paragraph 3, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Rawle Kennedy with an effective remedy, including compensation and consideration of early release. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

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2/ Reference is made to the United Kingdom's Homicide Act 1957, which restricted the death penalty to the offence of capital murder (murder by shooting or explosion, murder committed in the furtherance of theft, murder committed for the purpose of resisting arrest or escaping from custody, and murders of police and prison officers on duty) pursuant to section 5, and murder committed on more than one occasion pursuant to section 6.

3/ The law in Trinidad and Tobago does contain provisions reducing the offence of murder to manslaughter where murder was committed with diminished responsibility or under provocation.

4/ Counsel invokes the principles set down by the *Judicial Committee in Reckley v. Minister of Public Safety* (No.2) (1996) 2WLR 281 and *De Freitas v. Benny* (1976) A.C.

...

7/ Views on Communication 806/1998 (*Thompson v. St. Vincent and the Grenadines*), adopted on 18 October 2000, para. 8.2 (A/56/40, Vol.II, Annex X.H.).

Individual Opinion by Messrs. David Kretzmer and Mr. Maxwell Yalden (concurring)

In communication No. 806/1998 (*Thompson v. St. Vincent and the Grenadines*), I dissented from the Committee's view that the mandatory nature of the death sentence for murder according to the law of the State party necessarily meant that by sentencing the author to death the State party had violated article 6 (1) of the Covenant. One of the main grounds for my opinion was that according to the law of the State party the death penalty was mandatory only in the case of the intentional killing of another human being, a penalty which, while deeply repugnant to the undersigned, was not in our view in violation of the Covenant. In the present case which carries a mandatory death sentence, however, it has been shown that the definition of murder, may include participation in a crime which involves violence that results inadvertently in the death of another. Furthermore, the prosecution in this case did not claim that the author had intentionally killed Norris Yorke.

In these circumstances, it is not self-evident that the author was convicted of a most serious crime, which is a condition for imposing the death sentence under article 6, paragraph 2, of the Covenant. Furthermore, the mandatory nature of the sentence denied the court the opportunity of considering whether the specific crime of the author was indeed a most serious crime, within the meaning of article 6, paragraph 2. I am therefore of the opinion that in imposing a death sentence the State party violated the author's right to life protected under article 6, paragraph 2, of the Covenant.

- *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at paras. 2.1, 3.9, 9.2 and 9.8.

...

2.1 On 28 May 1988, the author was detained by the police and taken to hospital. On 31 May 1988 he was discharged from the hospital and on 2 June 1988 he was formally charged with the murder of his cousin "Lucky" Teesdale on 27 May 1988. After a trial, which started on 6 October 1989, the author was convicted and sentenced to death on 2 November 1989 by the San Fernando Assizes Court. He applied for leave to appeal against conviction and sentence. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 22 March 1994, with reasons given on 26 October 1994. On 13 March 1995, the Judicial

Committee of the Privy Council dismissed his petition for special leave to appeal. On 8 March 1996, a warrant for execution on 13 March was read out to the author. On 11 March, the author filed a constitutional motion to the High Court against the execution; the High Court granted a stay of execution. The Attorney General withdrew the case from the High Court and presented it before the Advisory Committee on the Power of Pardon. On 26 June, the author was informed that the President had commuted his death sentence to 75 years imprisonment with hard labour. It is submitted that all domestic remedies have been exhausted.

...

3.9 With regard to the commutation of his death sentence in June 1996, the author complains that the decision of the President to sentence him to 75 years of imprisonment with hard labour was unlawful and discriminatory. The author refers to the decision of the Judicial Committee of the Privy Council in the cases of *Earl Pratt and Ivan Morgan* and of *Lincoln Anthony Guerra*, and claims that his sentence should have been commuted to life imprisonment. The author submits that 53 other prisoners, who had been on death row for murder for more than five years, saw their sentence commuted to life imprisonment, which according to the author, means that they will be released after an average period of 12 to 15 years, whereas such parole is not available to him.

...

9.2 Concerning the warrant for the author's execution after he had spent over six years on death row, the Committee reaffirms its jurisprudence that prolonged delays in the execution of a sentence of death do not, *per se*, constitute cruel, inhuman or degrading treatment. The Committee, therefore, finds that the facts before it, in the absence of further compelling circumstances, do not disclose a violation of article 7 of the Covenant.

...

9.8 Concerning the author's claim that he is a victim of discrimination because of the commutation of his death sentence to 75 years of imprisonment with hard labour, the Committee notes that according to information provided by the author, the State party in 1996 commuted death sentences of prisoners who had been on death row for more then five years to life imprisonment in 53 cases, on the basis of constitutional provisions on commutation of death sentences. The Committee recalls its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities. The Committee considers that the decision to commute a death sentence and the determination of a term of imprisonment is within the discretion of the President and that he exercises this discretion on the basis of many factors. Although the author has referred to 53 cases where the death penalty was commuted to life imprisonment, he has not provided information on the number or nature of cases where death sentences were commuted to imprisonment with hard labor for a fixed term. The Committee is therefore unable to make a finding that the exercise of this discretion in the author's case was arbitrary and in violation of article 26 of the Covenant.

LIFE - RIGHT TO - DEATH PENALTY

For dissenting opinions in this context, see Teesdale v. Trinidad and Tobago (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at Individual Opinion by Mr. David Kretzmer and Ivan Shearer (partly dissenting), 44 and Individual Opinion by Mr. Hipólito Solari Yrigoyen (partly dissenting), 45.

- *Sahadath v. Trinidad and Tobago* (684/1996), ICCPR, A/57/40 vol. II (2 April 2002) 61 (CCPR/C/74/D/684/1996) at paras. 2.2-2.6, 7.2, 8 and 9.

...

2.2 On 8 March 1996, the author was read a warrant for his execution on 13 March 1996. On Tuesday 12 March 1996, a stay of execution was granted, with a view to obtaining a full psychiatric examination of the author. The author is believed to be mentally deficient, and counsel argued, in his initial submission, that it would be in violation of his rights under the Covenant to execute him under these circumstances.

2.3 On 9 March 1996, the author was visited at the State Prison by his counsel, Douglas Mendes. When counsel arrived at the prison gate and requested to see the author, the officer on duty made a circular motion with his index finger near his head, to indicate that the author was insane. The officer asked counsel whether in the circumstances he would still like to see the author and, upon counsel's insistence, said that special security arrangements would have to be made for the interview.

2.4 During the interview, counsel asked the author whether he wanted a constitutional motion to be filed on his behalf or not. At first, the author indicated that he wanted to be executed. After further discussion, he agreed to the filing of a constitutional motion. When counsel pointed to the contradictory behaviour of the author, the latter replied that he was confused and could not decide. Counsel ended the interview by telling the author that he would return later in the day, to allow him to make up his mind.

2.5 The author's appearance and demeanour, coupled with the prison guard's comments on his insanity, made counsel believe that the author was of unsound mind. He thus contacted a psychiatrist, Peter Lewis, who accompanied him to the prison in the afternoon of 9 March 1996. Mr. Mendes asked the author whether he wanted a constitutional motion to stop his execution to be filed, and the author replied in the affirmative. For the rest, counsel could not obtain further information from the author: he gave different dates for his conviction, was unaware that an appeal had been heard or that a petition to the Judicial Committee of the Privy Council had been filed. He could not remember the name of the lawyer who had represented him on trial and said that no lawyer had ever visited him for the preparation of the appeal. He further could not remember the name of the person of whose murder he had been convicted.

2.6 After interviewing the author, Mr. Lewis concluded in an affidavit that the author "is experiencing auditory hallucinations and is probably suffering from severe mental illness that may be significantly affecting his ability to think and behave normally. I recommend that a detailed examination of his mental status be conducted in order to determine the extent and nature of Mr. R. S.'s disorder".

...

7.2 As to the author's claim that issuing of a warrant for the execution of a mentally incompetent person constitutes a violation of articles 6 and 7 of the Covenant, the Committee notes that the author's counsel does not claim that his client was mentally incompetent at the time of imposition of the death penalty and his claim focuses on the time when the warrant for execution was issued. Counsel has provided information that shows that the author's mental state at the time of the reading of the death warrant was obvious to those around him and should have been apparent to the prison authorities. This information has not been contested by the State party. The Committee is of the opinion that in these circumstances issuing a warrant for the execution of the author constituted a violation of article 7 of the Covenant. As the Committee has no further information regarding the author's state of mental health at earlier stages of the proceedings, it is not in a position to decide whether the author's rights under article 6 were also violated.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 7 and 10, paragraph 1 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate medical and psychiatric care. The State party is also under an obligation to improve the present conditions of detention so as to ensure that the author is detained in conditions that are compatible with article 10 of the Covenant, or to release him, and to prevent similar violations in the future.

- *Hendricks v. Guyana* (838/1998), ICCPR, A/58/40 vol. II (28 October 2002) 113 (CCPR/C/76/D/838/1998) at paras. 2.1, 2.2, 6.4, 7 and 8 and Individual Opinion by Mr. Hipólito Solari Yrigoyen (dissenting in part), 118.

...

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

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

...

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

...

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

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

...

Individual Opinion by Mr. Hipómlito Solari Yrigoyen (dissenting in part)

I disagree with regard to the present communication on the grounds set forth below:

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

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Notes

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

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LIFE - RIGHT TO - DEATH PENALTY

- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/908/2000) at paras. 2.1, 2.3, 6.4, 6.5, 8 and Individual Opinion of Ms. Ruth Wedgwood, 223.

...

2.1 On 17 March 1986, the author was arrested for murder alleged to have been committed on 28 February 1986 and was subsequently charged with murder. Following a Preliminary Enquiry conducted before a Magistrate's Court, the trial took place before the High Court of Justice of San Fernando between 22 June 1988 and 4 July 1988, and the author was convicted of murder and sentenced to death. On 4 January 1994, the death sentence was commuted to life imprisonment for the rest of his "natural life".

...

2.3 During the five years and six months that the author spent on death row, he was detained in solitary confinement in a cell measuring 9 by 6 feet containing a steel bed, table and bench. There was no integral sanitation and he was provided with a plastic pail for use as a toilet, which he was allowed to empty twice a day. There was no natural lighting. The only light was provided by a fluorescent strip light illuminated 24 hours a day located outside his cell above the door. He was allowed out of the cell on average once or twice a week for exercise and was restrained in handcuffs for the duration of this period. Food was inadequate and almost inedible. No provisions were made for his particular dietary requirements. He was provided with fresh water twice a day, when available. Requests for a doctor or dentist were infrequently granted. In support of these allegations, the author refers to an article in a national newspaper, dated 5 March 1995, in which the General Secretary of the Prison Officers' Association, was quoted, among other things, as stating that "the conditions are highly deplorable, unacceptable and pose a health hazard". The author submits that in the same article the General Secretary stated that limited resources, the spread of communicable diseases, such as chicken pox, tuberculosis and scabies, also makes the job of the prison officer more harrowing.1/ The author also submits that the medical officer failed to respond to complaints or take any steps to alleviate the intolerable sanitary conditions in the prison.

...

6.4 As to the claim that the conditions of detention to which the author was subjected during his period on death row violated articles 7, and 10, paragraph 1, the Committee notes that, in the absence of any explanation from the State party, it must give due weight to the author's allegations. The Committee notes that the author was detained in solitary confinement on death row for a period of five years in a cell measuring 6 by 9 feet, with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once or twice a week during which he was restrained in handcuffs, and with wholly inadequate food that did not take into account his particular dietary requirements. The Committee considers that these - uncontested - conditions of detention, taken together, amount to a violation of article 10, paragraph 1, of the Covenant. In light of this finding, in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their

liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

6.5 As to the author's claim that he was denied access to the courts by not being allowed to make representations when his death sentence was commuted to life imprisonment for his "natural life", the Committee recalls its jurisprudence in *Kennedy v. Trinidad and Tobago*11/, in which it decided that State parties retain discretion for spelling out the modalities of the exercise of the right to seek commutation of the sentence of death (art. 6, para. 4) and that this right is not governed by the procedural guarantees of article 14. The Committee finds therefore that the author has not shown that his inability to make representations on the commutation of his sentence is such as to violate any of his rights protected under the Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including consideration of early release. As long as the author is in prison he should be treated with humanity and not subjected to cruel, inhuman or degrading treatment. The State party is also under an obligation to ensure that similar violations do not occur in the future.

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Notes

1/ In further support of these allegations, the author provides newspaper articles on prison conditions, an affirmation from counsel who visited the prison in question and who supplied in his affirmation information on prison conditions as described by inmates. The author was not one of these inmates.

...

11/ [*Kennedy v. Trinidad and Tobago*, Case No. 845/1998, Views adopted on 26 March 2002].

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Individual Opinion of Ms. Ruth Wedgwood (concurring in part)

...

Since the Committee has found the instant communication to be admissible, I would agree on the merits that the jail conditions on death row, as alleged by the author, appear to have been seriously deficient. The United Nations Standard Minimum Rules for the Treatment of Prisoners note that some countries face challenges of budget and resources. Nonetheless, these are "minimum conditions which are accepted as suitable by the United Nations." The conditions in which the author was confined during his years on death row did not meet the requirements of, *inter ali*a, paragraphs 11(a), 20(1), and 21(1) of the United Nations Standard Minimum Rules. These standards properly inform the Committee's construction of Article 10(1) of the Covenant on Civil and Political Rights.

For dissenting opinion in this context, see Evans v. Trinidad and Tobago (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216 (CCPR/C/77/D/998/2000) at Individual Opinion of Ms. Ruth Wedgwood, 223.

- *Carpo et al. v. The Philippines* (1077/2002), ICCPR, A/58/40 vol. II (28 March 2003) 363 (CCPR/C/77/D/1077/2002) at paras. 2.3, 2.4, 8.2, 8.3 and 10.

...

2.3 In the evening of 25 August 1996, a grenade was hurled into the bedroom of the Dulay family. The explosion killed Florentino Dulay, as well as his daughters Norwela and Nissan, and wounded a further daughter, Noemi. On 25 October 1996 and 9 December 1996, the authors Jaime Carpo and Roche Ibao, respectively, were arrested. Thereupon, the remaining authors Oscar and Warlito Ibao gave themselves up.

2.4 On 22 January 1998, the Regional Court of Tayug, Pangasinan, convicted the authors of "multiple murder with attempted murder", sentenced them to death and fixed the sum of civil liability at P600,000. On 4 April 2001, on automatic review of the authors' case, a fifteen judge bench of the Supreme Court affirmed the conviction after extensive review of the facts, and reduced the civil liability to P330,000. As to the sentence of death, the Court considered the case to fall within article 48 of the Revised Penal Code, according to which the most serious penalty for the more serious of several crimes had to be imposed.2/ As the maximum penalty for the most serious crime committed by the authors, ie. murder, was death, the Court considered article 48 applied, and required the death penalty...

...

8.2 As to the claim under article 6, paragraph 2, of the Covenant, the Committee observes at the outset, in response to the State party's argument that the Committee's function is not to assess the constitutionality of a State party's law, that its task rather is to determine the consistency with the Covenant alone of the particular claims brought before it.

8.3 The Committee notes that the offence of murder in the State party's law entails a very broad definition, requiring simply the killing of another individual. In the present case, the Committee observes that the Supreme Court considered the case to be governed by article 48 of the Revised Penal Code, according to which, if a single act constitutes at once two crimes, the maximum penalty for the more serious crime must be applied. The crimes committed by a single act being three murders and an attempted murder, the maximum possible penalty for murder - the death penalty - was imposed automatically by operation of the provisions of article 48. The Committee refers to its jurisprudence that mandatory imposition of the death penalty constitutes arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances

of the particular offence.5/ It follows that the automatic imposition of the death penalty upon the authors by virtue of article 48 of the Revised Penal Code violated their rights under article 6, paragraph 1, of the Covenant.

...

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy, including commutation. The State party is under an obligation to avoid similar violations in the future.

_____

Notes

...

2/ Article 48 of the Revised Penal Code provides as follows: "*Penalty for complex crimes.* - When a single act constitutes two or more grave or less grave felonies, or when an offence is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period."

...

5/ *Thompson v. St. Vincent and The Grenadines* Case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.

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For dissenting opinions in this context, see Carpo et al. v. The Philippines (1077/2002), ICCPR, A/58/40 vol. II (28 March 2003) 363 (CCPR/C/77/D/1077/2002) at Individual Opinion of Mr. Nisuke Ando, 370 and Individual Opinion of Ms. Ruth Wedgwood,372.

- *Bondarenko v. Belarus* (886/1999), ICCPR, A/58/40 vol. II (3 April 2003) 161 (CCPR/C/77/D/886/1999) at paras. 2.1, 8.1, 10.2 and 12.

...

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

...

8.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her son despite the fact that a communication had been sent to the Committee and the author had informed her son's lawyer, the prison authorities and the Supreme Court of this measure, prior to her son's execution and the formal registration of her communication under the Optional Protocol. The State party does not explicitly refute the author's claim, stating that rather that it was appraised of the registration of the author's communication under the Optional Protocol by note verbale of 28 October 1999, i.e., three months after the execution. In its earlier case law the Committee had addressed the issue

of a State party acting in breach of the its obligations under the Optional Protocol by executing a person who has submitted a communication to the Committee, not only from the perspective whether the Committee had explicitly requested interim measures of protection but also on the basis of the irreversible nature of capital punishment. However, in the circumstances of the current communication and in light of the fact that the first case in which the Committee established a breach of the Optional Protocol for the execution of a person whose case was pending before the Committee10/ was decided and published subsequent to the execution of Mr. Bondarenko, the Committee cannot hold the State party responsible for a breach of the Optional Protocol due to the execution of Mr. Bondarenko after the submission of the communication, but prior to its registration.11/

...

10.2 The Committee notes that the author's claim that her family was informed of neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegation. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The Committee considers that complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

...

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

Notes

...

10/ Communication No. 869/1999, *Piandiong et al. v. The Philippines*.

11/ Communications Nos. 839/1998, 840/1998, and 841/1998, *Mansaraj et al. v. Sierra Leone, Gborie et al. v. Sierra Leone,* and *Sesay et al. v. Sierra Leone*, paragraph 5.1 et seq.; communication No. 869/1999, *Piandiong et al. v. The Phillipines*, paragraph 5.1 et seq., and communication No. 580/1994, *Glenn Ashby v. Trinidad and Tobago.*

LIFE - RIGHT TO - DEATH PENALTY

See also:

- *Lyashkevich v. Belarus* (887/1999), ICCPR, A/58/40 vol. II (3 April 2003) 169 (CCPR/C/77/D/887/1999) at paras. 1.1, 5.2-5.4, 7.1, 9.2 and 11.

- *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 CCPR/C/78/D/796/1998 at paras. 2.1, 2.5 and 7.7.

...

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

...

2.5 In April or May 1995 the author's sentence of death was commuted to life imprisonment by the Governor-General.3/ The commutation was accompanied by a determination that seven years from the date of commutation had to elapse before the length of any non-parole period could be considered. He was not informed of the decision to commute his sentence until after the event and never received any formal documentation in relation to the decision. The author had no opportunity to make any representation in relation to the decision to commute his sentence or to the decision concerning the non-parole period. He remains imprisoned at St.Catherine's District Prison.

...

7.7 As to the author's claims of a violation of articles 9, paragraph 1, and 14, paragraphs 1 and 3, subparagraphs (a), (b) and (d), arising from the commutation of his sentence and the setting of a seven-year period before parole issues might arise, the Committee refers to its previous jurisprudence that the commutation process is not one attracting the guarantees of article 14.12/ Nor does the Committee share the view that a substitution of the death penalty with life imprisonment, with a prospect of parole in the future, is a "re-sentencing" tainted with arbitrariness. It follows from this conclusion that the author continued to be legitimately detained pursuant to the original sentence, as modified by the decision of commutation, and that no issue of detention contrary to article 9 arises. Accordingly, the Committee does not find a violation of the Covenant with respect to these matters.

Notes

...

3/ The sentence of death penalty was commuted to life imprisonment pursuant to the judgement of the Privy Council in *Pratt and Morgan v. Jamaica*. It is unclear on exactly what date the decision of commutation as taken by the Governor-General.

LIFE - RIGHT TO - DEATH PENALTY

...
12/ *Kennedy v. Trinidad and Tobago* Case No. 845/1998, Views adopted on 26 March 2002.
...

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- *Judge v. Canada* (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at paras. 2.1-2.8, 10.2-10.9, 11, 12 and Individual Opinion by Mr. Rajsoomer Lallah, 103.

...
2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.1/

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.2/

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.3/

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the

refusal to grant leave.

2.7 The author then petitioned the Superior Court of Quebec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Quebec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

...

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada,*35/ that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a State which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing State.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights - the right to life - and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and

in States which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving State, in the case of *United States v. Burns.* There, the Supreme Court of Canada held that the government *must* seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgement, "Other abolitionist countries do not, in general, extradite without assurances."36/ The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life…", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty…") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the *Travaux Préparatoires*, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the *Travaux* that, on the one hand, one of the

main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Quebec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Quebec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons...the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*37/, a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights - the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a State where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

...

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

Notes

1/ The author states that the mode of execution was subsequently changed to execution by lethal injection.

2/ As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

3/ As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50(1)(a) of the Immigration Act. An extradition request was never received.

...

35/ [*Kindler v. Canada*, Communication No. 470/1990, Views adopted on 30 July 1993].

36/ [*United States v. Burns*, [2001] S.C.J. No. 8].

37/ [*A. R. J. v. Australia*, Communication No. 692/1996, Views adopted on 28 July 1997].

...

Individual Opinion of Mr. Rajsoomer Lallah (concurring)

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6 (1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6 (1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6(1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions...

My second observation is that other provisions of the Covenant, in particular, articles 5 (2) and 26, may be relevant in interpreting article 6 (1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6(1) and the possible impact of article 5(2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

For dissenting opinions in this context, see Judge v. Canada (829/1998), ICCPR, A/58/40 vol. II (5 August 2003) 76 (CCPR/C/78/D/829/1998) at Individual Opinion of Mrs. Christine Chanet, 99 and Individual Opinion of Mr. Hipóito Solari-Yrigoyen, 101.

- *Howell v. Jamaica* (798/1998), ICCPR, A/59/40 vol. II (21 October 2003) 21 (CCPR/C/79/D/798/1998) at paras. 2.1, 2.3-2.6, 2.9, 6.2, 6.3, 7 and 8.

...
2.1 The author was charged with seven counts of capital murder and was convicted on all seven counts and sentenced to death on 27 October 1993 by the Home Circuit Court in Kingston. The basis for the charge of capital murder was that the murders had been committed in the course of or in the furtherance of an act of terrorism.
...
2.3 After his conviction, the author was confined to death row at St. Catherine's District Prison, Spanish Town, Jamaica. On 15 October 1996, the author petitioned the Privy Council in London for leave to appeal against his conviction and sentence. The appeal was set for hearing on 26-27 January 1998, but it remains unclear whether the Privy Council heard the appeal or not.

2.4 In a letter dated 21 March 1997, the author complained to his counsel about the prison conditions at St. Catherine's District Prison, and particularly about an incident which occurred on 5 March 1997. On that day, as a reaction to an escape attempt initiated by four other inmates, some prisoners - including the author - were brutally beaten by two groups of 20 and 60 warders who punished whoever was directly or indirectly involved in the escape attempt. The author observes that "some warders started to beat me from every handle1/ while some were throwing away my personal belongings out of my cell" and that afterwards "the warders carried me into an empty bathroom where my ordeal started again".

2.5 As a result of the beatings, the author was brought to hospital where he informed the

doctor that he was "feeling pain all over his body". The author was unable to contact counsel until some time later because he had suffered serious injury to one hand and was beaten to the point that "he could hardly walk". At the time of writing of his letter to the counsel - 16 days after the incident - he alleged that "various parts of [his] body is still swollen". Furthermore, his personal belongings as well as documents relating to his legal appeals were burned; in this connection, he reports that when he returned to his cell "it was almost empty and when I reach down stairs I saw a big fire on the compound with our personal belongings burning in the fire". The author adds that "as far as I understand, the warders got order to beat us and burn up our things".

2.6 The author submits that the scale of the warders' action and the apparent coordination of the respective groups of 20 and 60 warders can only be explained as deliberate and premeditated. In this connection, he alleges that the presence at the prison hospital of the Commissioner of Corrections as well as the Superintendent shortly after the incidents, taken together with the failure properly to investigate and prosecute the perpetrators of these actions, demonstrate the level at which the actions of the prison authorities were known and endorsed. He also states that he knew the names of the warders who searched his cell and beat him, but adds that he felt too threatened to denounce them.

...

2.9 Two letters dated 6 January and 4 September 1997 from a friend of the author to counsel, describe the conditions of detention, such as the size of the cells, hygienic conditions, the poor diet and the lack of dental care. It is submitted that visitors under 18 were not allowed into the prison, and the author could not see his children (aged 9 and 6) since he had been imprisoned; the death row compound - where inmates can only leave cells for about 20 minutes per day - is small and dirty, with faeces everywhere. The author could touch the walls on either side when standing in the middle of the floor of his cell and had to paper the walls to cover the dirt. The entire compound smells of sewage. Hygienic and medical conditions are poor, and so is the food. Due to the poor diet and the lack of dental care, the author lost numerous teeth.

...

6.2 In relation to the claim as to the violation of articles 7 and 10 (1), the Committee observes that the author has given a detailed account of the treatment he was subjected to and that the State party has not challenged his grievances. The Committee considers that the repeated beatings inflicted on the author by warders amount to a violation of article 7 of the Covenant3/. Furthermore, taking into account the Committee's earlier views in which it has found the conditions on death row in St. Catherine's District Prison to violate article 10 (1)4/, the Committee considers that the author's conditions of detention, taken together with the lack of medical and dental care and the incident of the burning of his personal belongings, violate the author's right to be treated with humanity and respect for the dignity of his person under article 10 (1) of the Covenant.

...

6.3 As to the claim that severe mental distress amounts to a further violation of Article 7 caused by the continued uncertainty of whether or not the author would be executed, the Committee recalls its constant jurisprudence that prolonged delays in the execution of a sentence of death do not per se constitute a violation of articles 7 in the absence of other "compelling circumstances"5/ In the present case, the Committee is of the view that the author has not shown the existence of such compelling circumstances. Accordingly, there has been no violation of article 7 in this respect.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 7 and 10(1) of the Covenant.

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

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Notes

1/ The author appears to refer to being made to run the gauntlet of a group of warders armed with sticks.

...

3/ See for example *McTaggart v. Jamaica*, No. 749/1997, para. 8.7, in which the author was beaten and had his personal belongings burnt.

4/ See particularly *McTaggart v. Jamaica*, Communication No. 749/1997.

5/ See e.g. *Johnson v. Jamaica*, No. 588/1994, para. 8.5; *Francis v. Jamaica*, No. 606/1994, para. 9.1.

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For dissenting opinion in this context, see Howell v. Jamaica (798/1998) ICCPR, A/59/40 vol. II (21 October 2003) 21 (CCPR/C/79/D/798/1998) at Individual Opinion by Mr. Prafullachandra Bhagwati, 27.

- *Wilson v. The Philippines* (868/1999), ICCPR, A/59/40 vol. II (30 October 2003) 48 (CCPR/C/79/D/868/1999) at paras. 2.3-2.6, 2.8, 3.1, 3.2, 7.2, 7.4, 8 and 9.

...

2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela...

2.4 The author was then placed on death row in Muntinlupa prison, where 1,000 death row prisoners were kept in three dormitories. Foreign inmates were continually extorted by other inmates with the acquiescence, and sometimes at the direction of, prison authorities. The author refers to media reports that the prison was controlled by gangs and corrupt officials, at whose mercy the author remained throughout his confinement on death row. Several high-ranking prison officials were sentenced for extortion of prisoners, and large amounts of weapons were found in cells. The author was pressured and tortured to provide gangs and officials with money. There were no guards in the dormitory or cells, which contained over 200 inmates and remained unlocked at all times. His money and personal effects had been removed from him en route to the prison, and for three weeks he had no visitors, and therefore no basic necessities such as soap or bedding. Food comprised unwashed rice and other inappropriate substances. Sanitation consisted of two non-flushing toilet bowls in an area which was also a 200-person communal shower.

2.5 The author was forced to pay for the 8 x 8 ft area in which he slept and financially to support the eight others with him. He was forced to sleep alongside drug-deranged individuals and persons who deliberately and constantly deprived him of sleep. He was forcibly tattooed with a permanent gang mark. Inmates were stretched out on a bench on public display and beaten with wood across the thighs, or otherwise "taught a lesson". The author states he lived in constant fear coming close to death and suicidal depression, watching six inmates walk to their execution while five others died violent deaths. Fearing death after a "brutally unfair and biased" trial, he suffered severe physical and psychological distress and felt "total helplessness and hopelessness". As a result, he is "destroyed both financially and in many ways emotionally".

2.6 On 21 December 1999, i.e. subsequent to the submission of the communication under the Optional Protocol, the Supreme Court, considering the case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered the author's immediate release. The Solicitor-General had filed a brief with the Court recommending acquittal on the basis that material contradictions in witness testimony, as well as the physical evidence to the contrary, justified the conclusion that the author's guilt had not been shown beyond reasonable doubt.

...

2.8 Upon his return to the United Kingdom, the author sought compensation pursuant to Philippine Republic Act 7309. The Act creates a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention, compensation being calculable by month. Upon inquiry, he was informed on 21 February 2001 that on 1 January 2001, he had been awarded P14,000, but that he would be required to claim it in person in the Philippines. On 12 March 2001, he wrote to the Board of Claims seeking reconsideration of quantum, on the basis that according to the legal scale 40 months in prison should result in a sum of P40,000. On 23 April 2001, he was informed that the amount claimed was “subject to

availability of funds" and that the person liable for the author's misfortune was the complainant accusing him of rape. No further clarification on the discrepancy of the award was received.

...

3.1 The author alleges a violation of articles 6 and 7 by virtue of the mandatory imposition of the death penalty under s.11 of *Republic* Act No. 7659 for the rape of a minor to whom the offender stands in parental relationship.1/ Such a crime is not necessarily a "most serious crime" as it does not involve loss of life, and the circumstances of the offence may vary greatly. For the same reasons, the mandatory death penalty is disproportionate to the gravity of the alleged crime and contrary to article 7. It is further disproportionate and inhuman, as no allowance is made for the circumstances of the individual crime and the individual offender in mitigation.

3.2 The author contends that the time spent on death row constituted a violation of article 7, particularly in the light of the massive procedural deficiencies of the trial. It is argued that there is, in this instance, a violation of article 7 because of the patently unfair proceedings at trial and the manifestly unsound verdict which resulted in the helplessness and anxiety placed on the author given he was wrongly convicted. This was aggravated by the specific treatment and conditions he was subjected to on death row.

...

7.2 As to the author's claims relating to the imposition of the death penalty, including passing of sentence of death for an offence that under the law of the State party, enacted subsequent to capital punishment having once been removed from the criminal code, carried mandatory capital punishment, without allowing the sentencing court to pay due regard to the specific circumstances of the particular offence and offender, the Committee observes that the author is no longer subject to capital punishment, as his conviction and hence the imposition of capital punishment was annulled by the Supreme Court in late December 1999, after the author had spent almost 15 months in imprisonment following sentence of death. In these circumstances, the Committee considers it appropriate to address the remaining issues related to capital punishment in the context of the author's claims under article 7 of the Covenant instead of separately determining them under article 6.

...

7.4 As to the claims concerning the author's mental suffering and anguish as a consequence of being sentenced to death, the Committee observes that the authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death,13/ the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost 15 months of imprisonment under

a sentence of death.

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible... All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

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Notes

1/ S.11 *Republic* Act 7659 provides that: "…the death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step parent, guardian…".

...

13/ *Johnson v. Jamaica* case No. 588/1994, Views adopted on 22 March 1996; *Francis v. Jamaica* case No. 606/1994, Views adopted on 25 June 1995.

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- *Baroy v. The Philippines* (1045/2002), ICCPR, A/59/40 vol. II (31October 2003) 518 (CCPR/C/79/D/1045/2002) at paras. 2.1-2.3, 8.3 and 9.

...

2.1 On 2 March 1998, a woman was raped three times. The author and an (adult) co-accused were thereafter charged with three counts of rape with use of a deadly weapon contrary to article 266A(1), 1/ in conjunction with article 266B(2), 2/ of the Revised Penal Code. It is alleged that on the date of the offence, the author would have been 14 years, 1 month and 14

days old, by virtue of being born on 19 January 1984.

2.2 At trial, the defence introduced the issue of minority through the author, who claimed to have been born in 1982. The trial court instructed the appropriate government agencies to submit evidence on his true age. Three documents were submitted. A Certificate of Live Birth listed the date as 19 January 1984, while a Certificate of Late Registration of Birth showed the date as 19 January 1981, and an Elementary School permanent record as 19 January 1980. The trial court considered, in the light of the author's physical appearance, that the author's true date of birth was 19 January 1980, thus making him over 18 years of age at the time the offence was committed.

2.3 On 20 January 1999, the author and his (adult) co-accused were each convicted of three counts of rape with a deadly weapon and sentenced to death by lethal injection. In imposing the maximum penalty available, the Court considered that there were the aggravating circumstances of night-time and confederation, and no mitigating circumstances. By way of civil liability, each was further sentenced to pay, in respect of each count, PHP50,000 in indemnity, PHP50,000 in moral damages and PHP50,000 in civil damages. On 4 January 2002, the communication was submitted to the Committee.

...

8.3 In spite of this conclusion with respect to the claims under article 6 [finding the claim inadmissible], the Committee observes that sentencing a person to death and placing him or her on death row in circumstances where his or her minority has not been finally determined raises serious issues under articles 10 and 14, as well as potentially under article 7, of the Covenant. The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a "partial motion for reconsideration", currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgment of 9 May 2002...

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2(b), of the Optional Protocol;

...

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Notes

1/ This provision defines rape as committed "by a man who shall have carnal knowledge of woman under any of the following circumstances:
a) through force, threat or intimidation; ….".

2/ This provision sets out : "Whenever the rape is committed with a use of a deadly weapon

or by two or more persons, the penalty shall be *reclusion perpetua* to death."

- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 2.2, 2.3, 3.3, 7.6, 7.7, 8 and 9.

...

2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001...

2.3 On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgement was confirmed by the Supreme Court, following extraordinary appeal proceedings.

...

3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.

...

7.6 As to the author's claim that her son's rights under article14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls5/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

...

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

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an

effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

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

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- *Arutyunyan v. Uzbekistan* (917/2000), ICCPR, A/59/40 vol. II (29 March 2004) 96 at para. 6.4.

...

6.4 The Committee recalls its jurisprudence2/ pursuant to which the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant, if no further appeal against the death sentence is possible. In Mr. Arutyunyan's case, the final death sentence was pronounced without the requirements for a fair trial set out in article 14 having been met. This results in the conclusion that the right protected under article 6 has also been violated. This violation was remedied by the commutation of the author's death sentence by the Presidium of the Supreme Court, on 31 March 2000.

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2/ *Brown v. Jamaica*, case No. 775/1997.

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- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 8.1 and 8.2.

...

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated *a priori* by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

- *Smartt v. Guyana* (867/1999), ICCPR, A/59/40 vol. II (6 July 2004) 41 at paras. 5.5, 6.2-6.4, 7 and 8.

...
5.5 With respect to the author's claim that the trial against her son was otherwise unfair, the Committee notes that the trial documents submitted by the author reveal that her son was not represented by counsel during the committal hearings. It also notes with concern that, despite three reminders addressed to it, the State party has failed to comment on the communication, including on its admissibility. In the absence of any such comments, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the trial against her son was unfair, and declares the communication admissible, insofar as it may raise issues under articles 6 and 14, paragraph 3 (d), of the Covenant.
...
6.2 The issue before the Committee is whether the absence of legal representation of the author's son during the committal hearings amounts to a violation of article 14, paragraph 3 (d), of the Covenant.

6.3 The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.6/ The pre-trial hearings, having taken place before the Georgetown Magisterial Court between 16 November 1993 and 6 May 1994, that is after the author's son had been charged with murder on 31 October 1993, formed part of the criminal proceedings. Furthermore, the fact that most witnesses of the prosecution were examined at this stage of the proceedings for the first time, and were subject to cross-examination by the author's son, shows that the interests of justice would have required securing legal representation to the author's son through legal aid or otherwise. In the absence of any submission by the State party on the substance of the matter under consideration, the Committee finds that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.4 The Committee recalls that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.7/ In the present case, the sentence of death was passed without

meeting the requirements of a fair trial set out in article 14 of the Covenant, and thus also in breach of article 6.

7. The Human Rights Committee...is of the view that the facts before it reveal a violation of articles 6 and 14, paragraph 3 (d), of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author's son is entitled to an effective remedy, including the commutation of his death sentence. The State party is also under an obligation to take measures to prevent similar violations in the future.

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Notes

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6/ See e.g. communication No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, at para. 6.5; communication No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, at para. 7.3; communication No. 775/1997, *Brown v. Jamaica*, Views adopted on 23 March 1999, at para. 6.6.

7/ See *ibid*., at paras. 7.7, 7.4 and 6.15, respectively.

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- *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 4.1-4.4, 6.8 and 6.9, 7 and 8.

...

4.1 The author has alleged that the State party breached its obligations under the Optional Protocol by executing her husband despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls 4/ that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional

Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her husband was denied rights under articles 6, 7, 9, 10 and 14 of the Covenant. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to have done so after the Committee has acted under rule 86 of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of the State party's explanation for its action, in spite of several requests made in this relation by the Committee, acting through its Chairman and its Special Rapporteur on new communications.

4.4 The Committee recalls that interim measures pursuant to rule 86 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the execution of the author's husband undermines the protection of Covenant rights through the Optional Protocol.

...

6.8 As to the alleged violation of article 14, paragraph 3 (b), in that the author's husband was legally represented only towards the end of the investigation and not by counsel of his own choice, with no opportunity to consult his representative, and that, contrary to article 14, paragraph 3 (d), Mr. Saidov was not informed of his right to be represented by a lawyer upon arrest, and that his lawyer was frequently absent during the trial, the Committee once more regrets the absence of a relevant State party explanation. It recalls its jurisprudence that, particularly in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer 7/ at all stages of the proceedings. In the present case, the author's husband faced several charges which carried the death penalty, without any effective legal defence, although a lawyer had been assigned to him by the investigator. It remains unclear from the material before the Committee whether the author or her husband have requested a private lawyer, or have contested the choice of the assigned lawyer. However, and in the absence of any relevant State party explanation on this issue, the Committee reiterates that while article 14, paragraph 3 (d) does not entitle an accused to choose counsel free of charge, steps must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.8/ Accordingly, the Committee is of the view that the facts before it reveal a violation of Mr. Saidov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

6.9 The Committee recalls 9/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation

of article 6 of the Covenant. In the current case, the sentence of death was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Saidov's rights under articles 6, 7, 10, paragraph 1, and 14, paragraphs 1, 2, 3 (b), (d), and (g), and 5, of the Covenant.

8. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

...

4/ See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

...

7/ See for example *Aliev v. Ukraine*, communication No. 781/1997, *Robinson v. Jamaica*, communication No. 223/1987, *Brown v. Jamaica*, communication No. 775/1997.

8/ See, *inter alia*, *Kelly v. Jamaica*, communication No. 253/1987.

9/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996, *Kurbanov v. Tajikistan*, communication No. 1096/2002.

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- *Mulai v. Guyana* (811/1998), ICCPR, A/59/40 vol. II (20 July 2004) 29 at paras. 6.1-6.3, 7 and 8.

...

6.1 The Committee notes that the independence and impartiality of a tribunal are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1, of the Covenant. In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee recalls that where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court 4/.

6.2 In the present case, the author submits that the foreman of the jury at the retrial informed the police and the Chief Justice, on 26 February 1996, that someone had sought to influence him. The author claims that it was the duty of the judge to conduct an inquiry into this matter to ascertain whether any injustice could have been caused to Bharatraj and Lallman Mulai, thus depriving them of a fair trial. In addition, the author complains that the incident was not disclosed to the defence although both the judge and the prosecution were made aware of it by the foreman of the jury, and that unlike in some other trials the trial against the two brothers was not aborted as a consequence of the incident. The Committee notes that although it is not in the position to establish that the performance and the conclusions reached by the jury and the foreman in fact reflected partiality and bias against Bharatraj and Lallman Mulai, and although it appears from the material before it that the Court of Appeal dealt with the issue of possible bias, it did not address that part of the grounds of appeal that related to the right of Bharatraj and Lallman Mulai to equality before the courts, as enshrined in article 14, paragraph 1, of the Covenant and on the strength of which the defence might have moved for the trial to be aborted. Consequently, the Committee finds that there was a violation of article 14, paragraph 1, of the Covenant.

6.3 In accordance with its consistent practice the Committee takes the view that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant. In the circumstances of the current case the State party has violated the rights of Bharatraj and Lallman Mulai under article 6 of the Covenant.

7. The Human Rights Committee...is of the view that the facts before reveal violations of article 14, paragraph 1, and article 6 of the International Covenant on Civil and Political Rights.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Bharatraj and Lallman Mulai with an effective remedy, including commutation of their death sentences. The State party is also under an obligation to avoid similar violations in the future.

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Notes

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4/ See *Willard Collins v. Jamaica*, case No. 240/1987, Views adopted on 1 November 1991, para. 8.4.

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LIFE - RIGHT TO - DEATH PENALTY

- *Ramil Rayos v. The Philippines* (1167/2003), ICCPR, A/59/40 vol. II (27 July 2004) 389 at paras. 7.1-7.3, 8 and 9.

...

7.1 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organize his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times"6/. The Committee understands from the legislation that the author would have at least 1 year and at most 18 months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under section 16 of the Republic Act No. 8177, 7/ following notification of execution he would have approximately eight hours to finalize any personal matters and meet with members of his family. The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimize this anguish as far as possible 8/. However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

7.2 Regarding the claim under article 6, paragraph 2, of the Covenant, the Committee observes that, in response to the State party's argument that the Committee's function is not to assess the constitutionality of a State party's law, its task is rather to determine the consistency with the Covenant of the particular claims brought before it 9/. The Committee notes from the judgements of both the Regional Trial Court and the Supreme Court, that the author was convicted of the complex crime of rape with homicide under article 335 of the Revised Penal Code, as amended by RA No. 7659, which provides that "When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death." Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee refers to its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence 10/. It follows that the automatic imposition

of the death penalty in the author's case, by virtue of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

7.3 With respect to the claim of a violation of article 14, paragraph 3 (b), as the author was not granted sufficient time to prepare his defence and communicate with counsel, the Committee notes that the State party does not contest this claim. Since the author was only granted a few moments each day during the trial to communicate with counsel, the Committee finds a violation of article 14, paragraph 3 (b), of the Covenant. As the author's death sentence was affirmed after the conclusion of proceedings in which the requirements for a fair trial set out in article 14 of the Covenant were not met, it must be concluded that the author's right protected under article 6 has also been violated.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 14, paragraph 3 (b), of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

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6/ Section 1, Republic Act No. 8177.

7/ Section 16 of the Republic Act No. 8117 - "…During the interval between the notification and execution, the convict shall, as far as possible, be furnished such assistance as he may request in order to be attended in his last moments by a priest or minister of the religion he professes and to consult his lawyers, as well as in order to make a will and confer with members of his family or of persons in charge of the management of his business, of the administration of his property, or of the care of his descendants." However, on 8 March 2004, counsel forwarded the text of EP 200, pursuant to which the condemned prisoner may only meet with a priest and his lawyer but not with family members.

8/ *Pratt and Morgan v. Jamaica*, cases Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989.

9/ *Carpo v. The Philippines*, case No. 1077/2002, Views adopted on 28 March 2003.

10/ *Thompson v. St. Vincent and The Grenadines*, case No. 806/1998, Views adopted on 18 October 2000; and *Kennedy v. Trinidad and Tobago*, case No. 845/1998, Views adopted on 26 March 2002.

For dissenting opinions in this context, see Ramil Rayos v. The Philippines (1167/2003), ICCPR, A/59/40 vol. II (27 July 2004) 389 at Individual Opinion of Nisuke Ando, 399, and Individual Opinion of Christine Chanet, 400.

- *Khomidov v. Tajikistan* (1117/2002), ICCPR, A/59/40 vol. II (29 July 2004) 363 at paras. 6.5, 6.6, 7 and 8.

...

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

6.6 With regard to the author's claim that her son's right to life under article 6 of the Covenant has been violated, the Committee recalls its constant jurisprudence 3/ that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant, if no appeal of the sentence is possible. In this case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of article 6.

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

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Khomidov with an effective remedy, entailing commutation of his sentence to death, a compensation, and a new trial with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

...

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

Jamaica, communication No. 730/1996.

- *Ganga v. Guyana* (912/2000), ICCPR, A/60/40 vol. II (1 November 2004) 40 at paras. 5.2, 5.3 and 7.

...

5.2 The Committee maintains its position that it is generally not in the position to evaluate facts and evidence presented before a domestic court. In the current case, however, the Committee takes the view that the instructions to the jury raise an issue under article 14 of the Covenant, as the defendant had managed to present *prima facie* evidence of being mistreated, and the Court did not alert the jury that that the prosecution must prove that the confession was made without duress. This error constituted a violation of Mr. Deolall's right to a fair trial as required by the Covenant, as well as his right not to be compelled to testify against himself or confess guilt, which violations were not remedied upon appeal. Therefore, the Committee concludes that the State party has violated article 14, paragraphs 1, and 3 (g), of the Covenant in respect of Mr. Deolall.

5.3 The Committee recalls its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant 4/. In the present case, since the final sentence of death was passed without having observed the requirement for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has also been violated.

...

7. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Deolall with an effective remedy, including release or commutation.

Notes

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4/ *Taylor v. Jamaica*, communication No. 705/1996, *Levy v. Jamaica*, 719/1996.

LIFE - RIGHT TO - DEATH PENALTY

- *Rolando v. The Philippines* (1110/2002), ICCPR, A/60/40 vol. II (3 November 2004) 161 at paras. 2.4, 5.2-5.4, 6, 7 and individual opinion of Mr. Martin Scheinen, Ms. Christine Chanet and Mr. Rajsoomer Lallah (partly dissenting), at 168.

...

2.4 The author describes the procedure set out in paragraph 7 (a) of EP 200, issued by the Bureau of Corrections pursuant to Republic Act 8177, for his execution. It provides that the condemned individual shall only be notified of the execution date at dawn on the date of execution and that the execution must take place within 8 hours of the accused being so informed. No provision is made for notifying the family of the condemned person. The only contact that the accused may have is with a cleric or with his lawyer. Contact can only take place through a mesh screen.

...

5.2 The Committee notes from the judgements of both the Regional Trial Court and the Supreme Court, that the author was convicted of statutory rape under article 335 of the Revised Penal Code, as amended by section 11 of Republic Act No. 8353 (see footnote 2 below), which provides that "[t]he death penalty shall be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim…" Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.7/ It also notes that rape, under the law of the State party is a broad notion and covers crimes of different degrees of seriousness. It follows that the automatic imposition of the death penalty in the author's case, by virtue of the application of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.

5.3 In light of the above finding of a violation of article 6 of the Covenant, the Committee need not address the author's remaining claims under paragraphs 1, 2 and 6 of article 6, which all concern the imposition of capital punishment in this case.

5.4 The Committee notes the author's claims of violations under articles 7 and 10, paragraph 1, on account of the fact that he would not be notified of the date of his execution until dawn of the day in question, whereupon he would be executed within 8 hours and would have insufficient time to bid farewell to family members and organize his personal affairs. It further notes the State party's contention that the death sentence shall be carried out "not

earlier than one (1) year nor later than eighteen (18) months after the judgement has become final and executory, without prejudice to the exercise by the President of his executive clemency powers at all times".8/ The Committee understands from the legislation that the author would have at least one year and at most 18 months, after the exhaustion of all available remedies, during which he may make arrangements to see members of his family prior to notification of the date of execution. It also notes that, under section 16 of the Republic Act No. 8177, following notification of execution he would have approximately eight hours to finalize any personal matters and meet with members of his family. The Committee reiterates its prior jurisprudence that the issue of a warrant for execution necessarily causes intense anguish to the individual concerned and is of the view that the State party should attempt to minimise this anguish as far as possible. 9/ However, on the basis of the information provided, the Committee cannot find that the setting of the time of the execution of the author within eight hours after notification, considering that he would already have had at least one year following the exhaustion of domestic remedies and prior to notification to organize his personal affairs and meet with family members, would violate his rights under articles 7, and 10, paragraph 1.

...

6. The Human Rights Committee...is of the view that the facts as found by the Committee reveal a violation by the Philippines of articles 6, paragraphs 1, 9, paragraphs 1, 2 and 3 and 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights.

7. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy including commutation of his death sentence. The State party is under an obligation to avoid similar violations in the future.

Notes

...

2/ The Supreme Court stated that the author was sentenced under section 11 of Republic Act No. 7659, which states inter alia that "The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances: 1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step parent, guardian, relative by consanguinity or affinity with the third civil degree, or the common-law spouse of the parent of the victim…". The court stated that "The qualifying circumstances of minority and relationship that would warrant imposition of the death penalty were specifically alleged and proven."

...

7/ *Thompson v. St. Vincent & The Grenadines*, case No. 806/1998, Views of 18 October 2000; and *Kennedy v. Trinidad & Tobago*, case No. 845/1998, Views of 26 March 2002, *Carpo v. The Philippines*, case No. 1077/2002, Views of 6 May 2002.

8/ Section 1, Republic Act No. 8177.

9/ *Pratt and Morgan v. Jamaica*, case No. 210/1986 and 225/1987, Views adopted on 6 April 1989.

Individual Opinion of Mr. Martin Scheinen, Ms. Christine Chanet and Mr. Rajsoomer Lallah, (partly dissenting)

We are in full support of the Committee's finding of a violation of article 6, paragraph 1, of the Covenant, due to categorization of the author's mandatory death penalty as arbitrary deprivation of life. In this respect, the case affirms and builds upon the Committee's earlier case law, as established in *Thompson v. St. Vincent and the Grenadines* (communication No. 806/1998), *Kennedy v. Trinidad and Tobago* (communication No. 845/1998), *Carpo et al. v. The Philippines* (communication No. 1077/2002) and *Ramil Rayos v. The Philippines* (communication No. 1167/2003).

...

For dissenting opinions in this context, see Rolando v. The Philippines (1110/2002), ICCPR, A/60/40 vol. II (3 November 2004) 161, Individual Opinion of Mr. Martin Scheinen, Ms. Christine Chanet and Mr. Rajsoomer Lallah (partly dissenting), at 168-172, and Individual Opinion of Ms. Ruth Wedgwood and Mr. Nisuke Ando, at 173.

- *Khalilov v. Tajikistan* (973/2001), ICCPR, A/60/40 vol. II (30 March 2005) 74 at paras. 1.1, 2.5-2.8, 2.11, 2.12, 4.1-4.4, 7.5-7.7, 8 and 9.

1.1 The author of the communication is Mrs. Maryam Khalilova, a Tajik citizen born in 1954. She submits the communication on behalf of her son - Validzhon Alievich Khalilov, also a Tajik national, born in 1973, who at the time of submission of the communication was kept on death row in Detention Centre SIZO No. 1 in Dushanbe and awaiting execution, following a death sentence handed down by the Supreme Court of Tajikistan on 8 November 2000. She claims that her son is a victim of violations by Tajikistan of articles 6, paragraphs 1 and 4; 10, paragraph 1; and 14, paragraphs 2, 3 (g), and 5, of the International Covenant on Civil and Political Rights. The communication also appears to raise issues under article 7 of the Covenant, with regard to the author and her son, although this provision was not directly invoked by the author. The author is not represented by counsel.

...

2.5 According to the author, her son was beaten by investigators to make him confess participation in different unresolved crimes, including murder, use of violence, robberies and theft, and different other crimes that occurred between 1998 and 2000. According to her, the investigators refused to interrogate neighbours of the aunts in whose houses her son hid between December 1997 and January 2000, and who could have testified that he was

innocent.

2.6 On an unspecified date, Mr. Khalilov was transferred from the Lenin District Police Department to Kaferingansky District Police Department. In the meantime, his father was taken from his workplace and brought to his son in the Kaferingansky District Police Department. The father noted that his son had been beaten and stated that he would complain to the competent authorities. The investigators began to beat him in front of his son. The author's son was threatened and told that he had to confess his guilt of two murders during a TV broadcast or otherwise his father would be killed. Mr. Khalilov confessed guilt in the two murders as requested. Notwithstanding, the investigators killed his father 1/.

2.7 On 12 February, Mr. Khalilov was shown again on national television (broadcast "Iztirob"). According to the author, he had been beaten and his nose was broken, but the cameras showed his face only from one particular angle that did not reveal these injuries.

2.8 Mr. Khalilov's case was examined by the Supreme Court jointly with the cases of other five co-accused 2/. The author's son was found guilty of the crimes under articles 104(2) (homicide), 181 (3) (hostage taking), 186 (3) (banditism), 195 (3) (illegal buying, selling, keeping, transporting of weapons, ammunitions, explosives, etc.), 244 (theft), and 249 (robbery with use of violence), of the Criminal Code of Tajikistan. He was sentenced to death on 8 November 2000. According to the author, no victim or injured party recognized her son in court as a participant in the criminal acts, notwithstanding the fact that the witnesses had declared that they could recognize by face every participant in the crimes. The Court allegedly ignored their statements and refused to take them into account or to include them in its decision.

...

2.11 The author also explains that she does not know where her son is held. The officials of the SIZO No. 1 Detention Centre in Dushanbe allegedly had refused to accept her parcels, telling that her son was removed, without explaining further.

2.12 On 18 February 2005, the author informed the Committee that she received a letter from the Deputy Chairman of the Supreme Court, dated 2 February 2005, where it was stated that her son was executed on 2 July 2001.

...

4.1 The Committee notes that the State party had executed the author's son despite the fact that a communication had been registered before the Human Rights Committee under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls 3/ that by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's

adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.

4.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleges that her son was denied rights under articles 6, 10 and 14 of the Covenant. She further makes claims that could be subsumed under article 7, even though this article is not specifically invoked. Having been notified of the communication, the State party has breached its obligations under the Protocol, by executing the alleged victim before the Committee concluded its consideration and examination and the formulation and communication of its Views. It is particularly inexcusable for the State to having done so after the Committee has acted under rule 92 (old 86) of its rules of procedure, requesting that the State party refrains from doing so.

4.3 The Committee also expresses great concern about the lack of State party's explanation for its action, in spite of several requests made in this relation by the Committee.

4.4 The Committee recalls 4/ that interim measures pursuant to rule 92 (old 86) of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as, as in the present case, the execution of the author's son undermines the protection of Covenant rights through the Optional Protocol.

...

7.5 The author claimed that her son's right to have his death sentence reviewed by a higher tribunal according to law was violated. From the documents before the Committee, it transpires that on 8 November 2000, the author's son was sentenced to death at first instance by the Supreme Court. The judgement mentions that it is final and not subject to any further cassation appeal. The Committee recalls that even if a system of appeal may not be automatic, the right to appeal under article 14, paragraph 5, imposes on the State party a duty substantially to review, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case 7/. In the absence of any pertinent explanation from the State party, the Committee considers that the absence of a possibility to appeal to a higher judicial instance judgements of the Supreme Court handed down at first instance, falls short of the

requirements of article 14, paragraph 5, and, consequently, that there has been a violation of this provision 8/.

7.6 With regard to the author's claim under article 6, paragraph 1, of the Covenant, the Committee recalls that that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant 9/. In the current case, the sentence of death of the author's son was passed, and subsequently carried out, in violation of the right to a fair trial as set out in article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

7.7 The Committee has noted the author's claim that the Tajik authorities, including the Supreme Court, have consistently ignored her requests for information and systematically refused to reveal any detail about her son's situation or whereabouts. The Committee understands the continued anguish and mental stress caused to the author, as the mother of a condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. The secrecy surrounding the date of execution, and the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the execution of her son amounts to inhuman treatment of the author, in violation of article 7 of the Covenant 10/.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of Mr. Khalilov's rights under articles 6, paragraph 1; 7; 10, paragraph 1; and 14, paragraphs 2, 3 (g) and 5, of the Covenant, and a violation of article 7 in the author's own respect.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

Notes

1/ The author submits a letter of her son (dated 27 December 2000), addressed to the Committee, in which M. Khalilov contends that his father was brought to the police department and was beaten, humiliated, and burned with an iron by the investigators, until he died. According to Mr. Khalilov, his father was returned home dead and was buried on 9 February 2000. Mr. Khalilov gives the names of two officials who participated in his and his father's beatings: one N., chief of a Criminal Inquiry Department, and his deputy, U. According to him, there were also 3-4 other persons.

2/ The exact dates of the proceedings are not provided.

3/ See *Piandong v. The Philippines*, communication No. 869/1999, Views adopted on 19 October 2000.

4/ See *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.
...
7/ See *Domukovsky and al. v. Georgia*, communications No. 623-627/1995, Views adopted on 6 April 1998, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

8/ See for example *Aliev v. Ukraine*, communication No. 781/1997, Views adopted on 7 August 2003, *Robinson v. Jamaica*, communication No. 223/1987, Views adopted on 30 March 1989, *Brown v. Jamaica*, communication No. 775/1997, Views adopted on 23 March 1999.

9/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, Views adopted on 3 November 1998, *Clarence Marshall v. Jamaica*, communication No. 730/1996, Views adopted on 3 November 1998, *Kurbanov v. Tajikistan*, communication No. 1096/2002, Views adopted on 6 November 2003, and *Saidova v. Tajikistan*, communication No. 964/2001, Views adopted on 8 July 2004.

10/ See communications Nos. 886/1999, *Bondarenko v. Belarus*, and 887/1999, *Lyashkevich v. Belarus*, Views adopted on April 2003.
