UNITED
NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.
RESTRICTED*

CCPR/C/63/D/672/1995
30 July 1998

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Sixty-third session
13 31 July 1998

VIEWS

Communication Nº 672/1995

Submitted by:	Clive Smart (represented by Mr. Clive Woolf of the London law firm S. Rutter and Co.)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	11 December 1995 (initial submission)
Date of adoption of Views	29 July 1998

On 29 July 1998, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 672/1995. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX*

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-third session -

concerning

Communication Nº 672/1995

Submitted by:	Clive Smart(represented by Mr. Clive Woolf of the London law firm S. Rutter and Co.)
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	11 December 1995 (initial submission)
Date of admissibility decision:	5 July 1996

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

Meeting on 29 July 1998,

Having concluded its consideration of communication No.672/1995 submitted to the Human Rights Committee by Clive Smart, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

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

1. The author of the communication is Clive Smart, a Trinidadian citizen and carpenter who is awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. The author claims to be a victim of a violation by Trinidad and Tobago of articles 7; 9, paragraph 3; 10, paragraph 1 and 14, paragraphs 1 and 3, of the International Covenant on Civil and Political Rights. He is represented by Mr. Clive Woolf of the London law firm S. Rutter and Co.

The facts as submitted by the author:

2.1 On 22 June 1988, the author was arrested for the murder of one Josephine Henry. He was found guilty as charged in the Scarborough Assizes Court on 14 February 1992, and sentenced to death. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 26 October 1994. On 11 December 1995, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal.

2.2 On trial, the prosecution's case was based on the author's evidence, who did not dispute the attack, and that of several witnesses. The author, in an apparent fit of jealousy, had attacked Josephine Henry, stabbing her 19 times.

2.3 The victim's sister, Charmaine Henry, testified that, on 22 June 1988, at 10:00 she had sent the author out of her house and told him to stay away. She claimed that some time later, she had heard loud calls of distress from her sister. She followed the cries and saw her sister struggling with the author, who was stabbing her. She stressed that her sister had been unarmed. She had implored the author to stop, ran down the road calling for help, then returned to the scene.

2.4 Another prosecution witness Hayden Griffith, testified that he had seen the author, whom he did not know, pass by his house gesticulating; he could not see who was with him. He had then seen the victim go past his window. A third witness, Michelle Quashie, at whose house the victim had been, testified that Ms. Henry had left the house and gone outside to talk to the author.

2.5 A further witness, Elizabeth Baird, who was a neighbour of Charmaine Henry, testified that she had overheard the conversation between the author and Charmaine Henry following which she had heard her calling out to her sister for help. She had seen the author stabbing her in the road; she had shouted to him to stop. Josephine Henry had fallen into the ditch, where the author had continued to stab her, despite her pleas that he stop. She claims that the victim had been unarmed.

2.6 The arresting officer gave evidence that when the author had seen him he said " Mr. Joefield I coming with all yut, I am not running". The author was cautioned and taken to the police station. Later the author accompanied various officers to retrieve the bloodstained knife, which was stuck in a mango tree, where the author said he had tried to commit suicide. The stains were of the same blood group as Josephine Henry.

2.7 The author invoked self defence and, subsidiarily, provocation. He gave evidence from the witness stand and testified that he and the victim had had a

relationship, that he gave her money every week, and that they were to be married. On 21 June 1988, he had given her $ 5,000 dollars he had won gambling, and she had promised to cook him dinner at his house that evening. When he returned home she had not been there. The author states that Josephine also failed to appear at court the following morning with the money as arranged, since he was expecting a fine for gambling. He went to look for her, first at her father's house where her sister Charmaine told him she was not there, then, at Michelle Quashie's, where he found her. He states that Josephine had come out of the house carrying a cutlass knife, with which she had been peeling a pineapple. The author testified that she told him that she had spent the money on tickets for a holiday for herself and three friends. He told her not to joke and to give him the money, so he could pay his fine and a debt he had with his foreman. He testified that she had abused him by saying: "is stupid $ 5,000 you getting on so for, my body worth more than that". She then had cut his hand and a struggle ensued, during which he took the knife from her and started to "fire stabs", the next thing he knew was that the victim was in the canal covered with blood. He ran away taking his jumper and shoes of climbing up a mango tree and trying to hang himself. He went off to his grandmother's where the arresting officer found him. He claims he told the police he had been cut. During cross examination, he admitted he had not told the arresting officer that he had been cut.

The complaint:

3.1 Counsel submits that the author is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, since he has been on death row for over four years and six months. It is argued that the delay in carrying out the execution is unconstitutional. In support of his argument, counsel refers to the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan[1], and to a judgment of the European Court of Human Rights.[2] Counsel further alleges that the anguish the author suffered during his pre-trial detention, facing the prospect of his execution, should he be convicted, should be relevant in adjudging whether the author has been a victim of inhuman and degrading treatment, in violation of the Covenant.

3.2 The author claims that his prologued pre-trial detention violated articles 9, paragraph 3, and 14 paragraph 3 (c), of the Covenant. In this respect he states that he was arrested on 22 June 1988 but that his trial only took place on 7 February 1992. This is said to be particularly unjustifiable in a case where there were no great difficulties in obtaining the attendance of witnesses, testimonies or evidence. Counsel argues that 44 months in pre-trial detention is incompatible with the Covenant; reference is made to the Committee's jurisprudence.[3] Counsel contends that the delay following the trial is equally

[1] Pratt and Morgan v. Attorney General of Jamaica et al. (1993), (Privy Council) Appeal No. 10 of 1993, Judgment delivered on 2 November 1993.

[2] Soering v. United Kingdom (1989), 11 EHRR 439.

[3] Communication No. 6/1977 (Sequeira v. Uruguay), Views adopted on 29 July 1980, and Communication No. 203/1986 (Muñoz Hermoza v. Peru), Views adopted 4 November 1988.

attributable to the State party; reference is made to the Privy Council's Judgment in Pratt and Morgan.

3.3 The author claims that his trail was unfair. Counsel argues that the trial judge violated his obligation of impartiality by the way in which, during his summing-up, he dealt with the issues of self-defence and provocation. Counsel further claims that the judge gave an inaccurate account and misdirected the jury on the effect of the evidence adduced by the prosecution with regard to the issue of self-defence. He claims that the judge misdirected the jury by imposing an objective, as opposed to a subjective, test for self-defence. Finally, he claims that the judge did not give proper directions on the test of a reasonable man in provocation, thereby denying the author the possibility of being acquitted or convicted of the lesser charge of manslaughter. Moreover, counsel submits that the author has been denied a fair trial in that the trial judge should have discharged one of the members of the jury, who it is alleged was related to the victim.[4] It transpires, however, that this issue was not raised either on trial nor on appeal.

3.4 With regard to the appeal, the author claims that counsel who represented him before the Court of Appeal failed to properly consult with him, because she did not pursue two of the grounds of appeal prepared by a different Counsel, not giving the author any explanations, and denying him the possibility of clarifying the matter.

3.5 Finally, the author invokes a violation of article 6, paragraph 2, of the Covenant, because he was sentenced to death without the requirements of a fair trial having been met.

State party's observations and Counsel's comments thereon:

4.1 By submission of 5 March 1996, the State party informed the Committee that it would submit its comments on the admissibility of the case by 18 March 1996. In a further submission dated 19 March 1996, the State party does not address the admissibility of the communication but, rather, informs the Committee that, to avoid further delays in the case of Mr. Smart, the State party would stay the author's execution for a period of two months only.

4.2 The State party submits as follows:

> ".. 1. The Government of Trinidad and Tobago is committed to upholding the rule of law and it would therefore not deny Mr. Smart access to the United Nations Human Rights Committee for the determination of his petition provided that the process is not abused by the condemned prisoner.

[4] From the trial transcript, it appears that two of the jurors who were selected disqualified themselves, because they knew the accused, five of those called had known the accused and family of the deceased.

2. The Government however has a responsibility to ensure that these petitions are determined quickly so as not to frustrate the application of the law. Any delay or procrastination by the United Nations Human Rights Committee can have the effect of subverting the sentence of the Court and Constitution of Trinidad and Tobago.

3. The Government therefore requests the petition of Smart be heard and determined within two months of the Government of Trinidad and Tobago submitting its response to the application before the said Committee.

4. During the two month period, the Government will not carry out the death sentence. ..."

4.2 On 2 April 1996 the Committee, through its Chairman replied to the State party by letter, reminding it that it had been the State party's own failure to submit comments on the admissibility within the imparted deadline that had caused the delay in deciding on the case. The letter noted that the State party's Note Verbale of 19 March 1996 did not contain any information relating to the admissibility of the case. It further stated that the Committee intended to take up the communication during its 57th Session.

4.3 In a further submission dated 20 May 1996 the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. It submits that the rights which the author invokes in his communication are coterminous with rights protected by the Trinidadian Constitution and refers to sections 4, 5 and 14 of the Constitution and that it is for the author to seek redress in the High Court. The State party further notes that the Legal Aid and Advisory Authority has not received an application for legal aid from Mr. Smart for a constitutional motion.

5.1 In his comments, dated 14 and 19 June 1996, counsel refutes the State party's contention that the author can still pursue a constitutional motion, because the courts of Trinidad and Tobago and the Privy Council have ruled that: " [a] person's constitutional rights are not infringed if that person has a trial at which the trial judge possesses the common law rights to prevent an abuse of process". The courts have further held that once there has been a trial with a Judge and jury any person convicted can only take constitutional points relating to the fairness and conduct of the trial in criminal appeals against conviction[5]. In line with this jurisprudence, the author has exhausted his right of appeal against conviction.

5.2 In respect of the State party's contention that legal aid is made available and that the author simply chose not to request it, counsel confirms that the author did not request legal aid but argues that this was because of the perceived futility of requesting something that has never, to counsel's knowledge, been granted to anyone imprisoned who complained of similar infringements. Counsel claims that the State party does not say that a request for legal aid for a constitutional motion would be successful but simply that

[5] See Chokolingo v. Attorney General Of Trinidad and Tobago 1981 1 WLR 106

it is available. Counsel explains that the legal aid procedure is long and bureaucratic, and recalls that the Judicial Committee has ruled that there must be a period of at least four days between the reading of a warrant of execution and the scheduled date of execution.[6] Such a delay is activated by the reading of the warrant of execution, after an unreasonable delay between the time of conviction and that of the reading of the warrant. Counsel alleges that given the Trinidadian scheme of legal aid, it is not possible to submit an application in time once a warrant has been read. Counsel alleges that for practical purposes, legal aid to a death row inmate, such as the author, is not available in Trinidad and Tobago; thus, constitutional redress remains a hypothetical remedy.

The Committee's admissibility decision:

6.1 During its 57th session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, the Committee took note of the State party's arguments that a constitutional remedy was still open to the author. However the Committee also noted counsel's counter-argument that legal aid has never been made available for this purpose and in this respect the Committee recalled its constant jurisprudence that for purposes of the Optional Protocol, domestic remedies must be both effective and available. The mere affirmation by the State party that a remedy exists is not sufficient for the Committee to consider it an effective remedy which needs to be exhausted for the purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, paragraph 2 (b),from considering the communication.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.[7] The Committee observed that the author has not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.3 As to the claim of undue prolongation in the judicial proceedings in violation of article 14, paragraph 5, of the Covenant, the Committee noted that, on the basis of all the information before it, it was clear that such delays in the appeal proceedings as occurred were essentially attributable to the author. In this respect the Committee noted the contents of an addendum in the Court of Appeal Judgement which stated that: "This appeal has been called up since 1st February of this year. Thereafter it was called up

[6]See Guerra v. Baptiste [1995] 3 WLR 891.

[7]See Committee's Views on communication Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliffe v.Jamaica), adopted on 30 March 1992; Communication No. 541/1993 (Errol Simms v. Jamaica), declared inadmissible on 3 April 1995.

on five further occasions, stretching from then into the month of July. On each occasion the appellant was responsible for the delay since he had been constantly writing letters to the Registrar whenever the matter had been called up to say that his family had been busy seeking to retain private attorney. It was only when this Court decided to act and to appoint attorney by way of legal aid that the appellant, for the first time, retained private attorney. This he did in October of this year. It was clear to us all that the appellant was attempting by this manoeuvre to beat the Pratt and Morgan deadline as best he could". The Committee concluded that in this respect the author had failed to advance a claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6.4 The Committee considered that the author and his counsel had sufficiently substantiated, for the purposes of admissibility, that the delay of forty four months in bringing the author to trial and his continued detention throughout this period may raise issues under articles 9, paragraph 3 and 14, paragraph 3 (c), of the Covenant, which should be examined on the merits.

6.5 As to the author's allegation that he was inadequately represented during his appeal hearing, the Committee considered that the claim could raise issues under article 14, paragraph 3 (b), of the Covenant.

6.6 With regard to the rest of the author's claims, the Committee noted that these related primarily to the conduct of the trial by the judge and his summing-up to the jury. It recalled that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge’s instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript do not reveal that the conduct of his trial suffered from such defects. In particular, it is not apparent that the judge should have dismissed a juror, who it was alleged was a member of the deceased family, and by not doing so had violated his obligation of impartiality. In this respect the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication was declared inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.7 On 5 July 1996, the Committee declared the case admissible with regard to article 9, paragraph 3, and article 14, paragraph 3 (c),(in respect of the claim of excessive delays in bringing him to trial) and with regard to the claim of inadequate representation on appeal under article 14, paragraph 3 (b) and consequently of article 6 of the Covenant.

State party’s observations on the merits and counsel’s comments:

7.1 By submission of 13 January 1997, the State party denies that there has been any violation of the Covenant, in the author’s case.

7.2 As to the allegations concerning the delays in hearing the author's case the State party contends that a delay of 18 months between indictment and trial with a preliminary inquiring within the first three months cannot be construed to be unreasonable. In relation with this first delay it also contends that it was not unreasonable, since the Office of the DPP was suffering an acute shortage of professional staff to handle the continually rising case load. With respect to the delay between the indictment and the trial itself the State party contends that the trial first came up for a hearing on 9 April 1990 and was adjourned nine times. On all but one occasion the prosecution was ready to proceed. The eight applications for adjournments were made by the defence and the court granted them. The trial commenced on 2 February 1992, it was completed by 14 February, within twelve days. The State party contends that the delays were of the author's own making, since only one adjournment was requested by the prosecution and that was the result of industrial action in the legal department at the time of the hearing.

7.3 Concerning the allegations of inadequate representation on appeal, in breach of article 14, paragraph 3 (b), in that counsel in Trinidad and Tobago, on appeal did not submitted two of the grounds of appeal put forward by the author's counsel in London, the State party contends that there is no merit to this allegation. It submitted an affidavit from the author's counsel in Trinidad and Tobago, Ms Paula Mae Weeks[8] where she states: " From the outset Mr Smart instructed me to forward the documents related to his appeal to English solicitors, Ingledew, Brown, Bennission [...] I did so and later received from them draft Grounds of Appeal. Further, at the point at which I entered the matter Alice Yorke-Soohon Attorney-at-law had already twice filed Grounds of Appeal in the matter. I reviewed all the grounds and adopted and incorporated those with which the law and I were in agreement. I did not explain this decision to Mr. Smart since these were matters exclusively with the purview of an Attorney-at-law. Mr Smart could make no useful input in respect of such matters". She further added: " I am of the firm belief that every viable ground of appeal that could have been advanced on Mr. Smart's behalf was ventilated adequately before the Court of Appeal".

8.1 In comments, dated 17 March and 4 June 1997 counsel submits that it is inadmissible for the State party to try and justify its failure to comply with its Covenant obligations by reference to administrative problems, if these exist and delays occur these should be limited to those cases where persons are not detained in custody before trial. With respect to the adjournments requested by the defence, the author states that the Supreme Court (High Court) in Tobago sits for only one month each year, as a consequence substantial delays are caused. The adjournments requested on behalf of the author took place in two months but because of the sitting arrangements made by the State party for the Supreme Court in Tobago, these adjournments were spread over a period of two years. It appears that the adjournments were requested to enable the author to be represented by Mrs Yorke at trial. Counsel states that the author cannot be held responsible for the sitting arrangements made by the State party in Tobago.

8.2 On the claims under article 14, paragraph 3 (b), counsel reiterates his claim that counsel in Trinidad acted against the author's wishes by not

[8]Ms Weeks currently sits on the High Court of Trinidad and Tobago

following the instructions of counsel in London, and if she had wanted authority to drop grounds of appeal she should have consulted with Clive Smart. The author states that at the time he met with Ms Weekes nothing about the case was discussed only the payment of fees.

9.1 In a further submission, dated 26 August 1997, the State party through its London solicitors, states that the delays admitted to by the State party are admitted as a matter of fact and not as a concession in the legal sense. It reiterates that these were not unreasonable and that the majority of adjournments were attributable to the author, either because the defence was not ready or due to unavailability of counsel.

9.2 It further submits that the State party is unable to respond to the author's superficial complaints that counsel may not have followed instructions, that it should have been plain to the author whether his instructions were followed or not. It further notes that the English solicitors are referring to matters which were taking place in Trinidad, Port of Spain and in respect of which they have no direct knowledge, information or instructions.

Examination of the merits:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.2 The State party has conceded that a period of over two years elapsed between the author's arrest on 22 June 1988 and the date set down for the beginning of the trial in September 1990. This delay in itself constitutes a violation both of article 9, paragraph 3, and of article 14, paragraph 3 (c). In these circumstances the Committee need not decide whether the further delays in the conduct of the trial, are attributable to the State party or not.

10.3 The author has alleged a violation of article 14, paragraph 3 (b), in that counsel did not follow his instructions in respect of the grounds of appeal to be put to the court. This is said to have denied him adequate representation on appeal as envisaged under the Covenant. The Committee notes that it is not apparent from the material before it that counsel's decision to drop two grounds of appeal was a function of anything else but her professional judegment. There is no evidence that counsel's behaviour was arbitrary or incompatible with the interests of justice. In the circumstances, there has been no violation of article 14, paragraph 3 (b), of the Covenant.

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

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Smart with an effective remedy, including commutation and compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

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