UNITED NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.
RESTRICTED*

CCPR/C/70/D/806/1998
5 December 2000

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Seventieth session
16 October – 3 November 2000

VIEWS

Communication No. 806/1998

Submitted by:	Mr. Eversley Thompson (represented by Mr. Saul Lehrfreund of Simons, Muirhead & Burton, London)
Alleged victim:	The author
State party:	St. Vincent & the Grenadines
Date of communication:	17 February 1998
Prior decisions:	Special Rapporteur's combined rule 86/91 decision, transmitted to the State party on 19 February 1998 (not issued in document form)
Date of adoption of Views:	18 October 2000

On 18 October 2000, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 806/1998. 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

- Seventieth session -

concerning

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

Meeting on 18 October 2000

Having concluded its consideration of communication No. 806/1998 submitted to the Human Rights Committee by Mr. Eversley Thompson 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, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the case: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of two individual opinions signed by five Committee members is appended to this document.

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

1. The author of the communication is Eversley Thompson, a Vincentian national born on 7 July 1962. He is represented by Saul Lehrfreund of Simons, Muirhead & Burton, London. Counsel claims that the author is a victim of violations of articles 6(1) and (4), 7, 10(1), 14(1) and 26 of the Covenant.

The facts as submitted by counsel

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. In his petition for special leave to appeal to the Judicial Committee of the Privy Council, counsel raised five grounds of appeal, relating to the admissibility of the author's confession statements and to the directions of the judge to the jury. On 6 February 1997, the Judicial Committee of the Privy Council granted leave to appeal, and after having remitted the case to the local Court of Appeal on one issue, it rejected the appeal on 16 February 1998. With this, all domestic remedies are said to have been exhausted.

2.2 At trial, the evidence for the prosecution was that the little girl disappeared on 18 December 1993 and that the author had been seen hiding under a tree near her home. Blood, faecal material and the girl's panty were found on the beach near the family's home. The girl's body was never found.

2.3 According to the prosecution, police officers apprehended the author at his home early in the morning of 19 December 1993. They showed him a red slipper found the evening before and he said that it was his. After having been brought to the police station, the author confessed that he had sexually abused the girl and then thrown the girl into the sea from the beach. He went with the policemen to point out the place where it happened. Upon return, he made a confession statement.

2.4 The above evidence by the police was subject to a *voir dire* during trial. The author contested ever having made a statement. He testified that the police officers had beaten him at home and at the police station, and that he had been given electric shocks and had been struck with a gun and a shovel. His parents gave evidence that they had seen him on 20 December 1993 with his face and hands badly swollen. After the *voir dire*, the judge ruled that the statement was voluntary and admitted it into evidence. Before the jury, the author gave sworn evidence and again challenged the statement.

The complaint

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.

3.3 Counsel further claims that the mandatory nature of the death sentence violates the author's rights under article 6(1) & (4).

3.4 Counsel also claims that article 14(1) has been violated because the Constitution of St Vincent does not permit the Applicant to allege that his execution is unconstitutional as inhuman or degrading or cruel or unusual. Further, it does not afford a right to a hearing or a trial on the question whether the penalty should be either imposed or carried out.

3.5 Counsel submits that the following conditions in Kingstown prison amount to violations of articles 7 and 10(1) in relation to the author. He is detained in a cell measuring 8 feet by 6 feet; there is a light in his cell that remains constantly lit 24 hours a day; there is no furniture or bedding in his cell; his only possessions in his cell are a blanket and a slop pail and a cup; there is no adequate ventilation as there is no window in his cell; sanitation is extremely poor and inadequate; food is of bad quality and unpalatable and his diet consists of rice every day; he is allowed to exercise three times a week for half an hour in the dormitory. Counsel also alleges that the conditions in prison are in breach of the domestic

[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.

prison rules of St Vincent and the Grenadines. Counsel also alleges that the author's punishment is being aggravated by these conditions.

3.6 Counsel further argues that the author's detention in these conditions renders unlawful the carrying out of his sentence of death.

3.7 Counsel also claims a violation of article 14(1) because no legal aid is available for constitutional motions and the author, who is indigent, is therefore denied the right of access to court guaranteed by section 16(1) of the Constitution.

The Committee's request for interim measures of protection

4.1 On 19 February 1998, the communication was submitted to the State party, with the request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author, while his case was under consideration by the Committee.

4.2 On 16 September 1999, the Committee received information to the effect that a warrant for the author's execution had been issued. After having sent an immediate message to the State party, reminding it of the rule 86 request in the case, the State party informed the Committee that it was not aware of having received the request nor the communication concerned. Following an exchange of correspondence between the Special Rapporteur for New Communications and the State party's representatives, and after a constitutional motion had been presented to the High Court of St. Vincent and the Grenadines, the State party agreed to grant the author a stay of execution in order to allow the Committee to examine his communication.

The State party's submission

5.1 By submission of 16 November 1999, the State party notes that the author has sought redress for his grievances by way of constitutional motion, which was dismissed by the High Court on 24 September 1999. The Court rejected declarations sought by counsel for the author that he was tried without due process and the protection of the law, that the carrying out of the death sentence was unconstitutional because it constituted inhuman or degrading punishment, that the prison conditions amounted to inhuman and degrading treatment, and that the author had a legal right to have his petition considered by the United Nations Human Rights Committee. The State party submits that, in order to expedite the examination by the Committee, it will raise no objection to the admissibility of the communication for reasons of non-exhaustion of domestic remedies.

5.2 The State party submits that the mandatory nature of the death penalty is allowed under international law. It explains that a distinction is made in the criminal law in St. Vincent and the Grenadines between different types of unlawful killing. Killings which amount to manslaughter are not subject to the mandatory death penalty. It is only for the offence of murder that the death sentence is mandatory.

Murder is the most serious crime known to law. For these reasons the State party submits that the death penalty in the present case was imposed in accordance with article 6(2) of the Covenant. The State party also denies that a violation of article 7 occurred in this respect, since the reservation of the death penalty to the most serious crime known to law retains the proportionate relationship between the circumstances of the crime and the penalty. The State party likewise rejects counsel's claim that there has been discrimination within the meaning of article 26 of the Covenant.

5.3 The State party also notes that the author had a fair trial, and that his conviction was reviewed and upheld by the Court of Appeal and the Privy Council. Accordingly, the death penalty imposed upon the author does not constitute arbitrary deprivation of his life within the meaning of article 6(1) of the Covenant.

5.4 As to the alleged violation of article 6(4) of the Covenant, the State party notes that the author has the right to seek pardon or commutation and that the Governor General may exercise the prerogative of mercy pursuant to sections 65 and 66 of the Constitution in the light of advice received from the Advisory Committee.

5.5 With regard to prison conditions and treatment in prison, the State party notes that the author has not shown any evidence that his conditions of detention amount to torture or cruel, inhuman or degrading treatment or punishment. Nor is there any evidence that he was treated in violation of article 10(1) of the Covenant. According to the State party, the general statements made in the communication do not evidence any specific breach of the relevant articles. Moreover, the State party notes that this matter was considered by the High Court when hearing the constitutional motion, and that the Court rejected it. The State party refers to the Committee's constant jurisprudence that the Committee is not competent to reevaluate the facts and evidence considered by the Court, and concludes that the author's claim should be rejected. The State party further refers to the Committee's jurisprudence that prolonged periods of detention cannot be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

5.6 The State party also argues that even if there had been a violation of the author's rights in relation to prison conditions, this would not render the carrying out of the death sentence unlawful and a violation of articles 6 and 7 of the Covenant. In this context, the State party makes reference to the Privy Council's decision in *Thomas and Hilaire v Attorney General of Trinidad and Tobago*, where the Privy Council considered that even if the prison conditions constituted a breach of the appellants constitutional rights, commutation of the sentence would not be the appropriate remedy and the fact that the conditions in which the condemned man had been kept prior to execution infringed his constitutional rights did not make a lawful sentence unconstitutional.

5.7 As to counsel's claim that the author's right to access to the constitutional court was violated, the State party notes that the author has indeed presented and pursued a constitutional motion in the High Court, during which he was represented by experienced local counsel. After his motion was dismissed, the author gave notice of appeal. On 13 October 1999, he withdrew his appeal. During these proceedings he was again represented by the same counsel. The State party submits that this is evidence

that there has been no conduct on the part of the State which has had the practical effect of denying the author access to court.

Counsel's comments

6.1 In his comments, counsel maintains that the author's death sentence violates various provisions of the Covenant because he was sentenced to death without the sentencing judge considering and giving effect to his character, his personal circumstances or those of the crime. In this connection, counsel refers to the report by the Inter-American Commission on Human Rights in the case of *Hilaire v. Trinidad and Tobago*[2].

6.2 With respect to the prerogative of mercy, counsel argues that the State party has not appreciated that the right to apply for pardon must be an effective right. In the author's case, he cannot effectively present his case for mercy and thus the right to apply for mercy is theoretical and illusory. The author cannot participate in the process, and is merely informed of the outcome. According to counsel, this means that the decisions on mercy are taken on an arbitrary basis. In this connection, counsel notes that the Advisory Committee does not interview the prisoner or his family. Moreover, no opportunity is given to the condemned person to respond to possible aggravating information which the Advisory Committee may have in its possession.

6.3 With regard to the prison conditions, counsel produces an affidavit sworn by the author, dated 30 December 1999. He states that his cell in Kingstown prison, where he was detained from 21 June 1995 to 10 September 1999, was 8 feet by 6 feet in size, and that the only articles with which he was supplied in his cell were a blanket, a slop pail, a small water container and a bible. He slept on the floor. In the cell there was no electric lighting, but there was an electric light bulb in the corridor adjacent to the cell, which was kept on night and day. He states that he was unable to read because of the poor lighting. He was allowed exercise for at least three times a week in the corridor adjacent to his cell. He did not exercise in the open air and did not get any sunlight. Guards were always present. The food was unpalatable and there was little variety (mainly rice). During a fire on 29 July 1999 caused by a prison riot, he was locked in his cell and only managed to save himself when other prisoners broke in through the roof. He is only allowed to wear prison clothes, which are rough on the skin. On 10 September 1999, he was placed in a cell in Fort Charlotte, an 18th century prison. The cell in which he is now held is moist and the floor is damp. He is supplied with a small mattress. The cell is dark night and day, as the light of the electric bulb in the corridor does not penetrate into the cell. He is given exercise daily but inside the building and he does not get any sunlight. Because of the damp conditions, his legs started swelling and he reported this to the authorities, who took him to hospital for examination on 29 December 1999. He adds that he was scheduled to be hanged on 13 September 1999 and that he was taken from his cell to the gallows and that his lawyer was able to obtain a stay of execution only fifteen minutes before the scheduled execution. He states that he has been traumatised and disoriented.

[2] Commission report No. 66/99, case No. 11.816, approved by the Commission on 21 April 1999, not made public.

6.4 Concerning the author's right of access to court, counsel submits that the fact that the author was fortunate enough to persuade counsel to take his recent constitutional case pro bono does not relieve the State party of its obligation to provide legal aid for constitutional motions.

Consideration of admissibility

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

7.2 The Committee notes that it appears from the facts before it that the author filed a constitutional motion before the High Court of St. Vincent and the Grenadines. The Committee considers therefore that the author has failed to substantiate, for purposes of admissibility, his claim under article 14(1) of the Covenant, that the State party denied the author the right of access to court in this respect.

7.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the remaining claims may raise issues under articles 6, 7, 10 and 26 of the Covenant. The Committee proceeds therefore without further delay to the consideration of the merits of these claims.

Consideration of the merits

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

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 offense. 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. In so far 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, 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 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.

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Appendix

Individual opinion by Lord Colville (dissenting)

The majority decision is based solely on the law which imposes a mandatory death sentence upon the category of crime, murder, for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. This conclusion has been reached without any assessment of either such set of circumstances, which exercise would in any case be beyond the Committee's jurisdiction. The majority, therefore, have founded their opinion on the contrast between the common law definition of murder, which applies in the State, and a gradation of categories of homicide in civil law jurisdictions and, by statute, in some States whose criminal law derives from common law. Thus the majority decision is not particular to this author but has wide application on a generalised basis. The point has now for the first time been taken in this communication despite Views on numerous earlier communications arising under (inter alia) a mandatory death sentence for murder; on those occasions no such stance was adopted.

In finding, in this communication, that the carrying out of the death penalty in the author's case would constitute on arbitrary deprivation of his life in violation of article 6.1 of the Covenant, the wrong starting-point is chosen. The terms of paragraph 8.2 of the majority decision fail to analyse the carefully-constructed provisions of the entirety of article 6. The article begins from a position in which it is accepted that capital punishment, despite the exhortation in article 6.6, remains an available sentence. It then specifies safeguards, and these are commented on as follows: -

(a) The inherent right to life is not to be subject to arbitrary deprivation. The subsequent provisions of the article state the requirements which prevent arbitrariness but which are not addressed by the majority except for article 6.4, as to which there now exists jurisprudence which appears to have been overlooked: (see below);

(b) Article 6.2 underlines the basic flaw in the majority's reasoning. There is no dispute that murder is a most serious crime; that is, however, subject to the majority's view that a definition of murder in common law may encompass offences which are not to be described as "most serious." Whilst this does not form part of their decision in those terms, the inevitable implication is that "murder" must be redefined.

The second point on article 6.2 emphasises that the death penalty can only be carried out pursuant to a final decision by a competent court. It follows inescapably from this that the actual law which compels the trial judge to pass a sentence of death when a person is convicted of murder does not and cannot in itself offend article 6.1 and certainly not because factual and personal circumstances are ignored: if the prosecuting authority decides, in a homicide case, to bring a charge of murder, a number of avenues immediately exist for the defence to counter, in the trial court, this accusation. These include –

- self-defence: unless the prosecution can satisfy the tribunal of fact that the defendant's

actions, which led to the death, exceeded a proportional response, in his own perception of the circumstances, to the threat with which he was faced, the defendant must be completely acquitted of any crime;

- other circumstances, surrounding the crime and relating fundamentally to the prevailing situation or the defendant's state of mind, enable the tribunal of fact to find that, if these defences have not been disproved by the prosecution (the onus is never on the defendant), the charge of murder can be reduced to manslaughter which does not carry a mandatory death sentence. According to the approach adopted by the defence and the evidence adduced by the parties, the judge is bound to explain these issues; if this is not done in accordance with legal precedent the failure will lead to any conviction being quashed;
- the issues which may thus be raised by the defence need only be exemplified: one is diminished responsibility by the defendant for his actions (falling short of such mental disorder as would lead, not to a conviction, but to an order for treatment in a psychiatric hospital); or provocation, which by judicial decision has been extended to include the "battered partner syndrome", whether resulting from an instantaneous or cumulative basis of aggravation by the victim;
- as a result, the verdict indicates whether murder is the only possible crime for which the defendant can be convicted. Questions of law which may undermine a conviction for murder can be taken to the highest appellate tribunal. It was by such an appeal that the law has recognised prolonged domestic violence or abuse as constituting a "provocation", thereby reducing murder, in proper cases, to manslaughter.

No comments arise in this case under article 6.3 or 6.5. Article 6.4 has, however, recently assumed a significance which the majority decision appears to have disregarded. It has always been the case that the Head of State must be advised by the relevant Minister or advisory body such as the Privy Council, whether the death penalty shall in fact be carried out. This system is necessitated by article 6.4 and it involves a number of preliminary steps: as the majority says in paragraph 8.2, 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. This is not only a correct statement but constitutes the essence and virtue of article 6.4; exactly this process is in place in the State.

The Judicial Committee of the Privy Council has, however, delivered its advice in the case of Lewis and others v. A.G. of Jamaica & another, dated 12 September 2000. Whilst Lord Slynn's majority opinion is not binding in any common law jurisdiction, it has such persuasive authority that it is certain to be given effect. He indicates that in Jamaica by its Constitution, but similarly elsewhere –

- A written report from the trial judge is available to the person or body advising on pardon or commutation of sentence. (It should be said, by way of gloss to this practice, that the trial judge will have seen the defendant and the witnesses at first hand in the course of the trial, and also will have had access to other material relating

- to the circumstances of the case and of the defendant which was never used in the trial itself. Evidence, inadmissible for production to the tribunal of fact, may, for example, contain much revealing information).
- "Such other information derived from the record of the case or elsewhere" shall be forwarded to the authority empowered to grant clemency.
- In practice the condemned accused has never been denied the opportunity to make representations which will be considered by that authority.

Where Lewis breaks new ground is in the advice that the procedures followed in the process of considering a person's petition are open to judicial review. It is necessary that the condemned person should be given notice of the date on which the clemency authority will consider his case. That notice should be sufficient for him or his advisers to prepare representations before a decision is taken. Lewis thus formalises a defendant's right to make representations and requires that these be considered.

The inevitable result of this analysis of article 6 as a whole together with judicial ruling likely to be given effect on all common law jurisdictions, including St. Vincent and the Grenadines, is that questions of arbitrariness do not depend on the trial and sentence at first instance, let alone in the mandatory nature of the sentence to be imposed on conviction for murder. There is no suggestion that arbitrariness has arisen in the course of the appellate procedures. The majority's view, therefore, must depend on a decision that the terms of article 6.4, as given effect in a common law jurisdiction, must incorporate an arbitrary decision, "without considering whether this exceptional form of punishment is appropriate in the circumstances" of the particular case (para 8.2). This is manifestly incorrect, as a matter of long-standing practice and now of persuasive advice from the Privy Council; it is no longer merely a matter of conscientious consideration by the authority but a matter of judicial reviewability of its decision.

Any interpretation finding arbitrariness in the light of existing common law procedures can only imply that full compliance with article 6.4 does not escape the association of arbitrariness under article 6.1. Such internal inconsistency should not be applied to interpretation of the Covenant, and can only be the result of a mistaken straining of the words of article 6.

On the facts of this case and the course of any clemency process which may yet ensue, I cannot agree that there has been any violation of article 6.1 of the Covenant.

Lord Colville [signed]

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

Individual opinion by Mr. David Kretzmer, co-signed by Mr. Abdelfattah Amor, Mr. Maxwell Yalden and Mr. Abdallah Zakhia (dissenting)

A. Past jurisprudence

1. Like many of my colleagues, I find it unfortunate that the Covenant does not prohibit the death penalty. However, I do not find this a reason to depart from accepted rules of interpretation when dealing with the provisions of the Covenant on the death penalty. 4 I am therefore unable to agree with the Committee's view that by virtue of the fact that the death sentence imposed on the author was mandatory, the State party would violate the author's right, protected under article 6, paragraph 1, not to be arbitrarily deprived of his life, were it to carry out the sentence.

2. Mandatory death sentences for murder are not a novel question for the Committee. For many years the Committee has dealt with communications from persons sentenced to death under legislation that makes a death sentence for murder mandatory. (See, e.g., Communication no. 719/1996, Conroy Levy v. Jamaica; Communication no. 750/1996, Silbert Daley v. Jamaica; Communication no. 775/1997, Christopher Brown v. Jamaica.) In none of these cases has the Committee intimated that the mandatory nature of the sentence involves a violation of article 6 (or any other article) of the Covenant. Furthermore, in fulfilling its function under article 40 of the Covenant, the Committee has studied and commented on numerous reports of States parties in which legislation makes a death sentence for murder mandatory. While in dealing with individual communications the Committee usually confines itself to arguments raised by the authors, in studying State party reports the initiative in raising arguments regarding the compatibility of domestic legislation with the Covenant lies in the hands of the Committee itself. Nevertheless, the Committee has never expressed the opinion in Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. (See, e.g., the Concluding Observations of the Committee of 19.1.97 on Jamaica's second periodic report, in which no mention is made of the mandatory death sentence).

It should also be recalled that in its General Comment no.6 that concerns article 6 of the Covenant, the Committee discussed the death penalty. It gave no indication that mandatory death sentences are incompatible with article 6.

The Committee is not bound by its previous jurisprudence. It is free to depart from such jurisprudence and should do so if it is convinced that its approach in the past was mistaken. It seems to me, however, that if the Committee wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the Covenant, when it changes course it owes the States parties and all other interested persons an explanation of why it chose to do so. I regret that in its Views in the present case the Committee has failed to explain why it has decided to depart from its previous position on the mandatory death sentence.

B. Article 6 and mandatory death sentences

3. In discussing article 6 of the Covenant, it is important to distinguish quite clearly between a mandatory death sentence and mandatory capital punishment. The Covenant itself makes a clear distinction between imposition of a death *sentence* and *carrying out* the sentence. Imposition of the death sentence by a court of law after a trial that meets all the requirements of article 14 of the Covenant is a *necessary*, but *insufficient*, condition for carrying out the death penalty. Article 6, paragraph 4, gives every person sentenced to death the right to seek pardon or commutation of the sentence. It is therefore obvious that the Covenant expressly prohibits a mandatory death penalty. However, the question that arises in this case does not relate to mandatory capital punishment or a mandatory death penalty, but to a mandatory death *sentence*. The difference is not a matter of semantics. Unfortunately, in speaking of the mandatory death penalty the Committee has unwittingly conveyed the wrong impression. In my mind this has also led it to misstate the issue that arises. That issue is not whether a State party may carry out the death penalty without regard to the personal circumstances of the crime and the defendant, but whether the Covenant requires that courts be given discretion in determining whether to impose the death sentence for murder.

4. Article 6, paragraph 1, protects the inherent right to life of every human being. It states that no one shall be arbitrarily deprived of his life. Had this paragraph stood alone, a very strong case could have been made out that capital punishment itself is a violation of the right to life. This is indeed the approach which has been taken by the constitutional courts of two states when interpreting their constitutions (see the decision of the South African Constitutional Court in *State* v. *Makwanyane* [1995] 1 LRC 269; Decision No. 23/1990 (X.31) AB of the Hungarian Constitutional Court.) Unfortunately, the Covenant precludes this approach, since article 6 permits the death penalty in countries which have not abolished it, provided the stringent conditions laid down in paragraphs 2, 4 and 5 and in other provisions of the Covenant are met. When article 6 of the Covenant is read in its entirety, the ineluctable conclusion must be that carrying out a death penalty cannot be regarded as a violation of article 6, paragraph 1, *provided all these stringent conditions have been met.* The ultimate question in gauging whether carrying out a death sentence constitutes violation of article 6 therefore hinges on whether the State party has indeed complied with these conditions.

5. The first condition that must be met is that sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence. In the present case the Committee does not expressly base its finding of a violation on breach of this condition. However, the Committee mentions that "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" and that the "death penalty is mandatory in all cases of murder". While the Committee does not mention article 6, paragraph 2, in the absence of any other explanation it would seem that the Committee has doubts about the compatibility with the Covenant of imposition of the death sentence for murder (the category of crime for which the death sentence is mandatory in the law of the State party). One can only assume that these doubts are based on the fear that the category of murder may include crimes that are not the most serious. I find it quite disturbing that the Committee is prepared to intimate that cases

of murder may not be a most serious crime. The Committee itself has stated that the right to life is the supreme right (see General Comment no. 6). Intentional taking of another person's life in circumstances which give rise to criminal liability must therefore, by its very nature, be regarded as a most serious crime. From the materials presented to the Committee in this communication it appears that a person is guilty of the crime of murder under the law of the State party if, with malice aforethought, he or she causes the death of another. The State party has explained (and this has not been contested) that the crime of murder does not include "killings which amount to manslaughter (for example by reason of provocation or diminished responsibility)." In these circumstances every case of murder, for which a person is criminally liable, must be regarded as a most serious crime. This does not mean, of course, that the death penalty should be imposed, nor that a death sentence should be carried out, if imposed. It does mean, however, that imposition of the death sentence cannot, *per se*, be regarded as incompatible with the Covenant.

6. In determining whether a defendant on a charge of murder is criminally liable the court must consider various personal circumstances of the defendant, as well as the circumstances of the particular act which forms the basis of the crime. As has been demonstrated in the opinion of my colleague, Lord Colville, these circumstances will be relevant in determining both the *mens rea* and *actus reus* required for criminal liability, as well as the availability of potential defences to criminal liability, such as self-defence. These circumstances will also be relevant in determining whether there was provocation or diminished responsibility, which, under the law of the State party, remove an act of intentional killing from the category of murder. As all these matters are part of the determination of the criminal charge against the defendant, under article 14, paragraph 1, of the Covenant they must be decided by a competent, independent and impartial tribunal. Were courts to be denied the power to decide on any of these matters, the requirements of article 14 would not be met. According to the jurisprudence of the Committee, in a case involving the death penalty this would mean that carrying out the death sentence would constitute a violation of article 6. It has not been argued that the above conditions were not complied with in the present case. Nevertheless, the Committee states that it would be a violation of the author's right not to be arbitrarily deprived of his life, if the State party were to carry out the death penalty "without regard to the defendant's personal circumstances or the circumstances of the particular offense." (See para. 8.2 of the Committee's Views). As it has not been claimed that personal circumstances of the particular offence relevant to the criminal liability for murder of the author were not taken into account by the courts, it is obvious that the Committee is referring to other circumstances, which have no bearing on the author's liability for murder. Article 6, paragraph 4, of the Covenant does indeed demand that the State party have regard to such circumstances before carrying out sentence of death. There is absolutely nothing in the Covenant, however, that demands that the *courts* of the State party must be the domestic organ that has regard to these circumstances, which, as stated, are not relevant in determination of the criminal charge.

7. In many societies, the law lays down a maximum punishment for a given crime and courts are given discretion in determining the appropriate sentence in a given case. This may very well be the best system of sentencing (although many critics argue that it inevitably results in uneven or discriminatory sentencing). However, in dealing with the issue of sentencing, as with all other issues relating to interpretation of the Covenant, the question that the Committee must ask is not whether a specific

system seems the best, but whether such a system is demanded under the Covenant. It is all too easy to assume that the system with which Committee members are most familiar is demanded under the Covenant. But this is an unacceptable approach in interpreting the Covenant, which applies at the present time to 144 State parties, with different legal regimes, cultures and traditions.

8. The essential question in this case is whether the *Covenant demands* that *courts* be given discretion in deciding the appropriate sentence in each case. There is no provision in the Covenant that would suggest that the answer to this question is affirmative. Furthermore, an affirmative answer would seem to imply that minimum sentences for certain crimes, such as rape and drug-dealing (accepted in many jurisdictions) are incompatible with the Covenant. I find it difficult to accept this conclusion.

Mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise serious issues under the Covenant. If such sentences are disproportionate to the crimes for which they are imposed, their imposition may involve a violation of article 7 of the Covenant. If a mandatory death sentence is imposed for crimes that are not the most serious crimes, article 6, paragraph 2 of the Covenant is violated. However, whether such sentences are advisable or not, if all provisions of the Covenant regarding punishment are respected, the fact that the minimum or exact punishment for the crime is set by the legislature, rather than the court, does not of itself involve a violation of the Covenant. Carrying out such a sentence that has been imposed by a competent, independent and impartial tribunal established under law after a trial that meets all the requirements of article 14 cannot be regarded as an arbitrary act.

I am well aware that in the present case the mandatory sentence is the death sentence. Special rules do indeed apply to the death sentence. It may only be imposed for the most serious crimes. Furthermore, the Covenant expressly demands that persons sentenced to death be given the right to request pardon or commutation before the sentence is carried out. No parallel right is given to persons sentenced to any other punishment. There is, however, no provision in the Covenant that demands that courts be given sentencing discretion in death penalty cases that they do not have to be given in other cases.

In summary: there is no provision in the Covenant that requires that courts be given discretion to determine the exact sentence in a criminal case. If the sentence itself does not violate the Covenant, the fact that it was made mandatory under legislation, rather than determined by the court, does not change its nature. In death penalty cases, if the sentence is imposed for a most serious crime (and any instance of murder is, by definition, a most serious crime), it cannot be regarded as incompatible with the Covenant. I cannot accept that carrying out a death sentence that has been imposed by a court in accordance with article 6 of the Covenant after a trial that meets all the requirements of article 14 can be regarded as an *arbitrary* deprivation of life.

9. As stated above, there is nothing in the Covenant that demands that courts be given sentencing discretion in criminal cases. Neither is there any provision that makes *sentencing* in cases of capital offences any different. This does not mean, however, that a duty is not imposed on States parties to consider personal circumstances of the defendant or circumstances of the particular offence before

carrying out a death sentence. On the contrary, a death sentence is different from other sentences in that article 6, paragraph 4, expressly demands that anyone under sentence of death shall have the right to seek pardon or commutation and that amnesty, pardon or commutation may be granted in all cases. It must be noted that article 6, paragraph 4, recognizes a *right*. Like all other rights, recognition of this right by the Covenant imposes a legal obligation on States parties to respect and ensure it. States parties are therefore legally bound to consider in good faith all requests for pardon or commutation by persons sentenced to death. A State party that fails to do so violates the right of a condemned person under article 6, paragraph 4, with all the consequences that flow from violation of a Covenant right, including the victim's right to an effective remedy.

The Committee states that "existence of a right to seek a pardon or commutation 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 the appropriate judicial review of all aspects of a criminal case". This statement does not help to make the Committee's approach coherent. In order to comply with the requirements of article 6, paragraph 4, a State party is bound to consider in good faith all personal circumstances and circumstances of the particular crime which the condemned person wishes to present. It is indeed true that the decision-making body in the State party may also take into account other factors, which may be considered relevant in granting the pardon or commutation. However, a court which has discretion in sentencing may also take into account a host of factors other than the defendant's personal circumstances or circumstances of the crime.

10. I may now summarize my understanding of the legal situation regarding mandatory death sentences for murder:
a. The question of whether a death sentence is compatible with the Covenant depends on whether the conditions laid down in article 6 and other articles of the Covenant, especially article 14, are complied with.
b. Carrying out a death sentence imposed in accordance with the requirements of article 6 and other articles of the Covenant cannot be regarded as arbitrary deprivation of life.
c. There is nothing in the Covenant that demands that courts be given discretion in sentencing. Neither is there a special provision that makes sentencing in death penalty cases different from other cases.
d. The Covenant expressly demands that States parties must have regard to particular circumstances of the defendant or the particular offence before carrying out a death sentence. A State party has a legal obligation to take such circumstances into account in considering applications for pardon or commutation. The consideration must be carried out in good faith and according to a fair procedure.

C. Violation of the author's rights in the present case

11.Even if I had agreed with the Committee on the legal issue I would have found it difficult to agree that the author's rights were violated in this case.

In the context of an individual communication under the Optional Protocol the issue is not the compatibility of legislation with the Covenant, but whether the author's rights were violated. (See, e.g.,

Faurisson v. *France*, in which the Committee stressed that it was not examining whether the legislation on the basis of which the author had been convicted was compatible with article 19 of the Covenant, but whether in convicting the author on the specific facts of his case the author's right to freedom of expression had been violated). In the present case the author was convicted of a specific crime: murder of a little girl. Even if the category of murder under the law of the State party may include some crimes which are not the most serious, it is clear that the crime of which the author was convicted is not among these. Neither has the author pointed to any personal circumstances or circumstances of the crime that should have been regarded as mitigating circumstances but could not be considered by the courts.

12. Finally I wish to emphasize that the Covenant imposes strict limitations on use of the death penalty, including the limitation in article 6, paragraph 4. In the present case, it has not been contested that the author has the right to apply for pardon or commutation of his sentence. An advisory committee must look into the application and make recommendations to the Governor-General on any such application. Under the rules laid down by the Privy Council in the recent case of Neville Lewis et al v. Jamaica, the State party must allow the applicant to submit a detailed petition setting out the circumstances on which he bases his application, he must be allowed access to the information before the committee and the decision on the pardon or commutation must be subject to judicial review.

While the author has made certain general observations relating to the pardon or commutation procedures in the State party, he has not argued that he has submitted an application for pardon or commutation that has been rejected. He therefore cannot claim to be a victim of violation of his rights under article 6, paragraph 4, of the Covenant. Clearly, were the author to submit an application for pardon or commutation that was not given due consideration as required by the Covenant and the domestic legal system he would be entitled to an effective remedy. Were that remedy denied him the doors of the Committee would remain open to consider a further communication.

David Kretzmer [signed]
Abdelfattah Amor [signed]
Maxwell Yalden [signed]
Abdallah Zakhia [signed]

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