



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Seventy-fourth session
18 March – 5 April 2002

VIEWS

Communication No. 792/1998

Submitted by: Mr. Malcolm Higginson

Alleged victim: The author

State party: Jamaica

Date of communication: 20 January 1997 (initial submission)

Document references: Special Rapporteur's rule 86/91 decision, transmitted to the State party on 14 January 1998 (not issued in document form)

Date of adoption of Views: 28 March 2002

On 28 March 2002 the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication 792/1998. 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

Seventy-fourth session

concerning

Communication No. 792/1998**

Submitted by: Mr. Malcolm Higginson

Alleged victim: The author

State party: Jamaica

Date of communication: 20 January 1997 (initial submission)

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

Meeting on 28 March 2002,

Having concluded its consideration of communication No. 792/1998, submitted to the Human Rights Committee by Mr. Malcolm Higginson 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 present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

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

1. The author of the communication, initial letter dated 20 January 1997, and subsequent letters dated May 1997 and 3 July 1997, is Malcolm Higginson, a Jamaican citizen, born on 20 March 1974, at the time of submission an inmate at the General Penitentiary Kingston, Jamaica. At present he is under detention at St. Catherine Adult Correction Centre. He claims that he is a victim of violations by Jamaica¹ of articles 2, 7 and 14 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as submitted by the author

2.1 On 19 May 1995, the author was convicted of illegal possession of a firearm, rape and robbery with aggravation by the High Court Division Gun Court, Kingston, Jamaica, and sentenced to respectively 5, 10 and 7 years imprisonment with hard labor, to run concurrently, and in addition to receive 6 strokes of the tamarind switch.

2.2 As it appears from the author's quotations from the Court hearing, on 19 May 1995, the trial against the author lasted for five days. During the trial the victim of the crime for which the author was charged testified that on 25th July 1993 at about 2.30 p.m. she went to see her boyfriend who worked at a funeral parlor in St. Andrew. On her way to the funeral parlor, she did not find her boyfriend but the author who was working for the same company. They talked for a few minutes, before the author's girlfriend came and the author and his girlfriend left together. After the author had left, a group of men, who were complete strangers to the victim and armed with a gun, surrounded her and took her to a room behind the funeral parlor where all of them raped her. According to the victim, the author entered the room some time later. He was also carrying a gun. The victim asked the author to rescue her. According to the victim, the author joined the group and raped her. The group of men also stole her watch and \$200. Several hours after being brought to the funeral parlor, the victim was released and went home. After 9 days she complained to the police and provided them with the author's name. On 29 October 1993, the author was arrested and charged with the crime. No other persons appear to have been charged in connection to the crime.

2.2 The author denied the allegation of gang rape and possession of a gun, whereas he admitted sexual intercourse with the woman on the same day, with her consent. The author stated that on the very same day, he had met the complainant and had talked with her. She came to his house, because she had trouble with her boyfriend, and it was she who took the initiative for intercourse.

2.3 During the trial, the case rested on the identification evidence of the victim. The victim stated that she heard somebody calling the author "Malcolm" during the rape, and thus she gave his name and description to the police. All the other men were strangers to her. The author however, submitted that when they were talking, they introduced themselves, and that's why she knew his name.

¹ The Optional Protocol entered into force for Jamaica on 23 March 1976, and Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998.

2.4 The author filed an application for leave to appeal on the grounds of unfair trial². One of the grounds for appeal was that during the cross-examination of the victim with respect to the identification of the author, the judge stopped the counsel from continuing the cross-examination of the victim. The Court of Appeal rejected the application for leave to appeal.

The Complaint

3.1 The author raises issues under article 14. He claims that the trial against him was unfair, since the judge stopped his counsel from continuing the cross-examination of the complainant and the conviction was based on the complainant's statements only. He further contends that the sentence of whipping entailed a violation of article 7 of the Covenant, because whipping constitutes cruel, inhuman and degrading punishment. According to the author, the Jamaican Constitution Section 26 (8) by allowing the constitutionality of laws in force prior to the Constitution allows the imposition of corporal punishment. He claims that relying on statutes that prescribe such punishment violates article 2 of the Covenant. The State party should, according to the author, repeal such laws to bring domestic legislation into conformity with the Covenant to ensure the protection of the rights guaranteed in the Covenant.

3.2 The author also states that with the rejection of the application for leave to appeal, all domestic remedies have been exhausted.

Examination of admissibility and merits

4.1 The communication with its accompanying documents was transmitted to the State party on 14 January 1998. The State party has not responded to the Committee's request, under rule 91 of the rules of procedures, to submit information and observations in respect of the admissibility and the merits of the communication, nor to its request to the State party not to carry out the sentence of whipping against the author, pursuant to rule 86. Reminders of the above requests were addressed to the State party on 4 October 2000 and on 24 July 2001. Only on 24 May 2001, the State party notified the Committee that investigation of the allegations was being undertaken. The Committee recalls that it is implicit in the Optional Protocol that the State party make available to the Committee all information at its disposal in due course, and regrets the lack of co-operation by the State party in the present case. In the absence of information from the State party, due weight must be given to the author's allegations to the extent that they have been substantiated.

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

4.3 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation settlement.

4.4 With respect to exhaustion of domestic remedies, the Committee notes that the author has argued that he unsuccessfully sought leave to appeal, and that no further domestic remedy is

² The author does not submit the date of the Appeal nor the date of the Court of Appeal decision.

available to him. The State party has not claimed that other domestic remedies are still available. The Committee considers therefore that it is not precluded by article 5, paragraph 2 b) of the Optional Protocol from examining the communication.

4.5 Although the author's submission raises issues about the fairness of the trial under article 14, and even in the absence of any response by the State party, despite its promise to investigate the matter, the Committee considers that the author has not sufficiently substantiated for purposes of admissibility his allegations of a violation of article 14 of the Covenant. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

4.6 The remaining part of the communication, i.e., the author's claim under article 7 of the Covenant, is admissible. The author has claimed that the use of the tamarind switch constitutes cruel, inhuman and degrading punishment, and that the imposition of the sentence violated his rights under article 7 of the Covenant. The State party has not contested the claim. Irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant³. The Committee finds that the imposition or the execution of a sentence of whipping with the tamarind switch constitutes a violation of the author's rights under article 7.

5. 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 reveal a violation of article 7 of the International Covenant on Civil and Political Rights.

6. 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 refraining from carrying out the sentence of whipping upon the author or providing appropriate compensation if the sentence has been carried out. The State party should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment.

7. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. 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. 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 issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
