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HUMAN RIGHTS COMMITTEE
Sixty-seventh session
18 October - 5 November 1999

DECISIONS

Communication Nº 845/1999

Submitted by:	Rawle Kennedy (represented by the London law firm Simons Muirhead & Burton)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	7 December 1998
Documentation references:	Prior decisions - Committee's combined rule 86/91 decision, transmitted to the State party on 15 January 1999 (not issued in document form)
Date of present decision	2 November 1999

On 2 November 1999, the Human Rights Committee adopted its decision on admissibility in respect of communication No. 845/1999. The text of the decision is appended to the present document.

[ANNEX]

*Made public by decision of the Human Rights Committee.

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ANNEX*

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS
- Sixty-seventh session -

concerning

Communication Nº 845/1999

Submitted by:	Rawle Kennedy (represented by the London law firm Simons Muirhead & Burton)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	7 December 1998

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

Meeting on 2 November 1999

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, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

**The texts of a concurring individual opinion, signed by one member, and of a dissenting opinion, signed by four members are appended to the present document.

Decision on admissibility

1. The author of the communication is Mr. Rawle Kennedy, a citizen of Trinidad and Tobago, awaiting execution in the State prison in Port of Spain. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3; 6, paragraphs 1, 2 and 4; 7; 9, paragraphs 2 and 3; 10, paragraph 1; 14, paragraphs 1, 3(c) and 5; and 26 of the International Covenant on Civil and Political Rights. He is represented by the London law firm Simons Muirhead & Burton.

The facts as submitted by the author:

2.1 On 3 February 1987, one Norris Yorke was wounded in the course of a robbery of his garage. He died of the wounds the following day. The author was arrested on 4 February 1987, charged with murder along with one Wayne Matthews on 9 February 1987, and first brought before a magistrate on 10 February 1987. The author was tried between 14 and 16 November 1988 and was found guilty. The author appealed against his conviction and on 21 January 1992, the Court of Appeal allowed the appeal and ordered a retrial which took place between 15 and 29 October 1993. The author was again found guilty and sentenced to death. A new appeal was subsequently lodged, but the Court of Appeal refused leave to appeal on 26 January 1996, giving its reasons for doing so on 24 March 1998. The author's subsequent petition to the Judicial Committee of the Privy Council was dismissed on 26 November 1998.

2.2 The case for the prosecution was that the victim, Mr. Norris Yorke, was at work in his gas station along with the supervisor, one Ms Shanghie, on the evening of 3 February 1987. After close of business, when Mr. Yorke was checking the cash from the day's sale, the author and Mr. Matthews entered the station. The prosecution alleged that the author asked Ms. Shanghie for a quart of oil, and that when she returned after getting it, she found Mr. Yorke headlocked by the author, with a gun pointing to his forehead. At this point, Mr. Matthews allegedly told the author that Mr. Yorke had a gun which he was reaching for, and then rushed into the room and struck Mr. Yorke on the head several times with a length of wood before he went back out of the room. Mr. Yorke subsequently told the intruders to take the money. Then Ms. Shanghie, on Mr. Yorke's proposal, threw a glass at Mr. Matthews upon which the author pointed the gun at her and told her to be quiet. Mr. Matthews then ran and hit Mr. Yorke on the head a second time causing him to slump down. The two intruders thereafter stole the money and escaped from the scene in a vehicle belonging to Mr. Yorke. Mr. Yorke died the next day from the wounds sustained during the robbery.

2.3 Counsel argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice due to the State party's unwillingness or inability to provide legal aid for such motions and to the extreme difficulty of finding a Trinidadian lawyer who would represent an applicant pro bono on a constitutional motion.

The Complaint:

3.1 The author alleges to be a victim of a violation of article 9, paragraphs 2 and 3, as he was not informed of the charges against him until five days after his arrest and was not brought before a magistrate until six days after his arrest. Counsel cites the Covenant which requires that such actions be undertaken "promptly", and submits that the periods which lapsed in this case do not meet that test. Reference is made to the Committee's General Comment on article 9[1] and to the jurisprudence of the Committee[2].

3.2 The author claims to be a victim of a violation of article 14, paragraphs 3(c) and 5, on the ground of undue delays in the proceedings against him. In this regard, counsel calls that it took 1) 21 months from the date on which the author was charged until the beginning of his first trial, 2) 38 months from the conviction until the hearing of his appeal, 3) 21 months from the decision of the Court of Appeal to allow his appeal until the beginning of the re-trial, 4) 27 months from the second conviction to the hearing of the second appeal, and 5) 26 months from the hearing of the second appeal until the reasoned judgement of the Court of Appeal was delivered. Counsel argues that there is no reasonable excuse as to why the re-trial took place some six years after the offence and why the Court of Appeal took a further four years and four months to determine the matter, and submits that the State party must bear the responsibility for this delay. Reference is made to the Committee's jurisprudence[3].

3.3 The author claims to be a victim of violations of articles 6, 7, and 14, paragraph 1, on the ground of the mandatory nature of the death penalty for murder in Trinidad and Tobago. Counsel states that the distinction between capital and non-capital murder which has been enacted in many other Common Law countries[4], has never been applied in Trinidad and Tobago[5]. It is argued that the

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[1] HRI/GEN/1/Rev. 3, 15 August 1997, pp 9 following.

[2] Communication No. R.2/11, Motta v. Uruguay; Communication No. 257/1987, Kelly v. Jamaica; Communication No. 373/1989, Stevens v. Jamaica; Communication No. 597/1994, Grant v. Jamaica.

[3] Communication No. 336/1988, Fillastre v. Bolivia; Communication No. 27/1978, Pinkney v. Canada; Communication No. 283/1988, Little v. Jamaica; Communication Nos. 210/1986 and 225/1987, Pratt and Morgan v. Jamaica; Communication No. 253/1987, Kelly v. Jamaica; Communication No. 523/1992, Neptune v. Trinidad and Tobago.

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

[5] The law in Trinidad and Tobago does however contain provisions reducing the offence of murder to one of manslaughter in cases of murder committed

stringency of the mandatory death penalty for murder is exacerbated by the Murder/Felony Rule which exists in Trinidad and Tobago and under which a person who commits a felony involving personal violence does so at his own risk, and is guilty of murder if the violence results even inadvertently in the death of the victim. The application of the Murder/Felony Rule, it is submitted, is an additional and harsh feature for secondary parties who may not have participated with the foresight that grievous bodily harm or death were possible incidents of that robbery.

3.4 It is submitted that given the wide variety of circumstances in which the crime of murder may be committed, a sentence which is indifferently imposed on every category of murder fails to retain a proportionate relationship between the circumstances of the actual crime and the punishment and therefore becomes cruel and unusual punishment in violation of article 7 of the Covenant. It is similarly submitted that article 6 was violated as imposing the death sentence irrespective of the circumstances was cruel, inhuman and degrading, and an arbitrary and disproportionate punishment which cannot justify depriving someone of the right to life. In addition, it is submitted that article 14, paragraph 1, was violated because the Constitution of Trinidad and Tobago does not permit the author to allege that his execution is unconstitutional as inhuman or degrading or cruel treatment, and because it does not afford the right to a judicial hearing or a trial on the question whether the death penalty should be imposed or carried out for the particular murder committed.

3.5 Counsel submits that the imposition of the death penalty without consideration and opportunity for presentation of mitigating circumstances was particularly harsh in the author's case as the circumstances of his offence were that he was a secondary party to the killing and thus would have been considered less culpable. In this regard, counsel makes reference to a Bill to Amend the Offences Against the Persons Act which has been considered but never enacted by the Trinidadian Parliament. According to counsel, the author's offence would have fallen clearly within the non-capital category had this bill been passed.

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

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with diminished responsibility or under provocation.

to make written or oral submissions or to have the right to be supplied with the material upon which the Advisory Committee will make its decision[6].

3.7 Counsel submits that the right to apply for mercy contained in article 6, paragraph 4, of the Covenant must be interpreted so as to be an effective right, i.e. it must in compliance with general principles be construed in such a way that it is practical and effective rather than theoretical or illusory, and it must therefore afford the following procedural rights to a person applying for mercy:
- The right to notification of the date upon which the Advisory Committee is to consider the case
- The right to be supplied with the material which will be before the Advisory Committee at the hearing
- The right to submit representations in advance of the hearing both generally and with regard to the material before the Advisory Committee
- The right to an oral hearing before the Advisory Committee
- The right to place before the Advisory Committee, and have it considered, the findings and recommendations of any international body, such as the United Nations Human Rights Committee.

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

3.9 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, as after having been arrested on 4 February 1987 he was tortured and beaten by police officers whilst awaiting to be charged and brought before a magistrate. It is submitted that he suffered a number of beatings and was tortured to admit to the offence. In particular, the author states that he was hit on the head with a traffic sign, jabbed in the ribs with the butt of a rifle, continually stamped on by named police officers, struck in the eyes by a named police officer, threatened with a scorpion and drowning, and denied food. The author states he complained of the beatings and showed his bruises to the court before which he was brought on 10 February 1987, and that the judge ordered that he be taken to hospital after the hearing, but that he nonetheless was denied treatment.

3.10 The author claims to be a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he has been detained, both on remand and on death row, in appalling conditions. It is submitted that for the duration of the periods on remand (21 months before the first trial and 21 months before the

[6]Counsel states that these principles were set forth by the Judicial Committee of the Privy Council in Reckley v. Minister of Public Safety (No. 2) (1996) 2WLR 281 and De Freitas v. Benny (1976) A.C.

second trial), the author was kept in a cell measuring 6 by 9 feet which he shared with between five to ten other inmates. With regard to the period of altogether almost eight years on death row, it is submitted that the author has been subjected to solitary confinement in a cell measuring 6 by 9 feet, containing only a steel bed, table and bench, with no natural light or integral sanitation and only a plastic pail for use as a toilet. The author further states that he is allowed out of his cell only once a week for exercise, that the food is inadequate and almost inedible and that no provisions are made for his particular dietary requirements. Care by doctors or dentists are, despite requests, infrequently made available. Reference is made to NGO reports on the conditions of detention in Trinidad and Tobago, quotations printed in a national newspaper from the General Secretary of the Prison Officers' Association, and the UN Standard Minimum Rules for the Treatment of Prisoners.

3.11 Further to the alleged violation of articles 7 and 10, paragraph 1, on the grounds of the appalling conditions of detention, the author claims that carrying out his death sentence in such circumstances would constitute a violation of his rights under articles 6 and 7. Reference is made to the Judicial Committee of the Privy Council's judgment in Pratt and Morgan v. The Attorney General of Jamaica (1994) 2 AC1, in which it held that prolonged detention under sentence of death would violate, in that case, Jamaica's constitutional prohibition on inhuman and degrading treatment. Counsel argues that the same line of reasoning must be applied in this case with the result that an execution after detention in such circumstances must be unlawful.

3.12 Finally, the author claims to be a victim of a violation of articles 2, paragraph 3, and 14 on the ground that due to lack of legal aid he is de facto being denied the right under section 14(1) of the Trinidadian Constitution to apply to the High Court for redress for violations of his fundamental rights. It is submitted that the costs of instituting proceedings in the High Court are extremely high and beyond the author's financial means and indeed beyond the means of the vast majority of those charged with capital offences. Reference is made to the jurisprudence of the European Court of Human Rights[7] and the jurisprudence of the Committee[8].

3.13 With regard to the State party's reservation set forward upon its reaccession to the Optional Protocol on 26 May 1998, the author claims that the Committee has competence to deal with the present communication notwithstanding the fact that it concerns a "prisoner who is under sentence of death in respect of [... matters] relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him".

3.14 Even though the reservation purports to exclude all communications relating to the sentence of death forwarded after 26 August 1998, the author submits that the reservation significantly impairs the competence of the Committee under the Optional Protocol to hear communications as it purports to exclude from consideration a broad range of cases, including many which would contain allegations of violations of non-derogable rights. It is submitted that the

[7] Golder v. UK (1975) A18; Airey v. Ireland (1979) A32.

[8] Communication No. 377/1989, Currie v. Jamaica.

reservation therefore is incompatible with the object and purpose of the Protocol and that it is invalid and without effect and thus presents no bar to the Committee's consideration of this communication.

3.15 To support this view, counsel advances several arguments. Firstly, counsel argues that the Preamble to the Optional Protocol as well as its articles 1 and 2 all state that the Protocol gives competence to the Committee to receive and consider communications from individuals subject to the jurisdiction of a State party who claim to be victims of a violation by the State party of *any of the rights* set forth in the Covenant. A State party to the Protocol thus, it is averred, accepts a single obligation in relation to all of the rights enumerated in the Covenant and cannot by reservation exclude consideration of a violation of any particular right. It is argued that this view is supported by the following points:
- The rights enumerated in the Covenant include non-derogable human rights having jus cogens status. A State party cannot limit the competence of the Committee to review cases which engage rights with such status, and thus a State party cannot, for example, limit communications from prisoners under sentence of death alleging torture.
- The Committee will be faced with real difficulties if it is to deal with communications only in relation to certain rights, as many complaints necessarily involve allegations of violations of several of the Covenant's articles.
- In its approach the Trinidad and Tobago reservation is without precedent and, in any event, there is little or no support for the practice of making reservations rationae personae or ratione materiae in relation to the Optional Protocol.

3.16 Secondly, counsel argues that in determining whether the reservation is compatible with the object and purpose of the Optional Protocol it is appropriate to recall that a State may not withdraw from the Protocol for the purpose of shielding itself from international scrutiny in respect of its substantive obligations under the Covenant. Trinidad and Tobago's reservation would in effect serve that purpose and accordingly allow such an abuse to occur.

3.17 Thirdly, counsel argues that the breadth of the reservation is suspect because it precludes consideration of any communications concerned not just with the imposition of the death penalty as such, but with every possible claim directly or even indirectly connected with the case merely because the death penalty has been imposed.

The State party's submission and counsel's comments thereon:

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

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

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

5. In his comments of 23 April 1999, counsel submits that the State party's assertion that the Human Rights Committee has exceeded its jurisdiction in registering the present communication is wrong as a matter of settled international law. It is argued that, in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24 para. 18[9] and to the Order of the International Court of Justice of 4 December 1998 in *Fisheries Jurisdiction (Spain v. Canada)*.

Issues and proceedings before the Committee

6.1 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.

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

6.3 To explain why such measures were taken, the State party makes reference to the decision of the Judicial Committee of the Privy Council in Pratt and

[9] I/GEN HR/1/Rev. 3, 15 August 1997, p. 48.

Morgan v. the Attorney General for Jamaica[10], in which it was held that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment"" in violation of section 17 of the Jamaican Constitution. The effect of the decision for Trinidad and Tobago is that inordinate delays in carrying out the death penalty would contravene section 5, paragraph 2(b), of the Constitution of Trinidad and Tobago, which contains a provision similar to that in section 17 of the Jamaican Constitution. The State party explains that as the decision of the Judicial Committee of the Privy Council represents the constitutional standard for Trinidad and Tobago, the Government is mandated to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed pursuant to the laws of Trinidad and Tobago can be enforced. Thus, the State party chose to denounce the Optional Protocol:

> "In the circumstances, and wishing to uphold its domestic law to subject no one to inhuman and degrading punishment or treatment and thereby observe its obligations under article 7 of the International Covenant on Civil and Political Rights, the Government of Trinidad and Tobago felt compelled to denounce the Optional Protocol. Before doing so, however, it held consultations on 31 March 1998, with the Chairperson and the Bureau of the Human Rights Committee with a view to seeking assurances that the death penalty cases would be dealt with expeditiously and completed within 8 months of registration. For reasons which the Government of Trinidad and Tobago respects, no assurance could be given that these cases would be completed within the timeframe sought."

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

6.5 At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can

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[10] 2 A.C. 1, 1994

be considered to be compatible with the object and purpose of the Optional Protocol.

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

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

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

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

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within

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

six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of transmittal;

(d) that this decision shall be communicated to the State party, to the author and his representatives.

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

Appendix

Individual, dissenting, opinion of Committee members Nisuke Ando, Prafulachandra N. Bhagwati, Eckart Klein and David Kretzmer

1. We agree that it was within the Committee's competence to register the present communication and to issue a request for interim measures under rule 86 of the Committee's Rules of Procedure so as to allow the Committee to consider whether the State party's reservation to the Optional Protocol makes the communication inadmissible. However, we cannot accept the Committee's view that the communication is admissible.

2. Recognition by a State party to the Covenant of the Committee's competence to receive and consider communications from individuals subject to the State party's jurisdiction rests solely on the ratification of, or the accession to, the Optional Protocol. Article 1 of the Optional Protocol states expressly that no communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the Optional Protocol.

3. The Optional Protocol is a distinct international treaty, which is deliberately separated from the Covenant, in order to enable States to accept the provisions of the Covenant without being obliged to accept the Committee's competence to consider individual communications. In contrast to the Covenant, which includes no provision allowing denunciation, article 12 of the Optional Protocol expressly permits the denunciation of the Protocol. It goes without saying that denunciation of the Optional Protocol can have no legal impact whatsoever on the State party's obligations under the Covenant itself.

4. In the present case the State party exercised its prerogative to denounce the Optional Protocol. By its reaccession to the Optional Protocol, it reaffirmed its commitment to recognize the competence of the Committee to receive and consider communications from individuals. However, this act of reaccesion was not unrestricted. It was accompanied by the reservation which concerns us here.

5. The Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with rules of customary international law that are reflected in article 19 of the Vienna Convention on the Law of Treaties, reservations can therefore be made, provided they are compatible with the object and purpose of the Optional Protocol. Thus, a number of States parties have made reservations to the effect that the Committee shall not have competence to consider communications which have already been considered under another procedure of international investigation or settlement. These reservations have been respected by the Committee.

6. The object and purpose of the Optional Protocol is to further the purposes of the Covenant and the implementation of its provisions by allowing international consideration of claims that an individual's rights under the Covenant have been violated by a State party. The purposes and implementation of the Covenant would indeed best be served if the Committee had the competence to consider every claim by an individual that his or her rights under the Covenant had been violated by a State party to the Covenant. However, assumption by a state of the obligation to ensure and protect all the rights set out in

the Covenant does not grant competence to the Committee to consider individual claims. Such competence is acquired only if the State party to the Covenant also accedes to the Optional Protocol. If a State party is free either to accept or not accept an international monitoring mechanism, it is difficult to see why it should not be free to accept this mechanism only with regard to some rights or situations, provided the treaty itself does not exclude this possibility. All or nothing is not a reasonable maxim in human rights law.

7. The Committee takes the view that the reservation of the State party in the present case is unacceptable because it singles out one group of persons, those under sentence of death, for lesser procedural protection than that enjoyed by the rest of the population. According to the Committee's line of thinking this constitutes discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols. We find this argument unconvincing.

8. It goes without saying that a State party could not submit a reservation that offends peremptory rules of international law. Thus, for example, a reservation to the Optional Protocol that discriminated between persons on grounds of race, religion or sex, would be invalid. However, this certainly does not mean that every distinction between categories of potential victims of violations by the State party is unacceptable. All depends on the distinction itself and the objective reasons for that distinction.

9. When dealing with discrimination that is prohibited under article 26 of the Covenant, the Committee has consistently held that not every differentiation between persons amounts to discrimination. There is no good reason why this approach should not be applied here. As we are talking about a reservation to the Optional Protocol, and not to the Covenant itself, this requires us to examine not whether there should be any difference in the substantive rights of persons under sentence of death and those of other persons, but whether there is any difference between *communications* submitted by people under sentence of death and communications submitted by all other persons. The Committee has chosen to ignore this aspect of the matter, which forms the very basis for the reservation submitted by the State party.

10. The grounds for the denunciation of the Optional Protocol by the State party are set out in paragraph 6.3 of the Committee's views and there is no need to rehearse them here. What is clear is that the difference between communications submitted by persons under sentence of death and others is that they have different results. Because of the constitutional constraints of the State party the mere submission of a communication by a person under sentence of death may prevent the State party from carrying out the sentence imposed, *even if it transpires that the State party has complied with its obligations under the Covenant.* In other words, the result of the communication is not dependent on the Committee's views – whether there has been a violation and if so what the recommended remedy is – but on mere submission of the communication. This is not the case with any other category of persons who might submit communications.

11. It must be stressed that if the constitutional constraints faced by the State party had placed it in a situation in which it was violating substantive

Covenant rights, denunciation of the Optional Protocol, and subsequent reaccession, would not have been a legitimate step, as its object would have been to allow the State party to continue violating the Covenant with impunity. Fortunately, that is not the situation here. While the Committee has taken a different view from that taken by the Privy Council (in the case mentioned in para. 6.3 of the Committee's views) on the question of whether the mere time on death row makes delay in implementation of a death sentence cruel and inhuman punishment, a State party which adheres to the Privy Council view does not violate its obligations under the Covenant.

12. In the light of the above, we see no reason to consider the State party's reservation incompatible with the object and purpose of the Optional Protocol. As the reservation clearly covers the present communication (a fact that is not contested by the author), we would hold the communication inadmissible.

13. Given our conclusion that this communication is inadmissible for the reasons set out above, we need not have dealt with a further issue that arises from the Committee's views: the effect of an invalid reservation. However, given the importance of this question and the fact that the Committee itself has expressed its views on this issue we cannot ignore it.

14. In para. 6.7 of its Views the Committee states that it considers that the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. Having reached this conclusion the Committee adds that "[t]he consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol." It gives no reason for this "consequence", which is far from self-evident. In the absence of an explanation in the Committee's Views themselves, we must assume that the explanation lies in the approach adopted by the Committee in its General Comment no. 24, which deals with reservations to the Covenant.

15. In General Comment no. 24 the Committee discussed the factors that make a reservation incompatible with the object and purpose of the Covenant. In para. 18 the Committee considers the consequences of an incompatible reservation and states:

"The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

It is no secret that this approach of the Committee has met with serious criticism. Many experts in international law consider the approach to be inconsistent with the basic premises of any treaty regime, which are that the treaty obligations of a state are a function of its consent to assume those obligations. If a reservation is incompatible with the object and purpose of a treaty, the critics argue, the reserving state does not become a party to the treaty unless it withdraws that reservation. According to the critics' view there is no good reason to depart from general principles of treaty law when dealing with reservations to the Covenant.

16. It is not our intention within the framework of the present case to reopen the whole issue dealt with in General Comment no. 24. Suffice it to say that even in dealing with reservations to the Covenant itself the Committee did not take the view that in every case an unacceptable reservation will fall aside, leaving the reserving state to become a party to the Covenant without benefit of the reservation. As can be seen from the section of General Comment no. 24 quoted above, the Committee merely stated that this would *normally* be the case. The normal assumption will be that the ratification or accession is not dependent on the acceptability of the reservation and that the unacceptability of the reservation will not vitiate the reserving state's agreement to be a party to the Covenant. However, this assumption cannot apply when it is abundantly clear that the reserving state's agreement to becoming a party to the Covenant is *dependent* on the acceptability of the reservation. The same applies with reservations to the Optional Protocol.

17. As explained in para. 6.2 of the Committee's Views, on 26 May, 1998 the State party denounced the Optional Protocol and immediately reacceded with the reservation. It also explained why it could not accept the Committee's competence to deal with communications from persons under sentence of death. In these particular circumstances it is quite clear that Trinidad and Tobago was not prepared to be a party to the Optional Protocol without the particular reservation, and that its reaccession was dependent on acceptability of that reservation. It follows that if we had accepted the Committee's view that the reservation is invalid we would have had to hold that Trinidad and Tobago is not a party to the Optional Protocol. This would, of course, also have made the communication inadmissible.

18. In concluding our opinion we wish to stress that we share the Committee's view that the reservation submitted by the State party is unfortunate. We also consider that the reservation is wider than required in order to cater to the constitutional constraints of the State party, as it disallows communications by persons under sentence of death even if the time limit set by the Privy Council has already been exceeded (as would seem to be the case in the present communication). We understand that since the State party's denunciation and reaccession there have been developments in the jurisprudence of the Privy Council that may make the reservation unnecessary. These factors do not affect the question of the compatibility of the reservation with the object and purpose of the Optional Protocol. However, we do see fit to express the hope that the State party will

reconsider the need for the reservation and withdraw it. We also stress the obvious: the acceptability of the reservation in no way affects the duty of the State party to meet all its substantive obligations under the Covenant. The rights under the Covenant of persons under sentence of death must be ensured and protected in all circumstances.

N. Ando (signed) P. N. Bhagwati (signed)

E. Klein (signed) D. Kretzmer (signed)

[Done in English, French and Spanish, the English 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.]

Individual concurring opinion by Committee member Louis Henkin

I concur on the result.

Louis Henkin (signed)

[Done in English, French and Spanish, the English 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.]