

UNIVERSALITY OF HUMAN RIGHTS AND THE DEATH PENALTY—THE APPROACH OF THE HUMAN RIGHTS COMMITTEE

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The application of the death penalty has occupied a number of United Nations human rights treaty bodies, and in particular the Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR). Article 6 of the ICCPR does not disavow capital punishment, but limits the imposition of a capital sentence to the most serious crime. Moreover, a capital sentence can only be pronounced upon conclusion of a trial in which all the guarantees of due process have been scrupulously observed under article 14 ICCPR.

The present article focuses on the approach of the Human Rights Committee vis-à-vis the death penalty. This will be done by reference to the Committee's periodic state reporting procedure, governed by article 40 of the ICCPR, and by reference to the Committee's jurisprudence on the death penalty, by now well established, under the First Optional Protocol to the ICCPR.

The Human Rights Committee is a body of eighteen independent experts of universal composition. Of the 132 states parties to the ICCPR, many still retain the death penalty on their books, although some are de facto abolitionist or have not carried out executions in many years. Other states parties, however, do resort to capital punishment. Given the wording of article 6 of the ICCPR, the Committee cannot be openly

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abolitionist. The adoption of the Second Optional Protocol on the Abolition of the Death Penalty in 1990, however, has given the Committee some leverage to press states parties on the death penalty issue; many Committee members have put probing questions on the death penalty to State party representatives, some of which will betray their abolitionist leanings. Thus, the tendency of the past six to eight years has been to question states parties which do carry out executions rather critically on their attitude towards the death penalty. This is true both for the state reporting procedure under article 40 of the ICCPR and the Optional Protocol procedure.

I. THE DEATH PENALTY IN THE PERIODIC STATE REPORTING PROCEDURE

The Committee first addressed the issue of the death penalty in general terms in its General Comment 6[16] on the right to life, adopted in July 1982. In it, it suggested that while the Covenant did not prohibit the death penalty, the article refers to abolition in terms which strongly suggest (paragraphs 2 and 6 of the provision) that abolition is desirable. It concluded that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40 ICCPR.¹

This philosophy has permeated the Committee's comments on states parties' periodic reports, in as far as the death penalty is concerned. The following examples are illustrative:

In its Comments on the Third Periodic Report of Japan, the Committee expressed serious concern over the number and the nature of crimes punishable by the death penalty under the Japanese Criminal Code. It recalled, in language that could be termed by now as standard, that the terms of the Covenant tend toward the abolition of the death penalty and those states which have not already abolished the death penalty are bound to apply it only for the most serious crimes.²

Commenting on the Second Periodic Report of Cameroon, the Committee was concerned that, in spite of a recent reduction, the number of offenses punishable by the death penalty in the Criminal Code [was] still excessive, in particular aggravated theft or traffic in toxic or dangerous wastes, and at the number of death sentences handed down by the courts.³

1. *General Comments under Article 40, Paragraph 4 of the Covenant*, 1982 Y.B. on H.R., General Comment 6(16), Article 6, at 196-7, U.N. Sales No. E.88.XIV 6.

2. *See Report of the Human Rights Committee*, U.N. GAOR, 49th Sess., Supp. No. 40, Vol. I, at 25, U.N. Doc. A/49/40 (1994).

3. *Id.* at 37.

It is noteworthy that the Committee claimed the authority to determine what, in its opinion, constitutes a most serious crime for the purpose of article 6. By doing so, it is progressively limiting the number of offenses for which the death penalty may legitimately be imposed. Admittedly, the Committee's observations and concluding comments in no way bind states parties to the Covenant, but states do pay attention to these statements and frequently try to implement them at the domestic level.

The Committee criticizes states parties' resort to capital punishment regardless of the legal system they adhere to. Commenting on the second periodic report of Yemen, whose legal system is based on Islamic law, the Committee deplored that, on the basis of the information before it, executions of persons below the age of eighteen had taken place and deemed this to be a clear violation of article 6, paragraph 5, of the Covenant.⁴

Perhaps the Committee's most detailed criticism of the application of the death penalty was formulated upon conclusion of the examination of the initial report of the United States in March 1995. In its Comments, the Committee expressed

[a] concern about the excessive number of offenses punishable by the death penalty in a number of States, the number of death sentences handed down by the courts, and the long stays on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.⁵

In another section, the Committee criticized the United States reservations entered in respect of articles 6, paragraph 5, prohibition of execution of minors, and paragraph 7, exemption of the death row phenomenon from the scope of application of the provision—the so called Soering reservation and urged the United States Government to withdraw

4. Annual Report of the Human Rights Committee, U.N. GAOR, Vol. 1, Annex I, at 51, U.N. Doc. A/50/40 (1995).

5. *Id.* at 54.

them. In this context, the Committee was undoubtedly mindful of the objections to said reservations deposited by a number of European states after United States ratification of the Covenant in the summer of 1992.⁶ It went on to urge the Government to revise federal and state legislation with a view to restricting the number of offenses carrying the death penalty strictly to the most serious crimes and *with a view eventually to abolishing it*. The Government was further exhorted to take steps to ensure that no one is sentenced to death for crimes committed under the age of eighteen. Finally, the Committee considered the determination of methods of execution had to take into consideration the prohibition against causing avoidable pain and urged that the Government take all necessary steps to ensure respect of article 7 of the Covenant.⁷

At the same time, the case of the United States exemplifies the limits of the Committee's capacity to influence a state's attitude vis-à-vis the death penalty, let alone its domestic politics. While the United States representative thanked the Committee for its carefully worded recommendations and promised to convey them to the Clinton Administration, he made it equally clear that the issue of withdrawal of the U.S. reservations to articles 6 and 7 and of a possibly more restrictive resort to capital punishment were non-negotiable politically. But even in such a situation, the Committee's recommendations should not be dismissed as pious or nave formulae — if they are taken up by sizable segments of civil society and repeatedly placed before executive and legislative bodies for consideration, the long-term effect may be far from negligible. Finally, repeated public criticism may ultimately shame a Government into action.

Close observers of the Committee's practice under article 40 ICCPR have charged — and not without some justification — that it has not always been consistent in its calls for the abolition of the death penalty, and that it may have applied a double standard with regard to abolition. While the suggestion of abolition was put to the United States delegation, this was not done in the cases of Yemen and Cameroon. In still other instances, the Committee has recommended that states parties consider ratifying the Second Optional Protocol to the Covenant, aiming at the Abolition of the Death Penalty.⁸

6. Reprinted in United Nations Office of Legal Affairs C.N.377, 1993 TREATIES 21 (1994).

7. See Annual Report, *supra* note 4, at 56.

8. Adopted on Dec. 15, 1989, in force since July 11, 1991. Twenty-nine states were parties to the Second Optional Protocol as of July 1996.

The Committee has viewed with concern the movement, in some states parties to the Covenant, towards re-introduction or extension of the death penalty, mostly against a background of rampant violent crime or anti-Government terrorism. Thus, the death penalty was recently re-introduced in Chile and in El Salvador; in Guatemala, its scope was extended. In the case of Peru, where the death penalty was re-introduced and extended in the 1993 Constitution to a wider range of offenses than in the 1979 Constitution, the Committee recalled its General Comment 6[16] of July 1982 and concluded that extension of the scope of application of the death penalty raises questions as to its compatibility with article 6 of the Covenant.⁹ On another occasion, it has argued that the re-introduction of the death penalty by a State which had previously abolished capital punishment would raise serious issues under article 6, paragraph 6.

II. THE DEATH PENALTY UNDER THE OPTIONAL PROTOCOL PROCEDURE

Since 1987, the Committee has been seized of numerous individual complaints involving capital punishment under the Optional Protocol procedure. Over the past decade, it has been able to set out numerous principles which, in their combination, limit the capacity of states parties to carry out capital sentences. At the same time, it should be pointed out that on no issue has the Committee been divided to such an extent as over the death penalty, as is borne out by the ratio decidendi of, and the numerous individual opinions appended to, many decisions addressing the so-called death row phenomenon, as well as the views dealing with the complex issue of extradition to face the death penalty.¹⁰

The Committee has consistently held that in capital cases, the obligation of states parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. From this premise, it has developed a number of principles for the conduct of capital cases in domestic courts, and which states parties are expected to respect. While this article does not permit a detailed analysis of the Committee's jurisprudence on the death penalty,¹¹ the most important statements are covered hereafter. Thus, on the issue of legal

9. *Preliminary Observations of the Human Rights Committee*, U.N. Doc. CCPR/C/79/Add.67 (1996).

10. Regrettably, the Summary Records of plenary debates on complaints examined under the Optional Protocol are confidential, so that no specific examples can be given.

11. Cf. the overview of the Committee's jurisprudence in MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* (2nd ed. 1994) (discussing article 6 of the ICCPR in one of its chapters); SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2nd ed. 1997).

representation of prisoners under sentence of death, the Committee has stated that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. This, it added, applies to the trial in the tribunal of first instance as well as to all appellate proceedings.¹²

The right of the accused to be present during his appeal has been addressed by the Committee in several capital cases. It found violations of article 14, paragraph 3(d), where the accused was not allowed to attend the hearing of his appeal despite his manifest desire to do so, or where he was represented by a lawyer whom he had not been able to instruct and who, without consulting with his client, had abandoned one or several grounds of appeal, thereby leaving the accused without effective representation.¹³ In a recent case concerning Jamaica, the Committee held that while it had no competence to question counsel's professional judgment that there was no merit in the appeal, counsel should nonetheless have informed his client of his intention not to raise any grounds of appeal, so that the latter could have considered any other remaining options open to him.¹⁴

In what is by now firmly established jurisprudence, the Committee holds that violations of the fair trial provisions in article 14 ICCPR in a capital case entail, if no further appeal against the sentence is possible, a violation of the right to life:

[t]he imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6. [T]he provision that a death sentence may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and

12. Hum. Rts. Comm., Communication No. 250/1987 (*Reid v. Jamaica.*), Views adopted on 20 July 1990, para. 11.4.

13. *See, e.g.*, Hum Rts. Comm., Communication No. 232/1987 (*Pinto v. Trinidad*), Views adopted on 20 July 1990, para. 11.4.

14. *See* Hum. Rts. Comm., Communication No. 353/1988 (*Grant v. Jamaica*), Views adopted on 31 Mar. 1994, para. 8.6.

the right to review of conviction and sentence by a higher tribunal.¹⁵

The question of what constitutes the most serious crime within the meaning of article 6, paragraph 2, ICCPR, has been discussed in several communications, but only one final decision is available as of the autumn of 1996. In a recent case concerning Zambia, the complainant had been sentenced to death for aggravated robbery involving the use of firearms. Considering that in the circumstances of the case, no person had been either killed or wounded, and that the domestic courts could not take these elements into consideration when imposing the death sentence, the Committee concluded that the mandatory imposition of the death sentence in the circumstances was incompatible with article 6, paragraph 2.¹⁶ While it is obviously difficult to generalize from a single decision, one may read between the lines that the Committee interprets the terms most serious crime in a restrictive manner; while states may retain some margin of discretion as to what constitutes a most serious crime, it is clear that the list is being narrowed down progressively.

Extradition to face the death penalty is a phenomenon which has occupied numerous judicial instances and human rights organs in recent years. The Human Rights Committee is no exception. In three decisions adopted in 1993 and 1994, respectively, the Committee was called upon to determine whether the extradition by a country which has abolished the death penalty to a country retaining capital punishment may be deemed a violation of article 6 ICCPR.¹⁷ In all three cases, the defendants, United States citizens, had been either convicted of a capital offense in United States courts or were facing capital charges in United States tribunals; they fled to Canada, where they were apprehended, and detained pending judicial determination of the United States' request for their extradition. After the Supreme Court of Canada had held that they could be extradited under the 1976 Extradition Treaty between the United States and Canada, the complainants turned to the Human Rights Committee. While the Committee majority held that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the applicants' extradition without seeking assurances that the death penalty would not be imposed and respectively carried out in the United States, an important Committee

15. See, e.g., Hum. Rts. Comm., Communications 464 and 482/1991 (Peart v. Jamaica), Views adopted on July 19, 1995, at 44, in U.N. Doc. CCPR/C/57/WP.1 (1996).

16. Hum. Rts. Comm., Communication No. 390/1990 (Lubuto v. Zambia), Views adopted on Oct. 31, 1995.

17. This issue is dealt with in more detail in the contribution of William Schabas to the symposium.

minority held that by allowing the authors' extradition, Canada, a state only retaining capital punishment for some offenses under military statutes, was violating its obligations under article 6 by exposing individuals under its jurisdiction to capital punishment in another state.¹⁸

The three preceding cases have tested the Committee's consensual decision-making procedure to its very limit. This becomes clear when one compares the number of individual opinions appended to the decisions in these cases, admittedly on different legal issues, to any other case previously decided by the Committee. This author submits that the Committee majority has been considerably more restrictive in its approach than other national highest appellate jurisdictions recently called upon to determine similar legal issues, e.g., the Hoge Raad of the Netherlands¹⁹ or the Conseil d'Etat of France.²⁰ In the perhaps most far-reaching judgment, the Italian Constitutional Court recently held that an individual may not be extradited to a state which retains the death penalty even if the receiving states gives assurances that the death penalty, if imposed, would not be carried out. The absolute guarantee [of the right to life] is not satisfied by a system that allows a decision on extradition to countries with the death penalty to be taken on a case-by-case basis, where the discretion to evaluate the guarantees given by the requesting state lies with the extraditing authorities.²¹ While this judgment may not be representative, it is clear that the trend goes in the direction of the highest domestic appellate instance refusing extradition to a country retaining the death penalty if no satisfactory assurances are received from the receiving country that the death penalty, if imposed, would not be carried out.²²

Another issue which has caused considerable discussion and dissent within the Committee concerns the so-called death row phenomenon, i.e. whether prolonged detention on death row can be deemed to constitute cruel, inhuman, and degrading treatment within the

18. See Hum. Rts. Comm., Communications No. 469/1991 (Charles Ch. Ng. v. Canada), Views adopted in Nov. 1993, Communication No. 470/1991 (Kindler v. Canada), Views adopted in July 1993, Communication No. 539/1993 (Cox v. Canada), Views adopted on Oct. 31, 1994. On the case of Joseph Kindler, see Schabas, 4 REVUE UNIVERSELLE DES DROITS DE L'HOMME 65-70 (1992).

19. See *Jurisdiction-NATO Status of Forces Agreement-U.S. Servicemen Charged with Criminal Offenses Overseas-European Convention on Human Rights: Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698 (1991).

20. *Aylor v. France*, Judgment of the Conseil d'Etat of Oct. 15, 1993, reported in LIBERATION, Nov. 3, 1993.

21. Italian Constitutional Court, judgment of 27 June 1996, reported in BULLETIN OF LEGAL DEVELOPMENTS 197-198 (Sept. 16, 1996).

22. See THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 644-645 (Harris ed. 1995), for the chapter written by Markus G. Schmidt.

meaning of article 7 ICCPR. In its first decision which addressed the problem, the Committee did not accept the authors' argument that detention on death row for over ten years constituted treatment contrary to article 7:

[i]n principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.²³

The Committee's approach in Pratt and Morgan must be contrasted with the judgment of the European Court of Human Rights in the case of *Soering v. United Kingdom*, in which the court held that the length of detention prior to execution, the conditions of incarceration on death row, as well as the complainant's mental state would bring the treatment on death row within the scope of application of article 3 of the European Convention on Human Rights and Fundamental Freedoms.²⁴

In 1992, the Human Rights Committee had the opportunity to fine-tune its jurisprudence on the death row phenomenon in the cases of *Barrett and Sutcliffe*. The complainants, who had been on death row for over thirteen years and argued that the length of their detention on death row violated article 7. The Committee reiterated its statement from Pratt and Morgan quoted above and added:

[i]n states whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence. Thus, even prolonged detention under a severe custodial regime cannot generally be considered to constitute cruel and inhuman treatment if the convicted person is merely availing himself of appellate remedies.²⁵

Significantly, one Committee member appended an individual opinion, noting that a very long period [of detention] on death row, even if partially

23. Hum. Rts. Comm., Communications Nos. 210/1986 & 225/1987 (Pratt v. Jamaica), Views adopted on 5 Apr. 1989, para. 13.6.

24. Series A, No. 161 (1989).

25. Hum. Rts. Comm., Communications Nos. 270/1988 & 271/1988 (Barrett v. Jamaica), Views adopted on 30 Mar. 1992, para. 8.4.

due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the state party from its obligations under article 7.²⁶

Although the Committee has confirmed its jurisprudence on several occasions since 1992, the repeated changes in the formulation it has chosen for its decisions, and a fresh look at the death row phenomenon by the highest judicial instances of some states parties, including the Supreme Court of Zimbabwe²⁷ and the Judicial Committee of the Privy Council in London,²⁸ have contributed to renewed and sometimes sharp exchanges between Committee members on the compatibility of prolonged detention on death row with article 7. In its latest decision, adopted in March 1996, the Committee acknowledges that it is aware that its jurisprudence has given rise to controversy. The detailed arguments that follow by and large confirm the Committee's previous jurisprudence, but at the same time some formulations in the operative part of the decision might lock the Committee into a straightjacket, permitting it no differentiated treatment of cases in which the length of detention exceeds every reasonable limit.²⁹

The compatibility of methods of execution of a capital sentence with international or regional human rights instruments has, to date, not been addressed by any of the regional human rights bodies. At the universal level, the Human Rights Committee was faced with it in 1993 in the case of *Ng v. Canada*. The complainant, awaiting extradition from Canada, argued that, if extradited to California and sentenced to death, he would face death by gas asphyxiation in the gas chamber, which he contended was contrary to article 7 ICCPR. The Committee began by noting that any method of execution provided for by law must be designed in such a way as to avoid conflict with article 7. It then noted that, by definition, every execution of a sentence of death could be considered to constitute cruel and inhuman treatment within the meaning of article 7. As article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes, however, the execution of the sentence must be carried out in such a way as to cause the least possible physical mental

26. *Id.*, as per individual opinion of Ms. Christine Chanet.

27. Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Supreme Court Judgment No. S.C. 73/93 (1993).

28. *Pratt v. Attorney-General of Jamaica*, Nov. 2, 1993, 33 I.L.M. 364.

29. *See* Hum. Rts. Comm., Communication No. 588/1994 (*Johnson v. Jamaica*), Views adopted on 22 March 1996, para. 8.2 to 8.6. Some formula, such as "Life on death row, harsh as it may be, is preferable to death," could for example be read as ultimately legitimizing periods of detention on death row exceeding twenty years. Two complaints currently pending under the Optional Protocol procedure and awaiting a decision on the merits may soon require further clarifications by the Committee.

suffering. On the basis of the detailed information provided by the defendant's representative, which had not been contradicted by the State party, the Committee concluded that asphyxiation by cyanide gas would not meet the test of least physical and mental suffering.³⁰

The Committee's reasoning was criticized by two Committee members who appended their individual opinion to the views. They rightly point out that every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity of having the process repeated.³¹ Furthermore, if one method of execution is deemed incompatible with article 7 ICCPR, the state party concerned may simply change the method of execution or provide for a choice between two or several methods; this is indeed what occurred in California, where the law now provides for a choice between execution by lethal injection or by gas asphyxiation.³²

Finally, the Committee has not hesitated to request interim measures of protection in many capital cases placed before it for consideration under the Optional Protocol. The basis for requests of stays of execution is Rule 86 of the Committee's rules of procedure, which provides that a state party may be asked not to take measures which would cause irreparable harm to the petitioner. Since the spring of 1987, numerous requests for stays of execution have been addressed to states parties in capital cases, occasionally in urgent situations in which the execution of the petitioner was scheduled within hours. Mechanisms have been devised by the Committee's Secretariat to process and transmit such requests as quickly as the situation warrants. The Committee has been careful to add that a request for interim measures does not imply, in any way, a determination of the admissibility or the merits of the communication. Thus, if consideration of a case is concluded with an inadmissibility decision or a merits decision finding no violation of the Covenant, the State party may in principle proceed with the execution.

States parties have displayed a commendably high degree of compliance with the Committee's requests for stays of execution. Requests under Rule 86 have been issued in approximately 150 communications involving the death penalty since 1987; in all but two cases have stays of execution been granted by the states parties concerned. In one instance concerning Trinidad and Tobago, the petitioner was

30. U.N. GAOR, Hum. Rts. Comm., Communication No. 469/1991 (Charles Ch. Ng v. Canada), Views adopted on 5 Nov. 1993, para. 16.2-16.4.

31. Appendix B. to Views on communication No. 469/1991, *supra* note 30.

32. Execution by cyanide gas asphyxiation was held to be unconstitutional in *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

executed despite a request for a stay of execution transmitted to the State party authorities one day prior to the scheduled execution. Apprised of the matter, the Committee plenary decided to schedule a public hearing on the issue,³³ it expressed its indignation over the state party's failure to comply with the request under rule 86 and adopted an unprecedented decision to this effect, which was published in the Committee's Annual Report.³⁴

In the second case of non-compliance during the summer of 1996, concerning Guyana, the confidentiality of the proceedings was similarly waived. While this procedural device obviously cannot help the victim, it does have its use for future cases: no state party likes to see itself criticized or placed on what amounts to a black list in public documents of the United Nations General Assembly. On balance, the application of rules on interim measures of protection has been efficient and prevented many executions from being carried out. It might be added here that in many of the capital cases from Caribbean States examined by the Committee, to which the tenor of the judgment of November 2, 1993 of the Judicial Committee of the Privy Council applies, namely that death sentences should be commuted to life imprisonment if the appellate process has not been completed in five years, the request for interim measures of protection under rule 86 of the Committee's rules of procedure has the effect of carrying the complainants beyond the five-year threshold while their case is pending before the Committee, thus providing a ground for commutation.³⁵

Since 1991, the Committee has endeavored to follow up on all those final decisions in which it found violations of the ICCPR, so as to improve the record of states parties' compliance with its recommendations. In numerous capital punishment cases in which the Committee concluded that the State party had violated the complainant's right to a fair trial, it recommended the author's release; in other cases, notably where judicial proceedings were deemed unduly prolonged in violation of article 14, paragraph 38, of the ICCPR, it recommended the commutation of the death sentence. It is interesting to note that it was the death penalty cases decided since 1989 which incited the Committee to establish what might be termed a follow up fact-finding capacity for the Committee's Special

33. Consideration of complaints under the Optional Protocol normally takes place in closed session, and on the basis of the parties written submissions. U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, at 63, U.N. Doc. A/49/40 (1994).

34. *Id.* at 70.

35. It is clear that the procedure under the Optional Protocol can be abused by complainants simply with a view to carrying them beyond this five-year threshold—this has been pointed out by some States parties to the Optional Protocol and was discussed in a working paper prepared for the Committee's 57th session in July 1996 (not made public).

Rapporteur for the follow-up on Views. This procedure is designed to facilitate a dialogue between the Committee and state party authorities, with a view to ultimately improving any given state party's compliance with the Committee's recommendations.

The first such follow-up mission took place in Jamaica in June 1995. During his mission, the Special Rapporteur for the follow-up on Views thoroughly discussed the status of implementation of Views adopted in respect of Jamaica with highlevel government and law enforcement officials and representatives of the judiciary. He was informed of the constitutional and legal constraints which had made it difficult to implement the Committee's recommendations fully.³⁶ Nonetheless, a number of death sentences had recently been commuted. The facilitation of this type of follow-up dialogue is in itself a novel and welcome development. If it further facilitates implementation of the Committee's recommendations and results in the commutation of sentences and/or the release of convicted prisoners, the quasi-judicial nature of the Optional Protocol procedure will be enhanced significantly.

III. CONCLUSION

The preceding sections demonstrate that in spite of the permissibility of the death penalty under article 6 of the Covenant, the Human Rights Committee has used both the reporting and the Optional Protocol procedure in an endeavor to significantly limit states parties' resort to capital punishment. The Committee has necessarily done so in a circumspect way — this is only natural, given that many states (and indeed most states parties to the Covenant) retain capital punishment, and that the trend towards abolition is slow and perhaps not even irreversible, as the re-introduction of the death penalty by some states in recent years shows. But the Committee has formulated such an impressive number of procedural safeguards which must be observed before a capital sentence can be imposed and executed that many states parties stop and pause to reflect before imposing the ultimate punishment.

In some instances, the Committee's comments under article 40 of the ICCPR or its recommendations in decisions adopted under the Optional Protocol have sparked national debates on the desirability of the maintenance or the abolition of the death penalty. If, in the process, states' parties also realize that the imposition and execution of capital sentences seldom fulfills the objective of deterrence, the Committee will have made a major contribution.

36. See Annual Report, *supra* note 4.