

Denunciation of the American Convention on Human Rights: The Trinidad & Tobago Death Penalty cases

Christina M. Cerna¹

Introduction:

In November 2009, during its 137 period of sessions, the Inter-American Commission on Human Rights admitted the case of Reshi Bissoon and Foster Serrette, on behalf of two death row inmates in Trinidad & Tobago, for possible violations of certain articles of the American Declaration of the Rights and Duties of Man and certain articles of the American Convention on Human Rights. The Inter-American Commission, a principal organ of the Organization of American States, applies the American Convention to the 24 States parties² thereto, and applies the American Declaration as a default instrument to the nine States³ that are not yet parties to the American Convention.⁴ Trinidad & Tobago acceded to the American Convention on April 3, 1991 and accepted the compulsory jurisdiction of the Inter-American Court on May 28, 1991. On May 26, 1998, it became the first country to denounce the American Convention, in accordance with Article 78(1) thereof. The denunciation came into effect one year later on May 26, 1999.

If Trinidad & Tobago denounced the American Convention and the denunciation became effective in 1999, pursuant to what authority or reasoning is the Inter-American Commission authorized to admit a case under the American Convention? Since the American Declaration is considered a default instrument, it is generally accepted that the Commission is competent to apply the American Declaration to States that have not yet ratified the American Convention, although some OAS member States have questioned the obligatory nature of Commission decisions under the Declaration. Since only Trinidad & Tobago has denounced the American Convention, whether a State that has ratified the American Convention and then decides to denounce it, again becomes subject to the American Declaration is an issue that is outside the scope of this inquiry and would be an interesting subject for another paper. The focus of his paper is exclusively on Trinidad & Tobago's obligations, if any, under the American Convention following its denunciation thereof.

As regards its jurisdiction over the Bissoon-Serrette case, the Commission stated the following in its admissibility decision:

¹ The author of this article is a staff member of the General Secretariat of the Organization of American States' Secretariat for the Inter-American Commission on Human Rights. The opinions expressed herein are the sole responsibility of the author in the author's personal capacity and are not to be interpreted as official positions of, and are not to be attributed to, the Inter-American Commission on Human Rights, the General Secretariat of the Organization of American States, or the Organization of American States.

² The 24 States parties to the American Convention as of November 30, 2009 are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

³ The nine OAS member States that have not yet ratified the American Convention are: Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and the United States.

⁴ Cuba, one of the 35 member States of the OAS was suspended from participation in 1962 because the Marxist Government of Fidel Castro was considered incompatible with the principles and purposes of the OAS. In June 2009, the OAS General Assembly adopted a resolution to lift Cuba's suspension, but Cuba has not sought reintegration into the OAS.

35. Trinidad & Tobago became a party to the American Convention when it deposited its instrument of ratification of that treaty on May 28, 1991. Trinidad & Tobago subsequently denounced the American Convention by notice given on May 16, 1998 in accordance with Article 78 of the American Convention, which then took effect one year later. Moreover, as mentioned above, Trinidad & Tobago deposited its instrument of ratification of the OAS Charter on March 17, 1967, and accordingly is a Member State of this Organization since this date. As such, with respect to acts one by the State wholly before May 28, 1991 or wholly after May 26, 1999, Trinidad and Tobago is subject to the allegations set forth in the American Declaration of the Rights and Duties of Man and the OAS Charter, and subject to the Inter-American Commission's authority to supervise the State's compliance with that instrument. The Inter-American Commission will analyze the facts that occurred after May 28, 1991 and prior to May 26, 1999, under the American Convention.⁵

Article x of the Vienna Convention on the Law of Treaties provides that a State ceases to perform obligations under a treaty once it denounces that treaty. The question is whether the non-performance of these obligations is only prospective or also retrospective.

1. Denunciations of international human rights treaties

a. The International Covenant on Civil and Political Rights

The UN International Covenant on Civil and Political Rights (ICCPR) is unique among international human rights treaties in that it permits no denunciations from the obligations undertaken. General Comment 26 to the ICCPR, adopted by the UN Human Rights Committee on August 12, 1997, provides that the Covenant:

... does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

General Comment 26 was adopted in reaction to the impending denunciation of the Covenant by a State party. The Democratic People's Republic of Korea (North Korea) notified the UN Secretary General of its intention to withdraw from the Covenant on August 25, 1997.⁶ Since the Covenant does not contain a withdrawal provision, the UN Secretariat informed North Korea of the legal position arising from its notification of withdrawal, to the effect that a withdrawal would not appear possible unless all the States

⁵ No authority is cited by the Commission for this latter pronouncement.

⁶ In August 1997, North Korea informed the UN that it had decided to withdraw from the ICCPR with immediate effect and to suspend its reporting to the UN Committee on the Rights of the Child. It stated that it had taken these steps in protest against a resolution critical of the human rights situation in North Korea, adopted in August by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. This resolution criticized in particular North Korea's failure to allow visits by human rights monitors and its failure to report in a timely manner to the UN Human Rights Committee on its implementation of the Covenant. North Korea was the first country ever to attempt to withdraw from the Covenant.

parties to the Covenant agreed with such a withdrawal, which was not the case. It is noteworthy that North Korea presented its initial report to the UN Human Rights Committee in April 1984 at a time when North Korea was not a member State of the United Nations. North Korea reconsidered its position in light of the Committee's General Comment and in July 2001, the Committee considered North Korea's second periodic report.

b. The First Optional Protocol to the ICCPR

Despite the fact that the Covenant does not permit denunciation, the First Optional Protocol to the Covenant does. By becoming a party to the First Optional Protocol a State authorizes the UN Human Rights Committee to consider and decide individual petitions presented against it. Since not all States that have ratified the ICCPR are required to ratify the First Optional Protocol denunciation thereof is permitted. Article 12 of the First Optional Protocol provides:

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

Article 12 provides that a denunciation may be filed by a State party, and also that it shall take effect three months after the notification has been received by the UN Secretary-General and that a denunciation shall not prejudice the continued processing of the individual petitions that have been submitted before the effective date of the denunciation.

Jamaica's denunciation of the Optional Protocol to the ICCPR

On October 23, 1997 Jamaica became the first country to denounce the Optional Protocol to the Covenant, effective three months later, January 23, 1998. British lawyers had flooded the UN Human Rights Committee with Jamaican death penalty cases since the late 1980s⁷ as part of a campaign against the death penalty in the Caribbean. In 1993, the Judicial Committee of the Privy Council, the highest appellate Court for Jamaica, held in the landmark case *Pratt and Morgan* case that the "death row phenomenon," i.e. prolonged detention on death row, constituted cruel and unusual punishment.⁸ As one commentator has noted, it was ironic that although the UN Human Rights Committee, had always rejected the death row phenomenon argument⁹, it was the adoption of this argument by the Privy Council that led to Jamaica's rejection of the Committee's jurisdiction.¹⁰ As of 1993, 23 death row prisoners in Jamaica had been awaiting

⁷ By October 23, 1997, the Committee had issued decisions in 67 Jamaican cases; in only 15 of these decisions was there a finding of no violation.

⁸ *Pratt & Morgan v. Attorney General for Jamaica* [1994] 2 App. Cas. 1.

⁹ The European Court of Human Rights accepted the "death row phenomenon" argument in the landmark *Soering* decision involving the extradition of a capital murderer from the UK to the United States where the defendant could be expected to spend years in detention on death row before being executed. ECHR, *Soering v. United Kingdom* (1989).

¹⁰ Natalia Schiffrin, "Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights" 92 AJIL 563, 565 (1998).

execution for more than 10 years and 82 prisoners had been waiting more than 5 years.¹¹ The Privy Council held in *Pratt and Morgan* that any delay over five years would provide strong grounds for concluding that an execution would be unconstitutional. Practically all persons on death row were provided pro bono counsel for appeal to the Privy Council and then to the international human rights bodies. The Privy Council did not consider the UN Human Rights Committee or the Inter-American Commission to be a fourth instance in the appellate process, and expected recourse to these bodies to be infrequent:

It further appears to their Lordships that provided there is in [the] future no acceptable delay in the domestic proceedings, complaints to the UNHCR from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.¹²

Jamaica unilaterally sought to put in place strict time limits to be adhered to in the processing of individual petitions before the international bodies in a set of “Instructions” promulgated by the Governor General in August 1997.¹³ The time limits required that the petition process before the Committee or the Commission be completed within a period of a little over seven months, much shorter than the 18 months envisaged by the Privy Council. These “Instructions” were rejected by both the Committee and the Commission and led to Jamaica’s withdrawal from each of these bodies.

The Committee continued to process the cases that were pending at the time of Jamaica’s denunciation and issued decisions in an addition 49 cases, finding no violation in three of them. The last Jamaican case to be decided by the Committee was that of Dennis Lobban, a case filed on January 16, 1998, before Jamaica’s denunciation came into effect on January 23d.¹⁴ It is noteworthy that Jamaica continued to participate in the processing of these cases and submitted information to the Committee in the Lobban case on July 13, 1999 and February 11, 2000, long after the denunciation had entered into effect.

Trinidad and Tobago’s denunciation of the Optional Protocol

Guyana’s denunciation of the Optional Protocol

c. Denunciation clauses in other UN human rights treaties

The UN Convention against Torture (CAT), UN Convention on the Rights of the Child (CRC), and the UN Convention on the Elimination of Racial Discrimination (CERD) provides that a denunciation will enter into effect one year after a written

¹¹ *Id.*, note 14.

¹² Pratt & Morgan, *supra* note 8, at 4.

¹³ N. Schiffrin, *supra* note 10 at 567.

¹⁴ Dennis Lobban, Communication no. 797/1998, May 13, 2004.

notification to the UN Secretary-General has been filed.¹⁵ The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW) provides that a denunciation will take effect six months after the date of receipt of the notification by the UN Secretary-General.¹⁶

Article 31 of CAT, similar to Article 19 of the Optional Protocol to CEDAW, Article 12 of the First Optional Protocol to the ICCPR, Article 11 of the Optional Protocol to the CRC (Armed Conflict), Article 15 of the Optional Protocol to the CRC (Sale, Prostitution, Pornography) and Article 89 of the Convention on Migrant Workers (CMW) provides that the denunciation “shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act which occurs prior to the date at which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way, the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.” What does the first part of that sentence mean: “Shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act which occurs prior to the date at which the denunciation becomes effective”? What are the “acts” and “obligations” referred to? The provision permitting denunciation explicitly states that :the continued consideration of any matter which is already under consideration by the Committee” such as a pending individual petitions, will continue to be processed until decided, but what sort of “acts” and “obligations”, if any, persist that are not included in pending cases? May new cases be presented? Only in the third paragraph of Article 31 of CAT and the fourth paragraph of Article 89 of the CMW is there a clarification: “Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.”

¹⁵ See Article 31 of CAT, Article 52 of CRC and Article 21 of CERD.

¹⁶ See Article 19 of the CEDAW Optional Protocol.