QUESTIONS

1. As a legislator, would you have voted for the Gayssot Act? How would you have reacted to the following argument in general, or as applied to the passage of that Act?

> Freedom of expression is indeed a fundamental right. While its protection may sometimes be an end in itself, its exercise may not disturb the fundamental goals underlying human rights law. One of the most fundamental of those goals is achieving equality and non-discrimination. In fact, if there is any right which enjoys primacy among rights, it is arguably the principle of equality and non-discrimination. . . . The goal of hate mongers is to convince others that the members of the target group are not entitled to equal protection of the law; the hate mongers seek a society of discrimination. . . . They should not be entitled to claim protection under the right to freedom of expression for their abuse of speech rights to achieve that goal.[5]

2. Suppose that an author's statements leading to a prosecution under the Gayssot Act appeared in a periodical article that was the only writing by the author on the subject. The author concludes that the Nuremberg judgment, later judicial decisions describing the Holocaust, and 'official' accounts of the Holocaust were part of a conscious conspiracy among the victorious Allies to spur feelings of guilt by Germans and hatred of others toward them.

Would a conviction by French courts be likely to be upheld under the opinion above for the Committee? Under the concurring opinion by Elizabeth Evatt and David Kretzmer? How do these opinions differ, and which do you view as the better one?

3. Should the opinions have referred to arguments in favour of freedom of speech, or to the criteria in Section 19 for limiting speech, such as 'public order' or 'public morals'? What could have been the bases or events in France and French history for relying on such criteria to uphold the statute and affirm the conviction? Would comparable bases have been available in the United States to justify legislation similar to the Gayssot Act?

4. Do you think that the opinions as a whole succeed in illuminating the relevant aspects of the ICCPR, or indeed of human rights in general? Do they advance understanding of the value and limitations of free speech, and of the dilemmas of resolving conflicts among rights within the human rights instruments?

NOTE

Some states have forbidden political groups or parties that are based on racism, and hence that employ hate speech, from participating in elections. In Israel, for example, a system of proportional representation works by having a candidates' list from different parties or political formations presented to the electorate, which votes for a list as a whole. Amendment No. 9 to the Basic Law on the Knesset (Parliament) provides: 'A candidate's list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: . . . (3) incitement to racism'.

[5] Stephanie Farrior, 'Moulding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech', 14 Berkeley J. of Int. L. 1 (1996), at 6, 98.

ADDITIONAL READING

Sandra Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1992); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995); S. Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches', 7 Wm. & Mary Bill of Rts. J. 305 (1999).

CHITAT NG V. CANADA

Communication No. 469/1991, Human Rights Committee
Views of Committee, November 5, 1993, UN Doc. A/49/40 (1994), Vol. II, at 189

[Chitat Ng, a British subject born in Hong Kong and a resident of the United States, was convicted in Canada in 1985 for attempted theft and shooting a security guard. In 1987, the United States requested his extradition to stand trial in California courts on 19 criminal counts including kidnapping and 12 murders committed in 1984–85. If convicted, Chitat Ng faced the possibility of the death penalty. At the time of his submission of this communication to the Human Rights Committee, he was detained in Canada.

Canada effectively abolished the death penalty in 1976 (with a limited exception for certain military offences). It was not party at the time of this litigation to the Second Protocol to the ICCPR. Its extradition treaty with the United States provided that extradition could be refused where the relevant offence was punishable by death in the requesting state but not in the requested state, unless the requesting state gave adequate assurance that the death penalty would not be imposed. The power to seek such assurance was discretionary. After the Supreme Court of Canada decided in 1991 that extradition without assurance did not violate Canada's constitutional protection of human rights or standards of the international community, Chitat Ng was immediately extradited.

He claimed that the extradition violated the ICCPR, on grounds that execution by gas asphyxiation as provided by California statutes, after a conviction and imposition of the death penalty, would constitute cruel and inhuman treatment; that prison conditions on death row were cruel and inhuman; and that racial bias in the United States would influence imposition of the death penalty.

Among other responses, Canada argued that Chitat Ng could not be considered a 'victim' within the meaning of Article 1 of the Optional Protocol since his allegations rested on assumptions of what might happen in the United States, not

on historical facts. The Committee concluded that he could be so considered, given the seriousness of the charges that were subject to the death penalty, statements by prosecutors involved in the case that they would seek the death penalty, and the failure of the State of California when intervening before the Supreme Court of Canada to disavow the prosecutors' position. Hence there was a 'real risk (a necessary and foreseeable consequence)' that Canada's extradition itself, the subject of the litigation, could be found to be a violation of the Covenant because of the fact of execution or the means of execution in the United States.

The materials at pp. 31–55, *supra*, consider the legality of capital punishment under national and international law. That broad issue is relevant to the excerpts that follow from the opinions of the Committee and several individual members.]

15.2 Counsel claims that capital punishment must be viewed as a violation of article 6 of the Covenant 'in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder'. Counsel, however, does not substantiate this statement or link it to the specific circumstances of the present case. . . . Mr. Ng was convicted of committing murder under aggravating circumstances; this would appear to bring the case within the scope of article 6, paragraph 2, of the Covenant. In this connection the Committee recalls that it is not a 'fourth instance' and that it is not within its competence under the Optional Protocol to review sentences of the courts of States. This limitation of competence applies a fortiori where the proceedings take place in a State that is not party to the Optional Protocol.

15.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. . . . Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes. He was over eighteen years when the crimes of which he stands accused were committed. Finally, while the author has claimed . . . that his right to a fair trial would not be guaranteed in the judicial process in California, because of racial bias in the jury selection process and in the imposition of the death penalty, these claims have been advanced in respect of purely hypothetical events, and nothing in the file supports the contention that the author's trial in the Calaveras County Court would not meet the requirements of article 14 of the Covenant.

. . .

15.7 In the light of the above, the Committee concludes that Mr. Ng is not a victim of a violation by Canada of article 6 of the Covenant.

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contended that execution by gas asphyxiation is

contrary to internationally accepted standards of humane treatment, and that it amounts to treatment in violation of article 7 of the Covenant. . . .

16.2 The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms . . . that, when imposing capital punishment, the execution of the sentence ' . . . must be carried out in such a way as to cause the least possible physical and mental suffering'.

16.3 . . .[T]he author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State party had the opportunity to refute these allegations on the facts; it has failed to do so. Rather, the State party has confined itself to arguing that in the absence of a norm of international law which expressly prohibits asphyxiation by cyanide gas, 'it would be interfering to an unwarranted degree with the internal laws and practices of the Unites States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation'.

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.

16.5 The Committee need not pronounce itself on the compatibility, with article 7, of methods of execution other than that which is at issue in this case.

17. The Human Rights Committee, acting under article 5, paragraph 4, of the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of article 7 of the Covenant.

18. The Human Rights Committee requests the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future.

. . .

INDIVIDUAL OPINION BY MR. FAUSTO POCAR (PARTLY DISSENTING, PARTLY CONCURRING AND ELABORATING)

. . .

. . . As the Committee pointed out in its General Comment 6(16), 'the article also refers generally to abolition in terms which strongly suggest that abolition is desirable'. Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates—within certain limits and in view of future abolition—the

existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, a fortiori, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is in my view under the legal obligation, under article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts—through extradition, expulsion or compulsory return—in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, I agree with the Committee that there has been a violation of the Covenant, but on different grounds. I subscribe to the observation of the Committee that 'by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant'. Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. . . .

INDIVIDUAL OPINION BY A. MAVROMMATIS AND W. SADI (DISSENTING)

We do not believe that, on the basis of the material before us, execution by gas asphyxiation could constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant. A method of execution such as death by stoning, which is intended to and actually inflicts prolonged pain and suffering, is contrary to article 7.

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 to have the process repeated. We do not believe that the Committee should look into such details in respect of execution such as whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.

. . .

INDIVIDUAL OPINION BY BERTIL WENNERGREN (PARTLY DISSENTING, PARTLY CONCURRING)

. . .

By definition, every type of deprivation of an individual's life is inhuman. In practice, however, some methods have by common agreement been considered as acceptable methods of execution. Asphyxiation by gas is definitely not to be found among them. There remain, however, divergent opinions on this subject.

On 21 April 1992, the Supreme Court of the United States denied an individual a stay of execution by gas asphyxiation in California by a 7:2 vote. One of the dissenting justices, Justice John Paul Stevens, wrote: 'The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our

contemporary understanding of execution by lethal gas, and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel. In light of all we know about the extreme and unnecessary pain inflicted by execution by cyanide gas', Justice Stevens found that the individual's claim had merit.

. . .

INDIVIDUAL OPINION BY KURT HERNDL (DISSENTING)

1. While I do agree with the Committee's finding that there is no violation of article 6 of the Covenant in the present case, I do not share the majority's findings as to a possible violation of article 7. . . .

Mr. Ng cannot be regarded as victim in the sense of article 1 of the Optional Protocol. . .

. . .

11. . . . The Committee's majority. . .attempts to make a distinction between various methods of execution.

. . .

13. No scientific or other evidence is quoted in support of this dictum. Rather, the onus of proof is placed on the defendant State which, in the majority's view, had the opportunity to refute the allegations of the author on the facts, but failed to do so. This view is simply incorrect.

14. As the fact sheets of the case show, the remarks by the Government of Canada on the sub-issue 'Death Penalty as a Violation of Article 7' total two and a half pages. In those remarks the Government of Canada states i.a. the following:

> While it may be that some methods of execution would clearly violate the Covenant, it is far from clear from a review of the wording of the Covenant and the comments and jurisprudence of the Committee, what point on the spectrum separates those methods of judicial execution which violate article 7 and those which do not.

. . .

17. It is also evident from the foregoing that the defendant State has examined the whole issue in depth and did not deal with it in the cursory manner suggested in paragraph 16.3 of the Committee's Views. . . . [T]he Minister of Justice of Canada stated as follows:

> You have argued that the method employed to carry out capital punishment in California is cruel and inhuman, in itself. I have given consideration to this issue. The method used by California has been in place for a number of years and has found acceptance in the courts of the United States.

. . .

19. . . . To attempt to establish categories of methods of judicial executions, as long as such methods are not manifestly arbitrary and grossly contrary to the moral values of a democratic society, and as long as such methods are based on a uniformly applicable legislation adopted by democratic processes, is futile, as it is

futile to attempt to quantify the pain and suffering of any human being subjected to capital punishment. . . .

. . .

INDIVIDUAL OPINION BY MR. NISUKE ANDO (DISSENTING)

. . .[T]he swiftness of death seems to be the very criterion by which the Committee has concluded that execution by gas asphyxiation violates article 7.

In many of the States parties to the Covenant where death penalty has not been abolished, other methods of execution such as hanging, shooting, electrocution or injection of certain materials are used. Some of them may take longer time and others shorter than gas asphyxiation, but I wonder if, irrespective of the kind and degree of suffering inflicted on the executed, all those methods that may take over ten minutes are in violation of article 7 and all others that take less are in conformity with it. . . .

. . .

. . .[I]t is impossible for me to specify which kind of suffering is permitted under article 7 . . . . What I can say is that article 7 prohibits any method of execution which is intended for prolonging suffering of the executed or causing unnecessary pain to him or her. As I do not believe that gas asphyxiation is so intended, I cannot concur with the Committee's view. . . .

. . .

NOTE

The electric chair was introduced in the United States in 1890 as a more humane form of execution. But over time it has been displaced by many states by other forms of execution, particularly lethal injection which is now viewed as more humane. In 1999, the US Supreme Court agreed to review a case from a state court raising the question of the constitutionality of execution by electric chair under the Eighth Amendment (cruel and unusual punishment) to the federal Constitution. *Bryan v. Moore*, 120 S.G. 394 (1999).

QUESTIONS

1. In light of the reasoning in the Committee opinion and individual opinions, what result would have been likely if the means of execution were the guillotine? Would it be relevant if execution were open, to the extent possible, to a public? What are the criteria that in fact emerge, and which if any of them do you find persuasive?

2. What guidance does the Committee opinion give to states in different parts of the world about the legality of their methods of execution? As a Committee member, what approach would you have suggested toward resolving the issue of the legality of a given means of execution in this multinational, multicultural world?

HENRY STEINER, INDIVIDUAL CLAIMS IN A WORLD OF MASSIVE VIOLATIONS: WHAT ROLE FOR THE HUMAN RIGHTS COMMITTEE?

in Philip Alston and James Crawford (eds.), The Future of UN Human Rights Treaty Monitoring 15 (2000), at 38

[In this article, Steiner considers what purposes the Committee might serve through the communications procedure. He concludes that the Committee cannot realistically serve the basic dispute-resolution function that informs adjudication by courts in many national legal systems. Nor can it effectively do justice in the individual case within the limits of its jurisdiction and to that extent vindicate the rule of law. Nor can it effectively protect rights under the ICCPR through deterrence. What remains a plausible and important purpose, Steiner concludes, is that of 'expounding (elucidating, interpreting and explaining) the Covenant so as to engage the Committee in an ongoing, fruitful dialogue with states parties, non-governmental and intergovernmental institutions, advocates, scholars and students'.]

The views written over two decades have created a considerable and important body of doctrine related to the ICCPR. But the doctrine is little reported or organised outside the Committee's internal documants such as Annual Reports, and a handful of scholarly articles and books. Only occasionally do views figure in a discursive way in judicial opinions of state courts. Only rarely do they summon attention and provoke comment outside formal legal circles. the production over two decades of views of this character, however valuable for the relatively small number of individual beneficiaries, has not mage a significant contribution to the normative development of the human rights movement.

Expounding a constitution or basic law-making treaty is a different business. It requires judges to use appropriate cases to elucidate the instrument that they are applying, to interpret and explain it. Committee members must employ such cases to probe the basic purposes of the Covenant, to show its significance for the life and needs of the peoples it is meant to serve. Such an understanding of the role of opinions will often require acknowledgement of the difficulties in reaching a judgment, the consideration of alternative grounds, and some form of justification for the decision reached. In the novel and vexing cases, it will always require reasoned argument rather than the terse and opaque application of norm to facts. The Committee must act as a deliberative body that is sensitive to the legitimate and immense possibilities of its role in the human rights movement.

Given the significance and complexity as well as range of the issues that come before it under the Protocol, The Committee is inevitably engaged in the development of the Covenant: confronting its ambiguities and indeterminacy, resolving conflicts among its principles and rights, working out meanings of its grand terms through consideration of the object and purposes of the Covenant, or through recourse to methods to interpretation other than the telelogical, such as *travaux préparatoires*, the contextual analysis of a provision within the broader structure of the treaty, or attention to trends in legal and moral thought.