Chisanga v Zambia (2005) AHRLR 34 (HRC 2005)
Communication 1132/2002, *Mr Webby Chisanga v Zambia*
Decided at the 85th session, 18 October 2005, CCPR/C/85/D/1132/2002
Prisoner sentenced to death had for two years reasons to believe his sentence had been commuted to imprisonment on appeal. Psychological impact on return to death row violates Covenant. Mandatory death penalty is a violation of Covenant
Interim measures (request for stay of execution, 1.2)
Admissibility (exhaustion of local remedies, presidential pardon, 6.3)
Evidence (local courts to judge facts, 6.4)
Fair trial (effective remedy in relation to appeal, 7.2)
Cruel, inhuman or degrading treatment (psychological impact of belief death sentence commuted, 7.3)
Life (mandatory death penalty, 7.4; amnesty, 7.5)

1.1. The author of the communication dated 15 October 2002 is Webby Chisanga, a Zambian citizen currently on death row. Although he does not invoke any provisions of the International Covenant on Civil and Political Rights (the Covenant), his claims of human rights violations by Zambia[1] seem to raise issues under articles 14(1), (2), (3)(b), and (5) together with article 2, 7, 6(2) and (4) together with article 2 of the Covenant. He is not represented by counsel.
1.2. On 28 October 2002, the Human Rights Committee, through its Special Rapporteur on New Communications, requested the state party, pursuant to rule 92 (old rule 86) of its Rules of Procedure, not to carry out the death sentence against the author whilst his case was under consideration by the Committee. By letter of 22 March 2004, the state party informed the Committee that it would comply with the request.

Factual background
2.1. In the night of 15 November 1993, a grocery store was robbed by three men, one of whom was armed. The owner of the shop was shot in the thigh and brought to hospital. The author was identified as the armed man by the shop-owner, who knew Mr Chisanga. He was arrested on 17 November 1993 and identified by the shop-owner during the identification parade. The author denied being one of the robbers and claims to be innocent.
2.2. On 12 May 1995, the author was convicted by the Ndola High Court, for attempted murder (in violation of section 215 of the Zambian Penal Code), and aggravated robbery (in violation of section 294 (2) of the Penal Code). He was sentenced to death on the second count, but was not sentenced on the first count, as the trial judge considered that the facts of the case supported the second count. The author appealed his death sentence to the Supreme Court, on the ground of mistaken identity.
2.3. In a submission to the Committee dated 5 December 2002, the author transmitted copy of a 'Notification of result of final appeal' of the Master (Registrar) of the Supreme Court dated 4 December 1997, informing him that his case had been heard on the same

day by the Supreme Court, which had ‘set aside the death sentence and imposed a sentence of 18 years with effect from the date of arrest’.

2.4. By further submission of 3 November 2003, the author informed the Committee that he had received another notification from the Master of the Supreme Court, attached to a letter from him, dated 1 October 2003, informing him that his appeal had been dismissed on 20 December 1999, that the death sentence was confirmed, and that he was sentenced to an additional 18 years of imprisonment. The author claims that the Supreme Court issued its judgment in his presence on 4 December 1997, and not on 20 December 1999.

2.5. According to the author, once his death sentence was commuted in 1997, he was moved from death row to the section of the prison for prisoners serving long-term sentences, where he performed carpentry work. He claims that this can be verified in the prison records. He recalls that death row prisoners do not work. After two years of service, he was put back on death row on 1 November 1999.

2.6. By letter of 28 March 2004, the author informed the Committee that death row prisoners were being moved to the long-term section of the prison. He indicates that only those who had been on death row for more than ten years were covered by a Presidential amnesty for death row inmates. The author, who had been in prison for eleven years, was kept on death row because he had served two years in the long-term section of the prison and thus only spent nine years on death row.

The complaint

3.1. The author argues that his trial was not fair as he was convicted on the sole testimony of one witness, as the original of the medical report on the victim's wounds was never presented in Court, and because the weapon of the crime was not investigated with regard to finger prints. He contends that he was not presumed innocent, that his alibi witness was ‘denied’, and that he was not given the chance adequately to prepare his defence, as his counsel was prevented from seeing him.

3.2. The author claims that he suffered inhuman treatment in prison because of the contradictory notifications concerning the outcome of his appeal and the resulting uncertainty about his sentence.

3.3. He argues that the crime for which he was sentenced to death, ie aggravated robbery with use of a firearm, is not one of the ‘most serious’ crimes within the meaning of article 6(2).

3.4. The author contends that the method of execution in Zambia, death by hanging, constitutes inhuman, cruel and degrading punishment, as it inflicts severe pain.

3.5. Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 14(1), (2), (3)(b), (5) together with article 2, 6(2) and (4) together with article 2, and 7.

The state party's submission on the admissibility and merits of the communication and author's comments

4.1. By letter of 31 March, and *note verbale* of 12 May 2004, the state party commented on the admissibility and merits of the communication. It considers that 'there is some confusion over the sentence that he [the author] has received'. It refers to a judgment of the Supreme Court at Ndola dated 5 June 1996, in which it appears that his death sentence was upheld on the second count of conviction (aggravated robbery), and that he received an additional sentence of 18 years on the first count of conviction (attempted murder), on which the High Court had failed to sentence him. The state party submits a copy of this judgment.

4.2. The state party further claims that the author has not 'completely' exhausted domestic remedies, as he is entitled to file a petition for Presidential mercy, under article 59 of the Zambian Constitution.

4.3. The state party underlines that although the death penalty still exists in law, its application has been restricted to the 'most serious' crimes, namely for murder, treason and aggravated robbery with use of a firearm. A Constitutional Review Commission has been set up to facilitate the review of the current Constitution, and is hearing views from the public on various issues, including on the death penalty. The state party considers that 'an opportunity for the abolition of the death penalty exists'. As a result of this, the President has recently pardoned many death row prisoners or commuted their death sentences to long-term imprisonment.

5. By letters of 14 November 2004, 18 January and 3 April 2005, the author commented on the state party's submission. In reply to the state party's argument that he did not exhaust domestic remedies, he argues that he sent three petitions for clemency to the President in 2001, 2003 and 2004, but never received any reply. He acknowledges that his case was heard on 6 June 1996, but reaffirms that the judgment against him was issued on 4 December 1997, and that his death sentence was commuted to 18 years of imprisonment.

Issues and proceedings before the Committee

Admissibility considerations

6.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5(2)(a) of the Optional Protocol.

6.3. With respect to the state party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee notes that the author claims to have made three petitions for pardon which remained without reply and which claim is uncontested, and reiterates its jurisprudence[2] that presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of article 5(2)(b) of the Optional Protocol.

6.4. With regard to the author's claim under article 14(1) in respect of the alleged unfairness of his trial, the Committee notes that this claim relates to the evaluation of

facts and evidence by the domestic courts. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of states parties to the Covenant to evaluate facts and evidence in a particular case and that it is not for the Committee to review these issues, unless the appreciation of the domestic courts is manifestly arbitrary or amounts to a denial of justice.[3] The Committee considers that the author has failed to substantiate, for the purposes of admissibility, any such exceptional element in his present case, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5. With regard to the claims under article 14(2) that the author was not presumed innocent, and 14(3)(b) in respect of his lack of opportunity to prepare his defence and to communicate with his counsel, the Committee notes that the author has not submitted any explanation or evidence in support of these claims and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

6.6. The Committee considers that the remaining claims under articles 14(5) together with article 2; 7; 6(2) and (4) together with article 2 of the Covenant are admissible and proceeds to the consideration of the merits.

Consideration of the merits

7.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5(1) of the Optional Protocol.

7.2. With regard to the contradictory notifications about the outcome of the author's appeal to the Supreme Court, the Committee notes that the author and the state party have provided conflicting versions of the facts. According to the author, he was handed two verdicts on appeal, one commuting his death sentence to 18 years of imprisonment, the subsequent one upholding his death penalty and sentencing him to an additional 18 years of imprisonment. According to the state party, this is incorrect, as there is only one judgment, which upheld the death sentence and sentenced him to an additional 18 years imprisonment. It appears from the file that the author was informed by official notification of 4 December 1997 with the seal of the registry of the Supreme Court of Ndola, that his death sentence had been commuted. That the author was thereupon transferred from death row to the long term section of the prison and put to work has not been challenged by the state party. This comforted the author in his belief that his death sentence had indeed been commuted. In the light of the state party's failure to provide any explanation or comments clarifying this matter, due weight must be given to the author's allegations in this respect. The Committee considers that the state party has failed to explain how the author came to be notified that the death penalty had been set aside. It is insufficient to dismiss it as a matter of the author's confusion. Transferring him to the long-term section of the prison only shows that the confusion was not a matter of the author's misunderstanding. To act inconsistently with the notification document transmitted to the author, without further explanation, calls into question the manner in which the right of appeal guaranteed by article 14(5) is executed, which in turn calls into question the

nature of the remedy. The Committee finds that in acting in this manner, the state party has violated the author's right to an effective remedy in relation to his right to appeal, under article 14(5) taken together with article 2.

7.3. The Committee further considers that to keep the author in doubt as to the result of his appeal, in particular by making him believe that his sentence had been commuted, only to inform him later that it was not, and by returning him to death row after two years in the long-term section, without an explanation on the part of the state, had such a negative psychological impact and left him in such continuing uncertainty, anguish and mental distress as to amount to cruel and inhuman treatment. The Committee finds that the state party violated the author's rights protected by article 7 of the Covenant in this context.

7.4. As to the author's claim that the crime for which he was sentenced to death, namely aggravated robbery in which a firearm was used, is not one of the 'most serious crimes' within the meaning of article 6(2) of the Covenant, the Committee recalls that the expression 'most serious crimes' must be read restrictively and that death penalty should be an exceptional measure.[4] It refers to its jurisprudence in another case concerning the state party,http://www.chr.up.ac.za/index.php/browse-by-subject/493-zambia-chisanga-v-zambia-2005-ahrlr-34-hrc-2005.html_-_edn5[5] where it found that the mandatory imposition of the death penalty for aggravated robbery with use of firearms violated article 6(2) of the Covenant. The Committee notes that the mandatory imposition of the death penalty under the laws of the state party is based solely upon the category of crime for which the offender is found guilty, without giving the judge any margin to evaluate the circumstances of the particular offence. The death penalty is mandatory for all cases of aggravated robbery with the use of firearms. The Committee considers that this mechanism of mandatory capital punishment would deprive the author of the benefit of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment could be appropriate in the circumstances of his case.[6] In the present case, the Committee notes that, although the victim of the crime was shot in the thigh, it did not result in loss of life and finds that the imposition of death penalty in this case violated the author's right to life protected by article 6 of the Covenant.

7.5. The Committee notes the author's allegations that he was transferred from death row to the long-term section of the prison for two years. After he had been transferred back to death row, the President issued an amnesty or commutation applicable to prisoners who had been on death row for more than ten years. The sentence imposed on the author, who had been in detention for 11 years, two of which he had served in the long-term section, was not commuted. In the absence of any clarifications of the state party in this regard, due weight must be given to the author's allegations. The Committee considers that taking him from death row and then refusing to apply to him the amnesty applicable to those who had been on death row for ten years, deprived the author of an effective remedy in relation to his right to seek amnesty or commutation as protected by article 6(4) together with article 2 of the Covenant.

7.6. In the light of the finding that the death penalty imposed on the author is in violation of article 6 in respect of his right to life, the Committee considers that it is not necessary to address the issue of the method of execution in use in the state party in relation to article 7 of the Covenant.

8. The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 14(5) together with article 2; 7; 6(2) and (6), 6(4) together with article 2 of the International Covenant on Civil and Political Rights.

9. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with a remedy, including as one necessary prerequisite in the particular circumstances, the commutation of the author's death sentence.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views.