F. Communications Nos. 210/1986 and 225/1987, Earl Pratt and Ivan Morgan v. Jamaica (Views adopted on 6 April 1989 at the thirty-fifth session)

Submitted by: Earl Pratt and Ivan Morgan

Alleged victims: The authors

State party concerned: Jamaica

Date of communications: 28 January 1986 and 12 March 1987

Date of decision on admissibility: 24 March 1988

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

Meeting on 6 April 1989,

Having concluded its consideration of communications Nos. 210/1986 and 225/1987, submitted to the Committee by Earl Pratt and Ivan Morgan for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communications dated 28 January 1986 and 12 March 1987 are Earl Pratt and Ivan Morgan, two Jamaican citizens awaiting execution at St. Catherine District Prison, Jamaica. They are represented by counsel. They claim to be victims of violations by the Government of Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights.

2.1 On 6 October 1977, Junior Anthony Missick was shot to death. Three men were reportedly involved in the shooting, including the authors, both of whom were tried in the Home Circuit Court at Kingston from 10 to 15 January 1979. It is alleged that an important defence witness, Mr. Clarence Smith, who would have provided an alibi for Mr. Pratt, was available to give testimony when the court hearing was convened on Friday, 12 January 1979. He had, however, temporarily left the premises, and when he returned, the Court had adjourned until Monday, 15 January. On that day Mr. Smith was not present and the judge closed the case without hearing his testimony. The jury found the authors guilty of murder and they were sentenced to death.

2.2 The Jamaican Court of Appeal considered the authors' appeal in September, November and December 1980. The defence argued that the trial judge "wrongly exercised his discretion not to discharge the jury upon the disclosure of prejudicial evidence, upon extraneous and irrelevant grounds, and upon a

misinterpretation of the evidence". The "prejudicial evidence" challenged in the appeal was the allegedly fortuitous statement by the chief witness for the prosecution that Mr. Pratt and Mr. Morgan had been friends of the deceased for about three years, and that Mr. Pratt and the deceased had previously shot another friend of theirs. This statement did not specify who had been shot or what the consequences of the shooting had been, but left an impression with the jury that the accused were capable of killing their own friends. It is argued that the jury should have been discharged and a new trial ordered, as requested by the defence. In rejecting the appeal, the Court of Appeal found that the directions of the trial judge had not operated to the detriment of the appellants. In the particular case of Mr. Morgan, the trial record shows that the only evidence against him was the statement of one witness that he had been with Mr. Pratt at the time of the shooting and that he too had had a gun. The witness had not seen him actually shoot, nor was there any evidence produced to show that the killing had been in pursuance to a prior agreement. In his defence, Mr. Morgan himself had stated, by way of alibi, that he had been with his wife and children at the time of the killing.

2.3 The Court of Appeal did not state its reasons for rejecting the appeal until nearly four years later, on 24 September 1984. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 17 July 1986. The Judicial Committee nevertheless expressed the view that it was disgraceful that some nine years had elapsed since the alleged offence and seven years since conviction before the matter came before it. In particular, the Judicial Committee thought that the delay by the Court of Appeal of Jamaica in issuing a written judgement, almost four years from the date of the hearing, was inexcusable and must never occur again, especially not in a capital penalty case. The Judicial Committee of the Privy Council expressed grave misgivings about this delay and pointed out that this could be the source of grave injustice and possibly constitute inhuman and degrading treatment. It is claimed on behalf of the authors that such "inexcusable delay" constituted cruel and inhuman treatment in that, between 1980 and 1984, they could not pursue their petition for special leave to appeal to the Privy Council because such a procedure was not possible without the written judgement of the Jamaican Court of Appeal. Moreover, during all this period they were detained in that part of the prison reserved for convicted persons awaiting execution.

2.4 On 13 February 1987, a warrant was issued for the execution of Mr. Pratt and Mr. Morgan to take place on 24 February 1987. A stay of execution was granted for both men on 23 February 1987. They were notified of the stay only 45 minutes before the executions were to take place.

3. In the case of Mr. Pratt, the Human Rights Committee had, by interim decision dated 21 July 1986, inter alia, requested the State party, under rules 86 and 91 of the Committee's rules of procedure, not to carry out the death sentence against the author before the Committee had had an opportunity to consider further the question of the admissibility of the communication and to provide the Committee with several clarifications concerning the judicial remedies available to the author. By submission dated 18 November 1986, the State party provided the clarifications sought by the Committee.

4. Under cover of a letter dated 20 March 1987, the authors' representative submitted further information. In particular, he argues: (a) that the delays in the judicial proceedings against the authors constitute a violation of the right to

be heard within a reasonable time; (b) that the authors have been subjected to cruel, inhuman and degrading treatment by reason of such delay and also by reason of having been confined to death row since their conviction and sentence in January 1979; (c) that service of a warrant for their execution would amount to an arbitrary deprivation of life; and (d) that the Court of Appeal's failure to provide a written judgement within a reasonable time constitutes a breach of section 20 of the Constitution of Jamaica and is contrary to the Court of Appeal's duty to give reasons for an important decision and, accordingly, contrary to principles of natural justice.

5. By decision dated 24 March 1987 concerning the communication of Mr. Morgan, the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide information and observations relevant to the question of the admissibility of the communication and, under rule 86 of the rules of procedure, not to carry out the death sentence against Mr. Morgan before the Committee had had the opportunity to render a final decision in the case. By further decision under rule 91 dated 8 April 1987, concerning the communication of Mr. Pratt, the Committee decided to transmit the additional information to the State party and to request it to clarify: (a) how long it would normally take the Court of Appeal to produce a written judgement in appeals against convictions for a capital offence; and (b) why the Court of Appeal did not provide a written judgement until three years and nine months after rejecting the author's appeal. As in the case of Mr. Morgan, it requested the State party, under rule 86 of the provisional rules of procedure, not to carry out the death sentence against the author until it had had an opportunity to render a final decision in the case.

6.1 In two submissions under rule 91 dated 4 and 10 June 1987, jointly relating to communications 210/1986 and 225/1987, the State party replied to the questions posed by the Committee in its decision of 8 April 1987, referred to in paragraph 5 above, and objected to the admissibility of the communications on a number of grounds.

6.2 With regard to the first question posed by the Committee, it explained that:

> "It is established practice of the Court of Appeal to endeavour to hand down judgements in criminal cases in the term in which the appeal is heard, or at the very latest, during the next term. This means that judgements or reasons for judgements are normally available within three months of the hearing of the appeal."

With regard to the second question, it stated that:

> "[O]n November 12, 1980, the application for leave to appeal by Earl Pratt and Ivan Morgan came up for hearing before the Court of Appeal. The application was refused and the Court promised to give written reasons at a later date. Regrettably, owing to an oversight, the papers in the case were co-mingled with completed case files. It was not until the summer of 1984 that it was brought to the attention of the judge who was to prepare the written judgement that the reasons for judgement were outstanding, and he then attended to the matter."

6.3 The State party rejects to the authors' contention that the delays in the judicial proceedings in their cases constitute a violation of the right to be heard within a reasonable time. It argues that, during the three years and nine months between the Court of Appeal's judgement and the delivery of its written decision, it would have been open to the authors or to their counsel to apply to the Court of Appeal for the written judgement; had they done so, the Court would have been obliged to provide it. According to the State party, the responsibility of the accused for asserting his rights is an important factor in considering an allegation of breach of the right to trial within a reasonable time. Since the authors are said not to have asserted their rights, the State party contends that article 14, paragraph 3 (d), of the Covenant, which it sees as being coterminous with section 20, paragraph 1, of the Jamaican Constitution, has not been violated. The State party further denies that delays in the judicial proceedings concerning the authors constitute cruel, inhuman or degrading punishment in violation of article 7 of the Covenant, or that service of a warrant for the execution of the authors would amount to an arbitrary deprivation of life.

6.4 The State party further contends that the authors' communications are inadmissible because they have failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol. It points out that in respect of the authors' complaints - breach of the right to trial without undue delay and breach of the right to protection against subjection to torture or cruel, inhuman or degrading treatment - it would have been open to the authors to apply to the Supreme Court for redress alleging breaches of these fundamental rights protected by sections 17 and 20, paragraph 1, of the Jamaican Constitution.

7.1 In their comments dated 29 October 1987, the authors contend that their allegations are well-founded, and that they have indeed exhausted all available legal remedies. They refer to the decision of the Judicial Committee of the Privy Council in Noel Riley et al. v. the Attorney-General (1981), where it was decided by a majority (3/2) that whatever the reasons for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be in contravention of section 17 of the Jamaican Constitution. Accordingly there are no grounds upon which an application by way of constitutional motion to the Supreme Court of Jamaica could successfully be brought. Any such motion must inevitably fail and be decided against the applicants: in consequence, this is not a domestic remedy available to the applicants. On 17 July 1986, the Judicial Committee of the Privy Council refused the applicants' petition for special leave to appeal.

7.2 In a further submission under rule 91 dated 17 February 1988, the authors provide additional information concerning the alleged violation of article 14 of the Covenant to the effect that they were not given a fair trial and were denied the opportunity to establish their innocence. They claim that during the trial the principal prosecution witness was questioned by the judge, to whom he answered that Mr. Pratt had shot a person other than the victim; thereafter the judge not only asked the shorthand writer to repeat this prejudicial evidence but proceeded to hear the submissions of the lawyer on this evidence in the presence of the jury. Thus it was impossible for the jury to ignore the above-mentioned prejudicial evidence against Mr. Pratt and, by association, Mr. Morgan. Furthermore, since the lawyer made his submissions in the presence of the jury immediately after the questioning of the witness by the judge, this highlighted the prejudicial nature of this piece of evidence in the eyes of the jury. It is argued that the extent of the prejudice was such that the judge could not redress the balance in his summing

up; in any event, he declined to do so. The authors consider this to be bias on the part of the judge against them. According to the authors, another example of the judge's bias was his refusal to confirm to the jury that they were of previous good character. They submit that this evidence should have been accepted. Finally they argue that they were poorly defended. In particular, they claim that it was wrong for Mr. Pratt's counsel, while waiting for the arrival of a vital alibi witness who would testify that Mr. Pratt was elsewhere at the time of the murder, to decide to close the case at this point and to so inform the Court. This is said to be buttressed by a statement of the Court of Appeal which, in refusing an application to call new alibi evidence, criticized Mr. Pratt's counsel as follows: "... it is clear that this was not a case of the witness not being available ... Indeed, we formed the view that counsel at the trial had chosen to close his case and to take a calculated chance".

7.3 For the above reasons, the authors claim that they were effectively denied the opportunity to have their innocence established. They refer in this context to resolution 1984/50 on "Safeguards guaranteeing protection of the rights of those facing the death penalty", adopted by the Economic and Social Council on 25 May 1984, and in particular safeguard No. 5:

> "Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

8. On 23 February 1988, a second warrant was issued for the execution of the authors on 8 March 1988. By telegram dated 24 February 1988 addressed to the Jamaican Deputy Prime Minister and Minister for Foreign Affairs, the Chairman of the Human Rights Committee reiterated the Committee's request for a stay of execution in conformity with its decisions of 24 March and 8 April 1987. A second stay of execution was granted for both men on 1 March 1988.

9.1 Before considering any claims in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 Having considered that communications No. 210/1986 and No. 225/1987 refer to the same events said to have taken place in Jamaica since October 1977 and can thus appropriately be dealt with together, the Committee decided on 24 March 1988 to deal jointly with these communications, pursuant to rule 88, paragraph 2, of its provisional rules of procedure.

9.3 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that, although the authors' cases were considered by the Inter-American Commission on Human Rights, they are no longer being examined under another procedure of international investigation or settlement.

9.4 With regard to the State party's contention that the authors had failed to exhaust domestic remedies because they would still be able to submit their case to the Supreme Court of Jamaica, the Committee noted that the allegations relating to violations of articles 14 and 7 of the Covenant were inextricably mixed and that,

in so far as article 14 was concerned, available remedies had been exhausted. Accordingly, the Committee was unable to find that the authors had failed to comply with the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

10. On 24 March 1988, the Human Rights Committee therefore decided that the communications were admissible.

11.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 19 August 1988, the State party notes that inasmuch as the authors' allegation concerning a violation of article 6 is concerned, the Committee's decision on admissibility suggests that this claim is no longer under consideration by it. With respect to the alleged violations of articles 7 and 14, it reiterates its arguments outlined in paragraph 6.4 above and comments on the authors' contentions in paragraph 7.1 above. Concerning the argument that any constitutional motion in their case would inevitably fail because of the precedent set by the Privy Council's decision in Riley v. the Attorney-General, it points out that the requirement of exhaustion of domestic remedies was adopted by consensus by the States parties to the Optional Protocol, and that in the circumstances of the case, the requirement cannot be deemed to have been met or waived for the reasons advanced by the authors. The only qualification, in article 5, paragraph 2 (b), in fine, that the general rule shall not apply "where the application of the remedies is unreasonably prolonged", is said to be inapplicable to the case.

11.2 The State party rejects the argument that "an application to the Supreme Court, in respect of section 17 of the Jamaican Constitution, must inevitably fail by reason of the Privy Council's decision in Riley's case". It contends that while it is true that the doctrine of precedent is generally applicable, it is equally true that this doctrine may be set aside on the grounds that a previous decision had been arrived at per incuriam (through inadvertence). Thus, it would be open to the authors to argue that the decision in Riley v. the Attorney-General was the result of inadvertence, especially in the light of the dissenting opinions given by Lord Scarman and Lord Brightman. For this reason, the State party contends that there are no grounds for disregarding its contention that the communications are inadmissible in so far as they relate to article 7.

11.3 With respect to the alleged violation of article 14, the State party refers to "curious aspects" in the way in which the Committee's decision on admissibility addresses this issue and its earlier submission that the communications are inadmissible because of non-exhaustion of domestic remedies because the authors did not avail themselves of the remedies provided for in section 25 of the Jamaican Constitution. It submits that since the authors had not complained about the non-availability of remedies in this respect, one should have expected the Committee to declare the communication inadmissible for non-exhaustion of domestic remedies. It describes the Committee's argumentation as "unreasoned" and affirms that the Committee's conclusion that domestic remedies had been exhausted in relation to article 14 rests on the simple assertion that "the allegations relating to violations of articles 14 and 7 of the Covenant are inextricably mixed and that, in so far as article 14 is concerned, available remedies have been exhausted".

11.4 According to the State party, the latter argument is:

> "unreasonable and unreasoned because, firstly, the [Committee's] decision does not identify the basis for the supposed principle that if the allegations relating to articles 14 and 7 are inextricably mixed, local remedies have for

that reason been exhausted; secondly, assuming the validity of any such principle (which the State party does not believe to exist), the decision proceeds by way of assertion rather than reason in that it does not offer any reason for, or illustration of, the 'inextricable mixture'; in short, it does not show how the different allegations relating to these separate articles are 'inextricably mixed'."

11.5 The State party thus concludes that the Committee's decision on admissibility is "unwarranted and without foundation" and reiterates that it considers the allegations relating to a violation of article 14 to be inadmissible for non-exhaustion of domestic remedies.

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

12.2 The Committee has taken note of the State party's contention that with respect to the alleged violations of articles 7 and 14, domestic remedies have not been exhausted by the authors. It takes the opportunity to expand upon its admissibility findings.

12.3 The State party has contended that the Committee has no discretion in the application of the local remedies rule (save that the remedy is unacceptably prolonged), in the sense that where local remedies are not exhausted it must declare a communication inadmissible. This is correct in principle, but the Committee necessarily has to determine whether there are effective local remedies left for an author to exhaust. That the local remedies rule does not require resort to appeals that objectively have no prospect of success, is a well established principle of international law and of the Committee's jurisprudence.

12.4 The Committee has taken due notice of the State party's argument that a constitutional motion filed on behalf of the authors in the Supreme Court of Jamaica is not bound to fail simply because of the precedent set by the judgement of the Judicial Committee of the Privy Council in the case of Riley v. the Attorney-General, and that the authors could have argued that the said judgement had been arrived at per incuriam.

12.5 A thorough consideration of the judgement of the Privy Council in the case of Riley does not lend itself to the conclusion that it was arrived at per incuriam. This judgement explicitly endorses the conclusion of the Privy Council in another case concerning chapter three of the Jamaican Constitution, a/ where it had been argued that this chapter proceeded on the assumption that "the fundamental rights which it covers are already secured to the people of Jamaica by existing law", and that "the laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms" of the provisions in chapter three. And while it is true that Lord Scarman and Lord Brightman dissented from the majority opinion, they did acknowledge that the constitutional remedy was only available where there was no other adequate redress. In these circumstances, authors' counsel was objectively entitled to take the view that, on the basis of the doctrine of precedent, a constitutional motion in the cases of Mr. Pratt and Mr. Morgan would be bound to fail and that there thus was no effective local remedy still to exhaust.

12.6 Section 20, paragraph 1, of the Jamaican Constitution guarantees the right to a fair trial, and section 25 provides for the implementation of the provisions guaranteeing the rights of the individual. Section 25, paragraph 2, stipulates that the Supreme Court has jurisdiction to "hear and determine applications" but adds, in fine, the following qualifications:

> "Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

In the view of the Committee the authors had means of redress available for the alleged breach of their right to a fair trial by appealing to the Jamaican Court of Appeal and by petitioning the Judicial Committee of the Privy Council for special leave to appeal. Their case thus falls within the scope of application of the qualification in section 25, paragraph 2, further confirming that no further local remedy would have been available by way of constitutional motion.

12.7 For the reasons indicated above, the Committee is not satisfied that a constitutional motion would constitute an effective remedy for the authors within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. It therefore concludes that there is no reason to revise its decision on admissibility of 24 March 1988.

13.1 With respect to the alleged violation of article 14, there are two questions before the Committee: first, whether consideration of issues relating to legal representation and the availability of witnesses amounted to a violation of the guarantees for a fair trial; and second, whether there was undue delay in the appeal process. The Committee has considered the information before it in connection with the trial in the Home Circuit Court of Kingston and the subsequent appeals.

13.2 As to the first issue under article 14, the Committee notes that legal representation was available to the authors. Although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation of article 14, paragraph 3 (d), by the State party. Nor is the Committee in a position to ascertain whether the failure of Mr. Pratt's lawyer to insist upon calling the alibi witness before the case was closed was a matter of professional judgement or of negligence. That the Court of Appeal did not itself insist upon the calling of this witness is not in the view of the Committee a violation of article 14, paragraph 3 (e), of the Covenant.

13.3 As to the second issue under article 14, the Committee has noted that the delays in the judicial proceedings in the authors' cases constitute a violation of their rights to be heard within a reasonable time. The Committee first notes that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without undue delay. In this context the Committee recalls its general comment on article 14, which stipulates, inter alia, that "all stages [of judicial proceedings] should take place without undue delay, and that in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal".

13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused. The Committee further observes that the Privy Council itself described the delay as inexcusable (see para. 2.3 above).

13.5 In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. In reaching this conclusion it matters not that in the event the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be.

13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but "cruel, inhuman and degrading treatment". The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or 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. In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for execution and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to the individual concerned. In the authors' case, death warrants were issued twice by the Governor General, first on 13 February 1987 and again on 23 February 1988. It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 20 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

(a) Article 7, because Mr. Pratt and Mr. Morgan were not notified of a stay of execution granted them on 23 February 1987 until 45 minutes before their scheduled execution on 24 February 1987;

(b) Article 14, paragraph 3 (c) in conjunction with paragraph 5, because the authors were not tried without undue delay.

15. It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not per se unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3 (c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence.

Notes

a/ Director of Public Prosecution v. Nasralla (1967) 2 All ER 161. Chapter III of the Jamaican Constitution concerns the rights of the individual.