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The Death Penalty: Remedying the Problems of Compliance with International Standards in the Commonwealth Caribbean

Hon Mr Justice R. Carl Rattray, OJ, QC

It is recognized and accepted by the various governments of the countries of the Commonwealth Caribbean that the international human rights instruments formulated by the United Nations represent universally accepted core values and are a benchmark of the civilization of states.

The International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol have been ratified or acceded to by a number of the independent Commonwealth Caribbean states.[1]

It is important for us to remind ourselves that for more than 25 years after it came into being the Universal Declaration of Human Rights provided the international "standard of achievement for all peoples and all nations". What the coming into being of the Covenants provided was the acceptance by States Parties of a legal obligation, which hitherto had been moral, to promote and protect human rights and fundamental freedoms.

It is in relation to the death penalty that problems have arisen in the Commonwealth Caribbean states in terms of compliance, and I will seek in this paper to identify such problems as have emerged and such progress as has been made in the efforts to remedy these problems.

It is to be noted that in Article 6(2) of the Covenant recognition is given to the fact that there are countries which have not abolished the death penalty and are therefore empowered to impose it as a sentence of the court. The provision reads as follows:

> "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the

1 At the time of writing, Barbados, Guyana, Jamaica, St Vincent and the Grenadines and Trinidad and Tobago had ratified the ICCPR and the Optional Protocol; Dominica and Grenada had ratified the ICCPR (but not the Optional Protocol); Antigua and Barbuda, Bahamas, St Kitts and Nevis, and St Lucia were party to neither of these treaties. [***EDITOR'S NOTE:*** *Subsequently, in October 1997, Jamaica notified the UN that it was withdrawing its ratification of the Optional Protocol. In May 1998, Trinidad and Tobago also announced its withdrawal from the Optional Protocol, purporting to re-accede to that instrument with a sweeping reservation precluding the Human Rights Committee from hearing any cases relating to the death penalty.*]

> provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

The Westminster model constitutions of all the Commonwealth Caribbean states protect and preserve the fundamental rights and freedoms of the individual in terms similar to those enumerated in the Covenant on Civil and Political Rights.

The death penalty has not been abolished in any of the Commonwealth Caribbean states, as it has been retained for the criminal offence of murder.

In so far, therefore, as there is a complaint that these fundamental rights and freedoms of the citizen have been violated by the state, the citizen would have had recourse to the domestic courts under the Constitution and the domestic laws of the state, and thereafter to the international agencies after the domestic remedies have been exhausted.

The Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted and proclaimed by the General Assembly of the United Nations in December 1989, is directed to the abolition of the death penalty. This Second Optional Protocol has not been ratified by the Commonwealth Caribbean nations, which still by their constitutions and domestic laws retain the death penalty.

Article 28 and Part 4 of the International Covenant on Civil and Political Rights establishes a Human Rights Committee, and by virtue of the provisions of Article 1 of the first Optional Protocol, Commonwealth Caribbean States Parties to the Protocol have recognized:

> "the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant."

However, persons who make such a claim must have, as a pre-condition, first exhausted all domestic remedies (Article 2).

Since the creation of the Organization of American States (OAS) for the protection of human rights among member states of the Organization, the Inter-American human rights system has evolved with the essential features, *inter alia,* of a Charter, the American Convention on Human Rights, the Declaration on the Rights and Duties of Man, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Under Article 44 of the Convention individuals or non-governmental agencies may lodge petitions alleging violation of the Convention by states who are parties to the Convention. The rights protected by the Convention are basically the same as those set forth in the typical Westminster model constitutions of the independent Commonwealth Caribbean territories and in the UN International Covenant on Civil and Political Rights.

With respect to its jurisdiction, only States Parties to the Convention and the Commission have a right to submit a case to the Inter-American Court of Human Rights.

Patrick Robinson, Jamaica's Deputy Solicitor-General and a member and one-time Chairman of the Commission has noted that:

> "Not many petitions have been lodged against Caribbean English-speaking States, perhaps because the level of human rights abuses is not very high in these countries and perhaps because the Commission is in contradistinction to the situation in the Latin American civil law countries not well known in those countries."[2]

The consideration therefore in respect of problems of compliance with international human rights standards as they relate to the Commonwealth Caribbean must recognize that for some states there are two existing regimes: the regime established under the UN Covenant; and the regime established under the OAS human rights Convention.[3]

It is in respect of the death penalty that both the UN Human Rights Committee and the Inter-American Commission on Human Rights have received communications from individuals in the Commonwealth Caribbean territories on whom sentence of death has been pronounced by the court in the domestic jurisdiction.

With regard to Jamaica, my research discloses that up to the beginning of 1995 there were 41 communications which have come before the UN Human Rights Committee from persons under sentence of death for murder and awaiting either the final determination of their cases in the domestic court system or their execution as ordered by the sentence of the court. Of these 41 cases, the Committee had in respect of 21 cases found a violation entailing the author's release or commutation of the sentence of death to one of imprisonment for life. The allegations in the different communications range over a very wide area and are directed to establishing that the author of the communication did not receive a fair trial. In some cases they have related to whether the author was promptly informed of the charges against him or was brought expeditiously before a judge or other officer authorized by law to exercise judicial discretion. In some cases the question has to do with whether the accused person had adequate time and facilities for the preparation of his defence, and sometimes even the adequacy of the legal representation has been relied upon to form the basis of a complaint.

The Westminster model constitutions of the Commonwealth Caribbean states

The fundamental rights and freedoms clauses to be found in all the constitutions of the Commonwealth Caribbean states include provisions entitling every person to the right to life, liberty and the security of the person, protection from arbitrary arrest and detention,

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2 West Indian Law Journal, Vol 17, May 1992, p 16.

3 [***EDITOR'S NOTE:*** *After this paper was written, in May 1998, Trinidad and Tobago became the first state ever to withdraw as a party to the American Convention on Human Rights. Its withdrawal will come into effect after one year, in May 1999.*]

protection from inhuman treatment, and provisions to secure the protection of the law, which include the right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. These rights are entrenched, as is also the right of any person alleging a breach of these provisions to seek redress by constitutional motion to the Supreme Court without prejudice to any other action with respect to the same matter which is lawfully available.

The communications to the UN Human Rights Committee and the Inter-American Commission all come from persons who have been tried in the domestic courts, convicted of murder and sentenced to suffer death in the manner provided by law.

The exhaustion of domestic remedies and the question of admissibility

In all the cases which I examined, the state took the position that the matter had been brought to the UN Human Rights Committee before the applicant had exhausted all available domestic remedies and therefore the communication was not admissible before the Committee. The domestic criminal jurisdiction in the Commonwealth Caribbean generally includes a final appeal from the local court of appeal to the Judicial Committee of the Privy Council in the United Kingdom. This is provided for under the various constitutions. There is, however, also provision in our constitutions giving a right to an aggrieved person who claims his constitutional rights to have been breached to apply to the Supreme Court by way of a constitutional motion for redress. In respect of the Jamaican cases the state maintained that the remedy of a constitutional motion was available even after the final appeal to the Judicial Committee of the Privy Council had been dismissed, since what is complained about in all the cases is in relation to breaches of constitutional rights guaranteed under the fundamental rights and freedoms clauses of the Constitution.

The UN Human Rights Committee consistently ruled the communications admissible and gave the following reasons:

> (a) The domestic remedies within the meaning of the Optional Protocol must be both available and effective.[4]
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> (b) In Jamaica legal aid is not provided in respect of constitutional remedies. As was said by the Committee in the case of *Glenford Campbell*,[5] since no lawyer in Jamaica was prepared to represent the author of the communication on a *pro bono* basis, "it is not the author's indigence that absolves him from pursuing constitutional remedies, but the State party's inability or unwillingness to provide legal aid for that purpose".[6]
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> (c) Although Article 5(2) of the Optional Protocol states:
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> "(2) The Committee shall not consider any communication from an

4 *George Winston Reid v Jamaica*, 355/1989, Annual Report of the Human Rights Committee 1994, GAOR 49th session, Supplement No 40 (A/49/40), pp 59-64, para 10.

5 *Glenford Campbell v Jamaica*, 248/1987, Annual Report of the Human Rights Committee 1992, GAOR 47th session, Supplement No 40 (A/47/40), pp 232-41.

6 Ibid, para 5.4.

> individual unless it has ascertained that ... (b) the individual has exhausted all available domestic remedies",

it further provides that

> "This shall not be the rule where the application of the remedies is unreasonably prolonged".

Within the meaning of these provisions the Committee has maintained that a constitutional motion does not constitute a remedy that is both available and effective.

Article 4(2) of the Optional Protocol requires that:

> "Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter, and the remedy, if any, that may have been taken by that State."

As a consequence of Jamaica's position with respect to admissibility on the ground that all domestic remedies have not been exhausted, as well as its frequent observation that, in many cases, the communication merely raises issues of fact and evidence which the Committee does not have the competence to evaluate, the clarifications have not been forthcoming.

The failure of Jamaica to give the clarifications required by the Committee has led the Committee in *Glenford Campbell*[7] to state:

> "The Committee cannot but interpret this as the State party's refusal to co-operate under Article 4 paragraph 2 of the Optional Protocol. ... The summary dismissal of the author's allegations ... does not fulfil the requirements of Article 4 paragraph 2. In the circumstances, due weight must be given to the author's allegations to the extent that they have been credibly substantiated."[8]

The consequence of this is that in most of these cases the Committee has arrived at a conclusion on the acceptance of the facts stated by the author in the communication, since the State Party has not contested the facts for the reasons already mentioned. The unsatisfactory consequence of the state's failure to answer factual allegations may be extracted from a part of the Committee's decision in *Glenford Campbell* which reads:

> "Concerning the adequacy of the author's legal representation, both on trial and on appeal, the Committee recalls that it is axiomatic that legal assistance be made available to individuals facing a capital sentence. In the present case, it is uncontested that the author instructed his lawyer to raise objections to the confessional evidence, as he claimed this was obtained through maltreatment; this was not done. This failure had a clear incidence on the conduct of the appeal; the written judgment of the Court of Appeal

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7 *Supra*, n 5.

8 Ibid, para 6.1.

> of 19 June 1987 emphasizes that no objections were raised by the defence in respect of the confessional evidence. Furthermore, although the author had specifically indicated that he wished to be present during the hearing of the appeal, he was not only absent when the appeal was heard but, moreover, could not instruct his representative for the appeal, despite his wish to do so. Taking into account the combined effect of the above-mentioned circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have allowed the author to instruct his lawyer for the appeal, or to represent himself at the appeal proceedings. To the extent that the author was denied effective representation in the judicial proceedings and in particular as far as his appeal is concerned, the requirements of Article 14 paragraph 3(d) have not been met."[9,10]

The Committee, of course, arrived at its conclusion on the facts relying solely on the author's allegations and the acceptance of them as true. The unsatisfactory effect has been that in these cases, and indeed they are the great majority, the decision of the Committee has been taken in the face of an objection to the admissibility of the complaint, and without the benefit of a satisfactory hearing in order to determine the facts. This situation is one which should always be avoided as being totally unsatisfactory.

The Judicial Committee of the Privy Council in *Pratt and Another v Attorney-General for Jamaica* (hereinafter referred to as *Pratt and Morgan*)[11] noted that

> "Jamaica being a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol the views of the UN [Human Rights Committee] should be afforded weight and respect but were not of legally binding effect; and that the like considerations applied to the [Inter-American Commission on Human Rights]."[12]

In *Pratt and Morgan* also, their Lordships of the Privy Council, without expressly stating so, seem to have given some endorsement to the UN Human Rights Committee's position in relation to the effect of the applicant not embarking upon a constitutional motion before making an application to the Committee. Their Lordships stated,

> "The UN [Human Rights Committee] does not accept the complaint unless the author 'has exhausted all available domestic remedies'. The UN [Human Rights Committee] has decided in this case and in *Carlton-Reid v Jamaica* (250/1987, Annual Report of the Human Rights Committee 1990, Vol II, GAOR, 45th session, Supplement No 40, p. 85), that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a

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9 Ibid, para 6.6.

10 Article 14(3)(d) of the Covenant guarantees the right of a person charged with a criminal offence "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

11 [1994] 2 AC 1.

12 Ibid, at 27C.

> complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council."[13]

It appears therefore that the objection to the admissibility of the complaint, on the ground that domestic remedies have not been exhausted because there still existed a right to bring a constitutional motion, is no longer available to the state, as a result of the dictum of the Judicial Committee of the Privy Council, the final court of appeal in our jurisdictions, and that these complaints to the UN Human Rights Committee can now be addressed without objection by the state on this ground.

The adequacy of legal representation and the provision of legal aid

In our jurisdictions legal aid is provided for all persons charged with a capital offence if that person cannot afford to pay for legal representation. This representation is by qualified lawyers whose competence must be presumed. Concerning the adequacy of legal representation referred to by the UN Human Rights Committee in *Glenford Campbell*,[14] it is relevant to point out that, although the trial judge has a duty to ensure fairness in the conduct of the trial, a trial judge cannot instruct counsel how to conduct the defence. If an appellant is represented by counsel in an appeal as distinct from a trial, the determination of whether the appellant is present at the hearing of the appeal is one for defence counsel acting on the instructions of his client who is in custody at the time of the hearing. Some persons may wish to come before the appeal court when the appeal is being heard notwithstanding the presence of the lawyer, some may not. The court is not made aware of the arrangements between counsel and client in this regard. The blame therefore laid on the State Party by the Committee in *Glenford Campbell* with respect to the author's legal representation seems in my view to have been misplaced, and results from a misunderstanding of what takes place in the appellate process.

Article 14 paragraph 5 of the Covenant provides:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The Committee has found a violation of this article in cases where the Court of Appeal did not give a written judgment, and the decision of the Court of Appeal was appealed to the Judicial Committee of the Privy Council which dismissed the appeal. It is very rare in Jamaica that the Court of Appeal does not give a written judgment when an appeal is dismissed. The Committee has stated that

> "... if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them. Moreover, in order to enjoy the effective use of this right, the convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal."[15]

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13 Ibid, at 35C.

14 *Supra*, n 5.

15 *Raphael Henry v Jamaica*, 230/1987, Annual Report of the Human Rights Committee 1992, GAOR 47th session, Supplement No 40 (A/47/40), pp 210-18, para 8.4.

Our jurisprudence has never mandated, however desirable, a compulsory written judgment by our Court of Appeal, although the seriousness of the offence and the penalty in an appeal which is being dismissed would make one most desirable. Since then, however, it has been directed that in all appeals determined by the Court of Appeal in capital cases a written judgment must be given. To this extent there is now compliance with the views of the Committee.

Inhuman or degrading treatment or punishment

Article 7 of the Covenant prohibits anyone being subjected to inhuman or degrading treatment or punishment. This is a provision which finds itself in the constitutions of all the territories of the Commonwealth Caribbean. There is, however, a proviso which is common to all these constitutions, though perhaps expressed in different words, but which in the case of the Jamaican Constitution Section 17(2) reads as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The appointed day is the day the territory receives its independence. The effect of this proviso has been to keep in place as constitutional descriptions of punishment which on examination may be found to be inhuman and degrading but which were types of punishment in force in our territories immediately before our independence. The proviso prevents the categorization of these as "inhuman and degrading treatment or punishment".

Punishments such as the death penalty and flogging and whipping may well be categorized as such by some jurists. I admit to this view. Public opinion in the Caribbean, however, is strongly in favour of the retention and imposition of these forms of punishment on the basis that in an environment of escalating violent crime they have a deterrent effect which is necessary at this period of our history. It is this very environment that militates against the calm and sober discussion of these issues and, in particular, of whether the use of legislated violence by the state achieves anything other than adding another element of violence to the already violent environment which is being sought to be remedied.

Pratt and Morgan - the question of delay

The Privy Council case of Earl Pratt and Ivan Morgan in Jamaica, which has been followed in judgments of the Judicial Committee of the Privy Council in other Caribbean jurisdictions (see *Guerra v Baptiste*[16] in Trinidad and Tobago and *Peter Bradshaw and Denzil Orlando Roberts v Attorney General*[17] in Barbados) raised two issues: the question of cruel and inhuman treatment; and the question of undue delay.

16 [1995] 4 All ER 583.

17 [1995] 1 WLR 936.

It is the requirement in our constitutions that a person charged with a criminal offence should be afforded a fair hearing within a reasonable time. Both issues coalesced in *Pratt and Morgan* since it was submitted that the delay amounted to cruel and inhuman treatment. The Judicial Committee of the Privy Council had originally dismissed the appeals of Messrs Pratt and Morgan, but the matter returned to that body by way of a constitutional motion brought by Pratt and Morgan in the Supreme Court and which eventually went on appeal to the Judicial Committee of the Privy Council. The Judicial Committee had in *Riley v Attorney-General*[18] decided on a three-to-two majority that whatever the length of delay or the reasons therefor in executing a sentence of death lawfully imposed, that delay afforded no ground upon which an application by means of constitutional motion could be successfully brought as being in contravention of Section 17 of the Constitution of Jamaica which prohibits inhuman or degrading punishment or other treatment. The Jamaican courts are of course, bound by the decisions of their final Court of Appeal which is the Judicial Committee of the Privy Council.

On 2 November 1993, in a landmark decision in the case of *Pratt and Morgan*,[19] the Judicial Committee of the Privy Council sitting in a panel of seven Law Lords, rather than a panel of five which had sat in *Riley*, reversed its own decision in *Riley*. Its conclusions are so central to our consideration that I cite the final paragraphs of the judgment delivered by Lord Griffiths:

> "Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within 12 months of conviction. The procedure contained in the Governor-General's Instructions should be reinstated so that the Jamaican Privy Council consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.

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18 *Noel Riley v Attorney-General of Jamaica*, [1983] 1 AC 719.

19 *Supra*, n 11.

> The final question concerns applications by prisoners to the [Inter-American Commission on Human Rights] and UN [Human Rights Committee]. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. ... If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UN [Human Rights Committee] does not consider its role to be that of a further appellate court:
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> > 'The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality.'[20]
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> It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UN [Human Rights Committee] 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 18 months.
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> These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'. If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to Section 25 of the Constitution, the Governor-General now refers all such cases to the Jamaican Privy Council who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to Section 17(1)."[21]

In the circumstances their Lordships advised Her Majesty that the appeal ought to be allowed, and the sentences of the appellants commuted to life imprisonment.

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20 *D.S. v Jamaica*, 304/1988, Annual Report of the Human Rights Committee 1991, GAOR 46th session, Supplement No 40 (A/46/40), pp 281, 282.

21 *Supra*, n 11, at 34F-36A.

There has been much discussion in Caribbean jurisprudential circles concerning *Pratt and Morgan* which I will not deal with in this paper. Suffice it to say the combination of *Pratt and Morgan* and an amendment to the Offences Against the Person Act, which I will deal with later, which categorizes murder in Jamaica into capital and non-capital, have led to a mass commutation of sentences of persons who were on death row.

The Jamaican Privy Council

The commutation of a sentence of the court or the release of a convicted person which is an exercise of the prerogative of mercy can only be effected in Jamaica by the Governor-General acting on the advice of the Jamaican Privy Council. The Governor-General is the representative in Jamaica of Her Majesty the Queen, who is the Queen of Jamaica and is the head of state of the nation,[22] which is an independent nation within the Commonwealth. The Governor-General appoints the Jamaican Privy Council and must act on its advice with respect to the exercise of the prerogative of mercy. The political government in Jamaica has no input into this determination, nor indeed in the process of the appointment of the Privy Councillors.

The recommendations of the UN Human Rights Committee are sent by the Committee to the relevant government ministry, the Ministry of Foreign Affairs, which transmits them to the Governor-General for consideration by the Privy Council for its advice, since it is only the Jamaican Privy Council that can under our Constitution commute the sentence of a court.

Of the 21 cases from Jamaica in which the UN Human Rights Committee has found a violation entailing the author's release or commutation of sentence, my enquiries reveal that 10 have been considered by the Jamaican Privy Council. In nine of those cases the advice to the Governor-General has been against release or commutation. In one case - Frank Robinson[23] - the sentence of death has been commuted to life imprisonment. The Committee had found that the violation entailed his release. It appears to me that the Jamaican Privy Council would have had before it in those cases the facts which the State Party had not supplied to the Committee, and which left the Committee to accept as factual the unrebutted allegations of the author of the communication. The Jamaican Privy Council therefore exercised its discretion on a fuller knowledge of the facts than was available to the Human Rights Committee.

Arising from this review it appears to me there needs to be some clarification between the State Party and the UN Human Rights Committee as to the role of the Committee as distinct from the role of the appellate courts in Jamaica. The lines of demarcation have to be clearly designated since a State Party is more likely to wish to follow the conclusions of the Committee if satisfied that the matters which have influenced the Committee to make its recommendations are not matters which fall within the exclusive function of the appellate courts to determine.

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22 There are states in the Commonwealth Caribbean - Trinidad and Tobago and Guyana - which are republics with a president as their head of state. Trinidad and Tobago has retained the Judicial Committee of the Privy Council as its final court of appeal.

23 *Frank Robinson v Jamaica*, 223/1987, Annual Report of the Human Rights Committee 1989, GAOR 44th session, Supplement No 40 (A/44/40), pp 241-5.

The State Party has a treaty obligation to effect the decisions of the relevant Committees established under the Covenants ratified by the state. This review raises the question as to whether a situation may not arise where in some respects the constitutional structures of the state fall short of empowering the state to carry out certain treaty obligations. If, as in the case of Jamaica, constitutionally the political government does not, in view of the constitutional role of the Jamaican Privy Council, have the final word in determining the question of commutation or release, how in this respect can it be ensured that the treaty obligation be met? There seems to me to be a need for a mechanism for dialogue on these issues and perhaps constitutional restructuring.

On an overall assessment the Commonwealth Caribbean nations' compliance with the Covenant has been substantial. The constitutions of our nations, our system of law including the common law statutes and proceedings, and our judicial structures provide an adequate framework within which the mandates of the Covenant can be, and are, substantially observed. In so far as I have highlighted the weaknesses for the purpose of this paper it is not to deny the satisfactory compliance in the areas not addressed. The existence of a vibrant, vocal and unfettered public opinion brings promptly to attention such infringements as may take place from time to time. The existence of machinery for redress is a restraining factor against excesses, even though admittedly an easy availability may not be so apparent. The pressure of escalating crime does severely test the integrity of our police forces, themselves endangered by violent crime. Efforts are continually made to clean up the police forces and institute professionalism.

If a judgment is to be given it must be against the background of these factors, including the fragile economic condition of small developing Caribbean states, which militates against large expenditures in areas like legal aid which a modern justice system demands. Perhaps the most effective monitor of the state and the most telling instrument of compliance in our democratic society would be the acceptance by the people themselves that the mandate of the Covenants is in their best interest, and that none of the provisions, including those against inhuman and degrading punishment and treatment, can be compromised because of the pressures, be they financial, or the escalating crime rates, or other, of a particular period in our history as a nation and as a people.

The way forward

I have so far sought to identify the areas of historical conflict or misunderstanding between the states of the Commonwealth Caribbean and the international human rights organizations in their treaty relationships and under the respective Covenants and specifically in relation to the death penalty.

Decisions of our final court of appeal, the Judicial Committee of the Privy Council, have sought to bring some certainty to the status of the relationship that Jamaica and other Commonwealth Caribbean jurisdictions, as signatories to the International Covenant on

Civil and Political Rights and the Optional Protocol, have to the views of the UN Human Rights Committee - namely, that they should be afforded weight and respect but are not of legally binding effect. The like considerations apply to the Inter-American Commission on Human Rights.

In so far as the interventions of the international human rights agencies and the exercise of their jurisdiction can add to delay, which takes on significant proportions in view of *Pratt and Morgan* and cases following, the question of procedures designed to minimize delay has to be addressed.

As I have noted, it now appears to be settled that a communication will be properly admissible when received by the international bodies, although a constitutional motion has not been pursued by the author. However, if states provide legal aid for such constitutional issues, the human rights image would be greatly enhanced. A new Legal Aid Bill in draft in Jamaica directed towards overhauling the legal aid system makes such a proposal.[24] Consultations between Jamaica's Solicitor-General and the Human Rights Committee in March 1994 sought to arrive at a consensus on the way forward. It was observed that

1. Greater attention should be given in the future to addressing matters of substance rather than being bogged down in preliminary issues of admissibility.

2. An "accelerated procedure" could be devised by the Committee which would expedite the process and was particularly necessary in view of the judicial decisions with respect to delays.

3. Applicants should file their substantive claims as soon as possible providing the fullest details available.

4. The Committee should not mechanically apply the five-year prescription in *Pratt and Morgan* but should assess each communication on a case-by-case basis.

5. Jurisdiction and merit issues should be dealt with at the same time, and communications speeded up by being faxed directly to the appropriate office dealing with the matter and responses sent directly to the Human Rights Committee.[25]

It does appear that if the Commonwealth Caribbean states could meet jointly with the international human rights organizations a consensus could be achieved on these issues and such other matters as would be relevant to ensuring that the states' treaty obligations are seen as mechanisms to achieve the enhancement of justice without the appearance of being a hindrance.

In Jamaica amending legislation enacted in 1992 to the Offences Against the Person Act,

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24 [***EDITOR'S NOTE:*** *This was passed into law in December 1997.*]

25 Oral communication to the author.

which created categories of murder (capital and non-capital), and a classification process in respect of prisoners on death row according to these new categories, has significantly reduced the numbers on death row. The new categorization has also resulted in fewer persons convicted of murder being sentenced to death. It is expected that there will be many fewer matters being the subject of complaints from aggrieved persons to the international human rights bodies and thus fewer communications from these bodies to the state.

In Jamaica too the combination of the effect of the Offences Against the Person (Amendment) Aet 1992 and the decision in *Pratt and Morgan* has so far resulted in the sentences of 220 persons convicted of murders and sentenced to death being commuted.

It appears to me too that some agreement could be arrived at which allowed either the UN Human Rights Committee or the Inter-American Commission on Human Rights to deal with a communication since they are in fact engaged in the same exercise and for the same purpose and neither constitute an appeal procedure from the other. Article 5(2) of the Optional Protocol to the UN Covenant does provide that

> "The Committee shall not consider any communication from an individual unless it is ascertained that ... the same matter is not being examined under another procedure of international investigation or settlement."

The question that needs to be clarified is whether the Committee should treat a case as admissible after another international investigation has been concluded, resulting in a decision.

In the final analysis, the acceptance of human rights mandates by the people, as distinct from the state, is the strongest guarantee of the survival of the human rights culture in our societies, which accept and welcome the scrutiny and recommendations of the specialist international agencies exercising their watchdog functions. This certainly requires an effective public education component, as being essential in terms of the public acceptance of the virtue of compliance with international standards in the Commonwealth Caribbean.