HUMAN RIGHTS COMMITTEE

McTaggart v. Jamaica

Communication No. 749/1997

31 March 1998

CCPR/C/62/D/749/1997*

VIEWS

Submitted by: Deon McTaggart (represented by Mr. David Stewart of S.J. Berwin & Co., London)

Victim: The author

State party: Jamaica

Date of communication: 10 April 1997 (initial submission)

Date of decision on admissibility and adoption of Views: 31 March 1998

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

Meeting on 31 March 1998,

Having concluded its consideration of communication No.749/1997 submitted to the Human Rights Committee by Mr. Deon McTaggart, 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 author of the communication, his counsel and the State party**,**

Adopts the following:

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

1. The author of the communication is Deon McTaggart, a Jamaican national awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations

by Jamaica of articles 6, 7, 9, 10, and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. David Stewart of the London law firm S.J.BERWIN & Co.

The facts as presented by the author:

2.1 On or around 26 March 1993 Deon McTaggart was arrested by the police and taken to an unknown location. He was beaten unconscious by the police and sustained several injuries including the dislocation of his collar bone. He was told that one Mr. Davy wanted to see him. It appears that during the 1991 elections the author had denounced, to the police, that some of Mr. Davy's men had killed one Mr. Kerr.

2.2 The author regained consciousness during the night and managed to escape. His family moved him to St. Elizabeth, in the parish of Aberdeen, where he received medical attention. He remained in the parish until July 1993 when he left Jamaica.

2.3 Mr. McTaggart was sent back to Jamaica from Canada after his application for political asylum failed. He arrived in Jamaica, on 18 April 1994, was arrested at the airport and remanded into custody until his trial. He was convicted, on 12 April 1995, of the murder of one Errol Cann and sentenced to death. On 31 July 1996 the Court of Appeal of Jamaica refused leave to appeal against conviction and sentence. The Judicial Committee of the Privy Council dismissed the author's application for special leave to appeal on 20 March 1997.

2.4 At the trial, the case for the prosecution was that on 11 June 1993, Deon McTaggart and several other men shot Errol Cann in an ambush in St. Catherine, Spanish Town, while he was being driven to the bank to lodge the proceeds of the sales of his business.

2.5 The prosecution presented several witnesses, including one Dorothy Shim who was driving the car when it was shot at. She was unable to identify the assailants; however she stated that she was forced to slow down and eventually halt the car because she noticed a small boy pushing a cart out of the car's path. It was when the car stopped that Mr. Cann was shot at with what was described as a pump rifle. Another man clung to the car and eventually fell off when she accelerated the car to drive to the hospital.

2.6 David Morris a 14 year old, gave evidence that he had known the author for a period of 4 years, under the alias of "German". He testified that on 10 June 1993, he was kidnapped by the author and two other men, who threatened to kill him because his mother was a police informer. The following day he was taken to Market Street and forced to push a hand cart into the middle of the road. He was then dismissed by the men. Morris stated that he hid close by and saw the events. A car drove up to the cart and was forced to stop, one of the assailants took out a pump rifle from a paper bag and went to the passenger side of the car and shot the victim. The car accelerated, the author leapt on to it but fell off with the acceleration.

2.7 The prosecution further relied on medical evidence indicating that the cause of death of the deceased had been multiple injuries caused by gunshot wounds to the chest.

2.8 In a statement, given by the author to two Jamaican officers while he was held in detention in Canada, at the West Detention Centre in Toronto, which was introduced as evidence during the trial, McTaggart admitted to the alias "German".

2.9 On trial, Mr. McTaggart made an unsworn statement from the dock claiming that he had not been in the area at the time of the crime and denied that he was known as "German".

The complaint:

3.1 On 18 April 1994, the author was sent back from Canada, and arrested on arrival in Jamaica. He appeared before the Gun Court on 26 April 1994. Counsel alleges that it was not until 11 May when he appeared before the Home Circuit Court, being first taken to the Gun Court again, that he was informed of the charges against him for the first time [1]. This is said to be in violation of article 9, paragraph 2, of the Covenant.

3.2 The author was arrested on 18 April 1994 and tried on 28 March 1995, this delay of 12 months in bringing him to trial and failing to release him on bail, is said to be an unreasonable and undue delay constituting a violation of articles 9, paragraph 3 and 14, paragraph 3 (a).

3.3 Counsel states that the author was not represented during the preliminary hearing. It is claimed that defence counsel only met with the author twice, each time for twenty minutes prior to the trial. He claims a further violation in that counsel failed to request an adjournment to consider with the author prosecution witness statements submitted without warning during the trial. It is contended that despite the author's wish that his counsel visit the scene of the crime, counsel failed to do so. The author by reason of the inadequate access to a lawyer was denied adequate time and facilities for the preparation of his case, in violation of article 14, paragraphs 1 and 3 (b) and (d).

3.4 Counsel argues that the author was denied a fair trial as there was extensive media coverage of the author's case. It is claimed that the extent of the coverage was such that the news even reached Canada, where the author was a resident in a detention centre, whilst applying for political asylum. Counsel argues that the presumption of innocence was further violated as the media coverage would have adversely influenced the jurors, [2] making it impossible for the author to have a fair trial.

3.5 Counsel further alleges that the author was denied a fair trial in that he was not correctly identified, since, on 11 May 1994, he was taken to the Gun Court, while on his way to the Circuit Court and placed in a small room, for police use, and pointed out by Morris the young witness. Counsel alleges that it was the police who pointed out the author to the witness before the witness identified him, this is said to constitute a violation of the author's right under article 14, paragraph 2.

3.6 Counsel argues that the unsatisfactory aspects of the trial, the misdirection by the judge to the jury on joint enterprise and the failure to give proper directions regarding evidence, rendered the trial unfair. In particular, he refers to the judge's instructions to the jury on how

to interpret confrontation identification evidence. In this connection, counsel refers to the testimony of the witness Morris that had known the author for four years, whereas the judge in his summing up said they had known each other four months. This discrepancy is said to amount to a violation of article 14, paragraph 1. Furthermore, counsel argues that Morris' evidence could not be true, since he was in a reform school at the time and the author was in prison. It is further argued that the imposition of a sentence of death on the basis of an unsafe conviction constitutes a violation of article 6 of the Covenant.

3.7 It is claimed that defence counsel's failure to call the author's father as a witness during the trial constituted a breach of article 14, paragraph 3 (e), of the Covenant.

3.8 Counsel claims that the author was injured in 1993, his collar bone being dislocated, which has not been set back nor has he received any medical treatment. The conditions in his cell, prior to trial, were very poor; he was kept in a cell with a number of men, with no slops bucket, all this is said to be in violation of article 10, paragraph 1.

3.9 During his detention prior to trial the author shared a cell with all classes of prisoners, it is argued that his non segregation from convicted persons while awaiting trial, was in violation of article 10, paragraph 2, of the Covenant.

3.10 It is further asserted that the detention regime at St. Catherine's District Prison constitutes a violation of articles 7 and 10, paragraph 1. Since his conviction the author has been kept in a solitary cell, with only a foam mattress to sleep on, and a slops bucket for all sanitation which he may only empty twice a day. Intermittently his visitors are said to be turned away and when allowed in, it is only very briefly. On 4 March 1997, the author and several other death row inmates were severely beaten by warders and then five men including himself were forced into one cell. The wardens burnt the author's belongings including letters from his lawyers, trial transcript and copy of his petition to the Privy Council. The author was then again beaten.

3.11 The lack of social rehabilitation for prisoners, especially for those on death row, within the Jamaican penitentiary system is said to constitute a violation of article 10, paragraph 3, of the Covenant.

State party's comments on admissibility and the merits:

4.1 In a submission of 12 June 1997, the State party waives the right to address the admissibility of the communication and addresses the merits of the author's claims. On the alleged violation of article 9, paragraphs 1 and 2, the State party denies that the author was not formally advised of the charges against him. In this respect, it is stated that the author was interviewed in Canada by a Jamaican police officer in connection with the murder of Mr. Cann, he was sent back to Jamaica and arrested for that offence, he appeared in Court and was remanded in custody for the same offence, consequently the State party contends that it is inconceivable that throughout this process the author was never formally charged.

4.2 With respect to the allegation that a period of 12 months between arrest and trial

constitutes undue delay, the State party categorically rejects that 12 months to try someone, in any way constitutes a violation of articles 9, paragraph 3, and 14 paragraph 3 (a).

4.3 With respect to the allegation that the author was denied a fair trial, in violation of article 14, paragraph 1, due to the extensive pre-trial publicity, the State party denies that the publicity was so extensive that it made it impossible for the author to obtain a fair trial.

4.4 With respect to the allegation that the author was not represented at the preliminary inquiry the State party contends that since the author was joined by a "voluntary bill of indictment" issued by the Director of Public Prosecutions, there was no preliminary enquiry. Consequently, the author could not have been represented. The State party argues that the above procedure is one established under Jamaican law and does not constitute a breach of the Covenant.

4.5 On the rest of the alleged violations of article 14, paragraph 1, the State party argues that they relate to the evaluation of facts and evidence, and considers that in accordance with the Committee's own jurisprudence these are matters which were properly left to the Court of Appeal to evaluate.

4.6 On the alleged violation of article 14, paragraph 3 (b), because of the conduct of legal aid counsel and the limited time he spent with the author prior to the trial, the State party contends that it has the responsibility to provide an accused person with competent legal counsel and not to obstruct them in the conduct of their case, and cannot therefore be held accountable for these actions of counsel.

4.7 With respect to the alleged violation of article 14, paragraph 3 (e), because of the failure of defence counsel to call a defence witness, or to request an adjournment in order to prepare cross- exanimation when evidence was introduced without warning, the State party relies on the same reasoning as above to reject any breach of the Covenant.

4.8 With respect to the allegations of violations of articles 7, and 10, paragraph 1, concerning the author's conditions of detention both before and after his conviction and in particular that he was denied medical attention for his dislocated collar bone. The State party recalls that by the author's own admission the injury occurred in 1993; that he was free during part of the time and then was in detention in Canada until April 1994. The State party rejects responsibility for any lack of medical attention that may have occurred, if any, during that period. With respect to the allegation that the author was beaten by wardens in March of 1997, the State party promised that the matter would be investigated. [3]

4.9 On the allegation that during his pre-trial detention the author was not segregated from convicted prisoners, in violation of article 10, paragraph 2, the State party contends that the author was held at Central Police Station and at the General Penitentiary. In this respect, it states that no convicted prisoners are held at Central Police Station, and that at the General Penitentiary convicted prisoners are separated from those awaiting trial, it rejects that there has been a violation of the Covenant.

5.1 Counsel reiterates the claims submitted in the original communication regarding: unfair trial; incompetence of counsel, for not calling witnesses and in the preparation of the author's trial, excessive publicity; undue delay; ill-treatment before and after conviction; non segregation from convicted prisoners while awaiting trial. Counsel points out that the State party has failed to address several of the allegations, in particular, those in respect of conditions of detention on death row, and that it has promised to investigate the allegations of beatings but has not hereto submitted any information.

5.2 He further argues that in respect of the non-segregation from convicted prisoners the State party has simply informed the Committee of the legal regulation, but has failed to address the author's specific situation, which did not follow the rule.

Admissibility consideration and examination of merits:

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

6.2 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, since he only met with him for a short time prior to the trial and failed to follow his instructions in visiting the scene of the crime and did not call a defence witness in violation of article 14, paragraph 3 (b) and (e), the Committee recalls its prior jurisprudence where it has held that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgment. The Committee finds that in this respect, the author has no claim under article 2 of the Optional Protocol.

6.3 With regard to the author's remaining allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of confrontation identification evidence and the relevance of the evidence of a witness, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. McTaggart's trial suffered from such defects. In particular, it is not apparent that his instructions on how to interpret confrontation identification evidence given by the witness Morris, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee considers that the author has failed to substantiate, for purposes of

admissibility, that he has been a victim of a violation of article 10, paragraph 3. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council in January 1997, the author has exhausted domestic remedies for purposes of the Optional Protocol. In the circumstances of the case, the Committee finds it expedient to proceed with the examination of the merits of the case. In this context, it notes that the State party has waived its right to address the issue of admissibility of the complaint and has proceeded to comment on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes. [4] The Committee further notes that counsel for the author has agreed to the examination on the merits of the case at this stage.

7. The Committee accordingly, declares the remaining claims admissible and proceeds, without further delay, to an examination of the substance of these claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 Article 9, paragraph 2, of the Covenant gives the right to everyone arrested to know the reasons for his arrest and to be promptly informed of the charges against him. Mr. McTaggart contends that he was not informed of the charges against him until he appeared before the Circuit Court on 11 May 1995, and that this was the first time he knew of the reasons for his arrest. The Committee notes from the material before it, submitted by the author's counsel, that Mr McTaggart saw a lawyer within the same week he was arrested, it was therefore highly unlikely that neither the author nor his Jamaican counsel were aware of the reasons for his arrest. In these circumstances and on the basis of the information before it the Committee concludes that there has been no violation of article 9, paragraph 2.

8.2 With regard to the author's allegation of excessive delay in the proceedings, the Committee notes that there was a delay of 12 months between the author's arrest, after his return from Canada, and his trial. While such a delay between arrest and trial in a capital case may not be desirable, the Committee does not on the basis of the material before it, conclude that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3 (a).

8.3 With regard to the allegation that the author was not represented at the preliminary enquiry, in violation of article 14, paragraph 3 (d), the Committee notes that the author was brought before the Court on trial for murder by a judge and jury under regular procedures of the Jamaican legal system. He was found guilty by the jury who heard and assessed the evidence against him, and the case was reviewed by the Court of Appeal. The fact that he was joined by "a voluntary bill of indictment", on his return to Jamaica after the preliminary enquiry had already taken place for the rest of the co-accused, following an established procedure, would not necessarily invalidate the fairness of the trial. Furthermore, this matter was never raised before the Courts, either on trial nor on appeal. Consequently, on the basis

of the information before it the Committee concludes that there has been no violation of the Covenant in this respect.

8.4 The author has claimed that he was denied a fair trial due to the extensive media coverage given to his case, which allegedly reached Canada. The Committee notes that from the material before it the coverage the case received in Canada was generated in Canada, since it referred primarily to the author having been arrested at Toronto airport trying to enter the country on false documents. Counsel has failed to provide the Committee with any material relating to media coverage in Jamaica. In the circumstances of the present case, and as far as concerns the possible effects of the media coverage of the trial, the Committee considers that there has been no violation of article 14, paragraph 1, of the Covenant.

8.5 The author has claimed that the conditions in his cell, prior to trial, were very poor; he was kept in a cell with a number of men, with no slops bucket. The State party has failed to address this allegation except in a very general manner. Consequently, the Committee considers that the author's rights as a person in detention have been violated, in breach of article 10, paragraph 1, of the Covenant.

8.6 With regard to the conditions of detention at St. Catherine's District Prison, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he is kept in a solitary cell, with only a foam mattress to sleep on, and a slops bucket for all sanitation which he may only empty twice a day. Intermittently, his visitors are sent away and when allowed in it is only very briefly. The State party has not refuted these specific allegations. In these circumstances, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

8.7 The author has alleged that, on 4 March 1997, he and several other death row inmates were severely beaten by warders and then five men including himself were forced into one cell. Later, the warders burnt his belongings including letters from his lawyers, trial transcript and copy of his petition to the Privy Council. The Committee notes that the State party promised to investigate the matter. It considers that, in the absence of any information from the State party, the treatment described by the author constitutes treatment prohibited by article 7 of the Covenant, and is likewise in violation with the obligation under article 10, paragraph 1, of the Covenant, to treat prisoners with humanity and with respect for the inherent dignity of the human person.

8.8 The author has claimed that during his detention prior to trial he shared a cell with all classes of prisoners, and was not segregated from convicted persons. The Committee notes the information provided by the State party in that Jamaican legislation requires that persons awaiting trial be separated from convicted persons. However, the State party has explained that the author was held at Central Police Station and at the General Penitentiary, where convicted prisoners are separated from those awaiting trial. In light of the information the Committee concludes that the author has failed to substantiate his claims and consequently, there has been no violation of article 10, paragraph 2, of the Covenant.

9. 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 before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy including compensation. The Committee urges the State party to take effective measures to carry out an official investigation into the author's allegations of beatings by wardens and where appropriate, identify the perpetrators and punish them accordingly, and to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subjected to its jurisdiction the rights recognized 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 ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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*/ Made public by decision of the Human Rights Committee.

*/ The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omar El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr.Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, and Mr. Maxwell Yalden.

1/ The author filled in a questionnaire for his London counsel, in which he stated that he saw a lawyer within the same week in which he was arrested, on his return to Jamaica.

2/ The media coverage submitted by counsel refers solely to the information which appeared in Canada when the author was detained on arrival in Toronto for travelling with false documents. In a further submission counsel states that evidence of the media coverage in Jamaica is being sought, but nothing has been submitted to the Committee.

3/ To date 6 April 1998 no information has been received from the State party in this respect.

4/ See Views on communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, paragraph 7.4.

Appendix

Individual opinion (partly dissenting) by Mr. Scheinin

On two important issues my position differs from those expressed in the Committee's views. One of them relates to the substance of the case where I, dissenting from the Committee's views, find certain violations of the Covenant over and above those determined by the Committee. The other issue relates to the obligation of the State party to provide an effective remedy to the author. Here, my opinion is to be understood more as a clarification than a dissent.

Violation of articles 9 and 14

According to article 5, paragraph 1, of the Optional Protocol the Committee shall consider a communication in the light of all written information made available to it by the individual and by the State party concerned. As in many other Jamaican cases involving the death penalty, counsel to the author has provided the Committee with lengthy submissions and extensive documentation, including transcripts of the domestic court proceedings. The State party, in turn, has submitted a letter of three and a half pages, addressing simultaneously both the admissibility and the merits of the communication, "in the hope of expediting its examination". The State party submission does not address all the complaints presented by the author, and on certain points it makes far-reaching inferences on the basis of the material submitted on behalf of the author without offering any additional proof. When, for instance, counsel to the author had used, erroneously as it appears, the term "extradition" of the author's deportation from Canada, the State party asserts that it would be "inconceivable" that the author, when extradited, had not been informed of the charges against him in compliance with article 9 of the Covenant.

The conduct of the State party puts the Committee in a position where it must choose between either finding violations of the Covenant on the basis of author's allegations presented in counsel's submissions and not properly answered by the State party or examining the extensive documentation submitted on behalf of the author in order to make an autonomous investigation of the merits of each allegation. Both of these approaches are untenable and bear the risk of errors which, in death penalty cases, may be lethal in the literal meaning of the term. The only alternative to these two approaches would be to request additional information and clarifications from the parties, an option the Committee is unwilling to take both because of its extremely scarce resources and because of the fully justified aim of expeditious handling of death penalty cases.

My findings of the facts of the case differ in two points from those of the Committee, and lead to two additional findings on violations of the Covenant in the author's case.

(i) According to the author he was interviewed in Canada in respect of several crimes that had occurred in Jamaica. Immediately upon his deportation to Jamaica, erroneously referred to as "extradition" by both counsel and the State party, the author was taken into custody. Only some three weeks later, on 11 May 1994, he was informed of the specific charges against him. The State party has failed to answer these allegations in a proper way, as it rests on an incorrect inference made from the notion of extradition. On the basis of all written information made available to the Committee by the individual and by the State party I find that there has been a violation of article 9, paragraph 2, of the Covenant.

(ii) My approach to alleged violations of article 14 (fair trial) rests partly on the above finding. If the author was originally interviewed in respect of several crimes and if he was, before being charged of the murder of Mr. Errol Cann, kept in custody for several weeks without effective access to a lawyer, there must be serious doubt as to whether the trial that followed could ever meet the requirements of a fair trial, in particular in a case involving the death penalty. The narrative presented in paragraphs 2.4 to 2.6 of the Committee's views of the murder of Mr. Cann is, unfortunately, quite telling of the nature of the trial. In paragraph 2.5 the Committee refers to the testimony of Ms. Dorothy Shim who was driving the car in which Mr. Cann was shot. According to the Committee, the witness had to halt the car "because she noticed a small boy pushing a cart out of the car's path". In paragraph 2.6 the Committee refers to a testimony by a David Morris, who at the time of the crime had just turned 13 years old and is referred to as "a small boy" on several occasions in the documentation submitted to the Committee by author's counsel. According to the Committee's narrative, Morris would have testified that he was kidnaped by the author and some other men on the previous evening and then, at the scene of the crime, been "forced to push a hand cart into the middle of the road".

This narrative appears coherent but represents only a reconstruction of what might have happened at the scene of the crime. As the author was identified as one of the assailants by David Morris only, the truthfulness of the author's participation in the crime does not depend on whether the description of the events is otherwise coherent. The problem, however, is that had the narrative presented in paragraph 2.6 of the Committee's views been the story by David Morris, this would have associated himself to the crime. Besides putting David Morris himself at risk of correctional measures this would have cast doubts on the reliability of David Morris identifying not just two or three but *six* men, including the author, as the assailants. It is to be noted that four of the six were not found guilty, one as the prosecution dropped charges, two by the jury and one on appeal. The author was the only one of the six to receive capital punishment, although no one had stated that he would have been the person who shot the lethal shot at Mr. Cann. Furthermore, the five other defendants had been identified by David Morris in identification parades, some of which were later on found unreliable. In contrast, no identification parade was held in the author's case as David Morris according to his own testimony knew the author personally (see paras. 3.5 and 3.6 of the views). David Morris had, according to the author and this was not contested by the State party, identified the author as one of the assailants on 11 May 1994, eleven months after the crime, with the assistance of the police and on the very day when the author was finally informed of the charges against him. The author has denied knowing David Morris. The statements given by David Morris to the police shortly after the murder, probably including

information as regards the identity of the assailants *if* at that time known by Morris, were never presented to the domestic courts, or by the State party to the Committee.

The testimony of David Morris, as it appears from the trial transcript, was that after being kidnaped by a group of men on 10 June 1993 and being detained by them over the night, he was brought by the men to the crime scene on the following day. There he was released and could freely, without being involved in the crime, witness Mr. Cann being murdered and then leave the scene. It is obvious to me that the trial testimony by David Morris is unreliable and that the Committee should not have altered the narrative of the events in order to add coherence to the case of the prosecution. What becomes crucial in relation to the possible findings of the Committee is whether this had any bearing on the fairness of the trial. The author was found guilty of capital murder by a jury. The trial transcript shows that the trial judge was very clear and detailed in pointing out the inconsistencies in the evidence on which the prosecution's case rested, in particular in relation to the story of David Morris, who at the time of the trial was under 15 years of age and was the sole person that had identified any one of the six accused persons, and all six of them.

The Committee has dealt with the relevance of a verdict by a jury for the Committee's own work in the case of *Byron Young v. Jamaica* (Communication No. 615/1995), in which the Committee took the position that very limited possibilities to contest a verdict by jury in domestic appeal proceedings does not constitute a violation of article 14 provided, *inter alia* that the trial itself was not unfair.

In the present case the trial judge was both skilled and conscientious in pointing out the inconsistencies in the prosecution's case. As the jury, nevertheless, returned a verdict of guilty in the case of the author, this does as such prove neither that the trial was fair nor that it was not fair. My finding that the trial could not be, and was not, fair is based on the following facts: (a) the author was detained for more than three weeks before being informed of the crime he was suspected of, (b) he had very limited access to a lawyer before the actual trial, which had an effect on his defence through a legal aid counsel, (c) the trial took place a year after the author was arrested and almost two years after the crime, and (d) the identification of the author as one of the assailants was made solely by David Morris who at the time of the crime had been barely 13 and whose statements given to the police, when detained soon after the incident, were never presented to the court. The State party is directly responsible for all these factors and they have not been properly addressed by the State party in the proceedings before the Committee. Taken together, these factors have the effect that the author did not have a fair trial, as guaranteed in article 14, paragraph 1, and further specified in paragraphs 2 and 3 of the said article and, in relation to cases involving the death penalty, in article 6, paragraph 2.

My finding does not contest the Committee's position that it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case, and that it is for the domestic appellate courts to review the judge's instructions to the jury and the conduct of the trial (see, para. 6.3 of the views). My point is that, in the circumstances of the case, the author could not receive a fair trial in April 1995, after he had been denied the prerequisites of a fair trial through the preceeding events identified above as (a) to (d).

The question of an effective remedy

The practice of the Committee in relation to the remedy has undergone a process of evolution during the twenty years of the Committee's work under the Optional Protocol. It is a legal obligation of a State party under article 2, paragraph 3, of the Covenant to ensure that any person whose rights protected by the Covenant have been violated "shall have an effective remedy". In addition to this general provision, article 9, paragraph 5, establishes a right to compensation for unlawful arrest or detention either under the Covenant or domestic law. Both of these obligations stem directly from the Covenant and not from the Committee's mandate to issue, when performing its functions under the Optional Protocol, interpretations or recommendations on what measures would in each case constitute an effective remedy. In its very first views the Committee did not specify the nature of the remedy even though the case clearly fell under article 9, paragraph 5 (see the views in *Moriana Hernández Valentini de Bazzano et al. v. Uruguay*, Communication No. 5/1977). However, already in its second case the Committee specified that compensation was the appropriate form of remedy in a case where a violation of article 9 was established (see, *Edgardo Dante Santullo Valcada v. Uruguay,* Communication No. 9/1977). In later years the Committee has recommended compensation as the remedy or as a part of the remedy in many cases in which a violation of only other articles than article 9 have been found. The first such recommendations of compensation were issued in the Committee's views adopted in its 15th session (1982) in the cases of *Pedro Pablo Camargo v. Colombia* (Communication No. 45/1979) and *Mirta Cubas Simones v. Uruguay* (Communication No. 70/1980), after finding a violation of article 6, and articles 10 and 14, respectively.

It is to be expected that the evolution towards more specific pronouncements on the remedy will continue. It should, for instance, be welcomed by the Committee that authors or counsel specify, when sending submissions to the Committee, the amount of compensation they consider appropriate for the violation suffered, and that State parties present their observations on such claims when answering to communications. This would enable the Committee to take the next logical step in addressing the issue of remedies, namely, to specify the amount and currency of compensation in those cases where compensation is seen by the Committee to be an appropriate remedy. This would strengthen both the nature of the Optional Protocol procedure as an international recourse to justice and the Committee's role as the internationally authoritative interpreter of the Covenant.

In death penalty cases the Committee has after finding a violation of the Covenant often, but not always, recommended either commutation or release as an effective remedy. Both of these remedies make it clear that when a person has been sentenced to death in violation of the Covenant or treated contrary to the provisions of the Covenant while awaiting execution, the remedy should include an irreversible decision not to implement the death penalty. The Committee has been particularly clear and consistent on this point when the requirements of a fair trial under article 14 have been found to be violated. In several cases the Committee has explicitly stated that the imposition of the death penalty after a procedure that does not meet the requirements of article 14 entails a violation of the right to life, i.e. article 6 of the Covenant.

In cases involving a violation of articles 7 and/or 10 of the Covenant in relation to persons on death row, the Committee has not been consistent in formulating its specific recommendations as to the remedy. This cannot, of course, alter the main rule that the victim is entitled to an *effective* remedy under article 2, paragraph 3, of the Covenant. In the final paragraph of the views in its most important case related to the death penalty, the case of *Earl Pratt and Ivan Morgan v. Jamaica* (Communication Nos. 210/1986 and 225/1987) the Committee gave a clear and convincing answer to the question what constitutes "effective remedy" to a person awaiting execution:

"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." (italics added)

In the light of what has been said above the pronouncement in paragraph 10 of the Committee's views in the present case is not as clear as I would have hoped. In accordance with article 2, paragraph 3, the Committee states that the remedy to be provided to the author must be an effective one. After that reaffirmation of the legal obligation the State party has directly under the Covenant the Committee, however, indicates that in the present case an "effective remedy" would entail compensation. On the basis of the violations determined by the Committee, it should in my opinion have been made clear that an effective remedy must include both commutation and compensation. As I have found a violation of articles 9 and 14 in addition to those determined by the Committee, I would have seen it appropriate to state that the author is entitled, as an immediate and irreversible measure, to the commutation of his death sentence, and thereafter to either a new trial or release. In any case it should be made more clear that an "effective remedy" in a case involving the death penalty and in which a violation of the Covenant is found must include, first and foremost, absolute protection of the victim against execution. To a person on death row it is a precondition for any other remedy being "effective" that he or she can preserve his or her life.