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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 97/98; Case 11.825
Title/Style of Cause: Neville Lewis v. Jamaica
Doc. Type: Decision
Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Commissioners: Alvaro Tirado Mejia, Claudio Grossman, Henry Forde.
Dated: 17 December 1998
Citation: Lewis v. Jamaica, Case 11.825, Inter-Am. C.H.R., Report No. 97/98,
OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
Represented by: APPLICANTS: Catherine Bailey and David Stewart
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I. SUMMARY

1. On October 2, 1997, the Inter-American Commission on Human Rights (hereinafter "Commission" or "IACHR") received a petition filed on behalf of Neville Lewis, a prisoner on death row in the St. Catherine District Prison in Jamaica, alleging the responsibility of the State of Jamaica ("Jamaica") for violations of Articles 4(2), 4(3), 4(6), 5(1), 5(2), 8, 10, 11, 21 and 24 of the American Convention on Human Rights (the "American Convention").

2. The petitioners, Catherine Bailey, and in the initial stages, David Stewart, of the law firm SJ Berwin & Co., reported that Mr. Lewis had been convicted of the crime of capital murder on October 14, 1994 by the Home Circuit Court in Kingston, Jamaica, and applications for appeal to the Court of Appeal and the Privy Council had been unsuccessful. The petitioners allege that the moratorium on executions placed in effect in Jamaica in 1988 constituted a de facto abolition of the practice, and that the execution of Mr. Lewis would constitute a reestablishment of the penalty in violation of Article 4(3) of the Convention. They maintain that the procedure to apply for mercy is defective because it does not meet the requirements of due process, effectively denying Mr. Lewis the right to petition for mercy contained in Article 4(6).

3. The petitioners argue that the manner in which Mr. Lewis was removed from his regular cell to the "condemned cell" (reserved for persons whose execution date has been fixed) for 4 days in September of 1997 constituted a form of torture under Article 5. In a supplemental filing of September 10, 1998, the petitioners submitted an additional claim relating to the removal of Mr. Lewis to the condemned cell for a 14 day period in August of 1998. They allege that the mandatory imposition of the death penalty in all cases of capital murder is a violation of the right to equal protection under Article 24, and has the further effect of depriving a defendant of the right to put forward mitigating evidence or evidence of duress in violation of Article 5. Further,

they contend that the Governor General's Instructions issued on August 7, 1997 restrict Mr. Lewis' right of petition before the IACHR.[FN1] The petitioners allege a violation of the right to property under Article 21 due to the confiscation and destruction of Mr. Lewis' personal items, including clothes, books and trial transcripts, by prison guards on March 5, 1997.

[FN1 These "Instructions" establish a series of procedures and timelines which the State will apply in dealing with petitions presented before the IACHR and/or United Nations Human Rights Committee ("UNHRC") concerning persons sentenced to capital punishment.

4. The record indicates that, on May 24, 1996, Mr. Lewis had filed a petition before the UNHRC complaining of violations of the International Covenant on Civil and Political Rights ("ICCPR"). The UNHRC issued its views on the petition on July 17, 1997, finding violations of Articles 9(3) and 10(1) and (2) of the ICCPR concerning pre-trial delay and conditions of detention, respectively. As a jurisdictional matter, the petitioners assert that the matters raised before the IACHR are distinct from those raised before the UNHRC. As a substantive matter, the petitioners allege a violation of the right to compensation set forth in Article 10 of the American Convention because the State refuses to implement the findings of the UNHRC with respect to reparation through compensation to Mr. Lewis. The petitioners allege that the State's noncompliance also constitutes a violation of Mr. Lewis' right to have his dignity respected under Article 11 of the Convention.

5. In their initial submissions, the petitioners reported that the only judicial remedy theoretically still available, the presentation of a constitutional motion, was effectively unavailable because Jamaica does not provide legal aid to assist indigents such as Mr. Lewis in the filing of a motion of that nature. The fact that the remedy was unavailable, they argued, also constituted a violation of Mr. Lewis' right to judicial guarantees under Article 8. Submissions in August and September of 1998 indicate that a constitutional motion was filed on Mr. Lewis' behalf pursuant to the issuance of a warrant for his execution in August.

6. The petitioners contend that the appropriate remedy for the violations alleged is that Mr. Lewis' sentence be quashed and that he be released, or, at a minimum, that his sentence be commuted to one of life imprisonment. Given the risk that the sentence against Mr. Lewis was subject to being carried out at any time, the initial petition asked that the IACHR address the State to request the adoption of precautionary measures to stay his execution pending the Commission's decision, pursuant to Article 29 of its Regulations.

7. The State of Jamaica maintains that the petitioners' claims concerning the moratorium on the death penalty are unfounded, as the penalty was never abolished. With respect to the procedure to apply for mercy, the State argues that there is neither a constitutional nor a Convention-based requirement that this comply with the guarantees invoked by the petitioners. The State indicates that the removal of Mr. Lewis to the condemned cell during the periods in question was effectuated in compliance with procedures mandated by law. It also controverts the petitioners' claims with respect to the effect of the mandatory imposition of the death penalty on the ability of the defendant to put forth mitigating or other evidence.

8. Further, the State considers that any questions concerning implementation of the findings of the UNHRC may be taken up by that body, and not by the IACHR. The claims concerning the confiscation and destruction of Mr. Lewis' personal items are reportedly under investigation. The State contends that the issuance of the Governor General's Instructions and adherence to the timetables set forth therein is required to ensure compliance with internal law. Finally, in its initial response, the State maintained that legal aid to assist an indigent applicant wishing to file a constitutional motion is neither required as a matter of domestic law nor pursuant to the terms of the American Convention.

II. PROCESSING BEFORE THE COMMISSION

9. The Commission acknowledged receipt of the petition by means of a note of October 2, 1997. Pursuant a request of the petitioners (aimed at compliance with timelines established in the Governor General's Instructions), on October 7, 1997, the Commission informed the State of Jamaica that a petition concerning Mr. Lewis had been received and was under study pursuant to the applicable Regulations.

10. The Commission opened Case 11.825 on October 31, 1997, and transmitted the pertinent parts of the petition to the Government of Jamaica in a note of that same date, with a response requested within 90 days. The petitioners were notified that this action had been taken.

11. On October 31, 1997, the State submitted a note indicating that it considered the laws and procedures of Jamaica, including the Governor General's Instructions, applicable to the case.

12. On November 20, 1997, the Commission addressed the State, pursuant to Article 29 of its Regulations, to request the adoption of precautionary measures to stay the execution of Mr. Lewis until such time as it could fully investigate the petition. The petitioners were notified the same day that this request had been made.

13. By a note of December 2, 1997, the State submitted its response to the Commission's request for information on the petition. In a separate note of that same date, the State informed the Commission of its position with respect to the timelines set forth in the Governor General's Instructions. The contents of these communications were transmitted to the petitioners on December 5, 1997, with observations requested within 30 days of receipt.

14. On January 5, 1998, the petitioners submitted observations on the response of the State, and also requested a hearing before the Commission. The pertinent parts of that communication were transmitted to the State on January 16, 1998, with observations in response requested within 30 days. The State acknowledged receipt, without further comments, on February 10, 1998. This information was transmitted to the petitioners on February 20, 1998.

15. On July 17, 1998, the Commission addressed the State to inform it that Mr. Lewis' case would be considered during its next period of sessions in October of 1998, and to reiterate its November 20, 1997 request for a stay of execution pending its determination. The petitioners were informed that this action had been taken by note of July 29, 1998.

16. On August 17, 1998, the petitioners informed the Commission that the State had issued a warrant for the execution of Mr. Lewis to be carried out on August 27, 1998, and asked that the Commission reiterate its request for a stay of execution. By a note of that same date, the Commission addressed the State to request information in response to its communication of July 17, 1998 and the reiteration of its request for a stay that had been set forth therein. The petitioners were duly informed that this action had been taken.

17. By a note of August 19, 1998, the petitioners addressed the Commission to petition that, in view of the pendency of the execution warrant, the latter expressly reiterate its request for a stay of execution in the case of Mr. Lewis.

18. On August 26, 1998, the State acknowledged receipt of the IACHR's August 17, 1998 communication, and indicated that Mr. Lewis was pursuing the matter of a stay of execution in the domestic courts, and that it would notify the Commission as to the outcome of those efforts.

19. On September 10, 1998, the petitioners addressed the Commission to inform it that, pursuant to the reading of the execution warrant, a constitutional motion had been filed on behalf of Mr. Lewis challenging the Governor General's Instructions and other infringements of his rights. They also submitted additional factual allegations in relation to their claims under Article 5. Further, they requested that the Commission petition the Inter-American Court of Human Rights to issue the provisional measures deemed pertinent. On September 11, 1998, the pertinent parts of that communication were transmitted to the State, with any observations requested within 10 days in order that the case could be considered during the Commission's next period of sessions.

20. On September 21, 1998, the State submitted a response to the Commission's request for information of September 11, 1998, noting that it had not accepted the jurisdiction of the Inter-American Court.

21. On September 22, 1998, the State submitted a communication informing the Commission that Mr. Lewis had applied to the Supreme Court of Jamaica for constitutional redress, and that his application would be heard shortly. The State urged the Commission to adopt the measures necessary to ensure that a decision would be taken on the case of Mr. Lewis and those of five other death row inmates during its next period of sessions.

22. On October 1, 1998, the petitioners transmitted copies of the documents filed before the Supreme Court of Jamaica in support of Neville Lewis' constitutional motion and an additional piece of information in relation to the case before the IACHR.

III. THE POSITIONS OF THE PARTIES

The Position of the Petitioners

23. The petitioners allege that the State of Jamaica is responsible for violations of Mr. Lewis' rights under Articles 4.2, 4.3, 4.6, 5.1, 5.2, 8, 10, 11, 21 and 24 of the American Convention.

According to the petition, Mr. Lewis was charged with the murder of Victor Higgs on July 22, 1994, and brought to trial on October 14, 1994. Mr. Lewis and his co-defendant, Peter Blaine,[FN2] were convicted of capital murder by the Home Circuit Court in Kingston, Jamaica that same day. The Court of Appeals of Jamaica refused Mr. Lewis' application for leave to appeal on July 31, 1995, and his application for special leave to appeal to the Judicial Committee of the Privy Council in England was dismissed on May 2, 1996.

[FN2] A petition filed before the IACHR on behalf of Mr. Blaine is under study as Case 11.827.

24. The petitioners raise several claims concerning the death sentence issued against Mr. Lewis and Article 4 of the Convention. First, while admitting that the "death penalty has not technically been abolished in Jamaica," they argue that the moratorium on executions put into effect in Jamaica in 1988 constituted a de facto abolition of that penalty. In the petitioners' view, ending that moratorium should be read as a post-abolition reestablishment of the death penalty, prohibited by Article 4(3).

25. Second, they claim that the process to apply for pardon in Jamaica is flawed because an applicant has no right to be heard by the Jamaican Privy Council (the body charged with reviewing such cases), and no right to see, challenge or respond to the information before that body. The Council meets in private, and gives no reasons for its decisions. "There are no controls or criteria for the exercise of such discretion" and no means to check the accuracy of the record before it or the review thereof. They contend that, as a result, the process is arbitrary and violates Article 4(6) of the Convention. They add that, because the prerogative of mercy is always exercised in favor of women, but only rarely in favor of men, the procedure is incompatible with the guarantee of equal protection established in Article 24 of the Convention.

26. Third, the petitioners indicate that Jamaican law mandates that the death penalty be imposed with respect to every conviction for the crime of capital murder. Due to the mandatory nature of the sentence, they contend, a person convicted of capital murder has no opportunity to present evidence in support of a defense of duress, or mitigating evidence regarding sentencing. This means that a person so convicted is sentenced in relation to the definition of the crime, rather than the specific circumstances of his culpability. According to the petitioners, "the requirement that the death penalty is imposed in every case of capital murder is cruel, inhuman and degrading and is an arbitrary and disproportionate punishment" in violation of Article 5. Moreover, they assert, the imposition of a uniform sentence "for acts of unequal culpability is substantive inequality," and contravenes the guarantee of equal protection set forth in Article 24 of the Convention.

27. In addition to the foregoing claims concerning the right to humane treatment, the petitioners allege a violation of Article 5 in relation to the removal of Mr. Lewis from his cell in preparation for execution. According to the petition, Mr. Lewis was moved to the "condemned cell" (where prisoners with a fixed date of execution are held), pursuant to the issuance of a warrant for his execution on September 12, 1997. He was held there for four days before being informed that an application had been made to the IACHR and his execution would be stayed.

The petitioners report that the condemned cell is approximately 30 yards from the gallows, and that the front of the cell is barred so the prisoner can be observed at all times. The gallows were tested pursuant to the issuance of the warrant, and "the Applicant suffered a harrowing time listening to the sounds" of the tests. "It is believed that the Applicant could also see the gallows and the tests being carried out." The petitioners claim that this treatment was meted out deliberately, and had a severely detrimental physical and psychological impact on Mr. Lewis. They claim a further violation in this regard with respect to his transfer to the condemned cell from August 14 - 28, 1998 (after which he was again returned to a regular cell).

28. The petitioners claim further violations of Article 5 with respect to the Instructions of the Governor General, which address how the State of Jamaica will respond to petitions presented before the IACHR and UNHRC concerning persons sentenced to death. They argue that the Instructions are incompatible with the norms of the American Convention because adherence to the timetables imposed impedes their right of petition before the Commission, and the ability of the latter to carry out its fact-finding and other procedures in the case.

29. The petitioners allege a violation of the right to property under Article 21, stemming from the reported confiscation and destruction of Mr. Lewis' personal items, including clothes, books and trial transcripts, by prison guards on March 5, 1997. They indicate that this was done by the guards as a form of retaliation against all death row prisoners for the attempted escape of a few (who did not include Mr. Lewis).

30. The petitioners report that, on May 24, 1996, Mr. Lewis had filed a petition before the UNHRC complaining of violations of Articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"). The UNHRC issued its views on the petition on July 17, 1997, finding violations of Articles 9(3) and 10(1) and (2) of the ICCPR concerning pre-trial delay and the conditions of Mr. Lewis' pre-trial detention, respectively, and dismissing the other claims. As a jurisdictional matter, the petitioners assert that the matters raised before the IACHR have not been submitted before the UNHRC or another intergovernmental procedure. As a substantive matter, the petitioners allege a violation of Article 10 of the American Convention because the State has not implemented the findings of the UNHRC with respect to compensation to repair the violations established. The petitioners allege that this noncompliance also constitutes a violation of Mr. Lewis' right to have his dignity respected under Article 11 of the Convention.

31. With respect to the question of access to judicial guarantees, it may be noted that the argumentation on record predates the filing of the constitutional motion on Mr. Lewis' behalf. As a jurisdictional matter, the petitioners had argued that the exhaustion of domestic remedies through the invocation of a constitutional motion should be excused in Mr. Lewis' case because of the absence of legal aid for an indigent to file such a motion. As a substantive matter, they had contended that the fact that the Jamaican legal system does not provide indigent persons, such as Mr. Lewis, with legal aid to file a constitutional motion denied him access to judicial guarantees and to a remedy for the violations of the Convention alleged, in contravention of Article 8(1) of the American Convention. They noted that constitutional proceedings are complex and require the assistance of an attorney to be effectively exercised. They argued that, in the absence of legal

aid, a potential applicant is dependent on pro bono legal assistance, which they characterized as virtually non-existent for death row inmates in Jamaica.

The Position of the State

32. The State of Jamaica maintains that the petitioners' claims concerning the moratorium on the death penalty are unfounded, as the application of the penalty was suspended for a period, but never abolished. The terms of the Offenses Against the Person Act and various other pronouncements had clearly indicated that the penalty would be retained, although for a reduced number of offenses.

33. With respect to the procedure to apply for mercy, the State argues that there is neither a constitutional nor a Convention-based requirement that this accord with the guarantees invoked by the petitioners. It submits that this "is not a judicial or quasi-judicial proceeding to which procedural and/or constitutional guarantees apply." The State considers that the procedures of the Jamaican Privy Council, which take into account all available information, are "more than adequate to meet the Convention's requirements."

34. In responding to the petitioners' claims concerning the removal of Mr. Lewis to the condemned cell, the State reports that it was simply following mandated procedures. It submits that its authorities are bound to comply with the terms of domestic law, which require a certain expedition in death penalty proceedings in order to comport with the prohibition of cruel, inhuman and degrading treatment set forth in the Jamaican Constitution and as expressed in applicable case law. The petitioner may avail himself of all available remedies to stay the application of the penalty, but must do so in a timely manner.

35. The State controverts the petitioners' claims that the legislative imposition of the death penalty as the sentence for capital murder has the effect of preventing the defendant from presenting mitigating evidence. "[T]here was nothing to prevent the applicant from offering evidence in mitigation during the trial concerning his conduct. Indeed, it is clear from the defence put forward, that the applicant was attempting to shift responsibility for the offense." Moreover, "[t]he imposition of a mandatory death sentence following a trial in which a person has been found guilty of deliberately killing another person while committing another crime cannot be said to be a breach of the Convention."

36. With respect to the petitioners' claims concerning the Governor General's Instructions and Article 5 of the Convention, the State maintains that these Instructions are necessary to enable it to comply with domestic law. Specifically, it contends that adherence to the timetables set forth therein is required to ensure compliance with the 1993 finding of the Judicial Committee of the Privy Council in the case of Pratt and Morgan, which established that "the delay which had ensued in the case since sentence [approximately five years] constituted cruel, inhuman and degrading treatment in breach of Section 17 of the Jamaican Constitution." The State also notes the July 4, 1987 communication of the Inter-American Commission regarding prisoners Pratt and Morgan informing it that the delay which had elapsed in the proceedings was violative of Article 5 of the American Convention. The State asserts therefore that the positions of the Judicial Committee of the Privy Council and the Commission are consistent, and require

the timely procedures contemplated through adherence to the timetables established in the Instructions.

37. With respect to the petitioners' claims concerning the alleged confiscation and destruction of Mr. Lewis' personal items on March 5, 1997, the State initially reported that that matter had been placed under investigation. The record contains no further information in this regard.

38. As noted above, the State considers that any questions concerning implementation of the findings of the UNHRC may be taken up by that body, and are not a matter to be addressed by the IACHR.

39. As with the petitioners, the argumentation of the State concerning access to judicial guarantees predates the filing of the constitutional motion which remains pending as of the date of the present report. In its initial response, the State had categorically refuted the petitioners' claims concerning access to judicial guarantees, maintaining that an indigent applicant wishing to file a constitutional motion does not require legal aid. "Under the Convention, there is no obligation to grant legal aid to an accused to pursue a constitutional motion." The State characterized that Article 8(2) of the Convention "implies that provisions should be made for legal aid in criminal matters. Therefore the failure to grant legal aid for constitutional matters does not run afoul of the Convention."

IV. ANALYSIS

A. Competence of the Commission

40. In accordance with its mandate, the Commission is competent to examine the subject matter of this complaint, as it concerns alleged violations of Articles 4, 5, 8, 10, 11, 21 and 24 of the American Convention. Jamaica has been a party to that Convention since its ratification of August 7, 1978, and the allegations at issue concern events subsequent to that date. The petitioners have locus standi to appear pursuant to the terms of Article 44 of the Convention. In their submissions, the petitioners have stated certain claims which, if consistent with other requirements and shown to be true, could tend to establish the violation of a right protected by the American Convention.

B. Requirements to Admit a Petition

Duplication

41. In accordance with Articles 46(c) and 47(d) of the American Convention, the Commission shall consider inadmissible a petition which is substantially the same as one pending before another international proceeding, or which has been previously studied by itself or another international organization.[FN3] Mr. Lewis had presented a petition before the UNHRC on May 24, 1996, complaining of violations of Articles 6, 7, 9, 10 and 14 of the ICCPR, principally in relation to alleged mistreatment aimed at coercing a confession, conditions of pre- and post-conviction detention, pre-trial delay, errors in the way the trial was conducted, and his

right to defense at trial and on appeal. On the basis of those violations, Mr. Lewis alleged that the imposition of the death sentence against him violated the right to life under the ICCPR. In its views, the UNHRC: established violations of Articles 9(3), and 10(1) and (2) of the ICCPR concerning pre-trial delay and the conditions of Mr. Lewis' pre-trial detention, respectively; recommended a remedy entailing compensation; and dismissed the other claims as inadmissible or unfounded. The petitioners maintain that they have presented an entirely distinct set of claims before this Commission. The State has submitted no observations on this question.

[FN3] This refers to an organization which is competent to take decisions on the specific facts set forth in the petition, and measures in favor of the effective settlement of the dispute concerned. See, e.g., IACHR, Reso. 33/88, Case 9786 (Peru), in OEA/Ser.L/V/II.76, Doc. 10, 18 Sept. 1989, at consideranda d – h.

42. Where a matter is first presented before one international proceeding, and is then essentially replicated and placed before another, the issue of duplication may be readily identified and disposed of. Where successive petitions do not clearly replicate each other, further analysis may be required. The fact that a communication involves the same person as a previously presented petition is just one element of duplication. Regard must also be had to the nature of the claims presented and the facts adduced in support thereof. The presentation of new facts and/or sufficiently distinct claims about the same person could, under certain circumstances, and with other applicable requirements having been met, provide the basis for consideration.[FN4] It may also be noted that, where a second presentation of claims concerns rights which were not covered by the subject matter jurisdiction of the body before which a first petition was presented, the matter will not, in principle, be barred as duplicative.[FN5]

[FN4] See, e.g., Eur. Comm. H.R., App. 10785/84, Dec. of July 18, 1986, D&R 48/102; App. 12164/86, Dec. of Oct. 12, 1988, D&R 58/63; App. 24088/94, Dec. of Oct. 12, 1994, D&R 79/138.

[FN5] See, e.g., Eur. Comm. H.R., App. 24088/94, Dec. of 10.12.95, D&R 79/138 (dismissing claims presented in prior petition, but accepting that new claim arising in relation to those previously presented was not barred in principle where the legal arguments, guarantees concerned and facts were distinct [dismissed on other ground]).

43. While the Commission has had occasion to apply Articles 46(c) and 47(d) in its practice, it has not previously explained in detail what is meant by a matter which is "substantially the same," and finds it pertinent to clarify what is required in this regard under the terms of Article 47(d) of the Convention, and Article 39 of its Regulations. Having examined the jurisprudence of the European human rights system, as well as that of the UNHRC, and consistent with its own past practice, the Commission observes that a prohibited instance of duplication involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof. This essentially means that a petitioner cannot file a petition before the UNHRC complaining of the violation of a protected right or rights based on a factual predicate, and then

present a complaint before this Commission involving identical or integrally related rights and facts which were or could have been raised before the UNHRC.

44. To illustrate, in *Ajinaja v. the United Kingdom*, the applicant had alleged before the European Commission on Human Rights that he had been unlawfully arrested, convicted and detained in violation of Articles 3, 4 and 5 of the European Convention. Pursuant to the rejection of that petition as manifestly ill-founded, the petitioner submitted a second application alleging violations of his right of defense under Article 6. The European Commission determined that the second petition represented a reformulation of complaints which clearly could have been presented in the original petition.^[FN6] Both petitions concerned the right to basic due process guarantees and relied on the same factual basis. Similarly, in *V.O. v. Norway*, the applicant had complained unsuccessfully before the European Commission about alleged violations of his rights in domestic custody proceedings. He then petitioned the UNHRC on the same facts and violations, arguing that the emphasis of the European Commission's analysis had been misplaced, and that the construction of the rights concerned differed in some respects under the jurisdiction of the Committee. The UNHRC deemed the petition inadmissible based on the identity between the legal claims and facts presented before it with those previously presented before the European Commission.^[FN7]

[FN6] See, Eur. Comm. H.R., App. 13365/87, Dec. of Mar. 8, 1988, D&R 55/294.

[FN7] UNHRC, App. 168/1984, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, CCPR/C/OP/2, at p. 48 (involving construction of reservation under Article 5(2) of the Optional Protocol).

45. Claims brought regarding the same individual, but concerning facts and guarantees not previously presented, and which are not reformulations, do not raise issues with respect to res judicata, and will not in principle be barred by the prohibition of duplication of claims. Expressed in positive terms, newly presented claims not challenging the effect of a previous decision as res judicata would, assuming compliance with other requirements, be admissible. For example, where an applicant has brought allegations concerning his or her right to due process at trial and appeal before the UNHRC, and is then subjected to repeated beatings in prison at the hands of guards, he or she could elect to complain about the latter situation before the IACHR. The legal claims and guarantees concerned would be distinct from those pending before the UNHRC, as would the facts alleged in support thereof.

46. In the case of Mr. Lewis, while it is true that the petitioners have cast their claims under headings distinct from those involved in the communication presented before the UNHRC, it is also true that certain claims presented before the IACHR involve the same rights and guarantees, and the same factual predicate as were previously examined by the UNHRC. The claims before the IACHR concerning the moratorium on capital punishment, the mandatory nature of the death penalty in cases of capital murder and the procedures to apply for mercy involve due process guarantees and arise directly out of Mr. Lewis' prosecution and appeals. The UNHRC examined the facts concerning Mr. Lewis' trial and appeal in examining his case. Challenges on the specific grounds presently invoked by the petitioners could have been raised in domestic

proceedings, but apparently were not (raising questions concerning the exhaustion of domestic remedies), and could thereafter have been raised before the UNHRC with the other due process violations alleged in relation to the trial and appeal. As stated, where a petitioner has filed claims concerning a specific guarantee and factual basis before one international organization, the rules prohibit the admissibility of claims concerning those same guarantees and facts by this Commission.

47. With respect to the claims concerning the removal of Mr. Lewis to the condemned cell in September of 1997 and August of 1998, the Commission first notes that these events occurred after the UNHRC had issued its findings on Mr. Lewis' petition. These claims are legally and factually distinct from those raised before the UNHRC, and could not, in any case have been placed before that body prior to its decision. A similar line of analysis may be applied with respect to the claims concerning the alleged confiscation and destruction of Mr. Lewis' personal items by prison guards on March 5, 1997, as these facts and the corresponding legal claims were not presented for the consideration of the UNHRC. As the foregoing matters were not raised in form or substance before the UNHRC, there is no bar to their admissibility with respect to the principle of *res judicata*.

48. Nor were the remaining claims, concerning the Instructions of the Governor General and the question of access to judicial guarantees, raised in form or substance before the UNHRC. The Instructions were, in fact, issued subsequent to the decision of the UNHRC on Mr. Lewis' communication. The relevant aspects of the petitioners' claims in that regard concern his right to petition the IACHR, and the ability of the latter to complete its investigation of the claims deemed admissible. The Commission finds no bar to consideration of these claims under Articles 46(c) and 47(d) of the Convention.

49. Independently of the question of duplication, the Commission observes that the petitioners' submissions concerning the alleged refusal of the State to comply with the recommendations of the UNHRC and Article 10 of the Convention are inadmissible because they do not constitute a cognizable claim. Article 10 provides that a person "sentenced by a final judgment through a miscarriage of justice" is entitled to be compensated in accordance with the law. The record discloses no basis by which this Article could apply to the alleged failure of the State to implement the recommendations of the UNHRC. Accordingly, this claim and the related claim under Article 11 need be analyzed no further.

Timeliness

50. In accordance with Article 46(b) of the Convention, the admission of a petition is subject to the requirement that it be presented in a timely manner, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. Where no such judgment has been issued because it has not been possible to exhaust internal remedies, Article 38 of the Commission's Regulations establishes that the deadline for presentation shall be "within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case."

51. The claims raised concerning Mr. Lewis' due process guarantees under Article 8 and the other questions directly related to the death sentence issued against him have already been dismissed as duplicative of those previously examined by the UNHRC, and need be considered no further. None of the remaining claims have been the subject of a final judgment of the Jamaican courts. For the purposes of analysis, these claims may be dealt with in two parts, the first concerning situations the petitioners maintain are ongoing, and the second concerning what are alleged to have been specific events. The former consists of the allegations concerning the Governor General's Instructions, and the lack of access to judicial guarantees resulting from the absence of legal aid. In each instance, the petitioners claim that Mr. Lewis' rights under the Convention have been and continue to be violated. While denying the substance of the claims, the State has not questioned the timeliness of their presentation.

52. As noted, the six months rule applies to matters which have been the subject of a final decision, ensuring legal certainty and stability once a decision has been taken. The six-months rule does not apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis.[FN8] As the foregoing claims concern sets of norms and consequences, respectively, which continue to apply and unfold, their admissibility is not barred by the six-months rule.

[FN8 See, e.g., Eur. Comm. H.R. Apps. 7151/75, 7152/75, Dec. of Mar. 5, 1979, D&R 15/15 (distinguishing between cases in which the complaint is directed at a specific decision or event, and those concerning a continuing situation).

53. The second part of the analysis concerns, first, the allegations that Mr. Lewis' personal items were confiscated and destroyed by prison guards on March 5, 1997, and second, that the treatment accorded him when he was removed to the condemned cell for two specific periods of time constituted a form of torture. The State reported that it was investigating the former allegations, and categorically controverts the substance of the latter. It has not challenged the timeliness of presentation of any of the claims raised. Given the dates of the several incidents alleged, March of 1997, September of 1997 and August of 1998; the September 29, 1997 filing of the petition before the IACHR; the information and arguments on record; and the fact that the claims regarding the confiscation of Mr. Lewis' personal items reportedly remain under investigation by the State, the Commission considers this complaint to have been timely filed.

Exhaustion of Domestic Remedies

54. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [shall] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework.

55. The record with respect to this question continues to reflect the respective positions of the parties prior to the filing of the constitutional motion referred to above. The petitioners had argued that the remedy normally applicable to these claims, a constitutional motion, was

essentially unavailable to Mr. Lewis because, as an indigent person, he could not obtain legal counsel to assist him in vindicating the rights alleged to have been violated. The petitioners had contended that the failure of the Jamaican system to grant legal aid under these circumstances was not only a procedural impediment, but a substantive violation of the Convention, as Mr. Lewis was thus unable to access the judicial guarantees set forth in Article 8.

56. The State had maintained that an indigent applicant wishing to file a constitutional motion did not require legal aid. "Under the Convention, there is no obligation to grant legal aid to an accused to pursue a constitutional motion." The State had contended that Article 8(2) of the Convention "implies that provisions should be made for legal aid in criminal matters. Therefore the failure to grant legal aid for constitutional matters does not run afoul of the Convention."

57. When domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.[FN9] Article 46(2) of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment through domestic recourses. Consequently, when a petitioner alleges that he or she is unable to prove exhaustion, Article 37 of the Commission's Regulations establishes that the burden then shifts to the Government to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged.[FN10]

[FN9] See IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para. 17.

[FN10] See, IACtHR, *Velásquez Rodríguez Case*, Judgment of June 26, 1987, Ser. C No.1, at para. 88.

58. Article 46(2)(b) applies when remedies exist, but are either denied to the claimant or he or she is unable to invoke them. While Article 46(2)(b) does not directly address the question of legal aid for indigent claimants, the Inter-American Court has established that "if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies." [FN11] In deciding whether legal representation is required, regard must be had to the circumstances of the particular case--"its significance, its legal character, and its context in a particular legal system." [FN12] Whether the internal system of the country concerned provides for legal aid as a matter of domestic law is not dispositive; rather, the analysis turns on whether legal representation is necessary for the recourse to be exercised effectively.

[FN11] Advisory Opinion OC-11/90 *supra*, at para. 30.

[FN12] *Id.*, para. 28.

59. Accordingly, in prior cases involving issues related in part to those raised presently, the Commission has found that the absence of legal aid to file a constitutional motion may render that recourse essentially unavailable to an indigent applicant.[FN13] While, as a practical matter, an applicant acting alone could file a constitutional motion, a proceeding involving the interpretation and application of constitutional provisions may well involve sophisticated and/or complex questions of law.

[FN13] See *mutatis mutandis*, IACHR, Report 90/98, Case 11.843, *Mykoo v. Jamaica*. This is consistent with various holdings of the UNHRC on this question. See, e.g., Comm. No. 459/1991, *Wright and Harvey v. Jamaica* (views of 17 March 1994), Report of the UNHRC (1997), GAOR Off. Recs. 51st Sess. Supp. 40 (A/51/40), Vol. II, at p. 35, 38 para. 6.2; Comm. No. 445/1991, *Champagnie et al. v. Jamaica* (views of 18 July 1994), Report of the UNHRC (1994), GAOR Off. Recs. 49th Sess. Supp. 40 (A/49/40), Vol. II, at p. 136, 139 para. 5.2.

60. Because the absence of legal aid may impede the invocation of a constitutional remedy to the extent that it is essentially unavailable to an indigent applicant, resort to that recourse may not have been required as a condition for admitting the present case. However, in view of the fact that the remedy has been invoked, apparently through the assistance of pro bono legal counsel, its potential efficacy must be evaluated.[FN14] In this regard, the Commission observes that it has no information on the record to show that this remedy is incapable of producing the results for which it was designed with respect to the two sets of claims identified above. Given that the barrier to exhaustion complained of has been surmounted; that these claims have not been raised before the Jamaican judiciary previously; and that there are no indicia of undue delay or other grounds for excuse on the record, the Commission concludes that it cannot admit the present case while the constitutional motion remains pending.

[FN14] See generally, IACtHR, *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Ser. C No. 4, at paras. 64-68 (defining what constitutes an adequate domestic remedy).

V. CONCLUSIONS

61. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the American Convention and the applicable provisions of its Regulations, the Commission concludes that it is unable to continue with the processing of this case at the present time. The claims concerning Articles 8 and 4 which relate to due process guarantees and the application of the death penalty in the case of Mr. Lewis are inadmissible due to the prohibition of duplication set forth in Article 47(d) of the Convention.

62. The remaining claims concern Articles 5, 8, 21 and 24, and relate to the alleged confiscation of Mr. Lewis' personal items, his removal to the condemned cell in September of 1997 and August of 1998, the Instructions of the Governor General insofar as they relate to the

question of the right of petition, and the question of access to judicial guarantees. While these claims are not barred by the prohibition of duplication or the requirement of timely presentation, they may not be admitted at this time because of the pendency of the constitutional motion filed on Mr. Lewis' behalf. The finding with respect to these claims is made without prejudice, and the Commission observes that, if the petitioners continue to believe that the relevant facts constitute a violation once the constitutional recourse has been decided, they may resubmit their claims.

63. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare inadmissible the claims presented on behalf of Mr. Lewis with respect to Articles 8 and 4, concerning his right to due process and the application of the death penalty, on the basis that they essentially duplicate matters considered by the UNHRC. The other claims, which relate to Articles 5, 8, 21 and 24, are inadmissible at this time due to the pendency of the constitutional motion filed on behalf of Mr. Lewis.
2. To transmit this report to the State of Jamaica and the petitioners.
3. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C., on the 17th day of the month of December in the year 1998. (Signed): Carlos Ayala Corao, Chairman; Robert K. Goldman, First Vice Chairman; Jean Joseph Exume, Second Vice Chairman; Commissioners Alvaro Tirado Mejia, Claudio Grossman and Henry Forde.