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Decided by: Chairman: Helio Bicudo;
First Vice-Chairman: Claudio Grossman;
Second Vice-Chairman: Juan Mendez;
Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo
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I. SUMMARY

1. This Report concerns five capital punishment petitions brought against the State of Jamaica (hereinafter "the State" or "Jamaica") and pertain to alleged violations of one or more of Articles 1, 4, 5, 7, 8, 24 and 25 of the American Convention on Human Rights (hereinafter "the Convention"). The petitions were presented to the Inter-American Commission on Human Rights (hereinafter "the Commission") on behalf of six condemned men on death row, at St. Catherine District Prison, Jamaica (hereinafter "the victims"), by four firms of Solicitors in London, United Kingdom (hereinafter "the Petitioners"). This report addresses the issues of the admissibility of the petitions, pursuant to Articles 46 and 47 of the American Convention, as well as the merits of each case.

2. The names of the Petitioners and victims in each of the five cases, the dates on which the Commission opened files in respect of each complaint, and the provisions of the American Convention alleged to have been violated in respect of the six victims in each of the five cases, are as follows:

Table 1

Case No.	Petitioners	Victim(s)	Date Petition Received	Date Case Opened	Violations alleged:
12.023	Eversheds	Desmond McKenzie	29/06/98	30/06/98	1, 4, 5, 7, 8, 24, 25
12.044	Simons Muirhead & Burton	Andrew Downer Alphonso Tracey	07/08/98	24/08/98	1, 2, 4, 5, 7, 8, 24, 25
12.107	Allen & Overy	Carl Baker	17/02/99	19/02/99	1, 4, 5, 8, 12, 24, 25
12.126	Cameron McKenna	Dwight Fletcher	11/03/99	29/03/99	4, 5, 7, 8, 24, 25
12.146	Simons Muirhead & Burton	Anthony Rose	30/04/99	11/05/99	4, 5, 24, 25

3. The State's principal legislation governing the punishment for the crime of murder is the Offences Against the Person Act, 1864, as amended by the Offences Against the Person (Amendment) Act 1992 (hereinafter referred to as "the Act"). The Act distinguishes between categories of "capital" and "non-capital" murder.[FN1] In addition, sections 3(1) and 3(1A) of the Act prescribe the death penalty as the only punishment for persons convicted of capital murder,[FN2] and for persons convicted on the same or a different occasion of more than one non-capital murder, referred to in this Report as "multiple non-capital murder".[FN3]

 [FN1] Section 2(1) of the Act defines "capital murder" as including murder committed against certain persons by virtue of their employment, position or status, for example law enforcement officials and judicial officers. It also includes murder committed in the course or furtherance of certain other crimes, including robbery, burglary, housebreaking, and arson in relation to a dwelling house. Section 2(3) defines non-capital murder as murder not falling within section 2(1) of the Act. The text of these provisions is set out in Part IV.C.1.a of this Report.

[FN2] Section 3(1) of the Act provides that "[e]very person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A), shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners. Where by virtue of this section a person is sentenced to death, the form of the sentence shall be to the effect only that he is to 'suffer death in the manner authorized by law.'"

[FN3] Section 3(1A) of the Act provides that, "a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has (a) whether before or after the 14th October, 1992, been convicted in Jamaica of another murder done on a different occasion; or (b) been convicted of another murder done on the same occasion."

4. The victims in these cases were tried, convicted and sentenced to death by hanging for capital murder, pursuant to Article 3(1) of the Act, or for multiple non-capital murder, pursuant to Article 3(1A) of the Act. In Case 12.023 (Desmond McKenzie) the victim was convicted of

capital murder in the furtherance of burglary and terrorism. In Case 12.044 (Andrew Downer and Alphonso Tracey), the victims were convicted of capital murder in the course or furtherance of terrorism and robbery.[FN4] In Case Nos. 12.107 (Carl Baker)[FN5] and 12.126 (Dwight Fletcher),[FN6] the victims were each convicted of three counts of non-capital murder. Finally, in Case 12.146 (Anthony Rose), the victim was convicted of capital murder in the course or furtherance of arson. Each of the victims in these cases appealed to the Court of Appeal in Jamaica and their appeals were dismissed. Subsequently, each victim filed a petition for Special Leave to Appeal to the Judicial Committee of the Privy Council, which dismissed their petitions.

[FN4] In Case 12.044 (Andrew Downer and Alphonso Tracey), the victims were originally charged with murder in the course or furtherance of an act of terrorism. The charge was amended during trial to add the charge of murder in the course or furtherance of robbery.

[FN5] In Case 12.107 (Carl Baker), the jury originally found the victim guilty on three counts of non-capital murder and he was sentenced to life in prison. The judge subsequently re-sentenced him on the same day to the death penalty, in accordance with the provisions of the Offences Against the Person Act.

[FN6] In Case 12.126 (Dwight Fletcher), the victim was originally convicted on three counts of capital murder and sentenced to death. On appeal, however, he was found guilty on three counts of non-capital murder. His death sentence was nevertheless sustained, in accordance with sections 3B3 and 3(1A) of the Offences Against the Person Act. Section 3(1A) of the Act provides that a conviction of non-capital murder with another murder results in a sentence of death. Section 3B3 of the Act provides that in the case of an appeal of capital murder which results in a conviction of more than one non-capital murder the court will determine whether the death sentence is warranted.

5. The petitioners in these cases allege that the State violated the victims' rights under the American Convention on one or more of the following grounds, particulars of which are provided in Part III.A of this Report:

- a. violations of Articles 4(1), 4(2), 4(3), 4(6), 5, 8, 24 and 25 of the Convention, relating to the mandatory nature of the death penalty for the crime of capital and multiple non-capital murder in Jamaica and the process for granting amnesty, pardon or commutation of sentence in Jamaica;
- b. violations of Articles 5, 7(4), 7(5), 7(6) and 8 of the Convention, relating to delays in the victims' criminal proceedings;
- c. violations of Articles 4 and 5 of the Convention, relating to the victims' conditions of detention and the method of execution in Jamaica;
- d. violations of Articles 4, 8(1) and 8(2) of the Convention, relating to the adequacy of time and facilities for preparing the victims' legal defenses, the adequacy of their legal representation, and the manner in which their criminal proceedings were conducted;
- e. violations of Articles 2, 8, 24 and 25 of the Convention, relating to the unavailability of legal aid for Constitutional Motions in Jamaica;
- f. violations of Articles 4(1), 4(6), 5(2) and 25 of the Convention, relating to the validity of Jamaica's Governor General Instructions;

- g. violation of Article 12 of the Convention, relating to freedom of conscience and religion;
- h. violations of Article 1(1) of the Convention with regard to the above mentioned violations.

6. As a procedural matter, the Commission decided to consolidate these five cases for the purposes of this Report pursuant to Article 40(2) of the Commission's Regulations, on the basis that the cases involve similar facts and substantially the same issues under the Convention.

7. The Commission had not previously made admissibility determinations pursuant to Articles 46 and 47 of the Convention in respect of any of the cases currently before it. After having considered the matters, the Commission decided to declare admissible the claims presented on behalf of the victims in their entirety in four cases: 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose). With respect to Case 12.107 (Carl Baker), the Commission decided to declare admissible the claims presented on behalf of the victim, with the exception of the violations of Articles 12(1) and 12(2) of the Convention alleged on behalf of the victim, which the Commission declared inadmissible pursuant to Article 47(b) of the Convention.

8. In addition, upon consideration of the merits of the five cases that are the subject of this Report, the Commission reached the following conclusions:

a. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 4(1), 5(1), 5(2) and 8(1), in conjunction with violations of Article 1(1) of the American Convention, by sentencing these victims to a mandatory death penalty.

b. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Article 4(6) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to provide these victims with an effective right to apply for amnesty, pardon or commutation of sentence.

c. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher) under Articles 7(5) and 8(1) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the delays in trying the victims.

d. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Dwight Fletcher) under Article 7(5) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to bring the victims promptly before a judge following their arrests;

e. The State is responsible for violating the rights of the victims in Case. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 5(1) and 5(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of these victims' conditions of detention.

f. The State is responsible for violating the rights of the victim in Case 12.126 (Dwight Fletcher) under Article 5(4) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by detaining the victim with convicted persons prior to his trial and conviction.

g. The State is responsible for violating the rights of the victim in Case 12.023 (Desmond McKenzie) under Article 5(6) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by depriving the victim of opportunities for reform and social readaptation.

h. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher) under Articles 8(2)(d) and 8(2)(e) in conjunction with violations of Article 1(1) of the Convention, by denying the victims legal counsel during various stages of their criminal proceedings.

i. The State is responsible for violating the rights of the victims in Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 8 and 25 of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to make legal aid available to these victims to pursue Constitutional Motions.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petitions and observations

9. The Commission opened the cases that are the subject of this Report on various dates between June of 1998 and May 1999, as set out in the previous Table 1, and transmitted the pertinent parts of the petitions to the State, with responses requested within 90 days. The materials filed in support of certain of the petitions included: transcripts from the victims' criminal proceedings before the Courts in Jamaica; judgments of the Jamaican Court of Appeal dismissing the victims' appeals from their convictions; petitions filed by the victims for Special Leave to Appeal to the Judicial Committee of the Privy Council; affidavits and questionnaires prepared by certain victims concerning the conditions of their detention and the circumstances of their criminal proceedings; and reports from various governmental and non-governmental organizations concerning prison conditions in Jamaica. The supporting materials pertaining to particular allegations raised by each victim are identified and discussed in the substance of this Report.

10. The particulars of the initial processing of each of the cases are set out in Table 2 below:

Table 2

Case No.	Date Pertinent Parts of Petition Sent to State	Date State's Response Received/ Transmitted to Petitioners	Date Petitioners' Observations Received/ Transmitted to State	Date State's Reply Received/ Transmitted to Petitioners	Date Petitioners' Observations Received/ Transmitted to State
12.023	30/6/98	30/7/98,3/8/98	4/9/98,15/9/98	30/9/98,14/10/98	22/10/98,24/11/98
12.044	24/8/98	23/9/98,16/11/98	23/12/98,4/1/99	4/2/99,19/2/99	19/3/99,30/3/99
12.107	19/2/99	18/3/99,30/3/99	29/4/99,11/5/99	3/6/99,24/6/99	14/7/99,18/8/99
12.126	29/3/99	3/5/99,7/5/99	21/6/99,24/6/99	16/7/99,19/7/99	13/8/99,18/8/99
12.146	11/5/99	10/6/99,24/6/99	3/8/99,18/8/99	15/9/99,24/9/99	-

11. As the above Table 2 indicates, the Commission received responses to the original petitions from the State in each of the five Cases. The pertinent parts of the State's responses were transmitted to the Petitioners, with observations and responses requested within 30 days. In all of the cases, the Petitioners delivered observations on the State's responses, the pertinent parts of which the Commission subsequently transmitted to the State, with responses requested within 30 days. In each of the five cases, the State delivered replies to the Petitioners' observations, the pertinent parts of which were transmitted to the Petitioners, with a response requested within 30 days.

12. Furthermore, in four of the five cases, Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker) and 12.126 (Dwight Fletcher), the Petitioners delivered "supplementary" written submissions to the Commission, which the Commission subsequently transmitted to the State with a response requested within a period of 30 days. In each of these cases, Case Nos. 12.023 (Desmond McKenzie), [FN7] 12.044 (Andrew Downer and Alphonso Tracey), [FN8] 12.107 (Carl Baker) [FN9] and 12.126 (Dwight Fletcher), [FN10] the State delivered a response to each of the "supplementary" written submissions, and those responses were transmitted to the Petitioners. The Commission received several additional observations and responses from both parties in the four cases mentioned above, each of which were transmitted to the opposing party with a response requested within a specified period. This included a communication from the State dated November 18, 1999 in Case 12.107 (Carl Baker), in which the State provided the Commission with the results of its investigation into alleged violations of Articles 5(1) and 5(2) of the Convention contained in the Petitioners' supplemental submission dated July 14, 1999.

[FN7] In Case 12.023 (Desmond McKenzie), the Commission received a response from the State on November 2, 1998, the pertinent parts of which were transmitted to the Petitioners on November 24, 1998, for a response within 30 days. The petitioners submitted a response on December 14, 1998, the pertinent parts of which were transmitted to the State on January 5, 1999, for a response within 30 days. The Commission received observations from the State on December 22, 1998, the pertinent parts of which were transmitted to the Petitioners on January 5, 1999, for a response within 30 days. The Commission continued to receive subsequent correspondence from both parties, the pertinent parts of which were transmitted for a response within a specified period.

[FN8] In Case 12.044 (Andrew Downer and Alphonso Tracey), the Commission received a response from the State on May 3, 1999, the pertinent parts of which were transmitted to the Petitioners on May 7, 1999, for a response within 30 days. The State submitted additional information to the Commission on June 14, 1999, the pertinent parts of which were transmitted to the Petitioners on July 1, 1999, for a response within 30 days. The petitioners submitted a response to the Commission on July 5, 1999, concerning the State's June communication, the pertinent parts of which were transmitted to the State on July 21, 1999, for a response within 30 days. The petitioners also submitted a response to the Commission on August 5, 1999, concerning the State's July communication, the pertinent parts of which were transmitted to the State on August 18, 1999, for a response within 30 days. The Commission received a response from the State on August 27, 1999, the pertinent parts of which were transmitted to the Petitioner for their information on September 3, 1999.

[FN9] In Case 12.107 (Carl Baker), the Commission received a response from the State on September 15, 1999, the pertinent parts of which were transmitted to the Petitioners on September 24, 1999.

[FN10] In Case Dwight Fletcher (12.126), the Commission received a response from the State on September 15, 1999, the pertinent parts of which were transmitted to the Petitioners on September 24, 1999.

13. During its 102nd Period of Sessions at its Headquarters in Washington, D.C., the Commission scheduled an oral hearing on March 1, 1999, in Case 12.023 (Desmond McKenzie). The victim's representatives attended the hearing and made submissions to the Commission. The State did not attend the hearing, but rather informed the Commission by letter dated February 19, 1999, that the State would not participate because it was "of the view that there are no outstanding issues that would necessitate the scheduling of such hearings."

B. Precautionary Measures

14. Contemporaneously with the transmission of the pertinent parts of the petitions in each of the five cases, Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose), the Commission requested pursuant to Article 29(2) of its Regulations that the State stay the execution of the victims pending investigation by the Commission of the alleged facts.

C. Friendly Settlement

15. By communications dated September 20, 1999 to the Petitioners and to the State, the Commission placed itself at the disposal of the parties in these five cases, with a view to reaching friendly settlements pursuant to Article 48(1)(f) of the Convention on the basis of respect for the human rights recognized therein. The Commission also requested that the parties provide the Commission with a response to the Commission's offers within 7 days of receipt of the communication, in default of which the Commission would continue with consideration of these matters.

16. In a communication dated September 24, 1999, the State informed the Commission that it had begun the process of consultation concerning the possibility of friendly settlement regarding each of the five cases, and that the Commission would be advised of its response within a week.

17. In a letter dated September 24, 1999, the Petitioners in Case Nos. 12.044 (Andrew Downer and Alphonso Tracey) and 12.146 (Anthony Rose) informed the Commission as follows:

For the reason set out in the written petition and further submissions transmitted to the Commission, the Applicants would ask the Commission to recommend that their sentences of death be commuted forthwith, so that they can be removed from the death row regime in the prison.

On the basis of respect for the human rights recognized in the [Convention], and the allegation that the Applicants' executions would now violate Articles 4, 5, 8 and 24 of the [Convention], the commutation of Messrs. Downer, Tracey and Rose's sentences of death is the only appropriate way of reaching a friendly settlement in this matter.

Should the State Party undertake to commute the Applicants' sentences of death, the Applicant would consider that a friendly settlement pursuant to Article 48(1)(f) of the Convention has been reached.

18. Additionally, in a letter dated September 27, 1999, the Petitioners in Case 12.126 (Dwight Fletcher) indicated that they welcomed the Commission's offer to hold a friendly settlement meeting, and looked forward to receiving details of the proposed meeting.

19. By communication dated September 28, 1999, the Commission transmitted the pertinent parts of the Petitioners' responses in these cases to the State, with a response requested within 7 days.

20. By letter dated October 7, 1999, the State informed the Commission that the Petitioners' responses to the Commission's friendly settlement offers in two of the cases "make it clear that there is no common ground for the success of a friendly settlements [sic] procedure." Accordingly, the State indicated that it looked forward to an "early conclusion of [the Commission's] deliberations on these five (5) cases, in accordance with Article 50 of the Inter-American Convention on Human Rights".

D. Jamaican Governor General's instructions

21. The Commission wishes to note that in each of the cases that are the subject of this Report, the Petitioners allege violations of Articles 4, 5 and 25 of the Convention and the Commission's Regulations in relation to the "Instructions for dealing with applications from or on behalf of prisoners under sentence of death to the United Nations Human Rights Committee or the Inter-American Commission on Human Rights", issued by Jamaica's Governor General (hereinafter referred to as the "Governor General's Instructions").^[FN11] The Governor General's Instructions designated limits on the time period during which a prisoner was permitted to petition the Inter-American Commission on Human Rights and the United Nations Human

Rights Committee.[FN12] The Instructions also placed time limits on when the Governor General was required to receive the prisoner's petition and a request for stay of execution.[FN13]Additionally, the Governor General's Instructions purported to prescribe a period of six months for the Commission and the Committee to investigate and rule on the prisoner's petition, and for the Governor General to advise the Jamaican Privy Council on the outcome of the petition.[FN14]

[FN11] Instructions for dealing with applications from or on behalf of prisoners under sentence of death to the United Nations Human Rights Committee or the Inter-American Commission on Human Rights where the Judicial Committee of the Privy Council has refused a petition or dismissed an appeal from or on behalf of such prisoner or a petition or an appeal from or on behalf of such a prisoner to the Judicial Committee of the Privy Council has been abandoned or withdrawn, Jamaican Gazette (Extraordinary), Vol. CXX, N° 84 (7 August 1997) (hereinafter the "Governor General's Instructions").

[FN12] Governor General's Instructions, Section 1 (defining "International Human Rights bodies" for the purposes of the Instructions as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights).

[FN13] Governor General's Instructions, Sections 2, 3.

[FN14] Under Sections 4 to 10 of the Governor General's Instructions, prisoners were permitted to petition both International Human Rights Bodies, and each body was limited to six months during which it was required to advise the Governor General of the outcome of the prisoner's petition.

22. On July 5, 1999, several Petitioners informed the Commission that the Jamaican Court of Appeal had issued a decision on June 15, 1999, with respect to the lawfulness of Jamaica's Governor General's Instructions.[FN15]In *Neville Lewis v. Attorney General for Jamaica et al.* (hereinafter referred to as "Neville Lewis"), the Jamaican Court of Appeal determined that the Governor General's Instructions were unlawful as a matter of Jamaica's domestic law.On page 11 of its decision the Court of Appeal declared that:

[FN15] This information was provided for in the Petitioner's communication to the Commission concerning Case 12.044 (Andrew Downer and Alphonso Tracey) dated July 5, 1999.Subsequently, the Commission received a similar communication from petitioners in Case 12.146 (Anthony Rose), dated August 3, 1999, and from petitioners in Case 12.126 (Dwight Fletcher), dated August 13, 1999.

...even though the recommendations of the [Inter-American] Commission are not binding on the Governor General in the exercise of the Prerogative of Mercy, given the terms of the treaty which the government ratified, the Privy Council ought to await the result of the petition, so as to be able to give it consideration in determining whether to exercise the Prerogative of Mercy.

Subsequently, on page 18 of its decision, the Court of Appeal found that "...to issue Instructions calling upon the [Inter-American] Commission to complete its process in 6 months or about 180 days, is in my view disproportionate, and consequently unlawful."

23. In its submission to the Commission concerning Case 12.044 (Andrew Downer and Alfonso Tracey), the State acknowledged the Court of Appeal's decision in Neville Lewis and indicated that:

the law in Jamaica is that the 1997 Governor General's Instructions are unlawful. The applicants therefore, could not be executed pursuant to those Instructions, unless the Instructions were amended or if the Privy Council were to overrule the Lewis decision.[FN16]

[FN16] The Government's submission to the Commission dated August 27, 1999 in Case 12.044 (Andrew Downer and Alphonso Tracey). In its most recent submissions to the Commission dated September 15, 1999 in Case 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose), the State indicated that steps were being taken to amend the Instructions so as to bring them in conformity with the Neville Lewis' decision. The Commission has not, however, been informed as to when any such amendments may be adopted or what effect, if any, such amended Instructions might be purported to have on the cases currently before the Commission.

24. As the Instructions in their current form do not have any legal effect in Jamaica, and as they do not affect the cases currently under consideration by the Commission, the Commission does not consider it necessary to address the submissions of the Petitioners or the State concerning the validity of the Instructions under the Convention and the Commission's Regulations.

III. POSITIONS OF THE PARTIES

A. Positions of the petitioners

1. Background to the cases

25. The following Table 3 summarizes the domestic criminal proceedings of the victims in the five cases before the Commission:

Table 3

Case No.	Victim(s)	Date of arrest	Date of Conviction	Date Court of Appeal of Jamaica Dismissed Appeal	Date Judicial Committee of the Privy Council Dismissed Appeal
12.023	Desmond McKenzie	19/10/93	Trial 22/04/95 to 04/05/95 Retrial 13/03/96 to 02/04/96 [FN17]	13/10/97	25/06/98
12.044	Andrew Downer Alphonso Tracey	Downer 30/4/91 Tracey 04/05/91	21/12/94	27/05/96	20/07/98
12.107	Carl Baker	11/08/95	27/11/96	26/02/98	20/01/99
12.126	Dwight Fletcher	21/11/93	21/08/96 [FN18]	08/05/98 [FN19]	21/01/99
12.146	Anthony Rose	20/01/97	25/07/97	31/07/98	14/04/99

[FN17] In Case 12.023, Mr. McKenzie was tried from April 22, 1995 to May 4, 1995, however, the jury was unable to reach a majority decision. A retrial was held beginning March 13, 1996, in which Mr. McKenzie was convicted and sentenced to death on April 2, 1996.

[FN18] In Case 12.126, Mr. Fletcher was convicted at his second trial, as the jury was unable to reach a verdict during his first trial in May of 1995.

[FN19] In Case 12.126, Mr. Fletcher was convicted of three counts of capital murder and sentenced to death. On appeal, Mr. Fletcher was found guilty on three counts of non-capital murder, but his death sentence was maintained in accordance with Article 3B(3) of the Act.

26. The pertinent background facts of these five cases, together with the categories of violations of the Convention raised in each case, are outlined below.

Desmond McKenzie (Case 12.023)

27. Desmond McKenzie was arrested and charged with the murder of the deceased, Fitzroy Dawson, on October 19, 1993. Mr. McKenzie was originally tried from April 22, 1995 to May 4, 1995, however, the jury was unable to reach a majority decision. A re-trial was held beginning March 13, 1996, and on April 2, 1996, Mr. McKenzie was convicted of capital murder in the furtherance of burglary and terrorism and sentenced to death. Mr. McKenzie subsequently appealed his conviction to the Court of Appeal, and his appeal was dismissed on October 13, 1997. He then petitioned the Judicial Committee of the Privy Council, and the Privy Council dismissed his petition on June 25, 1998.

28. The prosecution alleged that Mr. McKenzie was responsible for breaking and entering into the home of the deceased, Fitzroy Dawson, and his wife, Levina Miller, and causing the deceased's death during the evening of October 18, 1993. Mr. McKenzie was alleged to have visited the home of Ms. Miller and the deceased on the day of the murder, where Mr. McKenzie and the deceased argued and the deceased insulted Mr. McKenzie. Mr. McKenzie left, but returned to the home later the same evening, broke into the house, and shot the deceased. He then threw the deceased's body into the river.

29. In his defense, Mr. McKenzie claimed that he was driving home on the evening of the offense when a woman with a baby waved him down. When he stopped, two men ran out of a house, one with a bottle and the other with a machete. The victim was hit with the bottle, fired two shots in self defense, and one of the men stumbled into the river. During his re-trial, Mr. McKenzie gave evidence concerning his good character. He testified that he owned a supermarket and managed a clothing business, his father's farm and a warehouse business. He also claimed to have promoted community youth projects, assisted the elderly and local schools, and had standing as a local politician. The victim had no previous criminal record. A teacher, who was also a justice of the peace, was present at the re-trial to give character evidence on the victim's behalf.

30. The violations of the Convention alleged on behalf of Mr. McKenzie can be categorized as follows: 1) violations of Articles 4(3), 4(6), 5(1) and 24 relating to the mandatory nature of the death penalty under the Offences Against the Person Act and the process for granting of amnesty, pardon or commutation of sentence in Jamaica; 2) violations of Articles 4 and 5 relating to the victim's conditions of detention and his time in detention; 3) violations of Articles 7(5) and 7(6) relating to delays in the victim's criminal proceedings; 4) violations of Articles 8(1) and 8(2) relating to the trial judge's lack of impartiality and the inadequacy of the victim's legal representation; and 5) violation of Article 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

Andrew Downer and Alphonso Tracey (Case 12.044)

31. Mr. Downer and Mr. Tracey were charged with the March 4, 1991 murder of Kenneth McNeil. Mr. Downer was arrested on April 30, 1991, and Mr. Tracey was arrested May 4, 1991. Their joint trial commenced December 14, 1994, and they were convicted of murder in the course or furtherance of terrorism and robbery on December 21, 1994, and sentenced to death. The victims subsequently appealed their convictions to the Court of Appeal of Jamaica, and their appeals were dismissed on May 27, 1996. The victims then petitioned the Judicial Committee of the Privy Council on October 18, 1996. The victims were granted leave to appeal, however, the Privy Council dismissed their appeals on July 20, 1998.

32. The prosecution alleged that on March 4, 1991, the deceased, Kenneth McNeil, was working as a security guard with his co-worker Christian Riley. Mr. McNeil and Mr. Riley were collecting computer papers from bank safe deposit boxes when they noticed a car with four men pull alongside their van. The men in the car began to shoot at Mr. McNeil and Mr. Riley. Mr. McNeil and Mr. Riley returned fire, and Mr. Riley was shot in the shoulder. Mr. Riley then ran for cover and was shot twice in the back. Looking back from where he was lying, Mr. Riley saw

two men exiting the car, approach Mr. McNeil and "sandwich" him on the sidewalk. Mr. Riley saw one man point a gun at Mr. McNeil and heard shots, and then heard the car drive off. Mr. Riley was not certain whether one or both of the men shot Mr. McNeil. Three months after the incident, Mr. Riley identified the victims in an identification parade as the two men he saw exiting the car. Mr. Riley was the prosecution's principal witness at the victims' trial.

33. In their defense, the victims made unsworn statements from the dock. Mr. Tracey alleged that he was at a hotel on the night of the murder. He also alleged that his identification at the identification parade in June 1991 was unfair and that he was innocent. Mr. Downer alleged he was held up by a gunman and shot during an attempted robbery on the night of the murder. He denied any involvement in the crime.

34. The violations of the Convention alleged on behalf of Mr. Downer and Mr. Tracey can be categorized as follows: 1) violations of Articles 4(2) and 4(6) relating to the mandatory nature of the death penalty under the Offences Against the Person Act and the process for granting amnesty, pardon or commutation of sentence in Jamaica; 2) violations of Article 5 relating to the victims' conditions of detention; 3) violations of Articles 7(5) and 8(1) relating to the failure to bring the victims promptly before a judge and to try the victims within a reasonable time; 4) violations of Articles 4(1) and 8 relating to the fairness of the victims' trial; and 5) violations of Articles 2 and 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

Carl Baker (Case 12.107)

35. Mr. Baker was charged with the August 1995 murder of his wife, Ena, their 2 1/2-year-old daughter Lacy, and their 1-year-old daughter Renee. Mr. Baker was arrested on August 11, 1995. Mr. Baker's trial commenced on November 25, 1996, and he was convicted of three counts of non-capital murder on November 27, 1996 and sentenced to death. Mr. Baker subsequently appealed his conviction to the Jamaican Court of Appeal, and his appeal was dismissed on February 26, 1998. Mr. Baker then petitioned for Special Leave to Appeal to the Judicial Committee of the Privy Council, and the Privy Council dismissed his petition on January 20, 1999.

36. On the morning of August 10, 1995, Mr. Baker's home was discovered burned to the ground with the deceased members of his family inside. The prosecution alleged that Mr. Baker hit his wife with an axe and left her unconscious. They also alleged that a fire started in the house, and that the victim left his home without trying to save his family from the fire. An axe traced with blood was found between the house and the family's chicken coop, and the victim's belongings, including a television and gas burner, were found inside of the chicken coop. The prosecution claimed that Mr. Baker could have attempted to save his family, for example by shouting to neighbors for help or by using water from containers close to their house to extinguish the fire. Instead, according to the prosecution the victim ran to the home of his friend, Edward Morgan, who lived a mile from Mr. Baker's home. Mr. Baker also gave Mr. Morgan an attaché containing some of his belongings. The prosecution argued that this evidence was consistent with the victim having deliberately set fire to his house with the intent to kill all inside.

37. In a cautioned statement and at trial, Mr. Baker maintained that he had several quarrels with his wife on the night of the fire, which culminated in his wife stabbing him in the hand twice with a screwdriver. The victim claims to have then grabbed an axe from under the table and hit his wife on the head in self defense. He also claimed that as he brought the axe down he knocked the kerosene lamp off the table, which set the house on fire. He became frightened, climbed out of the window, and ran to Edward Morgan's home, after which he reported the incident to the police. He also stated that he had removed his belongings from the house because he intended to leave his family, and that he had left his attaché with Mr. Morgan on his way home from church the previous Sunday. He maintained that the fire was not deliberate, and that he loved his family.

38. The violations of the Convention alleged on behalf of Mr. Baker can be categorized as follows: 1) violations of Articles 4(1), 4(3), 4(6), 5, and 24 relating to the mandatory nature of the death penalty under the Offences Against the Person Act and the process for granting amnesty, pardon or commutation of sentence in Jamaica; 2) violations of Articles 4 and 5 relating to the victim's conditions of detention; 3) violations of Articles 5, 8(1) and 8(2) relating to the fairness of the victim's trial and the inadequate time and means for preparing the victim's defense; 4) a violation of Article 12 with regard to freedom of conscience and religion; 5) violations of Articles 8 and 25(1) relating to the absence of legal aid for Constitutional Motions in Jamaica; and 6) a violation of Article 1(1) relating to the above violations of the American Convention.

Dwight Fletcher (Case 12.126)

39. Mr. Fletcher was charged together with his co-defendants Whyett Gordon and Edwy Watson (now deceased) with the October 23, 1993 murders of Rajhni Williams, Georgia Shaw and Racquel Fearon. He was arrested on November 21, 1993 and was tried in August of 1996. On August 21, 1996 he was convicted on three counts of capital murder and sentenced to death. Mr. Fletcher subsequently appealed his conviction to the Jamaican Court of Appeal on May 8, 1998, where he was found guilty on three counts of non-capital murder, and his death sentence was maintained in accordance with 3(1A) and 3B(3) of the Offences Against the Person Act. Mr. Fletcher then petitioned the Judicial Committee of the Privy Council on October 9, 1998, and the Privy Council dismissed his petition on January 21, 1999.

40. The prosecution alleged that Mr. Fletcher and his co-defendants abducted the deceased Rajhni Williams, Georgia Shaw and Racquel Fearon from an open air dance on October 23, 1993. Mr. Fletcher drove the car that was used to commit the crimes. Following the abduction, Mr. Watson shot and killed Mr. Williams. Mr. Gordon then sexually assaulted Miss Fearon, and both women were then shot and killed. In a statement under caution Mr. Gordon said the shooting was carried out by Mr. Watson. The prosecution contended that Mr. Fletcher was part of a common criminal enterprise leading to the deaths of three people.

41. The violations of the Convention alleged on behalf of Mr. Fletcher can be categorized as follows: 1) violations of Articles 4(1), 4(6), 5(2) and 24 relating to the mandatory nature of the death penalty under the Offences Against the Person Act; 2) violations of Articles 4, 5(1), 5(2) and 5(4) relating to the victim's conditions of detention; 3) violations of Articles 7(4), 7(5), and

8(1) relating to the failure to bring the victim promptly before a judge and to try him within a reasonable time; 4) violations of Articles 8(1) and 8(2) relating to inadequate legal representation and inadequate time and facilities for preparing the victim's defense; and 5) a violation of Article 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

Anthony Rose (Case 12.146)

42. Mr. Rose was charged with the murder of Danisha Williams in the course or furtherance of arson of a dwelling house in June of 1996. The arson occurred on June 5, 1996 and Ms. Williams died on June 8, 1996. Mr. Rose was arrested on January 20, 1997. His trial commenced on July 21, 1997, and on July 25, 1997 he was convicted of murder in the course or furtherance of arson and sentenced to death. Mr. Rose subsequently appealed his conviction to the Jamaican Court of Appeal, and his appeal was dismissed on July 31, 1998. Mr. Rose then petitioned the Judicial Committee of the Privy Council for Special Leave to Appeal on February 15, 1999, and the Privy Council dismissed his petition on April 14, 1999.

43. The deceased Danisha Williams was the daughter of Mr. Rose's maternal step-brother. The prosecution alleged that on June 5, 1996, Mr. Rose and his step-brother argued while trying to defend their mother from her husband. During the dispute, Mr. Rose drew a knife and his step-brother drew a machete, following which they went their respective ways. Later the same evening, the victim set his step-brother's home on fire. Two witnesses claimed to have seen Mr. Rose running away from his step-brother's home at the time of the fire. The deceased was asleep in the home prior to the fire, and she could not be rescued in time to save her from the fire.

44. The victim's defense at trial was alibi. He claimed that he was at home on the evening of the fire. He also relied upon the evidence of one witness, Livina James, who was present at the scene and claimed that she did not see any one running from the house at the time of the fire. In addition, the victim maintained that he did not own the clothes that the witnesses claim were worn by the person seen running from the scene.

45. The violations of the Convention alleged on behalf of Mr. Rose can be categorized as follows: 1) violations of Articles 4(1), 4(2), 4(6) and 5(2) relating to the mandatory nature of the death penalty under the Offences Against the Person Act and the process for granting amnesty, pardon or commutation of sentence in Jamaica; 2) violations of Articles 5(1) and 5(2) relating to the victim's treatment and conditions during detention and the method of execution in Jamaica; 3) violations of Articles 4(2), 8(2)(c) and 8(2)(e) relating to the inadequacy of the victim's legal representation and of the time and facilities for preparing the victim's defense; and 4) violations of Articles 24 and 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

2. Positions of the petitioners on admissibility

46. In each of the five cases before the Commission, the Petitioners have submitted that their petitions are admissible in accordance with Articles 46 and 47 of the American Convention, based upon several grounds.

47. The petitioners in all five cases have submitted that the victims have exhausted all available and effective domestic remedies, because the victims have unsuccessfully appealed their convictions to the Jamaican Court of Appeal, and to the Judicial Committee of the Privy Council, the highest appellate body in Jamaica. The particular dates and decisions of the appeals sought by each victim are set out in Part III.A.1 of this Report.

48. In addition, the Petitioners in all five cases have indicated that the victims in those cases have not pursued Constitutional Motions in the domestic courts of Jamaica, because such a motion does not constitute an available and effective remedy within the meaning of Article 46(1)(a) of the American Convention.[FN20]The petitioners claim that a Constitutional Motion provided for by section 25(1) of the Constitution of Jamaica has effectively been denied to these victims because of the high cost and procedural complexity of instituting such a motion. Furthermore, the Petitioners indicate that no legal aid is available for such a motion and that the legal costs involved are well beyond the victims' means. They also claim it is extremely difficult to find a Jamaican lawyer to take Constitutional Motions pro bono. Moreover, the Petitioners indicate that even if some attorneys were willing to take a case pro bono, it is not sufficient reason for and does not justify the State's failure to provide prisoners with legal aid to present a Constitutional Motion.[FN21]The petitioners rely upon decisions of the United Nations Human Rights Committee, in which the Committee has rejected the State's argument that Constitutional Motions must be pursued in order to exhaust domestic remedies.[FN22]

[FN20] In Case 12.146 (Anthony Rose), the Petitioners also rely upon Article 46(2)(b) of the Convention as an exception to the requirement of exhaustion. The petitioners allege that the State has prevented the victim from exhausting domestic remedies as a result of not providing legal aid for such motions, and has thereby denied the victim access to judicial redress.

[FN21] In support of their position, the Petitioners cite decisions of other international human rights tribunals, including the decision of the European Court of Human Rights in *Airey v. Ireland* 2 EHRR 305 (1979), and the Human Rights Committee decision in the case of *Currie v. Jamaica*, Communication N° 377/1989, U.N. Doc. N° CCPR/C/50/D/377/1989 (1994).

[FN22] In support of their position, the Petitioners cite the decisions of the U.N. Human Rights Committee in *Little v. Jamaica*, Communication N° 283/1988, U.N. Doc. N° CCPR/C/43/D/283/1988, *Reid v. Jamaica*, Communication N° 725/1987, U.N. Doc. N° CCPR/PR/C/39/D/725/1987; *Collins v. Jamaica*, Communication N° 356/1989, U.N. Doc. N° CCPR/C/47/D/356/1989, *Smith v. Jamaica*, Communication N° 282/1988, U.N. Doc. CCPR/C/47/D/282/1988, *Campbell v. Jamaica*, Communication N° 248/1987, U.N. Doc. N° CCPR/C/44/D/248/1987, and *Kelly v. Jamaica*, Communication N° 253/1987, U.N. Doc. N° CCPR/C/41/D/253/1987.

49. Furthermore, the Petitioners in Case 12.146 (Anthony Rose) claim that, even if victims had the funds to pursue Constitutional Motions in the domestic courts of Jamaica, the issue of the mandatory nature of the death penalty in Jamaica could not in any event be raised by way of a Constitutional Motion, as such challenges are barred under the Constitution of Jamaica. The petitioners claim in this regard that Articles 17(2) and 26(8) of the Constitution of

Jamaica^[FN23] prohibit challenges to forms of punishment that pre-dated independence, which include the mandatory death penalty.^[FN24]

[FN23] The Constitution of Jamaica, 23 July 1962, Enacted as the Jamaica (Constitution) Order in Council, Second Schedule, Ch. III , Article 17(2) (providing in respect of protection from inhuman treatment that "[n]othing 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"); Article 26(8) (providing that "[n]othing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter [including the right to life and protection from inhuman treatment]; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.").

[FN24] In this regard, Articles 14 and 17 of the Jamaican Constitution provide for the recognition and protection of fundamental human rights and freedoms in Jamaica, including the right not to be subjected to cruel and unusual treatment or punishment. Also, as noted above, Articles 17(2) and 26(8) of the Constitution qualify the rights and freedoms under the Constitution, including and in particular the right not to be subjected to cruel and unusual treatment or punishment, by exempting laws that had effect as part of the law of Jamaica immediately before the commencement of the Constitution in 1962 from challenge under Articles 14 to 17 of the Constitution. As capital punishment, and the mandatory death penalty, were a part of the law of Jamaica before the enactment of its Constitution, the Petitioners allege that it is not open to individuals in Jamaica to effectively challenge the mandatory nature of the death penalty itself as contrary to their rights and freedoms under domestic law.

50. In each of the five cases in this Report, the Petitioners have also indicated that the victims' cases have not been submitted for examination by any other procedure of international investigation or settlement.

3. Positions of the petitioners on the merits

a. Articles 4, 5, 8, 24 and 25 - mandatory nature of the death penalty and the prerogative of mercy

i. Mandatory nature of the death penalty

51. All five of the petitions that are the subject of this Report allege that the State acted contrary to one or more of Articles 4(1), 4(2), 4(3), 4(6), 5(1), 5(2), 5(4), 8(1), 8(2), 24 and 25 of the American Convention by sentencing the victims to a mandatory death penalty, for the crime of capital murder or for committing more than one non-capital murder. In particular, the Petitioners argue that although the death penalty is only imposed in capital murder and multiple non-capital murder cases, the distinction between these categories of murder fail to allow for considerations of the particular circumstances of each offense and offender, including relevant aspects of the character and record of each convicted defendant. The petitioners therefore argue

that the mandatory death penalty is cruel, inhumane and degrading, is an arbitrary and disproportionate punishment and violates the right to a fair trial. Certain petitioners have also argued that the process for granting amnesty, pardon or commutation of the sentence in Jamaica does not remedy these violations, and in itself violates Article 4(6) of the Convention.

52. In support of their position that the mandatory death penalty for capital and multiple non-capital murder contravenes the American Convention, the Petitioners refer to decisions of the highest courts of several common law countries, including the United States of America,[FN25] the Republic of South Africa[FN26] and India,[FN27] where the death penalty has, at least until recently, been retained. According to the Petitioners, these authorities support the proposition that States that wish to retain the death penalty must distinguish between capital and non-capital murder. States must also provide for some form of "individualized sentencing", where victims are permitted to present mitigating factors concerning the particular circumstances of the case and the personal characteristics of the offender in determining whether the death penalty is an appropriate punishment.

[FN25] *Woodson V. North Carolina*, 428 U.S. 280 (1976) (U.S. Supreme Court).

[FN26] *The State v. Makwanyane and McHunu*, Judgement, Case CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).

[FN27] *Bachan Singh V. State of Punjab*, (1980) S.C.C. 475 (Supreme Court of India).

53. The petitioners therefore argue that the mandatory death penalty for capital and multiple non-capital murder in Jamaica interferes with the victims' right to life by imposing a sentence of death automatically and irrespective of the circumstances, and therefore violates Articles 4(1) and 4(6) of the Convention.

54. Also in relation to Article 4, the Petitioners in Case 12.146 (Anthony Rose) argue that the requirement under Article 4(2) of the Convention that the death penalty be imposed only for the most "serious offenses" should be interpreted so as to encompass more than the elements of a criminal offense, and in particular should be interpreted to require consideration of all factors of a criminal offense, including those referable to an individual applicant.

55. Each of the Petitioners who takes issue with the mandatory death penalty also claims that the mandatory death penalty violates the right to humane treatment under Article 5 of the Convention. They argue that, because of the wide variety of circumstances in which capital or multiple non-capital murder may be committed, the mandatory death penalty fails to retain a proportionate relationship between the circumstances of the actual crime, the offender and the punishment. In this regard, they submit that the manner in which the death penalty is carried out can be determined to be cruel, inhuman or degrading on the basis that it is arbitrary and disproportionate, even if the death penalty itself is not unlawful. They also contend that it is cruel to impose the death penalty where there is no mechanism to take into account the particular circumstances and characteristics of the offender.

56. The petitioners in several cases, including Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey) and 12.146 (Anthony Rose), argue further, that the absence of an opportunity for the victims to present mitigating evidence and make representations to the trial judges concerning the appropriateness of the death penalty in the circumstances of their cases contravened their rights to due process of law under Article 8 of the American Convention. They submit that, to the extent that the consideration of individual factors is a necessary component of the proper application of the death penalty, it follows that the right of the victims to make submissions is also a necessary component of the process, as there is no other proper way for the court to obtain the relevant information. The victims therefore contend that individualized sentencing forms part of the due process required in adjudicating offenses that may result in the death penalty.

57. In each of the five cases before the Commission, the Petitioners also argue that the mandatory nature of the death penalty violates Article 24 of the Convention. They claim that the mandatory death penalty deprives offenders of equality before the law, as offenders are not permitted to bring mitigating circumstances into consideration in order to differentiate their cases from those of others likely to face the death penalty. In this respect, the Petitioners claim that there is no accommodation for consistency in like and unlike cases, and therefore that the death penalty is applied in an arbitrary, and therefore inequitable, manner. In addition, the Petitioners maintain that although the mandatory nature of the death penalty presents a form of equality by treating all capital murders the same, it has the effect of imposing a uniform sentence for unequal offenses, and thereby creates substantive inequality between offenders.

58. In connection with the alleged violations of Articles 4, 5, 8 and 24 of the Convention relating to the mandatory death penalty, certain of the Petitioners have also identified specific mitigating factors in the circumstances of those victims' cases, which they claim should have been taken into account in determining whether the death penalty was an appropriate punishment in the circumstances of their cases. For example, in Case 12.023 (Desmond McKenzie), the Petitioners refer to evidence on the record relating to the victim's good character, namely that he was the owner of a supermarket, and managed a clothing business, as well as his father's farm and a warehouse. He had no previous convictions, promoted community youth projects and assisted at local schools and with the elderly. The victim also had standing as a local politician, and had the support of a character witness who was a teacher and a justice of the peace. Moreover, the Petitioners claim that the victim committed his crime as revenge for earlier insults from the deceased. While the jury may not have been satisfied that this fulfilled the requirements of the legal defense of provocation, the Petitioners argue that it was a relevant circumstance that should have been taken into account in the context of sentencing.

59. Finally, the Petitioners in Case Nos. 12.023 (Desmond McKenzie) and 12.107 (Carl Baker) argue that the victims' executions would violate Article 4(3) of the Convention, on the basis that there has been a moratorium on executions in Jamaica since 1988. The petitioners claim that this circumstance has given rise to an expectation on the part of death row prisoners that they will not in fact be executed. Moreover, the Petitioners claim that if the victims' executions were carried out after a moratorium of over 10 years, this in effect constitutes a reestablishment of the death penalty after it has been abolished, contrary to Article 4(3) of the Convention.

ii. Prerogative of mercy

60. The petitioners submit that, insofar as the rigors of the death penalty are mitigated by the power of pardon and commutation by the Jamaican Privy Council under Articles 90 and 91 of the Constitution of Jamaica, there are no criteria governing the exercise of the executive's discretion.[FN28] They also claim that there is no information as to whether the power is exercised on an accurate account of admissible evidence as to facts relating to the circumstances of an offense, and that there is no opportunity for a defendant to make oral or written representations as to whether the death sentence should be carried out. The petitioners also cite the decision of the Judicial Committee of the Privy Council in the case *Reckley v. Minister of Public Safety* (N° 2) [1996] 2 W.L.R. 281, for the proposition that the exercise of the power of pardon involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review. Consequently, the Petitioners claim that the exercise of the Prerogative of Mercy does not provide an adequate mechanism for individualized sentencing.

[FN28] Articles 90 and 91 of the Constitution of Jamaica provide as follows:

90.(1) The Governor General may, in Her Majesty's name and on Her Majesty's behalf-

(a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

61. Moreover, the Petitioners allege that the State has violated the victims' rights under Article 4(6) of the Convention, because no procedural protections are provided by the Jamaican Privy Council when considering whether to exercise the Prerogative of Mercy in a particular case. Cumulatively, the Petitioners contend that the process of mercy lacks criteria governing the State's discretion with regard to the Prerogative of Mercy since the Jamaican Privy Council meets in private, fails to provide or publish reasons for its decisions, and does not permit

prisoners to appear and make representations. Therefore, the Petitioners argue that the State fails to properly consider petitions for amnesty, pardon or commutation in accordance with Article 4(6) of the Convention because there is no criteria governing the exercise of the Governor-General's discretion, no possibility to draw attention to particular facts of a victim's case, and no way of knowing on what basis the discretion is ultimately exercised. The petitioners also argue that much of the information that the Privy Council requires to make a proper decision concerning amnesty, pardon or commutation is in the knowledge of the offender and his or her family, but that no mechanism exists for this information to be presented to the Privy Council.

62. Consequently, the Petitioners submit that, in order to be fair and effective, the process for granting amnesty, pardon or commutation of sentence should provide the victims with the right to be notified of the period during which the Jamaican Privy Council considers his or her case, the right to be supplied with the materials before the Privy Council and the right to submit materials and representations prior to the hearing. The petitioners also claim that condemned prisoners should be afforded the right to an oral hearing before the Privy Council, and to place before the Privy Council and to have it consider the decisions and recommendations of international human rights bodies.

63. The petitioners in Case Nos. 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Anthony Rose) also suggest that the State's process for granting the Prerogative of Mercy violates Article 4(2) of the Convention, because it provides no guarantee that the death penalty will be imposed only for the "most serious crimes." In order for there to be a reliable determination of which crimes constitute the most serious crimes, the decision making body, in the present cases the Jamaican Privy Council, must have before it all relevant mitigating evidence in relation to the prisoner. Only then can the body charged with the duty of exercising mercy make a reliable determination, and so comply with the requirements of Article 4(2). This in turn requires full participation on the part of the prisoner. According to the Petitioners, however, the "invariable practice" in Jamaica is that prisoners are not informed of the date on which their case is to be considered, and often they have no knowledge that the Jamaican Privy Council has met until they are told that the Prerogative of Mercy is not to be exercised in their favor.

64. Certain of the Petitioners also argue that there are no objective criteria to establish whether the death penalty should be imposed or carried out, and therefore the exercise of the Prerogative of Mercy can operate in an unequal and discriminatory fashion, contrary to Article 24 of the Convention. In this regard, the Petitioners in Case 12.107 (Carl Baker) argue that the Prerogative of Mercy is consistently exercised in favor of women on death row, and therefore there is no equal protection before the law in the application of the Prerogative of Mercy.[FN29]

[FN29] In their petition, the Petitioners in Case 12.107 (Carl Baker) claim that "it is understood that the Governor General always exercises the Prerogative of Mercy for women in Jamaica convicted of capital murder.").

65. In response to the State's argument that the Jamaican Constitution prescribes a procedure for exercising the Prerogative of Mercy, and that there is nothing that prohibits an offender from applying for mercy, the Petitioners contend that the process in fact does not provide for effective participation in the process. The petitioners indicate that Jamaican procedures do not permit an offender to present a case for mercy or to respond to adverse materials before the Jamaican Privy Council. Consequently, the right to apply for amnesty, pardon or commutation of sentence is theoretical and illusory. In this regard, the Petitioners in Case 12.146 (Anthony Rose) distinguish the right to apply for pardon in law from the right to apply for pardon in fact, and argue that the process in Jamaica violates Article 4(6) of the Convention because it does not provide for an effective opportunity in fact for petitioners to present a case for mercy.

b. Articles 4, 5, 7 and 8 - delay in victims' criminal proceedings

66. The petitioners in four of the cases that are the subject of this Report, Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker) and 12.126 (Dwight Fletcher), have alleged violations of one or more of Articles 7(4), 7(5), 7(6) and 8(1) of the Convention, on the ground that the victims were denied the right to be brought promptly before a judge subsequent to their arrest, were denied the right to be tried within a reasonable time, and have been subjected to prolonged periods of detention. In each of these cases, the victims were detained by authorities in Jamaica from the date of their arrest to the date of their final appeal before the Judicial Committee of the Privy Council. The delays alleged to have occurred in victims' criminal proceedings are set out below, based upon the history of the victims' proceedings as described in Part III.A.1 of this Report.

Table 4

Case No.	Victim(s)	Delay between Arrest and Conviction	Delay between Conviction and Judgment on Final Appeal	Total delay between Arrest and Judgment on Final Appeal
12.023	Desmond McKenzie	1 yr., 6 mos. (first trial) 10 mos. (Re-trial) [FN30]	2 yrs. 2 mos.	4 yrs. 8 mos.
12.044	Andrew Downer Alphonso Tracey	3 yrs., 8 mos.	3 yrs. 7 mos.	7 yrs. 3 mos.
12.107	Carl Baker	1 yr., 3 mos.	2 yrs., 2 mos.	3 yrs., 5 mos.
12.126	Dwight Fletcher	2 yrs., 9 mos.	2 yrs. 5 mos.	4 yrs. 2 mos.

[FN30] Mr. McKenzie was arrested October 19, 1993. He was originally tried from April 22, 1995 to May 4, 1995, but the jury was unable to reach a majority decision. He was re-tried commencing on March 13, 1996, and convicted on April 2, 1996.

67. In each of these cases, the Petitioners have alleged that the delays in bringing the victims before a judge subsequent to their arrests and in trying the victims were unreasonable. As a consequence, it is alleged that the State has violated the victims' rights to be brought promptly before a judge and the right to trial within a reasonable time under Articles 7(5), 7(6) and 8(1) of the Convention. Cumulatively, they submit that the delay in each case is wholly attributable to the State, and suggest that the evidence in the criminal cases was not particularly complex. The petitioners also argue that the State has not offered any explanation for the delay. Some of the Petitioners argue further that the delays in trying the victims, including the time that the Petitioners have been detained on death row, constitute cruel, inhuman or degrading punishment or treatment contrary to Article 5 of the Convention and therefore render the victims' executions unlawful.

68. In presenting their arguments, the Petitioners have intimated that the right to be tried within a reasonable time applies to all trial and all appeal proceedings, and therefore the entire delay between the date of the victims' arrests and the date on which their petitions for Special Leave to Appeal to the Judicial Committee of the Privy Council were dismissed should be taken into account in determining whether the State has violated Article 7(5), 7(6) and 8(1) of the Convention. In support of their positions in this regard, the Petitioners refer to the United Nations Human Rights Committee's decision in the case Paul Kelly v. Jamaica,[FN31] in which the Committee reaffirmed that in all cases, and in capital cases in particular, the accused is entitled to trial and appeal proceedings without undue delay, whatever the result of the judicial proceedings.

[FN31] U.N.H.R.C., Paul Kelly v. Jamaica, Communication N° 253/1987 (8 April 1991).

69. In several cases, the Petitioners provide specific examples of the manner in which they were denied their rights to be brought promptly before a judge and to be tried within a reasonable time. The particulars of the allegations in each of the cases are as follows:

Desmond McKenzie (Case 12.023)

70. The petitioners in Case 12.023 (Desmond McKenzie) claim that Mr. McKenzie was not brought before a judge until three weeks after his arrest, in violation of Article 7(5) and 7(6) of the Convention. The Petitioners cite the United Nations Human Rights Committee's decision in Peter Grant v. Jamaica,[FN32] where the Committee held that one week in detention without being brought before a judge violated the victim's right to be brought promptly before a judge. They also refer to the Committee's decision in Paul Kelly v. Jamaica,[FN33] in which Committee Member Wennergren defined "promptly" as not more than two to three days.

[FN32] U.N.H.R.C., Peter Grant v. Jamaica, Communication N° 597/1994, U.N. Doc. CCPR/C/56/D/597/194(1996).

[FN33] Paul Kelly v. Jamaica, supra.

71. In their observations on the State's contention that the victim was permitted to visit a hospital following his arrest and therefore was not detained, the Petitioners indicate that Mr. McKenzie was not freed from custody. While the Petitioners acknowledge that the victim was taken to a hospital following his arrest, they claim that he was handcuffed and accompanied by police officers. The petitioners also indicate that the victim was under guard while he was at the hospital, and that at the end of his visit he was returned to prison. The petitioners therefore maintain that Mr. McKenzie was in police custody from the date of his arrest until the date of his trial. They also maintain that he was not brought "promptly before a judge...[to] decide without delay on the lawfulness of his arrest or detention..." pursuant to Articles 7(5) and 7(6), until three weeks after his arrest.

72. In response to the State's contention that, even if Mr. McKenzie was always in custody, his detention was not detrimental to him because he was permitted to visit the hospital, the Petitioners assert that to provide medical treatment does not constitute exceptional treatment for a prisoner. Rather, they maintain it amounts to a standard necessity for the proper and human treatment of a person in custody. The petitioners submit further that the State's arguments do not justify the delay in bringing Mr. McKenzie before a judge concerning the lawfulness of his arrest and detention. Moreover, they note that the State failed to give reasons for the two to three week delay between the time the victim was released from the hospital and the time he was brought before a judge.

73. Finally, the Petitioners allege that the 30 month delay between Mr. McKenzie's arrest and his conviction on his second trial was excessive, contrary to Articles 5(2) and 7(5) of the Convention, and that the entire 4 year and 8 month delay that elapsed between his arrest and the determination of his final appeal contravenes Article 5 of the Convention as cruel, inhuman or degrading punishment or treatment. They argue in this regard that the need for a re-trial was the fault of the State and cannot constitute an excuse for the delay. The petitioners rely on the decision in *Pratt & Morgan v. Attorney General for Jamaica*,^[FN34] in which the Judicial Committee of the Privy Council held that executing a prisoner who has been held on death row for a prolonged period would violate the prohibition on inhuman and degrading punishment under Section 17(1) of the Constitution of Jamaica.

[FN34] *Pratt & Morgan v. Attorney General for Jamaica* [1944] 2 AC 1 (J.C.P.C.).

Andrew Downer and Alphonso Tracey (Case 12.044)

74. The petitioners in Case 12.044 (Andrew Downer and Alphonso Tracey) claim that there was a prolonged delay in bringing the victims before a judge after their respective arrests, as well as in bringing them to trial. The petitioners indicate that Mr. Downer was arrested on April 30, 1991. He was taken to a hospital after the police detained him for questioning, and he was returned to the police station, on May 8, 1991. He was not, however, brought before a judge until June 10, 1991. Mr. Tracey was arrested on May 5, 1991, but he was not brought before a judge until June 10, 1991. Consequently, more than a month passed before the victims were brought before a judge in order to review their arrests and the lawfulness of their detention. The

petitioners declare that, even though the State denies that such a delay constitutes a violation of Article 7(5), it is the State's burden to give detailed reasons as to why the State claims that the one-month period following their arrests did not constitute an unreasonable delay. The petitioners claim that the mere denial of a delay is not enough.

75. Additionally, the Petitioners argue that the victims were denied a speedy trial contrary to Articles 7(5) and 8(1) of the Convention, as a result of the delay of over three and a half years in bringing the victims to trial. The petitioners indicate that the case was based on the evidence of only one witness, that there was little investigation done by the police, and that there was no complicated forensic evidence against the victims. Citing the Commission's decision in the case *Gimenez v. Argentina*,^[FN35] the Petitioners argue that the State has failed to discharge its burden of justifying the delay by reference to sufficient relevant criteria.

[FN35] I/A Comm. H.R., *Gimenez v. Argentina*, Case 11.2454, Annual Report 1995, at 33.

Dwight Fletcher (Case 12.126)

76. The petitioners in Case 12.126 (Dwight Fletcher) allege that the State failed to comply with the requirements of Articles 7(4), 7(5) and 8(1) of the Convention. The petitioners indicate that Mr. Fletcher was not brought before a judge to review the lawfulness of his detention until three weeks after his arrest. They also claim that this was a delay of two years and nine months between the victim's arrest and his conviction, and that a further two years and five months passed from the date of his conviction to the date of the Privy Council's ruling on his appeal. The petitioners therefore claim that the State failed to bring the victim promptly before a judge, or to hold a trial "within a reasonable time", as required under Articles 7 and 8 of the Convention.

77. The petitioners also argue that the victim's detention on death row since his August 2, 1996 conviction violates Articles 5(1) and 5(2) of the Convention.

Carl Baker (Case 12.107)

78. The petitioners in Case 12.107 (Carl Baker) assert that the right to be tried within a reasonable time and without undue delay pursuant to Article 8(1) of the Convention extends to all appeal proceedings. The petitioners further indicate that there was a delay of one year and three months from the victim's arrest until his trial, and claim that this was unreasonable as contrary to Article 8(1) of the Convention.

79. In response to the State's claim in its reply to the petition that part of the delay in trying the victim was due to the convening of a preliminary inquiry, the Petitioners indicate that the preliminary inquiry would not, and should not, take one year and three months in the circumstances of the victim's case. As indicated by the State, the purpose of a preliminary inquiry is to establish basic facts in order to determine whether a prima facie case can be made out against the defendant. The petitioners concede that in cases where there are many witnesses and complicated evidence, the preliminary inquiry could take several months. In this case,

however, the Petitioners indicate that there were only five witnesses apart from the victim, two of whom were detectives. Therefore, the Petitioners suggest that the State has failed to justify a delay of one year and three months in the victim's trial.

c. Article 5 - conditions of detention and method of execution

80. The petitioners in each of the five cases that are the subject of this Report also allege that the conditions in which the victims have been detained by the State constitute a violation of each victims' rights under Article 5(1) of the Convention to have his physical, mental and moral integrity respected, as well as the right not to be subjected to cruel, inhuman or degrading punishment or treatment under Article 5(2) of the Convention. In their submissions, the Petitioners provide information as to the general conditions of detention facilities in Jamaica. The petitioners also provide information as to the particular conditions of detention experienced by the victims in each of their cases. Finally, the Petitioners in Case 12.023 (Desmond McKenzie) allege that the State violated Articles 5(4) and 5(6) of the Convention, also in relation to the victim's conditions of detention.

i. Allegations of fact

81. With respect to the conditions of detention facilities in Jamaica generally, the Petitioners refer to reports prepared by various governmental and non-governmental organizations respecting the State's prison conditions. These include Americas Watch: Prison Conditions in Jamaica (1990); Jamaica Prison Ombudsman: Prison and Lock Ups (1983); Americas Watch: Death Penalty, Prison Conditions and Prison Violence (1993); Jamaica Council for Human Rights: A Report on the Role of the Parliamentary Ombudsman in Jamaica (Summer 1994); Amnesty International: Proposal for an Inquiry into Death and Ill-treatment of Prisoners in St. Catherine's District Prison (1993), and Americas Watch: Human Rights in Jamaica (April 1993). These reports include information regarding the physical conditions of the prisons and prisoners, the treatment of prisoners by prison staff, and the status of medical, educational and work facilities and programs in various prisons and lock up facilities in Jamaica.

82. According to these reports, conditions of detention facilities in Jamaica are poor, and in many instances fall short of the standards prescribed by the United Nations Minimum Standards for the Treatment of Prisoners. The Jamaica Council for Human Rights, for example, stated in 1994 that "Although Jamaica faces a grave lack of resources, and still implements the death penalty, this does not absolve the government from ensuring the humane treatment of persons in state custody." Furthermore, the Jamaica Prison Ombudsman noted that "no genuine effort has been made by the immediate Ministry (the Corrections Ministry) or associated Ministries to alleviate the grave problems listed."

83. The petitioners cumulatively report that the victims are detained on death row in St. Catherine's District Prison, which was built in the 18th century and was formerly a slave market. The petitioners submit that the victims are locked in their cells for 23 hours a day, and are deprived of a mattress or other bedding and adequate sanitation. They also claim that the victims' cells have inadequate ventilation and no electric light. No medical or psychiatric care is provided to prisoners, and the food and water provided for prisoners are inadequate. The petitioners also

state that there are no adequate or effective complaint mechanisms for dealing with prisoners' complaints.

84. The petitioners in all of the cases also provided particulars of the conditions of detention alleged to have been experienced by the victims in these cases, as set out below:

Desmond McKenzie (Case 12.023)

85. The Petitioners in Case 12.023 (Desmond McKenzie) allege violations of Articles 5(1), 5(2), 5(4) and 5(6) of the Convention, because of poor prison conditions, ill-treatment suffered by the victim during his detention, and the fact that the victim was detained with convicted persons during his pre-trial detention. The petitioners allege that during Mr. McKenzie's pre-trial detention he was subjected to inhuman and degrading treatment when he was required to share cells with 12 to 15 other prisoners in Chapelton, May Pen and Four Paths lock ups, and in St. Catherine's District Prison. The petitioners claim that the victim, while on remand, was detained with convicted prisoners in St. Catherine's District Prison contrary to Article 5(4) of the Convention. They claim further that the cells in which the victim was detained had foul odors and were infested with flies and maggots. The cells also had no electric light, no furniture or bedding other than two concrete slabs, and the prison "toilets" and corridors were covered in maggots and flies. The petitioners also state that the only manner for prisoners to bathe was with a garden hose and that there were no exercise facilities and no educational facilities or books. The victim indicates that he was beaten at Four Paths lock up, but that he was unable to identify the officers who assaulted him.

86. On another occasion, the Petitioners claimed that the victim was held in a 9ft. by 6ft. cell at St. Catherine's District Prison that he shared with 2 other prisoners. The toilet was outside the cell and there was no bucket to use as a toilet inside the cell. Consequently, the victim starved himself most of the time to avoid having to go to the bathroom. There were no washing facilities and no exercise or educational facilities. Moreover, the Petitioners indicate that the victim was subject to beatings. For example, the Petitioners claim that on February 28, 1995, a prisoner broke down a fence. The next morning, unidentified warders entered the victim's cell and beat him with batons, and repeated this conduct in the neighboring cell. The victim received a cut on his head which stopped bleeding that day, and he had stomach pains for four days and bruises on his back. He requested to see a doctor but he was denied treatment. The victim also claims that he made complaints to the supervising warder, but nothing came of these complaints.

87. According to the Petitioners, the victim has also had back problems since the beginning of his detention, which are very painful. The victim claims that in the morning, he has to walk on his hands and knees until his back warms up. The victim states that he has complained for over four years to the State about his problems and that nothing has happened. The victim has only been able to see a doctor once, who prescribed him medicine, but the prison authorities will not give the medicine to him. The victim also claims that he has had ring worm in his left ankle and foot for about three years, and that each time he puts his name on a list to see a doctor, he is unsuccessful. He tries not to complain because if he does he runs the risk of being beaten or being denied food or water. The petitioners also allege a violation of Article 5(6) of the Convention because there are no educational facilities where the victim is being held, and

therefore argue that this constitutes a failure of the State to impose a sentence which aims for reform and social re-adaptation of prisoners.

88. The Petitioners have also submitted information regarding three specific incidents of abuse against the victim. The petitioners indicate that on March 5, 1997, subsequent to an attempted prison breakout by four other inmates, the victim was beaten and his spectacles were destroyed and not replaced for 14 months after numerous requests. In addition, the victim's belongings, including his clothes, toothpaste, toothbrush, trial transcript and personal and legal correspondence were destroyed or burned. The victim states that he complained to the local ombudsman on March 10, 1997, August 7, 1997, and October 13, 1997, but that prison authorities have failed to investigate this incident. After this incident, the victim was denied medical treatment. The Petitioners also claim that without his spectacles, the victim could not read or write, and therefore had difficulty preparing for his appeal. The Petitioners therefore allege that the destruction of the victim's correspondence, trial transcript and spectacles also violated his right under Article 8(2)(d) of the Convention to defend himself and to communicate freely and privately with his counsel.

89. Also according to the Petitioners, on August 3, 1997 the victim was subject to an assault and threats by a warder named Ferguson. The petitioners allege that the victim was released from his cell to bathe, but that Warder Ferguson subsequently locked the victim back in his cell while the victim still had shampoo in his hair. Warder Ferguson then opened the victim's cell and told him to get out. When the victim refused, Warder Ferguson entered the victim's cell and smashed his light bulb. The warder then locked the cell and told the victim that he must not catch him out of his cell, because the warder would kill the victim before the Government could do so. The warder added that he could kill anyone without getting into trouble. The victim reported the incident to the Department of Correction Services that same day.

90. The Petitioners also submit that on April 3, 1998, the victim was locked in his cell while it was being sprayed with insecticide. The victim indicates that during this time it was difficult to breath, and that he was forced to eat his meals in that environment. The victim was not released from his cell until the next day, and then only for one hour.

Andrew Downer and Alphonso Tracey (Case 12.044)

91. The petitioners in Case 12.044 (Andrew Downer and Alphonso Tracey) allege violations of Articles 5(1) and 5(2) of the Convention because the State refused to afford Mr. Downer adequate medical treatment during his questioning and detention, which they allege constitutes torture and cruel and inhuman treatment. The petitioners submit that the prison authorities refused to treat Mr. Downer with regard to a gun wound in his stomach, which he received during the attempted robbery the night before he was arrested. Rather, the police took the victim to the police station lock up where he was detained for questioning. Eventually, the victim was transferred to the Kingston Public Hospital for treatment and remained in the hospital for 8 days. He was then returned to detention in an unsanitary cell even though his injuries were still serious and required attention. On death row, Mr. Downer complained to prison authorities 6 times during a 5 month period before he was able to tell a doctor of his pain.[FN36] The petitioners

maintain that Mr. Downer continues to suffer pain as a result of his gun shot injuries, and that prison authorities continue to refuse him proper medical care.[FN37]

[FN36] Mr. Downer claims to have requested medical attention for his gun wound on June 12, 1996, June 13, 1996, July 12, 1996, July 25, 1996, August 5, 1996 and August 6, 1996. Mr. Downer saw a doctor on November 25, 1996.

[FN37] In support of their position, the Petitioners cite the decisions of the United Nations Human Rights Committee in the cases Antonaccio v. Uruguay, Doc. A/37/40, and Ambrosini v. Uruguay, Doc. A/37/40, in which the Committee held that the detention and questioning of persons who are obviously in need of treatment violates Articles 7 and 10(1) of the International Covenant on Civil and Political Rights.

92. Finally, the Petitioners allege that the victims are locked in their cells for 23 hours per day, and are deprived of a mattress or other bedding. The victims are also deprived of adequate sanitation, and are forced to use a bucket as a toilet. The petitioners claim that the cells have inadequate ventilation and no electric light, that no medical or psychiatric care is provided to prisoners, and that the food and water provided for prisoners are inadequate.

Carl Baker (Case 12.107)

93. The petitioners in Case 12.107 (Carl Baker) allege that the victim's prison conditions violate his right to humane treatment under Article 5 of the Convention, as well as Rules 86 through 91 of Jamaica's Correctional Institution (Adult Correctional Centre) Rules 1991. The petitioners allege that Mr. Baker has been detained in appalling conditions since his arrest. They also allege that Mr. Baker has been subjected to cruel, inhuman and degrading treatment by police officers in lock ups and warders at St. Catherine's District Prison. The petitioners submit that the victim has been subjected to mental and physical torture both by the police before trial, by warders while on remand at St. Elizabeth's lock up and by warders at St. Catherine's District Prison, and that he continues to suffer threats of further physical abuse. The victim has been assaulted while on remand at St. Catherine's prison and he is deprived of proper medical treatment. He has regularly been threatened by prison staff and the most recent threats on his life have been as a result of making complaints to his lawyers, the prison superintendent and governmental authorities about the treatment he is subjected to in prison.

94. For example, the Petitioners allege that on August 11, 1995, the first day of questioning by the police following his arrest, the victim was beaten while held in custody. Similarly, the Petitioners claim that the victim was severely beaten and his belongings were destroyed by prison officials following an attempted escape from prison by other inmates on March 5, 1997. The victim is said to have reported the incident to the Parliamentary Ombudsman, but no response to his complaint has been received. Also, according to the Petitioners, a warder named Mr. Onnis threatened the victim with death on March 16, 1999, and told the victim that he has no rights at the prison because he was brought there to die. Further, the Petitioners indicate that on April 7, 1999, and again on April 9, 1999, the victim's section of the prison was searched by officials, including warders, police officers and soldiers. They claim that the warders spilled the

victim's drinking water over his papers, documents and bedding. When the victim called out during the search, a soldier threatened him at gunpoint, telling him to be quiet because he was a condemned man who had been brought to the prison to die. The petitioners also indicate that the victim received an unprovoked beating to his face and stomach by a warder, Mr. Burke, and was told that he would be killed the next time anything happened on death row.

95. With respect to his prison conditions, the Petitioners state that the victim is locked in his cell 23 hours per day and that he is deprived of proper medical care, in part because his medication is out of date. They claim that there is inadequate ventilation and lighting in the victim's cell, and that the victim is deprived of proper bedding and adequate sanitation, as he must use a bucket as a toilet. The victim's food and water is inadequate and dirty, and his visiting time with his family is restricted to one visit per month and two or three minutes per visit. The petitioners also allege that there is no proper mechanism for addressing complaints by prisoners about prison conditions.

Dwight Fletcher (Case 12.126)

96. The petitioners in Case 12.126 (Dwight Fletcher) allege violations of Articles 5(1), 5(2) and 5(4) because of the victim's treatment while in detention, and the fact that he was detained with convicted prisoners prior to his conviction. With respect to Article 5(4) of the Convention, the Petitioners allege that the victim was held with convicted prisoners during his pre-trial detention, at St. Catherine's District Prison, General Penitentiary and Mandeville Police Station.

97. The petitioners have also referred to specific instances during which the victim was beaten and threatened while in detention. The petitioners submit, for example, that subsequent to his arrest on November 21, 1993, Mr. Fletcher was kicked and beaten with batons at Montego Bay police station by Sgt. Bowen and two other officers, first at the station and later at a location by riverside. During this incident, the officers fired shots against the victim's ear, removed his handcuffs and told him to run, but he refused. They continued beating the victim and they "ground" his fingers with the heels of their boots. When the officers took him back to the police station, Supt. Morrison asked him if he was ready to tell them where "Watson" was. At this time, the victim had been beaten so badly that he could not recognize his own name, and they continued to beat him until he was unconscious.

98. Similarly, the Petitioners indicate that the victim was taken to Mandeville police station on November 22, 1993, where Corporal Anderson visited his cell, took him out to the corridor and beat the victim in his stomach until he could not get up. Subsequently, on November 24, 1993, another police officer, Detective Daley, took the victim to Deputy Supt. Campbell's office, where they questioned the victim and beat him until blood came out of his ears when he would not sign a document with writing on it. After a week in Mandeville, the victim was taken to the Porus police station where he was handcuffed, denied food for three to four days, and was not permitted to use the bathroom. The petitioners describe several other specific incidents during the victim's pre-trial detention when he was beaten and threatened at various police stations and lock ups, including Mandeville police station, Cross Keys police station, and Kendal prison.

99. The Petitioners also refer to instances of abuse suffered by the victim during his post-conviction detention. For example, at St. Catherine's District Prison in 1997, the Petitioners allege that the victim was beaten by over two dozen warders during a prison riot at that institution and sustained injuries all over his body. As the victim had only been detained at the prison for one week, however, he was not able to identify any of the warders involved in the incident. In addition, the Petitioners state that the victim's cell was searched on April 8, 1999, and that during the search the warders destroyed the victim's trial transcript and other legal documents by pouring water over them. The petitioners add that a warder named Corporal Kennedy stripped the victim naked from the waist down and lifted him into the air by his testicles, causing the victim great pain. The victim reported the incident to another warder, Samuel Heslop, on April 12, 1999, who authorized him to attend the prison surgery, but the victim was denied access to the prison surgery by a medical staff warder.

100. With respect to the victim's prison conditions generally, the Petitioners claim that he is kept in solitary confinement in a 9ft. by 6ft. cell for 23 hours a day. The victim has no bedding on which to sleep, with the exception of a foam mattress, and must use a bucket as a toilet. There is inadequate ventilation and no electric light in his cell. Moreover, his food and water are inadequate and he is not given the correct medication prescribed to him by a doctor. The petitioners also claims there is no adequate mechanism for addressing prisoner's complaints about prison conditions.

Anthony Rose (Case 12.146)

101. The Petitioners in Case 12.146 (Anthony Rose) argue that the victim's conditions of detention violate Article 5 of the Convention as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners. The petitioners assert that the victim's conditions of detention are far below humane standards. He is locked in a 8ft. by 5ft. cell, which is full of cockroaches and other insects, for 23 hours a day. The victim is deprived of a mattress and sleeps on a slab of concrete, with a gutter full of waste in front of his cell which has a foul odor. The victim is also deprived of adequate sanitation and must use a bucket as a toilet. The cells have inadequate ventilation and no electric light, and the victim is served water with impurities and deplorable food such as spoiled meat. The petitioners also allege that there is a lack of medical and psychiatric care at the prisons. This is based in part on the fact that the victim has made two requests to see a doctor at the prison, and on each occasion it took approximately four months to see a doctor. The petitioners also claim that there is no adequate or effective complaint mechanism for dealing with prisoner complaints.

102. Furthermore, the Petitioners allege that the victim's rights under Articles 5(1) and 5(2) of the Convention have been violated, because the execution of the death sentence by hanging is cruel, inhuman and degrading punishment. In this regard, the Petitioners claim that the victim is denied the right to argue in any domestic court that execution of the death sentence by hanging is unconstitutional since Section 17(2) of the Constitution of Jamaica[FN38] is drafted so as to immunize from attack laws which pre-dated Independence. Consequently, the Petitioners maintain that an argument concerning the practice of hanging can only be made before the Commission under the American Convention.

[FN38] Constitution of Jamaica, supra, Section 17(1) (providing that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment."); Section 17(2) (providing that "[n]othing 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.").

103. In support of their position that execution by hanging constitutes cruel, inhuman or degrading punishment or treatment, the Petitioners provided affidavits from three doctors, who describe the physical effects of hanging. These include a sworn affidavit by Dr. Harold Hillman on April 28, 1999, in which Dr. Hillman makes several detailed observations in respect of the physiological impact of hanging on a prisoner. He notes, for example, that death during hanging results from slow strangulation and asphyxiation, during which the prisoner experiences humiliating and degrading physical reactions such as sweating, drooling and twitching. In addition, as the noose is placed between the chin and larynx, the prisoner cannot cry out because his vocal chords are obstructed and compressed, and this causes great distress. According to Dr. Hillman, hanging is also humiliating because the prisoner is masked and his wrists and ankles are bound, and as a consequence the prisoner cannot react to his pain, distress and feeling of asphyxia by the usual physiological responses of crying out or moving violently.

104. The petitioners also argue that even though Article 4(2) of the Convention permits the death penalty in countries that have not abolished it, Article 4 cannot conflict with Article 5 of the Convention. The petitioners claim that execution by hanging contravenes internationally accepted standards of humane conduct, as prescribed in Article 5(2) of the Convention, and consequently that Article 4(2) of the Convention cannot be relied upon by the State to authorize hanging as a method of execution. In support of this position, the Petitioners cite the decision of the United Nations Human Rights Committee in the case *Ng v. Canada*,^[FN39] in which the Committee stated that "when imposing capital punishment, the execution of the sentence... must be carried out in such a way as to cause the least possible physical and mental suffering."

[FN39] U.N.H.R.C., *Ng v. Canada*, Communication N° 469/1991, U.N.Doc. CCPR/C/49/D/469/1991 (1994).

ii. Allegations of Law

105. In respect of the legal standards that should be considered in determining whether prison conditions constitute violations of Article 5 of the Convention, the Petitioners in the cases before the Commission cumulatively rely upon several provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners. These include Article 10, which states that all accommodation provided for the use of prisoners shall "meet all requirements of health, due regard being paid to climatic conditions and particularly cubic content of air, minimum floor space, lighting, heating and ventilation."^[FN40] The petitioners also cite several decisions of the

U.N. Human Rights Committee and the European Court of Human Rights regarding humane treatment in the context of prison conditions. These include the case *Mukong v. Cameroon*,^[FN41] in which the U.N. Human Rights Committee noted that certain minimum conditions of detention must be observed regardless of a State Party's level of development. They also referred to the Greek Case,^[FN42] in which the European Commission and Court of Human Rights found that prison conditions may amount to inhuman treatment, where those conditions involve overcrowding, inadequate toilet and sleeping arrangements, inadequate food and recreation, and incommunicado detention.

[FN40] The petitioners additionally allege violations of Articles 11(a), 11(b), 12, 13, 15, 19, 22(1), 22(2), 22(3), 24, 25(1), 25(2), 26(1), 26(2), 35(1), 36(1), 36(2), 36(3), 36(4), 57, 71(2), 72(3) and 77 of the United Nations Standard Minimum Rule for the Treatment of Prisoners.

[FN41] U.N.H.R.C., *Mukong v. Cameroon*, Communication N° 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

[FN42] Greek Case 12 Y.B. 1 (1969) (Eur. Court H.R.)

106. Moreover, the Petitioners in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher) submit that the detention of the victims in these cases in inhumane and degrading conditions should be considered to render the carrying out of their death sentences unlawful, in the same manner that prolonged post-conviction detention was found by the Judicial Committee of the Privy Council in the *Pratt and Morgan* [1994] 2 A.C. 1 (P.C.) case to render a subsequent execution unlawful.

d. Articles 8(1) and 8(2) - Right to a fair trial

107. The petitioners in the five cases within this Report argue that the State has violated the rights of the victims in those cases to a fair trial under Article 8 of the Convention, based upon one or more of several grounds: that the trial judge was not competent or impartial; that the victims were not notified of the charges against them; that the victims were not provided with adequate time and facilities to prepare their defenses; and that the victims were not provided with competent legal representation during their criminal proceedings. Some of the Petitioners have also argued that the violations of the victims' rights under Article 8 of the Convention render their executions arbitrary contrary to Article 4 of the Convention.

108. The particulars of the complaints in each case are as follows:

Desmond McKenzie (Case 12.023)

109. The Petitioners claim that the State violated Mr. McKenzie's right to a fair trial because the trial judge lacked impartiality, and because Mr. McKenzie was provided with inadequate legal representation. More particularly, the Petitioners argue that the State violated Mr. McKenzie's rights under Article 8(1) of the Convention, because the trial judge's treatment of the evidence, his comments and summary of the facts during the trial, and his conduct generally was biased and prejudicial. The petitioners claim that the judge ridiculed Mr. McKenzie's attorney

and told the jury that Mr. McKenzie's case was not one of an accidental murder, which was the basis of Mr. McKenzie's defense. The petitioners therefore claim a denial of a fair trial based on a lack of justice and impartiality.

110. In support of their position, the Petitioners claim in their submission to the Commission dated August 18, 1998, that the State "conceded" that the judge's instructions to the jury in Mr. McKenzie's trial were biased. The petitioners state that this concession supports their submissions under Article 8(1) of the Convention, and therefore that executing Mr. McKenzie would violate Article 4 of the Convention. They also reject the State's contention that the concession was erroneous. Rather, the Petitioners suggest that in all of the circumstances the concession was made in good faith at the time and therefore the State should be estopped from amending its position in its original reply to the petition. The petitioners suggest that the Commission should either review Mr. McKenzie's case on the basis of the original submission, or resolve any doubts as to the State's intention in its reply in the victim's favor.

111. Additionally, the Petitioners claim that the State is responsible for violating Article 8(2) of the Convention, because Mr. McKenzie was provided with inadequate legal representation. The petitioners claim that the trial judge would not grant a short adjournment on the first day of Mr. McKenzie's trial, even though his legal representatives were either not present or not available. Since his lawyers were absent and the judge would not adjourn the trial, Mr. McKenzie was forced to conduct a cross examination of the prosecution's principal witness, Marlene Dawson, without any prior experience or legal knowledge.[FN43]

[FN43] The petitioners cite the United Nations Human Rights Committee's decision in the case Paul Kelly v. Jamaica, Communication N° 253/1987, in which the Committee stated that "it is axiomatic that legal assistance should be made available to a prisoner under sentence of death. This applies to all the stages of the judicial proceedings." The petitioners also refer to the Privy Council's decision in the case Dunkley and Robinson v. The Queen [1995] AC 419, in which the Privy Council held that "where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try and secure alternative representation."

112. In response to the State's observations, the Petitioners recognize that the right to counsel under the Constitution of Jamaica is not an absolute right, as was held by the Judicial Committee of the Privy Council in the case Robinson v. R.[FN44] The Petitioners argue, however, that the accused in the Robinson case had a history of requesting adjournments. In Mr. McKenzie's case, on the other hand, this was his first request for an adjournment. The petitioners claim that this fact was not properly considered by the trial judge in refusing the adjournment.

[FN44] Frank Robinson v. R. [1985] 1 A.C. 957.

113. The petitioners claim further that the violations of Article 8 concerning the victim also constitute violations of Articles 4 and 5 of the Convention, on the basis that it is cruel and inhuman treatment to sentence a person to death after an unfair trial, and that it results in the arbitrary deprivation of life.

Andrew Downer and Alphonso Tracey (Case 12.044)

114. The petitioners in Case 12.044 (Andrew Downer and Alphonso Tracey) claim that the State denied the victims the right to be notified in detail of the charges against them contrary to Article 8(2)(b) of the Convention. The petitioners indicate that the indictment against them was amended during their trial, in violation of their right to a fair trial. The amendment occurred during trial, after Mr. Riley and one of the officers who attended the victim's identification parade testified. The prosecution amended the charges to include the charge of murder in the course or furtherance of robbery, after the judge ruled that there was no case for murder in the course or furtherance of the act of terrorism. The trial judge allowed the amendment over the objections of defense counsel. As a consequence, the Petitioners argue that the victims were deprived of their right to proper notification in detail of the charges against them in order to allow them the necessary time and means to prepare their defense and examine witnesses in conformity with such charges.

115. The petitioners also claim that a violation of Article 8 results in a violation of Article 4 of the Convention because their case involves the mandatory application of the death penalty. The petitioners argue that the imposition of a sentence of death after a trial in which provisions of the Convention have been violated constitutes an arbitrary deprivation of life. [FN45]

[FN45] The petitioners cite General Comment 6(16) of the United Nations Human Rights Committee, which states that "the procedural guarantees therein [Article 14 of the ICCPR] prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal."

Carl Baker (Case 12.107)

116. The petitioners in Case 12.107 (Carl Baker) claim that the State has violated the victim's rights under Article 8 of the Convention, because the court which tried the victim was incompetent and because the victim received inadequate legal representation. More particularly, the Petitioners argue that the State violated Mr. Baker's rights under Article 8(1) because the trial judge was not aware of sentencing procedures. The petitioners argue that the trial judge in Mr. Baker's case did not know that the charge for which Mr. Baker was found guilty required a mandatory death sentence. The judge had sentenced Mr. Baker to life in prison, but, two and a half hours later and at the request of the prosecution, re-sentenced Mr. Baker to death. The petitioners argue that for the victim to have proper notice of the charges against him, the information must include the likely punishment imposed if he is found guilty. Additionally, the Petitioners maintain that in order for a trial to be fair, the accused, his representative, and the

judge should be aware of the sentence which must be imposed in the event of a guilty verdict. Therefore, the Petitioners argue that the tribunal was led by an incompetent judge and Mr. Baker was deprived of a fair trial contrary to Article 8(1) of the Convention.

117. The petitioners argue further that the State violated the victim's rights under Article 8(2) of the Convention, because of inadequate legal representation and inadequate time and facilities for preparation of the victim's defense. The petitioners argue that the victim's counsel failed to warn him at any stage of the trial that, if convicted of the three murders, the victim faced the death penalty. The petitioners also claim that the victim could only meet with counsel twice before trial for approximately 15 to 20 minutes each time, and that his counsel did not show him the prosecution's statements or discuss them at either of these meetings. The petitioners indicate further that the victim did not see counsel before or during appeal, despite the fact that he wrote to him. In support of their position, the Petitioners cite the decision of the United Nations Human Rights Committee in the case of Paul Kelly v. Jamaica,[FN46] which declared that there is no right for the accused to choose counsel provided free of charge by the State, but "measures must be taken to ensure that Counsel, once assigned, proves effective representation in the interests of justice."The petitioners also cite the decision of the United Nations Human Rights Committee in the case of Aston v. Jamaica[FN47] in, which it declared that "In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the Defence for trial; this requirement applies to all stages of the judicial proceedings" The petitioners therefore claim the victim's lack of opportunity to communicate with counsel, seriously prejudiced the provision of effective legal representation for the victim.

[FN46] Paul Kelly v. Jamaica, supra.

[FN47] U.N.H.R.C., Aston v. Jamaica, Communication N° 283/1988.

118. Furthermore, the Petitioners allege a violation of Article 8(2)(f) of the Convention. They claim that the State failed to ensure that a particular individual, Edward Morgan, appeared as a witness at trial, after it was discovered that Mr. Morgan's witness statement could not be found in the court file. Edward Morgan was the person who first saw the victim after the victim fled the fire. The petitioners maintain that, rather than obtain the appearance of Mr. Morgan, a detective was permitted to give hearsay evidence regarding what Mr. Morgan said to him. Moreover, the judge directed the jury during his summing up that they could rely on the detective's statements as circumstantial evidence. The petitioners claim further that the victim's counsel failed to give the victim an opportunity to respond to the hearsay evidence. Finally, the Petitioners argue that a violation of Article 8 of the Convention also constitutes a violation of Article 5 of the Convention, for reason of the cruel manner in which the victim was sentenced.

Dwight Fletcher (Case 12.126)

119. The petitioners in Case 12. 126 (Dwight Fletcher) allege violations of Article 8 because of inadequate legal representation and inadequate time and facilities in preparing the victim's defense. The petitioners argue that Mr. Fletcher was not provided with legal representation during

his preliminary hearing, and that he was held in detention for eighteen months before he was permitted to contact an attorney. The petitioners also claim that prior to his appeal, the victim was only able to meet once with his new attorney for approximately 25 minutes in a crowded cell, which was not conducive for the facilities necessary to prepare for trial.[FN48]

[FN48] In support of their position, the Petitioners also cite the U.N. Human Rights Committee decision in the case *Aston Little v. Jamaica*, supra.

120. Additionally, the Petitioners indicate that despite the victim's requests, his alibi witnesses were not called at trial, and allege that this constitutes a violation of Article 8(2)(f) of the Convention. They also complain that the prosecution called a witness at the victim's re-trial who had previously been found guilty of perjury in Mr. Fletcher's first trial and who claimed to have identified the victim in a dark football field. The petitioners argue that the victim's attorney did not challenge the use of such a witness, nor did the attorney enter evidence concerning the prosecution's use of a perjured witness.

Anthony Rose (Case 12.146)

121. In Case 12.146 (Anthony Rose), the Petitioners allege that the victim's rights under Articles 8(2)(c) and 8(2)(e) of the Convention have been violated, because of inadequate legal representation and inadequate time and means for preparing the victim's defense. The petitioners maintain that death penalty cases require a higher standard with regard to the time and means necessary for the preparation of trial. In this regard, the Petitioners claim that the victim only saw his attorney in court during trial, and that the victim's attorney blamed their infrequent contact on the limited means provided by the legal aid system in Jamaica. The petitioners argue that this standard of legal assistance is not in accordance with international human rights jurisprudence, or with the statements of the United Nation's Special Rapporteur on extrajudicial, summary and arbitrary executions, namely that at all stages defendants charged with capital offences must benefit from "an adequate provision for State funded legal aid by competent defense lawyers." [FN49]

[FN49] Report of the Special Rapporteur on ExtraJudicial, Summary or Arbitrary Executions, UN. Doc. E/CN.4/ at para. 547.

e. Articles 2, 8, 24 and 25 - unavailability of legal aid for Constitutional Motions

122. The petitioners in the five cases current before the Commission argue that the State does not provide legal aid for Constitutional Motions, and that this results in a denial of access to court and a denial of effective remedies, in violation of one or more of Articles 2, 8, 24 and 25 of the Convention.

123. More particularly, the Petitioners recognize that Article 25(1) of the Constitution of Jamaica provides individuals with the legal right to bring a Constitutional Motion before the Supreme Court. They argue, however, that there is no practical opportunity for the victims to pursue a Constitutional Motion because the proceedings are extremely expensive and beyond the victims' means, and because no legal aid is available for these motions. Consequently, the Petitioners submit that the State's failure to provide legal aid for Constitutional Motions denies the victims access to the courts and hence to an effective remedy for violations of the Constitution or of the American Convention. The petitioners also submit in this regard that the principle of effective access to courts is even more indispensable in capital cases, where a defendant's life and liberty are at stake.

124. In support of their arguments, the Petitioners cite decisions of other international human rights tribunals, such as the decision of the European Court of Human Rights in *Airey v. Ireland*,^[FN50] for the proposition that individuals must be guaranteed effective access to courts in fact as well as in law. The petitioners claim that the unavailability of legal aid in Jamaica in fact deprives the victims of effective access to the courts, and that the State is responsible for violations of Article 25 of the Convention.

[FN50] *Airey v. Ireland* [1979] 2 E.H.R.R. 305.

125. Finally, the Petitioners argue that the fact that some attorneys take pro bono cases does not relieve Jamaica of its obligation to provide legal aid with regard to Constitutional Motions. They also claim in this regard that very few attorneys in Jamaica accept requests to take Constitutional Motions pro bono

126. In response to the State's contention that Constitutional Motions are not criminal proceedings to which the right to legal counsel under Article 8(2)(e) of the Convention applies, the Petitioners maintain that a Constitutional Motion is a criminal proceeding. They argue that a Constitutional Motion in the context of the victims' cases arises because of an earlier criminal proceeding and that it could influence and change a ruling on a previous criminal proceeding, for example by quashing a capital sentence. As a consequence, the Petitioners argue that Constitutional Motions should be considered criminal proceedings for the purposes of Article 8(2)(e) of the Convention.

B. Positions of the State

1. Position of the State on admissibility

127. The State provided observations in each of the cases that are the subject of this Report. The State made reference to the issue of admissibility in only three of the five cases, Case 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose). In Case 12.107 (Carl Baker), the State contended that domestic remedies were exhausted when the victim's petition to the Judicial Committee of the Privy Council was dismissed.^[FN51] In Case 12.126 (Dwight Fletcher), the State declared that it waived the issue of admissibility, and proceeded to respond to

the merits of the petition, in order to expedite the examination of the allegations.[FN52]In Case 12.146 (Anthony Rose), the State declared that it deferred its right to address the admissibility of the victim's petition, but in the interest of time proceeded to address the merits of the victim's petition.[FN53]Since its original submissions to the Commission in Case 12.146 (Anthony Rose), the State has not revisited the issue of admissibility.

[FN51] In Case 12.107 (Carl Baker), the State's response to the petition dated March 18, 1999 stated that, "[o]n the issue of admissibility of the communication, the Ministry deems all domestic remedies exhausted when the author's petition to the Privy Council was dismissed on January 20, 1999."

[FN52] In Case 12.126 (Dwight Fletcher), the State's response to the petition dated May 3, 1999 stated that, "[i]n order to expedite the examination of these allegations, the Ministry will waive the issue of admissibility and proceed to respond to the merits of the petition."

[FN53] In Case 12.146 (Anthony Rose), the State's response to the petition dated June 10, 1999, stated that "[t]he Ministry at this time defers its right to address the admissibility of the applicant's petition, however in the interest of time it will address the merits of the applicant's petition."

128. In the two remaining cases, Case Nos. 12.023 (Desmond McKenzie) and 12.044 (Andrew Downer and Alphonso Tracey), the State has remained silent on the issue of admissibility.

2. Position of the State on the merits

a. Articles 4, 5, 8, 24 and 25 - mandatory nature of the death penalty and the prerogative of mercy

129. The State does not deny that the death penalty in Jamaica is mandatory for capital and multiple non-capital murders. Nonetheless, the State argues that the application of the mandatory death penalty in cases of capital murder is not arbitrary because there are established categories of capital murder, and there is nothing arbitrary about the differentiation between capital and non-capital murder. The State claims that the passage of the Offences Against the Persons (Amendment) Act 1992 retained capital punishment for certain offences within the State's sovereign rights. The State also indicates that Article 4 of the Convention does not prohibit the death penalty, it merely imposes limitations on its implementation. The State therefore argues that the mandatory death penalty does not violate the American Convention because it applies to serious offences and the State can demand a high penalty in such cases. The State also argues that the opportunity to offer a plea in mitigation is provided for through the Prerogative of Mercy.

130. In addition, the State cites section 17(2) of the Constitution of Jamaica, which preserves punishments that pre-date independence as lawful and shields them from constitutional challenge as constituting torture or inhuman or degrading treatment or punishment. Section 17 of the Constitution of Jamaica states:

1. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
2. 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.

131. In addition to the above provisions of the Jamaican Constitution, the State relies upon several decisions of the Judicial Committee of the Privy Council, including *Pratt v. Attorney General for Jamaica*, in which, according to the State, it was held that hanging by law pre-dates Jamaican Independence and therefore cannot be considered an inhumane form of punishment. Furthermore, the State submits that the existence of Article 6 of International Covenant on Civil and Political Rights is evidence that the international community does not regard the death penalty as inhuman or degrading punishment. Consequently, as the victim was duly convicted of capital murder and sentenced to death, the State denies that the mandatory nature of the death penalty is arbitrary, cruel, inhuman, degrading and a breach of the victim's right not to be arbitrarily deprived of his life.

132. In addition, in relation to Article 4(6) of the Convention, the State does not accept the Petitioners' argument that the victims' rights have been violated because of the courts' failure to accept and review mitigating circumstances with regard to sentencing at the trial stage. The State maintains that there is a procedure for offering pleas in mitigation, namely the Prerogative of Mercy. Additionally, the State denies the Petitioners' allegation that there is no criteria governing the executive's discretion with regard to the process of mercy. The State claims that clear criteria in the exercise of the Prerogative of Mercy is prescribed under Sections 90 and 91 of the Jamaican Constitution, which state:

90(1) The Governor General may, in Her Majesty's name and on Her Majesty's behalf (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions; (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence; (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.(2) In the exercise of the powers conferred on him by this section the Governor General shall act on the recommendation of the Privy Council.

91(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor General may require to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.(2) The power of requiring information conferred on the Governor General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his

judgment the matter is too urgent to admit such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

The State argues that the Prerogative of Mercy is not subject to procedural guarantees, because it is outside the judicial process. In support of this argument, the State cites the decision of the Judicial Committee of the Privy Council in *de Freitas v. Benny*,^[FN54] in which it was held that "[m]ercy is not the subject of legal rights. It begins where legal rights end."

[FN54] *de Freitas v. Benny* [1976] 2 A.C. 239.

133. The State indicates that the Prerogative of Mercy is an additional remedy to those available through the legal process, in that it constitutes an exercise of executive discretion, and an extrajudicial remedy not subject to principles of natural justice. The State also contends that the Prerogative of Mercy in Jamaica is not inconsistent with Article 4(6) of the Convention. The State argues that its only duty is to make the process available as an opportunity to re-examine the victim's case, and therefore maintains that it does not matter that it is not a legal remedy. Nevertheless, the State denies that the process is arbitrary or unavailable. It says that every offender can apply for mercy an unlimited amount of times, and that written representations are frequently submitted by accused persons, their attorneys and human rights organizations. The State also indicates that matters such as the victim's relevant physical and mental health are considered by the Jamaican Privy Council, and that it examines all aspects of an offender's case and evidence based on testimony given before a court of law, by way of the trial judge's report on the offender's case.

134. At the same time, in its response to Case 12.146 (Anthony Rose), the State confirms that the Prerogative of Mercy is a purely discretionary act. The State recognizes in this regard that the victim has no legal right to be notified of the date upon which the Jamaican Privy Council is to consider his case, no right to an oral hearing before the Privy Council or to be supplied with any material placed before the Privy Council at his hearing, and no right to submit representations in advance of the hearings. However, the State denies that the right to apply for mercy is illusory and ineffective, as nothing in fact precludes offenders from placing information before the Privy Council.

135. With respect to Case 12.107 (Carl Baker), the State specifically denies the Petitioners' contention that the Prerogative of Mercy is exercised only with respect to women, but rather indicates that men may also claim the benefit of mercy.

136. Finally, in relation to the violations of Article 4(3) of the Convention alleged by the Petitioners, the State argues that there has been no reintroduction of the death penalty in Jamaica. The State claims that a moratorium on executions was put in place while it was considering whether to abolish the death penalty, and that the vote in the Jamaican Parliament was decidedly in favor of retaining the death penalty. The State therefore contends that the death penalty was never abolished in Jamaica.

b. Articles 5, 7, and 8 - delay in the victims' criminal proceedings

137. In relation to the cases in which the victims allege the delays in their criminal proceedings violate one or more of Articles 5, 7 and 8 of the Convention, the State argues cumulatively that such delays are not sufficient to result in commutation of the victims' sentences. Additionally, the State indicates that according to the decision of the Judicial Committee of the Privy Council in *Pratt v. Attorney General for Jamaica*, prolonged judicial proceedings per se do not constitute cruel and inhuman treatment. Thus, while the State indicates that it will investigate allegations of delay in the victims' criminal proceedings, it argues that even if a delay is determined by the State or by the Commission to have been unreasonable, it would not be sufficient to result in commutation of the death sentence.

138. The State has also provided further submissions with respect to the allegations and circumstances of particular petitioners:

a. With respect to Case 12.023 (Desmond McKenzie), concerning the failure to bring the victim promptly before a judge subsequent to his arrest, the State denies a breach of the Convention. The State claims there is no violation since the victim was "freed on bail" at least 5 days after his arrest so his wife could take him to the May Pen Hospital. Therefore, the State maintains that there is no breach of the Convention, even if the victim first appeared before a magistrate three weeks after his arrest. The State notes the Petitioners' assertion that the victim was continuously in police detention during his visit to the hospital, but argues the delay was not detrimental to him since he was able to receive medical attention. The State suggests that this illustrates that there was never a deprivation of the victim's liberty.

b. With respect to Case 12.044 (Andrew Downer and Alphonso Tracey), the State initially denied that the victims were brought before a judge one month after their respective arrests. It recognized, however, that the 3 ½ year delay to bring victims to trial was "longer than desirable", and indicated that it would investigate the matter and inform the Commission of its findings. After investigating the matter, the State confirmed that Andrew Downer and Alphonso Tracey were arrested on May 4, 1991, and April 30, 1991, respectively, and that they first appeared before a judge on June 17, 1991, just over one month after their arrests. The State also confirmed that a preliminary inquiry was held in the victims' case between September 25, 1991, and January 6, 1992, and that, after appearing in Court on a "number of occasions", the victims' trial began on December 15, 1994. Based upon its investigation, the State suggests that officials were not idle during the pre-trial period. In any event, the State emphasized that even if the delay is found to be unreasonable, it would not be sufficient reason to commute the victims' death sentences.

c. With respect to Case 12.107 (Carl Baker), in which the Petitioners argue that the delay in the victim's criminal proceedings contravened Article 8(1) of the Convention, the State emphasizes that the delay of one year and three months from the time the victim was arrested to his trial date did not violate the Convention. The State argues that the victim's right to a hearing within a reasonable time was not violated, because the delay resulted from the need to conduct a preliminary inquiry and to fully investigate whether there was a prima facie case to justify trial. Subsequent to the Petitioners' request for a more detailed response concerning the preliminary inquiry, the State submitted to the Commission that it had nothing further to add concerning the allegation. Additionally, the State maintains that a delay of one year and three

months between the victim's date of conviction and the hearing of his appeal is not a breach of the Convention, indicating that a reasonable period must be allowed for the exhaustion of domestic remedies, including appeals. Furthermore, the State indicates that the victim's period of detention on death row does not rise to the level of the 5-year period mentioned in the Pratt v. Attorney General for Jamaica decision, and thus should not result in commutation.

d. With respect to Case 12.126 (Dwight Fletcher), the State emphasizes that even if there was an unreasonable delay in the victim's case, it is not sufficient to commute his death sentence. Nevertheless, the State indicated that it would investigate the allegation that the victim was detained for three weeks prior to being brought before a judge. The State also denies that the two and a half years spent by the victim on death row constitutes cruel or unusual treatment. It notes in this regard that the victim's time on death row falls far below, for example, the delay of four years and ten months that the Judicial Committee of the Privy Council found constituted cruel and unusual treatment in the case Guerra v. Baptiste and Others.[FN55]

[FN55] In its observations in Case 12.126 (Dwight Fletcher), the State claims in respect of the delay in the Guerra case that "[t]his was 4 years and 10 months following his conviction and there was a delay in the case because notes of the evidence at his trial were not available for appeal until over 4 years. In Mr. Fletcher's case the post-trial delay has been 2 and a half years, which the State does not consider cruel and unusual."

c. Article 4 and 5 - conditions of detention and method of execution

139. In relation to the cases in which the victims allege detention conditions as violating one or more of Articles 4 and 5 of the Convention, the State argues cumulatively that poor detention conditions alone will not render the victims' execution unlawful. The State relies in this regard on the decision of the Judicial Committee of the Privy Council in the case Thomas and Hilaire v. The Attorney General of Trinidad and Tobago and others.[FN56] According to the State, the Privy Council held in Thomas and Hilaire that conditions of detention similar to those alleged by the victims did not constitute cruel and unusual treatment or punishment, and that even if they did, commutation of the sentence would not be the appropriate remedy, as the treatment did not involve such egregious conduct as keeping an individual in solitary confinement, shackling, flogging or torture.

[FN56] Darren Roger Thomas and Haniff Hilaire v. Cipriani Baptiste and others, Privy Council Appeal N° 60 of 1998 (21 January 1999).

140. Additionally, the State indicates that it would not adopt the generalized positions concerning detention conditions stated in reports from international and domestic bodies relied upon by the Petitioners. The State argues that these reports are based on conditions from 1983 to 1990, and alleges that there have been "marked improvements" to the prison conditions in Jamaica since those reports were prepared. The State adds that it would only consider and

investigate individual complaints from the victims containing specific information pertaining to their personal experience in detention.

141. The State has also provided further submissions with respect to the allegations and circumstances of the particular victims:

a. With respect to Case 12.023 (Desmond McKenzie), the State denies the victim was detained with convicted persons prior to his conviction, contrary to Article 5(4) of the Convention. The State claims none of the lock ups in which the victim was detained hold convicted persons. The State also indicates that St. Catherine's District Prison holds convicted persons, but they are held in separate sections from those who are on remand. Further, the State claims the victim was not in prison on February 23, 1995, and therefore he could not have been subjected to abuse by prison warders on that date. The State indicated it would investigate the victim's allegations of ill treatment for which particulars are provided, including those alleged to have occurred on March 5, 1997;

b. With respect to Case 12.044 (Andrew Downer and Alphonso Tracey), the State indicates that Andrew Downer was arrested on April 30, 1991, and taken to the hospital on May 1, 1991. The State also claims there is no evidence that the victim's medical condition was so dire at the time of his arrest that he could not have been processed at the police station before attending the hospital, or that he was released contrary to medical advice. The State indicates that the victim's allegations in respect of his medical care should not be taken to show a deliberate and consistent attempt to deny him medical care, but rather that they reflect "the difficulties resulting from lack of resources, which affect the prison system. The Ministry does not offer this as an excuse, but as a statement of fact, however unfortunate." The State also notes that the victim saw three doctors, had X-rays taken and was given medication. Finally, the State denies that the victims' conditions of detention are such that their executions are rendered unlawful

c. With respect to Case 12.107 (Carl Baker), the State initially denied the victim's allegations of ill-treatment. Subsequently, in its September 15, 1999 submission to the Commission, the State indicated it would investigate the victim's detailed allegations of ill treatment. It emphasized, however, that even if the allegations are found to be true, they would not result in commutation of the victim's death sentence.

By communication dated November 19, 1999, the State provided the Commission with the results of its investigation into the allegations contained in the Petitioners' supplemental submission of July 14, 1999. In its communication, the State contends, inter alia, that the prison records do not indicate a warder named "Oniss" being employed on March 16, 1999. The records do, however, indicate that a warder named Mr. Winston Holness was employed at the prison at that time, and Mr. Holness has denied threatening the victim on March 16, 1999 or threatening or antagonizing him on a regular basis. The State indicates further that Warder Willam Burke has denied beating Mr. Baker on April 12, 1999 and that other members of the prison staff responsible for guarding the area where the victim was held on that day have denied having any knowledge of the beating. The State also claims that no search involving warders, police and military personnel was carried out at the prison on April 9, 1999, and that the medical journal and the victim's medical records do not reflect the victim's allegations of illness for the period April 6-11, 1999 or any referrals or medical appointments outstanding. Finally, the State alleges that, in the absence of specific information as to the identity of the warders accused of issuing

threats to the victim because he made complaints, and in the absence of any report of the victim being threatened, the State has been unable to investigate these allegations.

d. With respect to Case 12.126 (Dwight Fletcher), the State indicates that it would investigate the victim's allegations of ill-treatment and poor prison conditions, with additional information from the Petitioners, such as names, dates, and locations. At the same time, the State reiterates its position that poor prison conditions are not sufficient to result in commutation of a death sentence, and suggests that only complaints of beatings could be grounds for such relief.

e. With respect to Case 12.146 (Anthony Rose), the State denies that St. Catherine's District Prison has no or inadequate medical services. The State reports that St. Catherine's District Prison has a Medical Center staffed with two registered medical practitioners, a general practitioner and psychiatrist, dentist, nurse, social worker and medical orderlies. The State claims that, when a prisoner makes a complaint of a medical nature, arrangements are made with a medical orderly for that prisoner to be taken to see the doctor at the very earliest opportunity. If the complaint is of a serious nature and a doctor is not on duty at the time or cannot be located, the prisoner is immediately dispatched to the Spanish Town General Hospital, which is a few miles from the prison.

d. Articles 4 and 8 - Right to a fair trial

142. In respect of those cases in which the Petitioners allege violations of Article 8 of the Convention, based upon the adequacy of their legal representation and preparation and the manner in which their trials were conducted, the State raises several arguments.

143. With respect to the allegations in Case 12.023 (Desmond McKenzie) concerning the judge's conduct during the victim's trial, the State indicated in its initial observations on the Petitioners' petition that the Ministry "concedes that the judge's instructions to the jury in the applicant's trial were biased." The State nevertheless argued that this was a matter properly left to the appellate courts of Jamaica, that the issue was dealt with extensively by the Jamaican Court of Appeal, and therefore that there was no compelling reason for the Commission to review the matter.

144. In a letter to the Commission dated August 28, 1998, however, the State purported to amend its original response to the petition, declaring that it erred when it said that the Ministry "concedes" that the judge's instructions to the jury were biased, but rather intended to argue that the State did not concede the bias issue. Furthermore, in a letter dated November 2, 1998, the State reiterated that the concession was an error, and attached the memorandum of instructions dated July 29, 1998 from the Jamaican Attorney General's Department to its Embassy in Washington regarding the State's response in Case 12.023, which makes no reference to a "concession". The State indicates that its officials in Washington erred in editing the Ministry's memorandum, and therefore that it was an error to state there was a concession when none had been made.

145. Additionally, in relation to Mr. McKenzie's allegations concerning the violation of Article 8(2)(d) of the Convention, the State admits that it was unfortunate that the judge denied an adjournment until the victim's counsel could appear. However, the State denies that this incident rises to the level of a violation of the Convention, since the victim's counsel returned

that afternoon. The State cites the Privy Council's decision in the case *Robinson v. R.*[FN57] for the proposition that the right to counsel is not an absolute right, in that, for example, adjournments do not have to be repeatedly granted in order to ensure protection of the right.

[FN57] *Frank Robinson v. R.* [1985] 1 A.C. 957

146. With respect to the allegations in Case 12.044 (Andrew Downer and Alphonso Tracey) concerning the adequacy of the manner in which their trial was conducted, the State claims that the victims' objection to the amended indictment was overruled at trial. The State argues that issues concerning the notification of charges and amendments to indictments should be left to the trial and appellate courts to examine. It also notes that these issues were in fact examined by the Court of Appeal and by the Judicial Committee of the Privy Council in the context of the victims' cases, and therefore that no denial of justice has been shown.

147. In relation to Case 12.107 (Carl Baker), the State indicates that the judge amended the defect in the victim's sentence in accordance with his powers pursuant to section 20 of the Criminal Justice (Administration) Act of 1960. According to this Act, it is lawful for every judge at all times to amend all defects and errors of any proceedings in a criminal case. The State also indicates that the victim did not raise an objection when the judge amended his sentence.

148. Additionally, the State argues there was no act or omission on the State's part to prevent Mr. Baker from seeing his attorney. The State maintains that the preparation and handling of cases are matters for the attorney and his client, and that the State will not partake or interfere in these matters. The State argues that allegations by a victim that he had inadequate time with his attorney to prepare for trial does not engage the responsibility of the State. Finally, the State argues that it is not under an obligation to secure witnesses for trial, and therefore denies any violation of the Convention in this regard.

149. With respect to the allegations in Case 12.126 (Dwight Fletcher) in relation to the adequacy of the victim's legal representation, the State argues that it cannot be held accountable for alleged errors committed by victim's counsel. In support of its position, the State cites the decision of the United Nations Human Rights Committee in the case *D. Taylor v. Jamaica*,[FN58] in which the Committee expressed the opinion that "the State party cannot be held accountable for any alleged deficiencies in the defence of the accused or alleged errors committed by the defence lawyer, unless it was manifest to the trial judge that the lawyer's behavior was incompatible with the interest of justice." The State indicated, however, that it would investigate the Petitioner's allegations concerning the failure to provide the victim with legal representation at his preliminary hearing, the denial of contact with his attorney for eighteen months following his arrest, and the allegation that Mr. Fletcher's counsel failed to advance evidence and consult with the victim on appeal. The State also points out that section 3 of the Jamaica's Poor Prisoners' Defence Act obliges a Resident Magistrate or a Judge of the Supreme Court to grant an indigent accused a legal aid certificate, which entitles the accused to free legal aid in preparing and conducting his defense.

[FN58] U.N.H.R.C., *D. Taylor v. Jamaica*, Communication N° 705/1996.

150. The State did not provide any observations in respect of the violations of Article 8 of the Convention, alleged in Case 12.146 (Anthony Rose) relating to the victim's inadequate legal representation and inadequate time and facilities to prepare the victim's defense.

e. Articles 2, 8, 24 and 25 - unavailability of legal aid for Constitutional Motions

151. In four of the five cases before the Commission, Case Nos. 12.023(Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker) and 12.126 (Dwight Fletcher), the State claims that it is not required to provide legal aid for Constitutional Motions because Article 8(2)(e) of the Convention only requires a State Party to provide legal aid in criminal proceedings, indicating that a Constitutional Motion is not a criminal proceeding. Moreover, according to the State, a lack of legal aid regarding Constitutional Motions is not an absolute bar to presenting Constitutional Motions in Jamaica. The State cites cases such as *Pratt v. Attorney General for Jamaica* as examples of situations in which victims were able to pursue Constitutional Motions without legal aid. Consequently, the State denies any violation of the Convention relating to the provision of legal aid for Constitutional Motions. In Case 12.146 (Anthony Rose), the State did not respond to the Petitioners' allegations concerning the lack of legal aid for Constitutional Motions in violation of Articles 24 and 25 of the Convention.

IV. ANALYSIS

A. Competence of the Commission

152. The Commission has jurisdiction *ratione materiae* in the five cases in this Report, as the State deposited its instrument of accession to the American Convention on August 7, 1978,[FN59] and the Petitioners allege that the State has violated Articles 1, 2, 4, 5, 7, 8, 12, 24 and 25 of the Convention. The Commission also has jurisdiction *ratione temporis*, as the Petitioners' complaints pertain to acts or omissions that transpired after the State's accession to the Convention. Finally, the Commission has jurisdiction *ratione personae*, as the victims are natural persons and the Petitioners were authorized under Article 44 of the Convention to lodge petitions on behalf of the victims. The Commission is therefore fully competent to examine the five cases in this Report.

[FN59] Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.VII.92 doc.31 rev.3 (3 May 1996), p. 53.

B. Admissibility

153. The Commission has considered the admissibility of the five cases that are the subject of this Report, namely Case Nos. 12.023(Desmond McKenzie), 12.044(Andrew Downer and Alphonso Tracey), 12.107(Carl Baker), 12.126(Dwight Fletcher) and 12.146(Anthony Rose) pursuant to Articles 46 and 47 of the Convention and makes the following determinations.

1. Duplication

154. In each of the five cases noted above, the Petitioners have indicated that the victims' cases have not been submitted for examination by any other procedure of international investigation or settlement. The State has not contested the issue of duplication. The Commission therefore finds no bar to consideration of these cases under Articles 46 (1)(c) or 46(1)(d) of the Convention.

2. Exhaustion of domestic remedies

155. Article 46(1)(a) of the Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally accepted principles of international law." When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 46(2) of the Convention specifies that this exception to exhaustion applies if: (1) the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; (2) the party alleging the violation has been denied access to remedies under domestic law or has been prevented from exhausting them; or (3) where there has been unwarranted delay in rendering a final judgment. When a victim alleges that he or she is unable to prove exhaustion as provided for in Article 46(2) of the Convention, Article 37(3) of the Commission's Regulations provides that the burden shifts to the State to demonstrate that the remedies under domestic law have not been previously exhausted.[FN60]

[FN60] I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

156. Exhaustion of domestic remedies also need not be demonstrated by a victim in the event that the State against which the complaint is lodged waives this requirement. In this regard, the Inter-American Court of Human Rights has held that the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, because the rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had an opportunity to remedy them by internal means. According to the Court, the requirement is thus considered a means of defense and, as such, waivable, even tacitly. Further, a waiver, once effected, is irrevocable.[FN61]

[FN61] I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

157. As noted in Part III.B.1 of this Report, the State did not provide observations in respect of admissibility in two of the five cases before the Commission, Case 12.023 (Desmond McKenzie) and 12.044 (Andrew Downer and Alphonso Tracey). In addition, in Case 12.107 (Carl Baker) the State stated that domestic remedies were exhausted when the victims' petition to the Judicial Committee of the Privy Council was dismissed, and in Case 12.126 (Dwight Fletcher), the State expressly indicated that it waived the issue of admissibility. Finally, in Case 12.146 (Anthony Rose), the State indicated that it would "defer" its right to address the issue of admissibility, and proceeded to address the merits of the petition "in the interest of time". The State has subsequently made no submissions respecting admissibility in this case.

158. After considering the issue of admissibility in the context of these cases, the Commission finds that the State explicitly or tacitly waived any challenge with regard to the exhaustion of remedies that could potentially have been invoked by the Petitioners in domestic proceedings in all five of these cases. The Commission therefore does not consider Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) to be inadmissible by reason of Article 46(1)(a) of the Convention.

3. Timeliness of the petitions

159. In accordance with Article 46(1)(6) of the Convention, petitions must be presented in a timely manner, namely within a period of six months from the date on which the complaining party was notified of the final judgment at the domestic level.

160. As Table 5 below indicates, based upon the records before the Commission, the petitions in all five of the cases that are the subject of this Report were lodged with the Commission within 6 months from the date on which the final judgments on the victims' appeals from their criminal convictions were rendered. The State has not contested the issue of timeliness.

Table 5

Case No.	Victim(s)	Date of Final Judgment on Appeal	Date Petition Lodged with the Commission
12.023	Desmond McKenzie	June 25, 1998	June 29, 1998
12.044	Andrew Downer and Alphonso Tracey	July 20, 1998	August 7, 1998
12.107	Carl Baker	January 20, 1999	February 17, 1999
12.126	Dwight Fletcher	January 21, 1999	March 11, 1999
12.146	Anthony Rose	April 14, 1999	April 30, 1999

161. Accordingly, the Commission finds no bar to consideration of these five cases by reason of Article 46(1)(b) of the Convention.

4. Colorable claim

162. Article 47(b) and (c) of the Convention require, respectively, a petition to be declared inadmissible, if it does not state facts that tend to establish a violation of the rights guaranteed by the Convention, or if the statements of the Petitioner or the State indicate that the petition is manifestly groundless or out of order.

163. The petitioners in the five cases have alleged that the State has violated the victims' rights under one or more of Articles 1, 4, 5, 7, 8, 24 and 25 of the Convention as set out in paragraph 1 and particularized in Part III.A of this Report. In addition, the Petitioners have provided factual allegations, described in Part III.A.1 of this Report, that tend to establish that these alleged violations may be well-founded.

164. In Case 12.107 (Carl Baker), the Petitioners have also included Articles 12(1) and 12(2) of the Convention among the provisions alleged to have been violated in respect of the victim in that case. However, the Petitioners have not provided any submissions or evidence respecting the legal or factual foundation for these alleged violations. Consequently, the Commission finds the petition in Case 12.107 (Carl Baker) to be inadmissible pursuant to Article 47(b) of the Convention insofar as the Petitioners allege violations of Article 12(1) and 12(2) of the Convention.

165. The Commission therefore finds, in respect of all five cases, and without prejudicing the merits of the matter, that the Petitioners have presented colorable claims of violations of the victims' rights under the Convention for the purposes of Articles 47(b) and 47(c) of the Convention, with the exception of the violations of Articles 12(1) and 12(2) of the Convention alleged in Case 12.107 (Carl Baker).

5. Conclusions on admissibility

166. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the Convention and the applicable provisions of the Commission's Regulations, the Commission decides to declare as admissible the claims presented on behalf of the victims in four cases that are the subject of this Report: 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose).

167. With respect to Case 12.107 (Carl Baker), the Commission decides to declare as admissible the claims presented on behalf of the victim, with the exception of the violations of Articles 12(1) and 12(2) of the Convention alleged on behalf of the victim, which the Commission declares inadmissible pursuant to Article 47(b) of the Convention.

C. The merits

168. As detailed in Part III.A.1 of this Report, the violations alleged by the Petitioners in the cases currently under consideration by the Commission fall into one or more of the following categories:

- a. violations of Articles 4(1), 4(2), 4(3), 4(6), 5, 8, 24 and 25 of the Convention, relating to the mandatory nature of the death penalty for the crime of capital and multiple non-capital murder in Jamaica and the process for granting amnesty, pardon and commutation of sentence in Jamaica;
- b. violations of Articles 5, 7(4), 7(5), 7(6) and 8 of the Convention, relating to delays in the victims' criminal proceedings;
- c. violations of Articles 5(1), 5(2), 5(4) and 5(6) of the Convention, relating to the complaints' conditions of detention and the method of execution in Jamaica;
- d. violations of Articles 4, 8(1) and 8(2) of the Convention, relating to the adequacy of time and facilities for preparing the victims' legal defenses and of their legal representation, and the manner in which their criminal proceedings were conducted;
- e. violations of Articles 2, 8, 24 and 25 of the Convention, relating to the unavailability of legal aid for Constitutional Motions in Jamaica;
- f. violations of Article 1(1) of the Convention with regard to the above mentioned violations.

1. Standard of review

169. Before addressing the merits of the cases to which this Report relates, the Commission deems it advisable to articulate its standard of review in determining capital punishment cases. In this regard, the Commission is of the view that it must apply a heightened level of scrutiny in such cases. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights.[FN62] The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life perpetrated by a State Party through the death penalty comply strictly with the provisions of the Convention, including in particular the right to life provisions of Article 4, the guarantees of humane treatment under Article 5, and the due process and judicial protections guaranteed under Articles 8 and 25 of the Convention. This "heightened scrutiny" test is consistent with the restrictive approach to the death penalty provisions of human rights treaties advocated by the Commission and other international authorities.[FN63] In particular, the Inter-American Court has concluded that the American Convention has adopted an approach in respect of the death penalty that is "incremental" in character, whereby, "without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance." [FN64] As interpreted by the Inter-American Court, Article 4 of the Convention reflects a tendency to restrict the application of the death penalty. The purpose is "establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so." [FN65]

[FN62] See e.g. U.N.H.R.C., Baboheram-Adhin et al. v. Suriname, CommunicationNos. 148-154/1983, Adopted 4 April 1985, para. 14.3 (observing that the right to life under Article 6(1) of the International Covenant on Civil and Political Rights is the "supreme right of the human being").

[FN63] *Id.* (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.). See also Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter “Ndiaye Report”), para. 378 (commenting upon fair trial standards relating to capital punishment as follows):

While in many countries the law in force takes account of the standards of fair trials as contained in the pertinent international instruments, this alone does not exclude that a death sentence may constitute an extra-judicial, summary or arbitrary execution. It is the application of these standards to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.

[FN64] I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, (8 September 1983), Annual Report 1984, p. 31, para. 57.

[FN65] *Id.*, para. 56. The Inter-American Court concludes its authoritative interpretation of the American Convention by stating the aspiration to progressively suppress the death penalty:

On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance. (*Id.*, para. 57).

170. The Commission also notes that this heightened scrutiny approach to death penalty cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees.[FN66]The fourth instance formula does not, however, preclude the Commission from considering a case where the Petitioner's allegations entail a possible violation of any of the rights set forth in the Convention. In the case of Clifton Wright,[FN67] for example, a Jamaican citizen who alleged that a judicial error resulted in a death sentence against him, the Commission concluded that the conviction and sentence were undermined by the record in the case, but that the appeals process in Jamaica did not permit for a correction of the situation. Consequently, the Commission found that Jamaica had violated the Petitioner's right to judicial protection under Article 25 of the Convention, and recommended that the Government of Jamaica order an investigation of the matter and afford Mr. Wright a judicial remedy to have the inconsistency corrected. As Mr. Wright had been denied effective domestic judicial protection, he was the victim of a specific human rights violation under the Convention and the fourth instance formula did not apply in the circumstances of his case.

[FN66] See I/A Comm. H.R., *Santiago Marzioni*, Report N° 39/96, Case 11.673 (Argentina), October 15, 1996, Annual Report 1996, p. 76, paras. 48-52. See also I/A Comm. H.R., *Clifton Wright*, Case 9260 (Jamaica), September 16, 1988, Annual Report 1987-88, p. 154.

[FN67] Clifton Wright Case, *supra*. See also I/A Comm. H.R., *William Andrews v. United States of America*, Annual Report 1997, p. 614.

171. The Commission will therefore review the Petitioners' allegations pertaining to the imposition of capital punishment with a heightened level of scrutiny, to ensure that the right to life as prescribed under the Convention is properly respected. In addition, the fourth instance formula will not preclude the Commission from adjudicating the Petitioners' claims, insofar as those claims disclose possible violations of the Convention.

2. Articles 4, 5, 8, and 24 - the mandatory death penalty

a. The victims have been sentenced to mandatory penalties of death

172. The records in the 5 cases that are the subject of this Report indicate that all of the victims have been convicted of capital murder or multiple non-capital murders and sentenced to death.[FN68] In each case, the sentence was imposed pursuant to legislation in Jamaica that prescribes the death penalty as the only punishment available when a defendant is found guilty of capital murder, or of more than one non-capital murder.

[FN68] Case 12.023 (Desmond McKenzie) (convicted of capital murder in the furtherance of burglary); Case 12.04 (Andrew Downer and Alphonso Tracey) (convicted of murder in the course of furtherance of robbery); Case 12.107 (Carl Baker) (convicted of three counts of non-capital murder); 12.126 (Dwight Fletcher) (convicted of three counts of non-capital murder); Case 12.146 (Anthony Rose) (convicted of murder in the course or furtherance of arson).

173. More particularly, all of the victims have been convicted of capital murder, or of more than one non-capital murder, under Jamaica's Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992 (hereinafter the "Act").[FN69] Article 2(1) of the Act defines capital murder as follows:

[FN69] Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992 (13 October 1992), N° 14.

2.(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say-

a. the murder of-

i. a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;

- ii. a correctional officer acting in the execution of his duties or of a person assisting a correctional officer so acting;
- iii. a judicial officer acting in the execution of his duties; or
- iv. any person acting in the execution of his duties, being a person who, for the purpose of carrying out those duties, is vested under the provisions of any law in force for the time being with the same powers, authorities and privileges as are given by law to members of the Jamaica Constabulary Force, or the murder of any such member of the security forces, correctional officer, judicial officer or person for any reason directly attributable to the nature of his occupation;[FN70]

[FN70] Section 2(5) of the Act defines the various officials referred to in Section 2(1) as follows:
2(5) In this section-

"correctional officer" has the same meaning as in the Corrections Act; "judicial officer" means-

a. a Judge of the Supreme Court or the Court of Appeal, the Master in Chambers or any person for the time being performing the functions of a Judge of the Supreme Court or the Court of Appeal or of the Master in Chambers;

b. the Registrar or Deputy Registrar of the Supreme Court, the Revenue Court or the Court of Appeal or any person for the time being performing the function of Registrar or Deputy Registrar;

c. a Resident Magistrate or any person for the time being performing the functions of a Resident Magistrate;

d. a person employed in a court's office who carries out prosecution of offences or in the Office of the Director of Public Prosecutions or engaged to carry out functions on behalf of the Director of Public Prosecutions;

"member of the security forces" means a member of-

a. the Jamaica Constabulary Force;

b. the Jamaica Defence Force to the extent that such member has been assigned to act in aid of the Police;

c. the Island Special Constabulary Force;

d. the Rural Police.

b. the murder of any person for any reason directly attributable to-

i. the status of that person as a witness or party in a pending or concluded civil cause or matter or in any criminal proceedings; or

ii. the service or past service of that person as a juror in any criminal trial;

c. the murder of a Justice of the Peace acting in the execution of his judicial functions;

d. any murder committed by a person in the course or furtherance of-

i. robbery;

ii. burglary or housebreaking;

iii. arson in relation to a dwelling house; or

iv. any sexual offence;

- e. any murder committed pursuant to an arrangement whereby money or anything of value-
 - i. passes or is intended to pass from one person to another or to a third party at the request or direction of that other person; or
 - ii. is promised by one person to another or to a third person at the request or direction of that other person, as consideration for that other person causing or assisting in causing the death of any person or counselling or procuring any person to do any act causing or assisting in causing that death;
- f. any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public.

174. Article 3(1) of the Act in turn prescribes the death penalty as the mandatory punishment for any person convicted of a capital offence as defined under Article 2 the Act:

2(1) Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A), shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.

Where by virtue of this section a person is sentenced to death, the form of the sentence shall be to the effect only that he is to "suffer death in the manner authorized by law."

175. In addition, Article 3(1A) of the Act prescribes the death penalty as the mandatory punishment for an individual who has been convicted of more than one non-capital murder, as follows:

3(1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has:

- a. whether before or after the 14th October, 1992, been convicted in Jamaica of another murder done on a different occasion; or
- b. been convicted of another murder done on the same occasion.

176. The Act therefore prescribes death as the mandatory punishment for all capital murders, as well as for individuals who are convicted of more than one non-capital murder. The Act also defines capital murder as murder committed against certain persons by virtue of their employment, position or status, as well as murder committed in the course or furtherance of certain other offences, including robbery, burglary, housebreaking, and arson in relation to a dwelling house. Non-capital murder is defined under the Act as any murder not falling within the definition of capital murder.

177. Accordingly, once the jury found each of the victims in the five cases currently before the Commission guilty of capital or multiple non-capital murders, the death penalty was the only available punishment. The transcripts for the trials in several of the cases, for example in Case 12.044 (Andrew Downer and Alphonso Tracey),^[FN71] illustrate and confirm the mandatory nature of the death penalty for the crime of capital or multiple non-capital murders as it has applied to the victims in these cases.

[FN71] The State v. Alphonso Tracey and Andrew Downer, Transcript, Verdict and Sentencing, Home Circuit Court N° 2, 21 December 1994, File N° 5&6/95, at p. 289 (sentencing the victims as follows:

Alphonso Tracey, please stand. The jury having found you guilty of capital murder, the sentence of the court is that you shall suffer death in the manner prescribed by law. Downer, the jury having found you guilty of capital murder, the sentence of the court is that you shall suffer death in the manner prescribed by law.)

178. Crimes of capital murder and multiple non-capital murders in Jamaica can therefore be regarded as being subject to a “mandatory death penalty”, namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder or of more than one non-capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death.

179. This is subject to one exception, however. Article 3(2) of the Act specifically exempts from the death penalty female offenders who are convicted of offenses punishable with death, but who are found by a jury to be pregnant:

3(2) Where a woman convicted of an offence punishable with death is found in accordance with the provisions of this section to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment with or without hard labour for life instead of sentence of death.

(3) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before whom a woman is so convicted thinks fit to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by a jury.

(4) Subject to the provisions of this subsection, the said jury shall be the trial jury, that is to say the jury to whom she was given in charge to be tried for the offence, and the members of the jury need not be re-sworn:

Provided that-

(a) if any member of the trial jury, after the conviction, dies or is discharged by the court as being through illness incapable of continuing to act for any other cause, the inquiry as to whether or not the woman is pregnant shall proceed without him; and

(b) where there is no trial jury, or where a jury have disagreed as to whether the woman is or is not pregnant, or have been discharged by the court without giving a verdict on that question, the

jury shall be constituted as if to try whether or not she was fit to plead, and shall be sworn in such manner as the court may direct.

(5) The question whether the woman is pregnant or not shall be determined by the jury on such evidence as may be laid before them either on the part of the woman or on the part of the Crown, and the jury shall find that the woman is not pregnant unless it is proved affirmatively to their satisfaction that she is pregnant.

(6) Where in proceedings under this section the jury finds that the woman in question is not pregnant the woman may appeal under the Judicature (Appellate Jurisdiction) Act, to the Court of Appeal and that Court, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed on her and instead thereof pass on her a sentence of imprisonment with or without hard labour for life:

Provided that the operation of the provisions of this subsection shall be deemed to be coincident with the operation of the Judicature (Appellate Jurisdiction) Act.

180. Therefore, the penalty for a female offender who is convicted of a capital or multiple non-capital murder, but who is found by a jury to be pregnant, is a sentence of imprisonment with or without hard labour for life instead of a sentence of death.

181. As indicated in III.A.3.a of this Report, the Petitioners in all five of the cases before the Commission have alleged that their sentencing to a mandatory death penalty violates one or more of Articles 4(1), 4(2), 4(3), 5(1), 5(2), 5(4), 8(1), 8(2), 24 and 25 of the Convention. In particular, the Petitioners argue that although the death penalty is only imposed in capital or multiple non-capital cases, the distinction between these categories of murders and non-capital murders for which the death penalty is not imposed fails to allow for considerations of the particular circumstances of each offence and offender, including relevant aspects of the character and record of each defendant. As a consequence, the Petitioners claim that mandatory sentencing for capital and multiple non-capital murders violates the Convention. The petitioners also argue that the process for granting amnesty, pardon or commutation of sentence in Jamaica does not provide an adequate opportunity for considering individual circumstances, and in itself is inconsistent with Article 4(6) of the Convention.

182. In addressing the Petitioners' allegations, the Commission will first analyze the compatibility of mandatory death sentences for the crimes of capital and multiple non-capital murder with Articles 4, 5 and 8 of the Convention, in light of the terms of those provisions, their underlying principles, and relevant international and domestic precedents. The Commission will then determine whether the State has violated the Convention rights of the victims in the cases within this Report, because of the manner in which those victims have been sentenced to death.

b. Articles 4, 5 and 8 of the Convention and the mandatory death penalty

183. In light of the allegations raised by the Petitioners, the Commission must first ascertain whether the practice of imposing the death penalty through mandatory sentencing is compatible with Article 4 (right to life), Article 5 (right to humane treatment), and Article 8 (right to a fair trial) of the Convention and the principles underlying those provisions.

184 Article 4 of the American Convention provides as follows:

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

185. Article 4 of the Convention permits States Parties that have not abolished the death penalty to continue to impose it. At the same time, the Convention strictly regulates the manner in which the death penalty may be imposed by those States Parties. This restrictive approach to the implementation of the death penalty mirrors the treatment of the death penalty generally under contemporary international and, as the next section of this Report will indicate, domestic practice.

186 .Drawing in part upon the past experience of international human rights bodies, several general principles of interpretation can be identified in respect of the death penalty provisions of international human rights instruments in general, and Article 4 of the Convention in particular. First, the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation. In its Advisory Opinion on Restrictions to the Death Penalty under Articles 4(1) and 4(4) of the Convention, for example, the Inter-American Court of Human Rights adopted a restrictive approach to Article 4 of the Convention, finding that “the text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned”.[FN72]

[FN72] Advisory Opinion OC-3/83, *supra*, at 31, para. 52.

187. Other international human rights supervisory bodies have similarly afforded a strict interpretation to the death penalty provisions of human rights treaties. The U.N. Human Rights

Committee has held in the context of Article 6 of the ICCPR, which parallels Article 4 of the Convention in many respects,[FN73] that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.[FN74] The Committee has accordingly determined that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of Article 6 of the Covenant. Its recommended remedies in such cases have included release[FN75] and commutation of the death sentence.[FN76] The U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has likewise emphasized that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries and other strict requirements of due process.[FN77] This Commission has also closely scrutinized the circumstances of death penalty cases to ensure strict compliance with the requirements of due process and judicial protection.[FN78]

[FN73] Article 6 of the ICCPR provides as follows:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. 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 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.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Convention to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

[FN74] See e.g. *Baboheram-Adhin et al. v. Suriname*, supra, para. 14.3.

[FN75] See e.g. *Anthony McLeod v. Jamaica*, Communication N° 734/1997, U.N.Doc CCPR/C/62/734/1997.

[FN76] See e.g. *Patrick Taylor v. Jamaica*, Communication N° 707/1996, U.N. Doc. CCPR/C/60/D/707/1996.

[FN77] *Ndiaye Report*, supra, para. 377.

[FN78] See e.g. *Clifton Wright*, supra.

188. It is also generally recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment. It is the

absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life and, once implemented, is irrevocable and irreparable. As the United States Supreme Court has observed, “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”[FN79] In the Commission's view, the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the American Convention.

[FN79] Woodson v. North Carolina 49 L Ed 2d 944, 961.

189. Finally, with respect to the restrictions prescribed in Article 4 of the American Convention in particular, the Inter-American Court has identified three principal limitations explicitly prescribed in Article 4 on the ability of States Parties to the Convention to impose the death penalty:

Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.[FN80] [emphasis added]

[FN80] Id. at 31, para. 55.

190. The Court’s observations therefore accentuate the significance of strict adherence to and review of due process guarantees in implementing the death penalty in accordance with Article 4 of the Convention. Moreover, as part of that process, the Court indicates that certain circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and therefore must be taken into account in sentencing an individual to death.

191. It is in light of the foregoing interpretive rules and principles that the Commission must determine whether the practice of imposing the death penalty through mandatory sentencing is compatible with the terms of Articles 4, 5 and 8 of the Convention and the principles underlying those provisions.

192. The Commission recognizes that the State, like many other jurisdictions that have retained capital punishment, has created a distinction in its criminal law between capital and non-capital murder. By doing so, the State has limited punishment by the death penalty to more

narrowly defined categories of crimes than murder simpliciter. In the Commission's view, this development is consistent with the reductive interpretation of Article 4 of the Convention enunciated by the Inter-American Court, and the Commission commends the State for taking this initiative.

193. Notwithstanding the prescribed distinction between capital and non-capital murder, it remains the case in Jamaica that the death penalty is imposed in capital and multiple non-capital cases through mandatory sentencing. In the Commission's view, three aspects of imposing mandatory death penalties are problematic in the context of a proper interpretation and application of the Convention, even when applied to limited categories of murder. First, it is well-recognized that the crime of murder, even when defined through categories akin to "capital" and "non-capital" murder, can be perpetrated in the context of a wide variety of mitigating and aggravating circumstances, with varying degrees of gravity and culpability.[FN81] This conclusion is illustrated by, for example, the broad definition of certain categories of capital murder under Jamaican law, such as murder committed by a person in the course of a robbery.[FN82] It is also illustrated by the circumstances of the cases currently before the Commission, as described in Part III.A.1 of this Report, which vary in terms of degrees of gravity and culpability as between individual offenses and offenders. Notwithstanding the existence of such disparities, however, the mandatory death penalty seeks to impose capital punishment in all cases of capital and multiple non-capital murders, without distinction, save that provided in respect of pregnant offenders. It subjects an individual who, for example, commits a capital murder in a impulsive act of passion or anger, to the equivalent and exceptional punishment as an individual who executes a capital murder after careful planning and premeditation.

[FN81] In 1953, the British Commission on Capital Punishment noted that "there is perhaps no single class of offences that varies so widely both in character and culpability as the class comprising those which may fall within the comprehensive common law definition of murder...no one would now dispute that for many of these crimes it would be monstrous to inflict the death penalty. The view is widely accepted that this penalty should be reserved for the more heinous offences of murder." Royal Commission on Capital Punishment, September 1953 Cmnd 8932, Exh. 20. Even in those jurisdictions in which a distinction has been drawn capital and non-capital murder, experience indicates that varying degrees of culpability exist within categories of capital murder which may warrant discriminate application of the death penalty. See e.g. *Woodson v. North Carolina*, 49 L Ed 2d 944, 956, n. 31 (indicating that data compiled on discretionary jury sentencing of persons convicted of capital murder in the United States reveal that the penalty of death is generally imposed in less than 20% of the cases).

[FN82] See e.g. *The State v. Alphonso Tracey and Andrew Downer*, Transcript, Summing Up, Home Circuit Court N° 2, 21 December 1994, File N° 5&6/95, at pp. 251, 287 (defining "murder" for the jury as "the deliberate act of killing another person with the intention to kill or to cause serious bodily harm from which death in fact results" and "robbery" as "taking and carrying away somebody's things"); *R. v. Cunningham* [1982] A.C. 566 (P.C.) (defining murder as the unlawful killing of another person with the intent to kill or to cause serious bodily injury.).

194. Indeed, by its very nature, mandatory sentencing precludes consideration of whether the death penalty is an appropriate or permissible form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was properly convicted of an offense for which the death sentence is the prescribed punishment.

195. In the Commission's view, these aspects of mandatory death sentences cannot be reconciled with Article 4 of the Convention in several respects. As noted above, the mandatory death penalty in Jamaica imposes the death penalty on all individuals convicted of capital or multiple non-capital murders, despite the fact that such crimes can be committed with varying degrees of gravity and culpability. Moreover, in the case of Article 2 of Jamaica's Offences Against the Person Act, the law presumes that the murder of certain individuals, for example judges or witnesses, will, by virtue of the person's employment, position or status alone warrant the imposition of the death penalty in all cases. While the status of an individual may be a significant aggravating factor in determining whether the death penalty is an appropriate punishment, Jamaican law permits no account to be taken of the circumstances in which a particular murder may be committed or the degree of culpability of the offender. It also allows for no comparison with murders involving individuals not falling within the prescribed categories, for example children, but which may in their circumstances be considered equally or more grave or culpable. Not only does this practice fail to reflect the exceptional nature of the death penalty as a form of punishment, but, in the view of the Commission, it results in the arbitrary deprivation of life, contrary to Article 4(1) of the Convention.

196. More particularly, imposing a mandatory death penalty for all crimes of capital or multiple non-capital murders prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances. By its nature, then, this process eliminates a reasoned basis for sentencing a particular individual to death, and fails to allow for rational and proportionate connections between individual offenders, their offenses, and the punishment imposed on them. Implementing the death penalty in this manner therefore results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article 4(1) of the Convention.

197. Accepted principles of treaty interpretation suggest that sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article 4(1) of the Convention. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." In this regard, the ordinary meaning of the term "arbitrary" connotes an action or decision that is based on random or convenient selection or choice rather than on reason or nature.[FN83] The U.N. Human Rights Committee suggested a similar meaning for the term "arbitrary" in the context of Article 6(1) of the ICCPR, in the case of *Kindler v. Canada*. [FN84] In that case, the victim, a citizen of the United States, was ordered extradited from Canada to face a possible death sentence in the State of Pennsylvania for a murder conviction. The

Committee found that Canada did not violate the victim's right under Article 6(1) of the ICCPR not to be arbitrarily deprived of his life, by extraditing him to the United States without first seeking assurances from the U.S. Government that the death penalty would not be imposed. At the same time, the Committee suggested that the decision not to refuse extradition or to seek assurances must be shown to have been based upon a reasoned consideration of the circumstances of Mr. Kindler's case:

[FN83] Webster's Third International Dictionary.

[FN84] U.N.H.R.C., *Kindler v. Canada*, Communication N° 470/1991, U.N. Doc. CPR/C/48/D/470/1991 (1993).

While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.[FN85]

[FN85] *Id.*, para. 14.6.

198. The Committee has therefore suggested that an arbitrary decision includes one that is taken in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made. In this respect, the mandatory death penalty can be regarded as arbitrary within the ordinary meaning of that term and in the context of the Convention as a human rights instrument. In Jamaica, for example, the decision to impose the death penalty on a person for the crime of capital or multiple non-capital murder through a mandatory sentence is not based upon a reasoned consideration of a particular defendant's case or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment. Rather, the penalty flows automatically once the elements of the offenses of capital or multiple non-capital murders have been established. The death penalty is also imposed regardless of the relative degree of gravity of the offense or culpability of the offender.

199. The mandatory death penalty cannot be reconciled with Article 4 of the Convention in another significant respect. As noted previously, the Inter-American Court has emphasized several restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention. These include considerations relating to the nature of a

particular offense, for example whether it can be considered a political or related common offense, as well as to factors concerning the circumstances of an individual offender, for example the offender's age at the time he or she committed the crime for which the death penalty may be imposed. In this manner, Article 4 of the Convention itself presumes that before capital punishment may be lawfully imposed, there must be an opportunity to consider certain of the individual circumstances of an offender or an offense. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death. In Jamaica, this is subject to the exception in Articles 3(2) to 3(6) of the Offences Against the Person Act, whereby a mechanism is prescribed for exempting pregnant offenders who are convicted of capital or multiple non-capital murders from sentences of death.

200. Similarly, by reason of its compulsory nature, a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As indicated previously, once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was properly found guilty of a crime for which the sentence was mandated. There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles 4 and 8 of the Convention that govern the imposition of the death penalty, which, as the Inter-American Court has recognized, include strict observance and review of the procedural requirements governing the imposition or application of the death penalty. The absence of effective review further illustrates the arbitrary nature of implementing the death penalty through mandatory sentencing, and leads the Commission to conclude that this practice cannot be reconciled with the terms of Article 4 of the Convention and its underlying principles.

201. The Commission is also of the view that imposing the death penalty through mandatory sentencing is not consistent with the terms of Article 5 of the Convention or its underlying principles. Article 5 of the Convention provides as follows:

Article 5 – Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

202. Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of the human personality.[FN86] From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that persons be treated with individual dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic of the rights and freedoms of an individual. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial when determining whether a person should be deprived of his or her right to life.

[FN86] The Preamble to the Convention recognizes that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon the attributes of the human personality."

203. The mandatory imposition of the death penalty, however, has both the intent and the effect of depriving a person of their right to life based solely upon the category of crime for which the offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offense. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Article 5(1) and 5(2) of the Convention, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.

204. Finally, the Commission considers that mandatory death sentences cannot be reconciled with an offender's right to due process, as provided for in Article 8 of the Convention. It is well-established that proceedings leading to the imposition of capital punishment must conform to the highest standards of due process. The due process standards governing accusations of a criminal nature against an individual are prescribed in Articles 8(1) and 8(2) of the Convention, and include the right to a hearing before a competent, independent and impartial tribunal, the right of the accused to defend himself or herself, personally or by counsel, and the right to appeal the judgment to a higher court. In addition, as noted previously, Article 4 of the Convention provides that the death penalty should be imposed only for the most serious offenses, and contemplates that certain factors attributable to a particular offender or offense may bar the imposition of the death penalty altogether in the circumstances of a particular case.

205. In the Commission's view, therefore, the due process guarantees under Article 8 of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, presuppose as part of an individual's defense to a capital charge an opportunity to make

submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. This may be on the basis, for example, that the crime for which they have been convicted should be considered a political or related common crime within the meaning of the Convention. The due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.

206. The mandatory imposition of the death sentence is inherently antithetical to these prerequisites. By its nature, it precludes any opportunity on the part of the offender to make representations or present evidence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the considerations in Article 4 of the Convention or otherwise. Again, this is subject to the exception under Articles 3(2) to 3(6) of Jamaica's Offences Against the Person Act applicable to pregnant offenders. Also, as noted previously, mandatory sentencing precludes any effective review by a higher court of a decision to sentence an individual to death. These violations of Article 8 of the Convention in turn compound the arbitrary nature of any deprivation of life perpetrated pursuant to mandatory sentences, contrary to Article 4(1) of the Convention.

207. Contrary to the current practice in Jamaica, the Commission considers that imposing the death penalty in a manner which conforms with Articles 4, 5 and 8 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or appropriate form of punishment in the circumstances of their case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty.

208. In this regard, as the following discussion of international and domestic jurisdictions will indicate, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.

209. Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and humane treatment under Articles 4, 5 and 8 of the Convention governing the lawful imposition of the death penalty should also to be interpreted to require individualized sentencing in death penalty cases.[FN87] In the Commission's view, this is consistent with the restrictive interpretation to be afforded to Article 4 of the Convention, and in particular the Inter-American Court's view that Article 4 of the Convention should be interpreted "as imposing restrictions designed to delimit strictly the scope and application of the

death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance.”[FN88]

[FN87] The Commission refers in this regard to the interpretative approach advocated by the European Court of Human Rights, that its governing Convention is “a living instrument which...must be interpreted in light of present-day conditions.” See *Tyrer v. United Kingdom* (1978) 3 E.H.R.R. 1 at para. 31.

[FN88] Advisory Opinion on the Death Penalty, *supra*, at para. 57.

210. As the Commission noted previously, Jamaica has already considered it appropriate to prescribe in its legislation a mechanism by which a jury may determine whether an individual female offender should be spared the death penalty because she is pregnant. The Commission therefore considers that the foundation already exists under Jamaican law to extend this mechanism, or to develop a comparable mechanism, to permit a jury to consider other potentially mitigating factors pertaining to an offender in determining whether the death penalty should be imposed in the circumstances of the offender's case.

211. In light of the foregoing analysis, the Commission considers that imposing the death penalty through mandatory sentencing, as Jamaica has done in respect of crimes of capital and multiple non-capital murders, is not consistent with the terms of Article 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those Articles.

c. Individualized sentencing in other international and domestic jurisdictions

212. The experience of other international human rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Articles 4, 5, and 8 of the Convention that prohibits mandatory death sentences. Based upon a study of these various international and domestic jurisdictions, it is the Commission's view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

213. In the case of *Lubuto v. Zambia*,[FN89] for example, the victim had received a mandatory sentence of death for armed robbery. The U.N. Human Rights Committee did not address the question of whether mandatory death penalties per se contravened the International Covenant on Civil and Political Rights (“ICCPR”). The Committee found, however, that the absence of discretion on the part of a sentencing authority to consider the particular circumstances of an offense in determining whether the death penalty is an appropriate punishment may, in certain circumstances, contravene internationally-prescribed conditions for

implementing capital punishment. In this case, the Committee found that the absence of discretion contravened the requirement under Article 6(2) of the ICCPR[FN90] that the death penalty be imposed “only for the most serious crimes”. The Committee concluded:

[FN89] Lubuto v. Zambia (N° 390/1990), U.N. Doc. CCPR/C/55/D/390/1990/Rev. 1, (October 1995) (U.N. Human Rights Committee), para. 7.2.

[FN90] Article 6 of the ICCPR provides as follows:

1. Every human being as the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. 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 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.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Convention to derogate in any way from any obligation assumed under the provisions of the Convention on the prevention and punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2 of the Covenant.

214. The U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has suggested more generally that the due process standards applicable in death penalty proceedings require, inter alia, that all mitigating factors be taken into account in imposing sentence:

Proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries. All defendants in capital cases must benefit from the full guarantees for an adequate defense at all stages of the proceedings, including adequate provision for State-funded legal aid by competent defense lawyers. Defendants must be presumed innocent until their guilt has been proven without leaving any room for reasonable doubt, in application of the highest standards for the gathering and assessment of evidence. All mitigating factors must be taken into account. A procedure must be guaranteed in which both factual and legal aspects of the case may be reviewed by a higher tribunal composed of judges other than those who dealt with the case at the first instance. In

addition, the defendant's right to seek pardon, commutation of sentence or clemency must be guaranteed.[FN91] [emphasis added]

[FN91] Ndiaye Report, *supra*, para. 377. With respect to international sentencing standards more generally, the International Criminal Tribunal for the Former Yugoslavia provides one of the few modern examples of an international tribunal adjudicating serious violations of international humanitarian law, including genocide. While the penalty imposed by the Tribunal is limited to imprisonment, the Tribunal's governing statute specifically provides that "[i]n imposing the sentences, the Trial Chambers should take into account such matters as the gravity of the offence and the individual circumstances of the convicted person." Statute for the International Criminal Tribunal for the former Yugoslavia, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N., Doc. S/25704/Add.1/Corr.1 (1993), Art. 24. See similarly Statute for the International Criminal Tribunal for Rwanda, Annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), Art. 23.

215. The highest courts of various common law jurisdictions in which the death penalty has, at least until recently, been retained have similarly concluded that the rational, humane and fair imposition of the death penalty requires discretion on the part of courts to examine the mitigating circumstances of individual offenders and offenses in sentencing individuals to death. The United States Supreme Court in the case of *Woodson v. State of North Carolina*[FN92] found a mandatory death sentence for first degree murder under the law of North Carolina to violate the Eighth[FN93] and Fourteenth[FN94] Amendments to the U.S. Constitution. North Carolina, like Jamaica, had established distinctions between capital, or first degree, and non-capital, or second degree, murder, and subjected only the former category of murder to the death penalty.[FN95] The Court nevertheless found North Carolina's law to be unconstitutional. Among the grounds for the Court's decision was a finding that the mandatory death penalty did not satisfy a basic constitutional requirement that the process for imposing a sentence of death be rational by incorporating "objective standards" that guide and regularize the process and make it amenable to judicial review.[FN96] The Court also found that the mandatory death penalty failed to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposing upon him of a sentence of death, and was therefore inconsistent with the fundamental respect for humanity underlying the prohibition of cruel and unusual punishment under the Eighth Amendment. In respect of the latter ground, the Court made the following compelling observations:

[FN92] *Woodson v. North Carolina* 49 L Ed 2d 944.

[FN93] The Constitution of the United States, Amendment VIII (1791) (providing "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[FN94] *Id.* Amendment XIV, Section I (providing "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

[FN95] *Id.*, at 950, n. 4.

[FN96] *Id.* at 960. In its decision in the case *Furman v. Georgia*, 408 U.S. 238, the Supreme Court declared the vesting of standardless sentencing discretion in the jury in imposing capital sentences as contrary to the Eighth and Fourteenth Amendments. In rejecting North Carolina’s contention in *Woodson* that the inadequacies identified in *Furman* were remedied by withdrawing all sentencing discretion from juries in capital cases, the Court suggested that the mandatory sentencing scheme was no more rational, as the statute provided “no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die”, and provided no way for the judiciary to “check arbitrary and capricious exercise of that power through a review of death sentences.” *Id.*

In *Furman*, members of the Court acknowledged what cannot be fairly denied – that death is a punishment different from all other sanctions in kind rather than degree. See 408 US, at 286-291, 33 L Ed 2d 346, 92 S Ct 2726 (Brennan J. concurring); *id.*, at 306, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

This Court has previously recognized that “[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” *Pennsylvania ex rel. Sullivan v. Ashe*, 302 US 51, 55, 82 L Ed43, 58 S Ct 59 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York*, 337 US, at 247-249, 93 L Ed 1337, 69 S Ct 1079; *Furman v. Georgia*, 408 US, at 402-3, 33 L Ed 2d 346, 92 S Ct 2726 (Burger C.J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply an enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 US, at 100, 2 L Ed 2d 630, 78 S Ct 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[FN97]

[FN97] Id. at 961. See also Roberts (Stanislaus) v. Louisiana, 428 U.S., 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

216. In the case of *The State v. Makwanyane and McHunu*, [FN98] the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act N° 51 [FN99] as inconsistent with South Africa's 1993 Constitution. As part of its analysis, that Court also suggested that the guided discretion provided to South African judges to consider the personal circumstances and subjective factors of a defendant in applying the death penalty satisfied in part the requirement that the death penalty not be imposed arbitrarily or capriciously, and reasoned as follows: [FN100]

[FN98] *The State v. Makwanyane and McHunu*, Judgment, Case N° CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).

[FN99] Section 277 of the Criminal Procedure Act N° 51 provided:

Sentence of Death

(1) The sentence of death may be passed by a superior court only and only in the case of a conviction for:

a. murder;

b. treason committed when the Republic is in a state of war;

c. robbery or attempted robbery, if the court finds aggravating circumstances to have been present;

d. kidnapping;

e. child-stealing;

f. rape.

(2) The sentence of death shall be imposed

a. after the presiding judge conjointly with the assessors (if any), subject to the provisions of s. 145(4)(a), or, in the case of a trial by a special superior court, that court, with due regard to any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and

b. if the presiding judge or court, as the case may be, with due regard to that finding, is satisfied that the sentence of death is the proper sentence.

[FN100] Id. pp. 32-36 (footnotes included). The Court went on to conclude that additional factors such as discrimination and the "imperfection" inherent in criminal trials may also lead to arbitrary results in the imposition of the death penalty, and determined further that such arbitrary results could not be appropriately remedied through strict due process, as had been endeavored in the United States. Id. at 36-43.

Basing his argument on the reasons which found favour with the majority of the United States Supreme Court in *Furman v. Georgia*, Mr. Trengove contended on behalf of the accused that the imprecise language of section 277, and the unbounded discretion vested by it in the Courts, make its provisions unconstitutional.

[. . .]

Under our court system questions of guilt and innocence, and the proper sentence to be imposed on those found guilty of crimes, are not decided by juries. In capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. The Criminal Procedure Act allows a full right of appeal of persons sentenced to death, including a right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge. The Appellate Division is empowered to set the sentence aside if it would not have imposed such a sentence itself, and it has laid down criteria for the exercise of this power by itself and other courts.[FN101] If the person sentenced to death does not appeal, the Appellate Division is nevertheless required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence.[FN102]

[FN101] Criminal Procedure Act N° 51 of 1977, section 322(2A) (as amended by section 13 of Act N° 107 of 1990).

[FN102] Id. section 316A(4)(a).

Mitigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond a reasonable doubt the existence of aggravating factors, and to negate beyond a reasonable doubt the presence of any mitigating factors relied upon by the accused.[FN103] Due regard must be paid to personal circumstances and subjective factors which might have influenced the accused person's conduct,[FN104] and these factors must then be weighed up with the main objects of punishment, which have been held to be: deterrence, prevention, reformation, and retribution.[FN105] In this process "[e]very relevant consideration should receive the most scrupulous care and attention",[FN106] and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence. [FN107]

[FN103] S. v Nkwanyana and Others 1990 (4) SA 735 (A) at 743E-745A.

[FN104] S v. Masina and Others 1990 (4) SA 709 (A) at 718G-H.

[FN105] S v. J 1989 (1) SA 669 (A) at 682G. "Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the 'essential', 'all important', 'paramount', and 'universally admitted' object of punishment." Id. at 682I-J (cited with approval in S v P 1991 (1) SA 517 (A) at 523G-H. CF. R. v Swanepoel 1945 AD 444 at 453-455.

[FN106] Per Holmes JA in S v Letsolo 1970 (3) SA 476 (A) at 477B (cited with approval by Nicholas AJA in S v Dlamini 1992 (1) SA 18 (A) at 31I-32A in the context of the approach to sentencing under section 322(2A)(b) of the Criminal Procedure Act N° 51 of 1977).

[FN107] S v Senonohi 1990 (4) SA 727 (A) at 734F-G; S v Nkwanyana, supra at 749A-D.

There seems to me to be little difference between the guided discretion required for the death sentence in the United States, and the criteria laid down by the Appellate Division for the imposition of the death sentence. The fact that the Appellate Division, a court of experienced judges, takes the final decision in all cases is, in my view, more likely to result in consistency of sentencing, than will be the case where sentencing is in the hands of jurors who are offered statutory guidance as to how that discretion should be exercised.[FN108]

[FN108] Id. at 35-36.

217. Similarly, in the case of *Bachan Singh v. State of Punjab*,[FN109] the appellant argued before the Supreme Court of India that section 354(3) of the Indian Criminal Procedure Code of 1973, contravened the requirement under Article 21 of the Indian Constitution that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law”, because the provision provided judges with too much discretion in determining whether offenders should be sentenced to death.[FN110] The Indian Supreme Court rejected the appellant’s contention in this regard. This was in part because, in the Court’s view, it was consistent with the requirements of Article 21 for the legislation to leave the imposition of the death penalty to “the judicial discretion of the Courts which are manned by persons of reason, experience and standing in the profession” who exercise their sentencing discretion “judicially in accordance with well-recognized principles crystallised by judicial decisions directed along the broad contours of legislative policy towards the signposts enacted in section 354(3).”[FN111] In reaching this conclusion, the Court articulated the following propositions intended to guide judges in India in exercising their sentencing discretion relating to the death penalty:

[FN109] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 475.

[FN110] Id. at 509-510.

[FN111] Id. at 516.

a. the normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

b. while considering the question of sentence to be imposed for the offence of murder under section 302, Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence.[FN112]

[FN112] Id. at 515.

218. The Court also emphasized the crucial role that mitigating factors play in the humane imposition of capital punishment. The Court stated that the “scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy written in section 354(3),” and opined that

[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[FN113]

[FN113] Id. at 534.

219. The experience in other international and domestic jurisdictions therefore suggests that a court must have the discretion to take into account the particular circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the minimum requirements of due process. The individual circumstances to be considered have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender’s conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Authorities in these jurisdictions have also suggested that, in order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. In the Commission’s view, these principles should also be considered in interpreting and applying Articles 4, 5 and 8 of the Convention, so as to require individualized sentencing in implementing the death penalty. To accept any lesser standard would, in the Commission’s view, fail to afford sufficient protection to the most fundamental of rights under the Convention.

d. The cases before the Commission

i. Mandatory Death Penalty

220. As indicated previously, the victims in the five cases that are the subject of this Report were convicted of capital murder, or multiple non-capital murders, under Jamaica’s Offences Against the Person Act. Murder for the purposes of the Act is defined as the unlawfully killing of another person with the intent to kill or to cause serious bodily injury.[FN114]Once an offender is found guilty of capital murder, Article 3(1) of the Act requires a court to impose the death penalty. Similarly, the death sentence is mandatory for a conviction for multiple non-capital murders as provided for in Article 3(1A) of the Act. With the exception of the pregnancy provisions in Articles 3(2) to 3(6) of the Act, there are no provisions in the Act that permit a

judge or jury to consider the personal circumstances of an offender or his or her offense, such as the offender's record or character, the subjective factors that may have motivated his or her conduct, or the offender's likelihood of reform or social readaptation, in determining whether the death penalty is an appropriate penalty for a particular offender in the circumstances of the offender's case. Upon satisfying the elements of Articles 3(1) or 3(1A) of the Act, death is the automatic penalty.

[FN114] R. v. Cunningham [1982] A.C. 566.

221. Consequently, in the cases within this Report, the Commission concludes that once the victims were found guilty of their crimes, the law in Jamaica did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty for those victims. There was no opportunity for the trial judge or the jury to consider such factors as the victims' characters or records, the nature or gravity of the offenses, or the subjective factors that may have motivated the victims' conduct, in determining whether the death penalty was an appropriate form of punishment. The victims were likewise precluded from making representations on these matters. The courts sentenced the victims based solely upon the category of crimes for which they had been found responsible.

222. Moreover, the records before the Commission indicate that there may have been mitigating factors pertaining to certain of the victims and the circumstances of their offenses that could have been taken into account during sentencing, and which therefore may be considered to illustrate the necessity of individualized sentencing. In Case 12.023 (Desmond McKenzie), the record reveals evidence of Mr. McKenzie's good character. The victim was, for example, the owner of a supermarket, ran a clothing business, and managed his father's farm and a warehouse. He had no previous convictions and was actively involved in his community, where he had standing as a local politician, promoted community youth projects and provided assistance at local schools and to the elderly. There is also evidence that the victim committed his crime as revenge for earlier insults from the deceased. While this circumstance may not have satisfied the requirements of the legal defence of provocation, it nevertheless may have been probative in determining whether the victim's offense warranted the death penalty.

223. The Commission recognizes that, had the courts in these cases been presented with evidence of mitigating factors such as those noted above, and had they been permitted to consider this evidence in determining an appropriate sentence, they may well have still imposed the death penalty. The Commission cannot, and indeed should not, speculate as to what the outcome may have been. This determination properly falls to the domestic court. What is crucial to the Commission's determination that the victims' sentences violate the Convention, however, is the fact that the victims were not given an opportunity to present evidence of mitigating factors, nor did the courts have a discretion to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of each case.

ii. Prerogative of mercy

224. Contrary to the State's submissions, the Commission does not consider that the exercise of the Prerogative of Mercy by the Jamaican Privy Council provides an adequate opportunity consistent with the requirements of Articles 4, 5 and 8 of the Convention for the proper implementation of the death penalty through individualized sentencing. The authority of the Executive in Jamaica to exercise its Prerogative of Mercy is prescribed in Sections 90 and 91 of the State's Constitution:

90.(1) The Governor General may, in Her Majesty's name and on Her Majesty's behalf-

- a. grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
- b. grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
- c. substitute a less severe form of punishment for that imposed on any person for such an offence; or
- d. remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.[FN115]

[FN115] The Jamaica (Constitution) Order in Council 1962, Second Schedule, Sections 90, 91.

225. The Commission is not, however, aware of any prescribed criteria applied in the exercise of the functions or discretion of the Governor-General or Privy Council of Jamaica under Sections 90 and 91, save for the requirement in death penalty cases that the Governor-General cause a written report of the case from the trial judge, and possibly other information in the Governor-General's discretion, to be forwarded to the Privy Council. Nor is the Commission aware of any right on the part of an offender to apply to the Privy Council, to be informed of the time when the Privy Council will meet to discuss the offender's case, to make oral or written submissions to the Privy Council or to present, receive or challenge evidence considered by the Privy Council. Indeed, the submissions of the Petitioner and the State alike confirm in this regard that the exercise of the power of pardon in Jamaica involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review.[FN116]

[FN116] See *Reckley v. Minister of Public Safety (N° 2)* [1996] 2 W.L.R. 281 at 289-291 (finding that the exercise of the Prerogative of Mercy by the Minister of Public Safety in The Bahamas involved an act of mercy that was not the subject of legal rights and was therefore not judicable.); *de Freitas v. Benny* [1976] 2 A.C. 239..

226. This process is not consistent with the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially-prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in Jamaica clearly does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.

227. Moreover, based upon the information before it, the Commission finds that the procedure for granting the Prerogative of Mercy in Jamaica does not guarantee condemned prisoners an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the victims' right under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence.

228. In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the Convention.

229. In this respect, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements", and the corresponding Article 22(7) of the Convention, which provides for the right to "seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related

common crimes." [FN117] The Commission has interpreted the former provision, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status. [FN118] Other internationally-articulated requirements governing the right to seek asylum reflect similar minimum standards, namely the right of an individual to apply to appropriate authorities for asylum, to make representations in support of their application, and to receive a decision. [FN119]

[FN117] See similarly Universal Declaration on Human Rights, Article 14 (providing for the right of every individual to "seek and to enjoy in other countries asylum from persecution.").

[FN118] I/A. Comm. H.R., Haitian Center for Human Rights and others (United States), Case 10.675 (13 March 1997), Annual Report 1996, para. 155.

[FN119] See e.g. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 189-219 (prescribing basic requirements for the procedures for determining refugee status, including the right of an applicant to be given the necessary facilities for submitting his case to the authorities concerned, and that the applicant be permitted to remain in the country pending a decision on his initial request for refugee status); Council of Europe, Resolution on minimum guarantees for asylum procedures, Brussels, 21 June 1995, Articles 10, 12, 14, 15, 23 (prescribing common procedural guarantees to be provided by Member States of the European Union in processing asylum application, including the right of an asylum-seeker, at the border or otherwise, to have an opportunity to lodge his asylum application as early as possible, to remain in the territory of the state in which his application has been lodged or is being examined as long as the application has not been decided upon, to be given the opportunity of a personal interview with an official qualified under national law before a final decision is taken on the asylum application, and to have the decision on the asylum application communicated to the asylum-seeker in writing.).

230. Consistent with the interpretation of the right to seek asylum by the Commission and other international authorities, the Commission finds that Article 4(6) of the Convention must be interpreted to encompass certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. The Commission notes in this regard that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process. [FN120]

[FN120] In the State of Ohio, for example, clemency review has been delegated in large part to the Ohio Adult Parole Authority (OAPA). In the case of an inmate under sentence of death, the OAPA must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole board members. The OAPA holds a hearing, completes its clemency review, and makes a recommendation to the Governor. If additional information later becomes available, the OAPA may in its discretion hold

another hearing or alter its recommendation. See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). See also *Ohio Adult Parole Authority v. Woodward*, Court File N° 96-1769 (25 March 1998)(U.S.S.C.) (finding that Ohio's clemency procedures do not violate the U.S. Constitution's Due Process Clause).

231. The information before the Commission indicates that the process in Jamaica for granting amnesty, pardon or commutation of sentence does not guarantee condemned prisoners, including the victims in the cases that are the subject of this Report, any procedural protections. By their terms, Sections 90 and 91 of the Jamaican Constitution do not provide condemned prisoners with any role in the mercy process. In addition, the Petitioners have claimed that the "invariable practice" in Jamaica is that prisoners are not informed of the date on which their cases are to be considered, and that often the first time they learn of the mercy process is when they are told that the Prerogative of Mercy is not to be exercised in their case.

232. The State has suggested that condemned individuals can apply for mercy an unlimited amount of times and that they or their counsel can bring information to the Privy Council's attention. At the same time, the State has reiterated that prisoners have no legal right to engage in the process of determining whether they should be pardoned for their crimes. Whether and the extent to which prisoners may apply for amnesty, pardon or commutation of sentence remains entirely at the discretion of the Jamaican Privy Council. The Commission has not been apprised of any procedure or mechanism through which prisoners may file an application for amnesty, pardon or commutation of sentence or to be informed as to when the Jamaican Privy Council may consider his or her case. Likewise, there appears to be no process through which a prisoner may submit representations in support of his or her application, or receive a decision. Consequently, the Commission finds that the State has failed to respect the right of the victims under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence.

iii. Conclusion

233. Based upon the foregoing facts and the interpretive principles outlined above, the Commission finds that the State, by imposing mandatory death penalties on the victims in the five cases that are the subject of this Report, violated the rights of these victims under Articles 4(1), 5(1), 5(2), and 8(1) of the Convention. The State has also failed to properly guarantee the victims' rights under Article 4(6) of the Convention.

234. More particularly, with respect to Article 4(1) of the Convention, the Commission concludes that the trial judges imposed mandatory penalties of death upon the victims, in the absence of any guided discretion to consider the victims' personal characteristics and the particular circumstances of their offenses to determine whether death was an appropriate punishment. The victims were likewise not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of their cases. Rather, the death penalty was imposed upon each of the victims abstractly and without principled distinction or rationalization as to whether it was an appropriate form of punishment in the particular circumstances of each case. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and the

executions of the victims are now imminent, their convictions having been upheld on appeal to the highest court in Jamaica. The Commission therefore concludes that the State has violated the victims' rights under Article 4(1) of the Convention not to be arbitrarily deprived of their lives, and therefore that the victims' death sentences are unlawful.

235. The Commission further concludes that the State, by sentencing the victims in these cases to a mandatory penalty of death absent consideration of their individual circumstances, has failed to respect the victims' physical, mental and moral integrity contrary to Article 5(1) of the Convention, and has subjected them to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced the victims to death solely because they were convicted of a predetermined category of crime. Accordingly, the process to which the victims have been subjected would deprive them of their most fundamental right, their right to life, without considering their personal circumstances and the particular circumstances of their offenses. Treating the victims in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Convention, and Article 5(1) and (2) in particular.

236. The Commission also concludes that the State has violated Article 4(6) with respect to the victims in these cases, by failing to guarantee the victims an effective right to apply for amnesty, pardon or commutation of sentence, to be informed as to when the Jamaican Privy Council may consider his or her case, to make representations, in person or by counsel, to the Jamaican Privy Council, and to receive a decision from the Jamaican Privy Council within a reasonable time prior to his or her execution.

237. Finally, the Commission concludes that the State has violated the rights of the victims under Article 8(1) to a hearing with due guarantees by a competent, independent and impartial tribunal in the substantiation and defense of the criminal accusations against them. The victims were not provided with the opportunity to make representations and present evidence to the trial judge as to whether their crimes permitted or warranted the ultimate penalty of death, and were therefore denied the right to fully answer and defend the criminal accusations against them.

238. It follows from the Commission's findings that, should the State execute any of the victims pursuant to these sentences, this would constitute further egregious and irreparable violations of Articles 4 and 5 of the Convention.

239. Given its foregoing conclusions as to the legality of the victims' death sentences under Articles 4, 5 and 8 of the Convention, the Commission does not consider it necessary to determine whether the method of execution in Jamaica violates Articles 4(2) or 5(2) of the Convention, or whether the State has violated Article 4(3) of the Convention because of a moratorium on executions in Jamaica. It likewise does not consider it necessary to determine whether mandatory death sentences, or the exercise of the Prerogative of Mercy in Jamaica, contravene Article 24 of the Convention.

3. Articles 5, 7 and 8 - delays in the victims' criminal proceedings

240. As indicated in Part III.A.3.b of this Report, the Petitioners in four of the cases that are the subject of the present Report, set out in Table 5 below, allege that the State has violated one

or more of Articles 7(5), 7(6) and 8(1) of the Convention in relation to the victims in those cases. In addition, certain of these petitioners have argued that the delays in their criminal proceedings should be considered to violate Article 5 of the Convention and thereby render the victims' executions unlawful.

241. Articles 7(4), 7(5), 7(6) and 8(1) of the Convention provide as follows:

7(4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

7(5) Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

7(6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In State Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

8(1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

242. As summarized in Part III.A.1 of this Report, the victims in these cases were subjected to the following delays in the course of their criminal proceedings:

Table 6

<i>Case Number</i>	<i>Victim(s)</i>	<i>Delay between arrest and being brought before a judge</i>	<i>Delay between Arrest and Conviction</i>	<i>Delay between Conviction and Judgment on Final Appeal</i>	<i>Total Delay between Arrest and Judgment on Final Appeal</i>
12.023	Desmond McKenzie	3 weeks	1 yr., 6 mos. (first trial); 10 mos. (Re-trial)	2 yrs., 2 mos.	4 yrs., 8 mos.
12.044	Andrew Downer	1 month, 1 week	3 yrs., 8 mos.	3 yrs., 7 mos.	7 yrs., 3 mos.

	Alphonso Tracey				
12.107	Carl Baker	-	1 yr., 3 mos.	2 yrs., 2 mos.	3 yrs., 5 mos.
12.126	Dwight Fletcher	3 weeks	2 yrs., 9 mos.	2 yrs., 5 mos.	5 yrs., 2 mos.

a.Delay in being brought promptly before a judge

243. In its observations on these four cases, the State has raised several arguments in response to the Petitioners' allegations that the victims were not brought promptly before a judge following their arrests, contrary to Article 7(5) of the Convention. First, with respect to Case 12.023 (Desmond McKenzie), the State argues that the victim was free on bail at least five days after detention to visit a hospital and therefore the victim was no longer deprived of his liberty. The petitioners indicate, however, that the victim was taken to the hospital in his wife's car, in handcuffs and with police escort, and was under police guard throughout his stay at the hospital. In addition, the victim was returned to the Chapelton police station lock up following his release from the hospital. The State does not deny these allegations and does not deny that the victim remained in continuous police detention during his time in the hospital. The petitioners argue that the State has failed to explain the two to three week delay in bringing the victim before a judge following his release from the hospital.

244. With respect to Case 12.044 (Andrew Downer and Alphonso Tracey), the State confirms that the delay between the victims' arrest and their first appearance before a judge was over one month, but denies that this constitutes a violation of Article 7(5) of the Convention. The State offered no explanation for the delay.

245. In relation to Case 12.126 (Dwight Fletcher), the State indicated that it would investigate the three week delay in being brought before a judge alleged by the victim. At present, the Commission has no information regarding the status or results of any such investigation.

246. Apart from the information noted above, the State failed to justify or explain the periods of delay that passed before the legality of the victims' detentions were entrusted to the judiciary. Rather, the State appears to be of the view that the delays in these cases, which range from three weeks to five weeks, satisfy the requirement in Article 7(5) of the Convention that a detainee be brought promptly before a judge. The State also suggests that, even if these delays are found to violate Article 7(5) of the Convention, they would not result in a commutation of the death sentence.

247. In addressing the issue of Article 7(5) with regard to being brought promptly before a judge, the Commission has held that it is fundamental that a person be brought before a judge promptly subsequent to their detention in order to ensure their well-being and avoid any infringement of their other rights. In Report N° 2/97, the case of Jorge Luis Bernstein and others, the Commission declared that "[t]he right to the presumption of innocence requires that the duration of preventive detention not exceed the reasonable period of time cited in Article 7(5)."[FN121] Furthermore, the Commission noted that:

[FN121] I/A Comm. H.R., Jorge Luis Bernstein and others, Annual Report 1997, p. 244, para. 12. The Commission notes that the Constitution of Jamaica has a clause which declares that any person who is arrested or detained "...shall be brought without delay before a court...." Constitution of Jamaica, 1962, Section 15(2) "Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention." [emphasis added] Article 15(3) "Any person who is arrested or detained (a) for the purpose of bringing him before a court in execution of the order of a court; or (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released, shall be brought without delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." [emphasis added]

In order to ensure the effective judicial oversight of the detention, the competent court must be quickly appraised of the persons who are held in confinement. One of the purposes of such action is to protect the well-being of the persons detained and to avoid any violation of their rights. The [Commission] has determined that, unless such detention is reported to the court, or the court is so advised after an appreciable length of time has elapsed from the time the subject has been deprived of his freedom, the rights of the person in custody are not being protected and the detention infringes that person's right to due process. [FN122]

[FN122] Id., para. 11, [citing I/A Comm. H.R., Second Report on the Situation of Human Rights in Suriname. OEA/Ser.L/V/II.66, doc. 21/Rev.1, 1985, pages 23 and 24.]

In addition, the Commission stated that when the Commission finds that a State has purported to provide a justification for preventive detention, "[the Commission] must proceed to ascertain whether [the State] authorities have exercised the requisite diligence in discharging the respective duties in order to ensure that the duration of such confinement is not unreasonable." [FN123] In the Commission's view, such justifications might include the presumption that the accused has committed an offense, danger of flight, the risk that new offences may be committed, the need to investigate, the possibility of collusion, the risk of pressure on the witnesses, and the preservation of public order. [FN124]

[FN123] Id. at para. 24.

[FN124] Id., at pp. 247-248.

248. Other international human rights tribunals have endeavored to define the "prompt" appearance of a detainee before a judge more precisely. The United Nations Human Rights

Committee in the case of Peter Grant v. Jamaica,[FN125] found that a one week period from the time of arrest to the date of being brought before a judge constitutes a violation of Article 9(3) of the ICCPR[FN126] [equivalent to Article 7(5) of the Convention].Additionally, in the decision of the Committee in the case of Paul Kelly v. Jamaica[FN127],the individual opinion submitted by Mr. Bertil Wennergren indicated that the word "promptly" does not allow for a delay in excess of two or three days.

[FN125] Peter Grant v. Jamaica, Communication N° 597/1994, U.N. Doc. N° CCPR/C/56/D/597/1994 (1996).

[FN126] International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, Article 9(3) "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[FN127] U.N.H.R.C., Paul Kelly v. Jamaica, Communication N° 253/1987.

249. Additionally, the European Court of Human Rights has emphasized the importance of "promptness" in the context of Article 5(3) of the European Convention as follows:[FN128]

[FN128] Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. N° 5, (4 November 1950), Article 5(3) (providing that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial").

[I]t enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (citation omitted).Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3) [of the European Convention on Human Rights], which is intended to minimize the risk of arbitrariness.Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society"....[FN129]

[FN129] Eur. Court H.R., Case of Brogan and Others, Ser. A, vol. 145, 29 Nov. 1988, at para. 58.

Furthermore, in the case of Brogan and Others, the European Court of Human Rights found that a period of detention of four days failed to comply with the requirement of a "prompt"

appearance before a judicial authority.[FN130]Similarly, in the case of *Koster v. The Netherlands*, the European Court found a delay of five days to be in excess of the meaning of "promptness" in bringing a detainee before a judicial authority, therefore in violation of Article 5(3) of the European Convention.[FN131]

[FN130] *Id.* at para. 62.

[FN131] Eur. Court H.R., *Case of Koster v. The Netherlands*, Ser. A, Vol. 221, 28 Nov. 1991, at paras. 24-25.

250. The Commission likewise considers that it is essential for a detainee to be brought before a judicial authority in order to review the lawfulness of their detention, not only in order to comply with the requirements under Article 7(5), but also to ensure the protection of the prisoner's other guaranteed rights while in detention and to minimize the risk of arbitrariness.[FN132]

[FN132] *Jorge Luis Bronstein and others*, *supra*.

251. Clearly, the delays in bringing the victims before a judge in the three cases referenced above are far in excess of the delays which were found to constitute violations before the United Nations Human Rights Committee and the European Court on Human Rights. The provisions of the ICCPR[FN133] and European Convention[FN134] under consideration by those tribunals are virtually identical to Article 7(5) of the American Convention, and the Commission sees no reason why the Convention should be subject to any lesser standard regarding the right of a detained person to be brought promptly before a judge. Moreover, the State has offered no adequate explanation or justification for the delays in these cases.

[FN133] International Covenant on Civil and Political Rights, Art. 9(3), *supra*.

[FN134] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5(3), *supra*.

252. With respect to Case 12.023 (*Desmond McKenzie*) in particular, the Commission considers, on the information before it, that the victim effectively remained in police custody during his time in the hospital, and continued to be so detained by the State following his release from the hospital. Consequently, the State was obliged to bring the victim promptly before a judge, but did not do so until three weeks following the victim's arrest, and, according to the Petitioners, at least two weeks following his release from the hospital. The State has failed to explain or justify this delay.

253. The Commission therefore finds that the victims in Case Nos. 12.023 (*Desmond McKenzie*), 12.044 (*Andrew Downer and Alphonso Tracey*) and 12.126 (*Dwight Fletcher*), were

not brought "promptly" before a judicial authority, in violation of their rights under Article 7(5) of the Convention.

b. Trial within a reasonable time

254. In relation to a trial within a reasonable time and the length of detention, the Petitioners in four of the cases within this Report, Case 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.126 (Dwight Fletcher) and 12.107 (Carl Baker) allege that the State failed to try the victims within a reasonable time, contrary to Article 7(5) or 8(1) of the Convention, based upon the delays outlined in Table 5 above.

255. The State responded to the allegations relating to the delay in trying the victims in three of the four cases, Case Nos. 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker) and 12.126 (Dwight Fletcher). In two of these cases, Case Nos. 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Dwight Fletcher), the State indicated that it would conduct investigations into the delays in trying the victims. The Commission has only been provided with the results of the State's investigation in Case 12.044, which confirmed that the delay between the arrest and trial of the victims amounted to approximately three years and 8 months. The State purported to explain this delay on the basis that a preliminary inquiry was held between September 25, 1991 and January 6, 1992, and that the victims appeared in court on "a number of occasions" before they were arraigned on December 14, 1994.

256. With respect to Case 12.107 (Carl Baker), the State denies that the delay of 1 year and 3 months in bringing the victim to trial constitutes a violation of the Convention, and has also explained the delay on the basis that a preliminary inquiry was held as a component of the pre-trial process.

257. In each of the three cases in which it made submissions on the issue, the State argues that even if the delay in bringing the victims to trial is considered unreasonable, such delays would not be sufficient to render the victims' sentences unlawful as cruel, inhuman and degrading punishment or treatment under Article 5(2) of the Convention.

258. In addressing the issue of a "reasonable time" under Articles 7(5) and 8(1) of the Convention, the Inter-American Court has confirmed that the purpose of the reasonable time requirement is to prevent accused persons from remaining in that situation for a protracted period and to ensure that a charge is promptly disposed of.[FN135] The Inter-American Court has also considered that the point from which a reasonable time is to be calculated is the first act of the criminal proceedings, such as the arrest of the defendant, and that the proceeding is at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases. According to the Inter-American Court, the calculation of a reasonable time must, particularly in criminal matters, encompass the entire proceeding, including any appeals that may be filed.[FN136]

[FN135] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, p. 283, para. 70.

[FN136] Id., para. 71.

259. In determining the reasonableness of the time in which a proceeding must take place, the Inter-American Court has shared the view of the European Court of Human Rights that three points must be taken into account: (a) the complexity of the case; (b) the procedural activity of the Interested party; and (c) the conduct of the judicial authorities.[FN137] This Commission has likewise suggested that the reasonableness of a pre-trial delay should not be viewed exclusively from a theoretical point of view, but must be evaluated on a case by case basis.[FN138]

[FN137] *Id.*, para. 72. See also I/A Court H.R., *Genie Lacayo Case*, Judgment of January 29, 1997, Annual Report 1997, para. 77. See also Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina) March 11, 1997, Annual Report 1997 at 241, 245-6. This reasoning was set forth in the leading European Court case on this issue, the *Stogmuller v. Austria* judgment of 10 November 1969, Series A N° 9, p. 40.

[FN138] See Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina), *supra*.

260. In addition to its case by case analysis of the reasonableness of the pre-trial delay, the Inter-American Commission has established that the burden of proof is on the State to present evidence justifying any prolongation of a delay in trying a defendant. In assessing what is a reasonable time period, the Commission, in cases of *prima facie* unacceptable duration, has placed the burden of proof on the state to adduce specific reasons for the delay. In such cases, the Commission will subject these reasons to the Commission's "closest scrutiny." [FN139]

[FN139] Report N° 12/96, Case 11.245 (Argentina), March 1, 1996, Annual Report 1995, at 33, See similarly U.N.H.R.C., *Desmond Williams v. Jamaica*, Communication N° 561/1993, U.N. Doc. CCPR/C/59/D/561/1993 (1997) (holding that by "rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention.").

261. In three of the four cases before the Commission, Case Nos. 12.023 (*Desmond McKenzie*), 12.044 (*Andrew Downer and Alphonso Tracey*) and 12.126 (*Dwight Fletcher*), the victims have been subjected to a pre-trial delay of more than 2 years, and the delays between their arrests and the disposition of their final appeals exceeded 4 years. In light of the past jurisprudence of this Commission and other international authorities, the Commission is of the view that the delays in these cases are *prima facie* unreasonable and call for justification by the State.[FN140]

[FN140] See e.g. *Suárez Rosero Case*, *supra*, p. 300, para. 73 (finding that a period of delay of 4 years and 2 months between the victim's arrest and disposition of his final appeal to "far exceed"

the reasonable time contemplated in the Convention and therefore to violate Articles 7(5) and 8(1) of the Convention.); I/A Comm. H.R., Report on Panama, Annual Report 1991, at p. 485 (finding an average pre-trial delay of 2 years and 4 months to be unreasonable contrary to Article 7(5) of the Convention); Desmond Williams v. Jamaica, supra, para. 9.4 (finding a delay of two years between arrest and trial to be prolonged and unreasonable); U.N.H.R.C., Patrick Taylor v. Jamaica, Communication N° 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997) (finding a delay of 28 months between arrest and trial to be a violation of the Petitioner's right to be tried without undue delay).

262. In addition, the State has failed to provide any proper justification for the delays in bringing these victims to trial. While the State noted in Case 12.044 (Andrew Downer and Alphonso Tracey) that part of the delay was attributable to a preliminary inquiry, the Commission considers that preliminary inquiries cannot in and of themselves constitute justification for a prolonged delay. Such inquiries, like the other elements of the State's criminal procedural machinery, must as a whole be regulated so as to ensure that individuals are tried within a reasonable time.[FN141] Similarly, the State must take responsibility for a delay caused by the need for a re-trial, as was the case in Case 12.023 (Desmond McKenzie), unless an explanation or justification from the State may lead to a different conclusion.

[FN141] See similarly U.N.H.R.C., Andre Fillashe v. Bolivia, Communication N° 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 (1991), para. 6.5 (finding that the fact that the investigation into a criminal case in Bolivia was carried out by way of written proceedings did not justify the delay in bringing a defendant to trial).

263. Consequently, the Commission concludes that the State failed to try the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Dwight Fletcher) within a reasonable time, contrary to Articles 7(5) and 8(1) of the Convention.

264. With respect to Case 12.107 (Carl Baker), the Petitioners assert that the right to be tried within reasonable time and without undue delay, pursuant to Article 8 of the Convention, extends to all appeal proceedings. The petitioner further argues that the 1 year and 3 month delay between his arrest and trial, and the 1 year and 3 month delay between his conviction and final appeal contravene Article 8(1) of the Convention. The State argues that such delays are not unreasonable and do not constitute a breach of the Convention. The State indicates that the delay of 1 year and 3 months from the time the victim was arrested to his trial date was the time necessary to conduct a preliminary inquiry and full investigation to establish whether there was a prima facie case to justify a trial, suggesting that a full investigation would take months for completion. Additionally, the State maintains that a delay of 1 year and 3 months between the victim's date of conviction and hearing of appeal is a reasonable period for the exhaustion of domestic remedies, including appeals, and therefore does not violate the Convention.

265. In response to the State's argument in justification of the delay, the Petitioners indicate that the preliminary inquiry in the victim's case would not, and should not, take one year and

three months. As indicated by the State, the purpose of a preliminary inquiry is to establish basic facts in order to determine whether a prima facie case can be established. The petitioners concede that in cases where there are many witnesses and complicated evidence, the preliminary inquiry could take several months. In this case, however, there were only five witnesses other than the victim, two of whom were detectives. There is also no indication that the case involved a complicated investigation or complex evidence. The petitioners requested a detailed account of the State's inquiry in order to justify a delay of one year and three months following which the State informed the Commission that it had nothing further to add concerning the allegation.

266. After considering the information before the Commission in this case, in light of the factors laid out by the Inter-American Court in analyzing whether there has been a breach of the right to a trial within a reasonable time, the Commission concludes that the delay in trying the victim was unreasonable contrary to Articles 7(5) and 8(1) of the Convention. According to the information before the Commission, the victim's prosecution does not appear to have been particularly complex, and there is also no indication that the prosecution's case consisted of complex evidence that might assist in explaining such a delay. The State has failed to provide the Commission with any information suggesting that the case was sufficiently complex so as to warrant a 1 year and 3 month delay in each of the victim's pre and post-trial proceedings. Similarly, there is no information before the Commission concerning the procedural activity of the victim or the conduct of the judicial authorities that explains or justifies a delay of 2 years and 6 months between the victim's arrest and the final disposition of his appeal.

267. Therefore, the Commission finds that the State has violated the right of the victim in Case 12.107 (Carl Baker) to a trial within a reasonable time, contrary to Articles 7(5) and 8(1) of the Convention.

268. Finally, the Petitioners in Case 12.126 (Dwight Fletcher) have included Article 7(4) of the Convention among those provisions alleged to have been violated by the State, but have not provided any particulars or submissions substantiating this allegation. Consequently, the Commission finds no violation of the Convention in this regard.

269. Given its conclusions in Part IV.C.2 of this Report that the death sentences imposed upon the victims contravene Articles 4, 5, and 8 of the Convention and are therefore unlawful, the Commission does not consider it necessary to determine whether the length of the delays in trying the victims or their prolonged period of post-conviction detention, as outlined above, constitute cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and therefore may also render the victims' executions unlawful.

4. Articles 4 and 5 – conditions of detention/method of execution

270. The Petitioners in all five of the cases under consideration by the Commission allege that the conditions in which the victims have been detained by the State constitute a violation of their rights under Article 5(1) of the Convention to have their physical, mental and moral integrity respected, as well as their right not to be subjected to cruel, unusual or degrading punishment or treatment under Article 5(2) of the Convention. The Petitioners in Case 12.023 (Desmond McKenzie) have also argued that the State failed to segregate the victim from convicted persons

prior to trial, contrary to Article 5(4) of the Convention, and that the absence of educational facilities for the victim contravenes Article 5(6) of the Convention. Several petitioners have argued further that the conditions of detention should be considered to render the executions of the victims in those cases unlawful under Article 4 of the Convention. Finally, the Petitioners in Case 12.146 (Anthony Rose) submit that execution by hanging constitutes cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and claim that hanging is therefore inconsistent with the requirements under Article 4(2) of the Convention governing the implementation of capital punishment.

271. As indicated in Part III.A.3.c of this Report, the Petitioners in the five cases before the Commission provide similar particulars regarding the prison conditions of the victims in those cases during their time in detention on death row in Jamaica. The petitioners cumulatively claim that the victim in each case has been held in solitary confinement in cells approximately 8 feet by 5 feet in size. They claim that the cells have insufficient light and ventilation and no bedding, and that some of the cells are infested with insects. They also claim that the conditions in the prison are unhygienic. They claim that there is no integral sanitation in the cells and therefore that the victims must use buckets for toilets, and that the prisoners' washing facilities are located in the same place as their "excrement well". The petitioners claim further that the victims are confined to their cells for approximately 23 hours per day, and that the food and water provided to the victims are inadequate.[FN142]

[FN142] The affidavit filed by the Petitioners in Case 12.146 (Anthony Rose) is illustrative of the allegations regarding conditions of detention on death row. In his affidavit, the victim states as follows:

4. My cell is approximately 8 ft X 5 ft and I am constantly held in solitary confinement. I sleep on a slab of concrete as I am not provided with a mattress. There is no other furniture in my cell except for a water jug and a bucket, which I use as a toilet.
5. The lighting in my cell is insufficient. There is no electric lighting and whenever I go out into the sunlight, my eyes are extremely sensitive and hurt me. There is hardly any ventilation in my cell, which becomes extremely hot during the day. There is no integral sanitation in my cell which is full of cockroaches and other insects. Right in front of my cell there is a gutter full of waste water which has a foul odour. The gutter is always full and I find myself eating and sleeping in conditions that constantly stench.
6. I receive fresh water every day, however, some times the water is full of impurities, which often results in me suffering from diarrhea. The food is deplorable. Meat is invariably spoiled and often cannot be eaten.
7. I am allowed out of my cell each day for one hour. During this time I am expected to wash my clothes, bathe and take physical exercise. I have made two requests to see a doctor at the prison and on each occasion it took approximately four months before I was actually seen by the doctor.

272. The petitioners in Case Nos. 12.023 (Desmond McKenzie), 12.044(Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker) and 12.146 (Anthony Rose) also claim that the victims in those cases have not been provided with adequate medical care. In Case 12.044 (Andrew Downer and Alphonso Tracey), for example, the Petitioners claim that following the arrest of the

victim Andrew Downer, prison authorities refused to treat a gun shot wound in the victim's stomach, despite his requests for medical aid. Rather, they claim that the police took the victim to the police station lock up where he was detained for questioning. Following this, the victim was transferred to the Kingston Public Hospital where he remained for 8 days. The petitioners also allege the authorities then returned the victim to detention in an unsanitary cell even though his injuries were serious and required attention, and the victim continues to suffer pain as a result of these injuries.

273. Several of the Petitioners also allege that the victims have been subjected to violence at the hands of the police and prison staff. The petitioners in Case 12.107 (Carl Baker) allege that the victim was subjected to physical and mental torture by the police before trial, by warders while on remand at the St Elizabeth's lock up and by warders at St. Catherine's District Prison. They also claim that the victim has regularly been threatened by prison staff as a consequence of his complaints to officials about his treatment in prison. Similarly, the Petitioners in Case 12.023 (Desmond McKenzie) claim that the victim was abused on three specific occasions during his incarceration, on March 5, 1997, subsequent to an attempted escape from the prison by four other inmates, on August 3, 1997, when he was the subject of assaults and threats by a warder named Ferguson, and on April 3, 1998, when the victim was locked in his cell during and after it was sprayed with insecticide. In Case 12.126 (Dwight Fletcher), the Petitioners allege the victim was beaten at the police station following his arrest on November 21, 1993, during which time police officers placed a gun in his mouth and nostril and fired the gun next to his head, and threatened to beat him if he reported the incident. They claim that Mr. Fletcher was also the subject of beatings at the Montego Bay station in 1993 and in the Mandeville station in 1994, after which he had to be taken to the hospital. The petitioners provided the State and the Commission with additional information pertaining to these incidents, as the State requested in its initial observations on the petition.

274. Finally, the Petitioners in Case 12.023 (Desmond McKenzie) claim that during his time on remand, the victim was forced to share cells with 13 to 15 other prisoners at Chapelton and May Pen lock ups. Further, they claim that during his pre-trial detention in St. Catherine's District Prison, the victim was held with convicted persons contrary to Article 5(4) of the Convention. They also claim that the victim is provided with no educational facilities, and that the State has failed to provide the victim with any opportunities for reform and social readaptation contrary to Article 5(6) of the Convention.

275. The Petitioners' allegations in these cases regarding the victims' conditions of detention appear to be corroborated by general sources of information supplied by the Petitioners in respect of prison conditions in Jamaica. These sources include an April 1993 report prepared by Americas Watch in respect of the death penalty, prison conditions and prison violence in Jamaica, and a December 1993 report by Amnesty International proposing an inquiry into death and ill-treatment of prisoners in St. Catherine's District Prison. These reports provide information in respect of, inter alia, a lack of medical facilities and health care, ill-treatment of prisoners by warders, and the absence of effective complaint mechanisms concerning conditions and treatment in detention facilities in Jamaica. In the 1993 Americas Watch Report, for example, the following observations are made in respect of conditions of detention in Jamaica:

Past reports by Americas Watch have found the prisons squalid: "overcrowded, filthy and unsanitary cells, insect infestation, inadequate or no light in cells, insufficient ventilation...". A Jamaican cabinet task force of 1989 was "shocked at the appalling conditions."

Unfortunately, there is no substantial improvement to report. The equivalent of about fifty cents a day is budgeted for food for each inmate. St. Catherine's District Prison, which houses 1300 inmates in a space built for 800, has had prison riots between 1990 and 1992 arising out of conditions there. The sanitary conditions, due to inadequate plumbing and garbage disposal, are dreadful. The conditions at the General Penitentiary are substantially similar. Recent studies have reiterated the findings of earlier studies that the situation has not improved.[FN143]

[FN143] Americas Watch, Human Rights in Jamaica: Death Penalty, Prison Conditions and Police Violence, News from Americas Watch, April 1993, Vol. 5, N° 3, p. 3

276. The State has criticized these reports as being out-of-date and indicates that there have been "marked improvements" in prison conditions since the reports were prepared. However, the State has not provided the Commission with any specific information with regard to such improvements.

277. The State has provided specific responses in respect of some of the victims' allegations regarding prison conditions. For example, in Case 12.023 (Desmond McKenzie), the State has alleged that the victim was not detained with convicted prisoners prior to his conviction, as none of the lock ups in which he was held contain convicted persons, and because at St. Catherine's District Prison, they detain convicted persons in separate sections from those on remand. Accordingly, the State denies any violation of Article 5(4) in respect of the victim in this case. Additionally, the State maintains that the victim was not in prison on February 23, 1995, and therefore could not have been beaten by prison staff on that date. This date appears to have been cited by the State in error, because the incidents complained of by the Petitioners occurred between March 5, 1997 and April 3, 1998.

278. With respect to Case 12.044 (Andrew Downer and Alphonso Tracey), the State indicates that the victim Andrew Downer was taken to the hospital for his gun shot wound. The State also claims there is no evidence that the victim's injuries were so dire that he could not be arrested and processed prior to being taken to the hospital, or that he was released from the hospital contrary to medical advice. The State also claims that any allegations of deficiencies in the victims' medical treatment only reflect "difficulties resulting from lack of resources, which affect the prison system. The Ministry does not offer this as an excuse, but as a statement of fact, however unfortunate." Conversely, in Case 12.146 (Anthony Rose), the State denies that medical services at St. Catherine's Prison are inadequate. The State claims that the prison has a Medical Center staffed with two registered medical practitioners, a general practitioner and psychiatrist, a dentist, a nurse, a social worker and medical orderlies. The State also indicates that, when a prisoner makes a complaint of a medical nature, arrangements are made with a medical orderly for that prisoner to be taken to see a doctor at the very earliest possibility. The State further asserts that if the complaint is of a serious nature and a doctor is not on duty at the time and

cannot be located, the prisoner is immediately dispatched to the nearby Spanish Town General Hospital.

279. With respect to Case 12.107 (Carl Baker), by communication dated November 19, 1999, the State provided the Commission with the results of its investigation into the allegations contained in the Petitioners' supplemental submission of July 14, 1999. In its communication, the State contends, inter alia, that the prison records do not indicate a warder named "Oniss" being employed on March 16, 1999. The records do, however, indicate that a warder named Mr. Winston Holness was employed at the prison at that time, and Mr. Holness has denied threatening the victim on March 16, 1999 or threatening or antagonizing him on a regular basis. The State indicates further that Warder Willam Burke has denied beating Mr. Baker on April 12, 1999 and that other members of the prison staff responsible for guarding the area where the victim was held on that day have denied having any knowledge of the beating. The State also claims that no search involving warders, police and military personnel was carried out at the prison on April 9, 1999, and that the medical journal and the victim's medical records do not reflect the victim's allegations of illness for the period April 6-11, 1999 or any referrals or medical appointments outstanding. Finally, the State alleges that, in the absence of specific information as to the identity of the warders accused of issuing threats to the victim because he made complaints, and in the absence of any report of the victim being threatened, the State has been unable to investigate these allegations.

280. Apart from the above submissions, the State has not specifically responded to the victims' allegations in respect of the conditions alleged to have been experienced by them. Rather, the State indicated that it would conduct investigations into the victims' claims. The Commission has not received information from the State as to the status or results of any such investigations, with the exception of the State's response to the petitioners' July 12, 1999 supplemental submission in Case 12.107 (Carl Baker), as noted above.

281. The State has also consistently argued that even in the event that the Petitioners' allegations regarding prison conditions are determined to be accurate, they are not sufficiently serious to render the victims' executions illegal. In support of its position, the State cites the case of *Thomas and Hilaire v. The Attorney General of Trinidad and Tobago and others*, [FN144] in which the Judicial Committee of the Privy Council's decision is interpreted by the State as suggesting that ill-treatment must be in the nature of solitary confinement, shackling, flogging or torture before a subsequent execution may be rendered illegal as cruel or unusual treatment or punishment.

[FN144] *Thomas and Hilaire v. The Attorney General of Trinidad and Tobago and others*, Case 60 of 1998 (Judicial Committee of the Privy Council).

282. With respect to the contravention of Article 5(4) raised in Case 12.023 (Desmond McKenzie), neither party has presented compelling independent or corroborating documentation or information from which the Commission may determine whether the victim was in fact detained with convicted persons. As a consequence, the Commission is confronted with

contradictory submissions from the parties on this issue, and considers that it does not have sufficient information to make a determination as to whether the victim in this case was held with convicted inmates during his time in pre-conviction detention. Consequently, the Commission finds no violation of Article 5(4) of the Convention in respect of the victim in Case 12.023 (Desmond McKenzie). In Case 12.126 (Dwight Fletcher), however, the Petitioners have similarly argued that the victim was detained prior to trial with convicted persons at St. Catherine's District Prison, General Penitentiary and Mandeville police station, and the State has indicated that it would investigate this allegation. The State has not provided the Commission with any information concerning the status or results of any such investigation. Consequently, the Commission finds on the basis of the information provided by the Petitioners that Article 5(4) of the Convention has been violated in respect of the victim in Case 12.126 (Dwight Fletcher).

283. With respect to the remaining allegations raised by the Petitioners, the Commission finds that the State has failed to provide specific or sufficient responses so as to effectively answer the Petitioners' allegations in respect of the victims' conditions of detention. Rather, the State has indicated that it will investigate several of the Petitioners' allegations of ill-treatment. The status or results of any such investigations are unknown to the Commission. On the issue of medical conditions, the State suggested in Case 12.146 (Anthony Rose) that medical conditions in St. Catherine's District Prison are adequate, but has failed to respond to the specific allegations raised by the victims in each case. To the contrary, the State has suggested in Case 12.044 (Andrew Downer and Alphonso Tracey) that there may be inadequate resources in providing medical care to prisoners. Finally, the State argues that even in the event that the victims' allegations regarding their conditions of detention are accurate, the conditions would not render the victims' executions unlawful.

284. Where, as in these cases, the State has failed to respond specifically or sufficiently to allegations raised by a petitioner in respect of the conditions of detention and treatment of individual victims, in the Commission's view the State cannot be considered to have refuted the Petitioner's case. In such cases, the Commission must dispose of the complaints based upon the evidence and submissions before it. In the cases currently before the Commission, this consists substantially of information provided by the Petitioners.

285. The Commission acknowledges that the State provided it with the results of the State's investigation into the allegations of abuse and inadequate medical treatment contained in the Petitioners' supplemental submission of July 12, 1999 in Case 12.107 (Carl Baker). However, the State's information consists largely of bare denials by prison warders of the victim's allegations with no corroborating evidence. Moreover, the State has not provided any information regarding other instances of abuse alleged by the victim, for example the allegations in his initial petition that he was beaten following his arrest on April 11, 1995, and again on March 5, 1997. Nor has the State provided any information concerning Mr. Baker's detention conditions generally.

286. The Commission must next determine whether the conditions of detention, as disclosed by the Petitioners' information, constitute violations of Article 5(1) and 5(2) of the Convention. As outlined above, the Petitioners in the five cases before the Commission have made similar allegations in respect of their conditions of detention. They allege, for example, that the victims

have suffered overcrowding, and that sanitation is inadequate because the prisoners' washing facilities and "excrement well" are in the same location. They also claim that the lighting and ventilation in their cells are poor, and that they have been locked in their cells for 23 or more hours per day. The victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), and 12.146 (Anthony Rose) specifically allege that they have been given inadequate access to medical treatment. Further, the Petitioners in Case Nos. 12.023 (Desmond McKenzie), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) allege that the victims have been abused and threatened by police officers and prison staff.

287. In the Commission's view, these conditions of detention, when considered in light of the periods of time for which these victims have been held in detention prior to the final disposition of their appeals, fail to satisfy the standard of humane treatment prescribed under Article 5(1) and 5(2) of the Convention. In this regard, the Inter-American Court considered similar conditions of detention in the Suarez-Rosero Case.[FN145] In that case, the victim alleged, inter alia, that he was held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons. In finding that the victim had been subjected to cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention, the Court stated as follows:

[FN145] I/A Court H.R., Suárez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283.

The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suarez-Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his incommunicado detention was arbitrary and carried out in violation of Ecuador's domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspapers; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suarez Rosero was subjected may be described as cruel, inhuman and degrading.[FN146]

[FN146] Id., at pp. 302-3, para. 98.

288. While the victims in the cases under consideration do not claim to have been held incommunicado, they are held in solitary confinement on death row, and the prison conditions under which they have been detained are strikingly similar to those to which the victim in the Suárez Rosero case was subjected. The victims have been held in confined conditions with inadequate hygiene, ventilation and natural light, and are allowed out of their cells infrequently. Several of the victims allege to have been abused by police and prison staff, or to have been

provided with inadequate medical care. These observations, together with the length of time over which the victims were held in these conditions, suggest that the treatment of the victims has failed to meet the minimum standards under Articles 5(1) and 5(2) of the Convention, which apply irrespective of the nature of the conduct for which the person in question has been imprisoned[FN147]and regardless of the level of development of a particular State Party to the Convention.[FN148]

[FN147] See e.g. Eur. Court H.R., Ahmed v. Austria, Judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 220, para. 38.

[FN148] See similarly U.N.H.R.C., Mukong v. Cameroon, Communication N° 458/1991, U.N. Doc. N° CCPR/C/51/D/458/1991 (1994), para. 9.3 (observing that certain minimum standards governing conditions of detention for prisoners, as prescribed by the International Covenant on Civil and Political Rights and reflected in the U.N. Standard Minimum Rules for the Treatment of Prisoners, must be observed regardless of a state party's level of development).

289. A comparison of the prison conditions of the victims in the cases under consideration with international standards for the treatment of prisoners also suggests that their treatment has failed to respect minimum requirements of humane treatment. In particular, Rules 11, 12, 15, 21, 24 and 25 of the United Nations Standard Minimum Rules for the Treatment of Prisoners[FN149] provide for the following basic standards in respect of accommodation, hygiene, exercise, and medical treatment for prisoners:

[FN149] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (N° 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (N° 1) at 35, U.N. Doc E/5988 (1977).

10. All accommodation provided for the use of prisoners and in particular all sleeping arrangements shall meet all requirements of health, due regard being paid to climactic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

21.(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

26.(1) The medical officer shall have the care of the physical and mental health of the prisoners and should see daily all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

290. It is evident based upon the victims' allegations that the State has failed to meet these minimum standards of proper treatment of prisoners, in such areas as hygiene, exercise, and medical care. The impact of these conditions is exacerbated by the periods of time for which several of these victims have been incarcerated in connection with their criminal proceedings.

291. Consequently, in respect of Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose), the Commission finds that the conditions of detention to which the victims have been subjected fail to respect the physical, mental and moral integrity of the victims as required under Article 5(1) of the Convention, and, in all of the circumstances, constitute cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention. The Commission therefore finds the State responsible for violations of these provisions of the Convention in respect of these victims, in conjunction with the State's obligations under Article 1(1) of the Convention.

292. With respect to the allegation in Case 12.023 (Desmond McKenzie) that the State is responsible for violating Article 5(6) of the Convention, Article 5(6) of the Convention provides that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." The petitioners have alleged that the victim has had no access to educational facilities in prison. Consequently, they argue that he has been deprived of any opportunity for reform and social readaptation, as guaranteed under Article 5(6) of the Convention.

293. After considering the matter, the Commission is of the view that Article 5(6) of the Convention, when interpreted in light of the object and purpose of the Convention, should be read to require reform and social readaptation to be considered in the treatment of any prisoners whose liberty has been deprived by the State as a consequence of a criminal conviction. This encompasses prisoners who have been sentenced to death, but whose punishment is not final until the prisoner has exhausted all avenues of appeal available to him, including proceedings before this Commission. Until such avenues have been exhausted, there remains a possibility that the death sentence may be expunged or commuted. During this interim period, then, opportunities of reform and social readaptation for the prisoner should not be prejudiced. Indeed, as is suggested by Rule 40 of the U.N. Standard Minimum Rules for the Treatment of Prisoners,[FN150] the provision of some degree of educational materials for prisoners is required as a component of the minimum guarantees of humane treatment of all prisoners. Consequently, the State is responsible for violating Article 5(6) of the Convention as regards the victim in Case 12.023 (Desmond McKenzie).

[FN150] U.N. Standard Minimum Rules for the Treatment of Prisoners, supra, Rule 40 (providing that "[e]very institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.").

294. Given its conclusions in Part IV.C.2 of this Report that the victims' death sentences contravene Articles 4, 5 and 8 of the Convention, so as to render any subsequent execution unlawful, the Commission does not consider it necessary to determine whether the length of time for which the victims in the cases before it were held in detention, or the victims' conditions of detention, may also render their executions unlawful. Similarly, the Commission does not consider it necessary to determine whether the method of execution employed in Jamaica constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention.

5. Articles 4 and 8 - Right to a fair trial

295. The petitioners in all of the cases that are the subject of this Report allege violations of Articles 8(1) and 8(2), based upon one or more of several grounds, namely, the manner in which the trial judge conducted the victims' trial, the absence of adequate time and facilities to prepare the victims' defenses and to communicate freely and privately with counsel, and the absence of competent legal representation during the victims' criminal proceedings. Some of the Petitioners have also alleged that violations of the right of the victims in those cases to a fair trial should also be considered to render their executions unlawful contrary to Article 4 of the Convention.

296. The Commission has outlined in Part III.A.3.d of this Report the victims' arguments in respect of the manner in which their criminal proceedings were conducted. In particular, the Petitioners in Case 12.023 (Desmond McKenzie) complain that the trial judge conducted himself in a manner that deprived the victim of a just and impartial trial. These allegedly included prejudicial comments made by the trial judge to the jury. The petitioners also note that, in its

initial observations to their petition, the State "conceded" that the trial judge was not impartial, and suggest that the State cannot now retract its concession for the purposes of the proceeding before the Commission. In Case 12.044 (Andrew Downer and Alphonso Tracey), the Petitioners take issue with the trial judge's decision to permit the prosecution to amend the victims' indictment during the trial to add the offense of murder in the course of robbery. The petitioners in Case 12.107 (Carl Baker) criticize the fact that the trial judge re-sentenced the victim to death after having sentenced him to life imprisonment, when the judge realized that the offenses for which the victim was convicted mandated the death penalty. A review of the records in these cases indicates that the victims raised or could have raised essentially the same arguments in their appeals to the Court of Appeal of Jamaica or the Judicial Committee of the Privy Council.

297. With respect to the State's purported "concession" regarding the trial judge's instructions to the jury in Case 12.023 (Desmond McKenzie), the Commission accepts, based upon the explanation and documentation provided by the State,[FN151] that the "concession" arose as a result of an error in communicating the State's position to the Commission, and that the State, in good faith, never intended to concede this issue. As a consequence, the Commission will determine this issue based upon the remaining substantive submissions and information provided by each of the parties.

[FN151] By communication dated November 2, 1998, the State transmitted to the Commission a copy of the Memorandum of instructions dated July 29, 1998 from the Office of the Attorney General of Jamaica to Jamaica's Mission to the OAS, which did not contain a "concession" that the judge's instructions to the jury in the victim's case were biased.

298. After carefully reviewing the victims' allegations and the information in the records before it, the Commission is of the view that the submissions in the above cases in respect of the manner in which the victims' trials were conducted are matters which are more appropriately left to the domestic courts of States Parties to the Convention. The Commission considers that it is generally for the courts of States Parties to the Convention to review the factual evidence in a given case and give directions as to the applicable domestic law. Similarly, it is for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. In the present cases, the Petitioners have failed to demonstrate that the manner in which their criminal proceedings were conducted warrants interference by this Commission. It is not evident, for example, in what respect the re-sentencing of the victim in Case 12.107 (Carl Baker) prejudiced the victims in the context of their cases so as to constitute a violation of the Convention. Indeed, it appears that the defense raised no objection when the re-sentencing occurred.

299. The petitioners in these cases also argue that they were not provided with adequate time and facilities to prepare their defenses because they were not provided with sufficient time and opportunity to consult with their counsel. The petitioners in Case 12.023 (Desmond McKenzie) claim the victim requested, and was denied, an adjournment on the first day of this trial because his counsel was not present. As a consequence, the victim had to conduct a cross-examination of

the prosecution's principal witness without the assistance of counsel. In Case Nos. 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose), the Petitioners argue that the victims were not provided with adequate time to consult with their attorneys. In addition, the Petitioners in Case 12.126 (Dwight Fletcher) claim the victim was detained for 18 months before he was permitted to consult with an attorney, and was not provided with an attorney during his preliminary inquiry.

300. Further, some petitioners argue that they were not provided with competent legal representation. In Case 12.107 (Carl Baker), the Petitioners argue that the victim was not aware of the fact that he faced the death penalty until after he was re-sentenced. They also claim that neither the victim's attorney nor the State ensured the presence at trial of Edmund Morgan, a witness who was the first person to see the victim after the fire. Similarly, in Case 12.126 (Dwight Fletcher), the Petitioners indicate that the victim's trial attorney failed to call the victim's alibi witnesses at trial despite the victim's requests for him to do so, and failed to object to or enter evidence in respect of the prosecution's use of a perjured witness. These victims therefore claim they have been the victims of further violations of their rights under Articles 8(1) and 8(2) of the Convention.

301. After carefully reviewing the records in these cases, the Commission does not find on the material before it that the State is responsible for any violations of Article 8(1) or 8(2) of the Convention in respect of the victims in the above cases, with the exception of Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher). In each of these cases, the State fulfilled its burden of providing the victim with legal assistance in the course of their criminal proceedings. In the particular case of the provision of State-funded defense counsel, the Commission considers that it cannot hold the State responsible for actions of which it has no knowledge. The Commission shares the views of the European Court in this regard, which has observed that, as a consequence of the independence of the legal profession from the State, the conduct of the defense is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately appointed.[FN152] As a result, the Commission concludes that the competent national authorities are required under Article 8(2)(c) of the Convention to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention.[FN153] The records in these cases do not indicate that the victims made it known to State officials that they considered the time and facilities for preparing their defenses or their legal representation to be inadequate, during their trials or during their appeal proceedings. Moreover, it is not apparent that any decisions made by the victims' solicitors were not rendered in the exercise of their professional judgment, or that it was clear or should have been manifest to the trial or appeal judges that the lawyer's behavior was incompatible with the interests of justice.[FN154]

[FN152] Eur. Court H.R., *Kamasinski v. Austria*, 19 December 1989, Series A. N° 168 para. 65. See similarly U.N.H.R.C., *Young v. Jamaica*, Communication N° 615/1995 (1997).

[FN153] *Kamasinskiv. Austria*, supra.

[FN154] See e.g. *Anthony McLeod v. Jamaica*, supra, at para. 6.1.

302. In Case 12.023 (Desmond McKenzie), however, the State has not denied that the victim was not granted an adjournment on the first day of his trial despite the absence of this counsel, or that as a consequence the victim was required to cross-examine the prosecution's principal witness without the benefit of counsel. Rather, the State claims that the victim's counsel returned that afternoon. Consequently, on the information available, the Commission can only conclude that the victim was denied counsel at a crucial point in his trial.

303. Similarly, in Case 12.126 (Dwight Fletcher), the State has not denied the Petitioners' allegation that the victim was held in detention for 18 months before he was permitted to contact his attorney and that he was not provided with legal counsel during his preliminary inquiry. Rather, the State has indicated that it would investigate the Petitioner's allegations in this regard. The Commission has not been apprised of the status or results of any such investigation by the State.

304. Article 8(2)(d) of the Convention provides every person accused of a criminal offense has the right to defend himself personally or to be assisted by legal counsel of his own choosing. Article 8(2)(e) of the Convention provides every such person the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time limit established by law. Strict compliance with these and other guarantees of due process are particularly fundamental in the context of trials involving capital offenses. The Commission also considers that these rights apply at all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, leading to his committal for trial, and at all stages of the trial itself.[FN155] In order for these rights to be effective, a defendant must be provided with an effective opportunity to retain counsel as soon as reasonably practicable following their arrest or detention. The State's obligations in this regard involve not only making legal aid available, but facilitating reasonable opportunities for the defendant to contact and consult with their respective counsel.

[FN155] See similarly U.N.H.R.C., Paul Kelly v Jamaica, Communication N° 253/1987 (1991).

305. In Case 12.023 (Desmond McKenzie), the victim was denied legal representation at a significant stage of his trial because the trial judge refused his request for an adjournment. Likewise, in Case 12.126 (Dwight Fletcher), the victim has made uncontradicted assertions that he was held in detention for 18 months before he was permitted to contact an attorney, and that he was not provided with legal representation during his preliminary inquiry. The Commission considers that these constitute serious violations of these victims' rights to counsel as provided for under Article 8 of the Convention. Moreover, these circumstances were apparent to the judge who denied an adjournment to the victim in Case 12.023 (Desmond McKenzie), and should have been apparent to the victim's detaining authorities, as well as to the tribunal that conducted the victim's preliminary inquiry in Case 12.126 (Dwight Fletcher).[FN156] As a consequence, the Commission finds that the State violated Articles 8(2)(d) and 8(2)(e) of the Convention as regards the victims in Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher).

[FN156] Indeed, the State has indicated that section 3 of the Poor Prisoners' Defence Act in Jamaica obliges a Resident Magistrate or a Judge of the Supreme Court to grant an indigent accused a legal aid certificate which entitles them to free legal aid in preparing and conducting his defence.

306. Given its conclusions in Part IV.C.2 of this Report that the death sentences imposed on the victims contravene Articles 4, 5 and 8 of the Convention so as to render their executions unlawful, the Commission does not consider it necessary to determine whether the violations of Article 8 determined above may also render the carrying out of the victim's death sentences unlawful contrary to Article 4 of the Convention.

6. Articles 8, 24 and 25 – unavailability of legal aid for Constitutional Motions

307. The petitioners in the five cases that are the subject of this Report argue that legal aid is not effectively available for Constitutional Motions before the courts in Jamaica, thus constituting a violation of the right to due process under Article 8, the right to equal protection under Article 24 and the right to judicial protection under Article 25 of the Convention.

308. More particularly, in Part III.A.3.e of this Report, the victims have claimed that Constitutional Motions before the domestic courts in Jamaica often involve sophisticated and complex questions of law which require the assistance of counsel. The victims also claim that they are indigent, and the State does not provide legal aid to pursue Constitutional Motions in Jamaica. The victims state further that it is extremely difficult to find Jamaican lawyers who will pursue Constitutional Motions on a pro bono basis. As a consequence, the Petitioners allege that the State's failure to provide legal aid in order to present Constitutional Motions constitutes a denial of access to the court and to effective remedies, in fact as well as in law.

309. In this connection, the Petitioners assert that a Constitutional Motion in the context of the victims' cases constitutes a criminal proceeding for which Article 8(2)(e) of the Convention requires the State to provide legal assistance. They argue that a Constitutional Motion should be considered a criminal proceeding because a decision on such a motion could influence and change a ruling on a previous criminal proceeding. They also argue that the fact that some attorneys take pro bono cases does not relieve Jamaica of the obligation to provide legal aid with regard to Constitutional Motions.

310. In response to these contentions, the State has argued in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher), that it is not required to grant legal aid for Constitutional Motions because under Article 8(2)(e) of the Convention, the State only has a duty to give legal aid in respect of criminal proceedings, and a Constitutional Motion is not a criminal proceeding. The State argues further that in any event, the absence of legal aid for Constitutional Motions is not an absolute bar to presenting Constitutional Motions, because condemned prisoners have in the past been able to seek Constitutional Motions without legal aid. The State cites, inter alia, the case of Pratt and Morgan v. A.G. for Jamaica[FN157] in support of its position.

[FN157] Pratt v. Attorney General for Jamaica [1994] 2 A.C. 1 (P.C.).

311. Based upon the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by the victims in their proceedings before the Commission, such as the right to due process and the adequacy of the victims' conditions of detention, are procedurally and substantively complex and cannot be effectively raised or presented by a victim in the absence of legal representation. The Commission also finds that the State does not provide legal aid to individuals in Jamaica to bring Constitutional Motions, and that the victims in the cases at issue are indigent and are therefore not otherwise able to secure legal representation for Constitutional Motions.

312. While the State has indicated that condemned prisoners have in the past brought Constitutional Motions with the assistance of pro bono counsel, there is no evidence that such assistance is effectively available to these victims. There is also no evidence of any other avenues through which condemned prisoners are able to effectively raise alleged violations of their rights under the Jamaican Constitution or under the American Convention before the courts in Jamaica. In any event, the Commission considers that in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed, the high standards of procedural fairness applicable in capital cases do not properly permit the effective protection of those rights to be left to the random prospect of whether an attorney may be willing or available to take the defendant's case without charge. Judicial protection of the right to life and other fundamental rights of condemned prisoners must be guaranteed through the effective provision of legal aid for Constitutional Motions.[FN158] The State cannot be said to have afforded such protection to the victims in the cases noted above.

[FN158] See similarly U.N.H.R.C., Currie v. Jamaica , Communication N° 377/1989, U.N.Doc. CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance); U.N.H.R.C., William Collins v. Jamaica, Communication N° 240/1987, U.N. Doc. N° CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice.).

313. The Commission considers that in the circumstances of the present cases, the State's obligations in respect of legal assistance for Constitutional Motions flow from both Article 8 and Article 25 of the Convention. In particular, the determination of rights through a Constitutional Motion in the Supreme Court of Jamaica must conform with the requirements of a fair hearing in accordance with Article 8(1) of the Convention. In the circumstances of the cases before the Commission, the Court would be called upon to determine whether the victims' criminal

convictions violated their rights under the Constitution of Jamaica. In such cases, the application of a requirement of a fair hearing in the Supreme Court should be consistent with the principles in Article 8(2) of the Convention.[FN159] Accordingly, when a convicted person seeking constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State. In the present cases, the effective unavailability of legal aid has denied the victims the opportunity to challenge the circumstances of their convictions under the Constitution of Jamaica in a fair hearing, and therefore has contravened Article 8(1) in respect of those victims.[FN160]

[FN159] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 28 (interpreting Article 8(1) of the Convention as follows:

For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature, Article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. [emphasis added]

See also I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report N° 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

[FN160] See similarly *Currie v. Jamaica*, supra, para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

314. Moreover, Article 25 of the Convention provides individuals with the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his or her fundamental rights recognized by the constitution or laws of the State concerned or by the Convention. The Commission has stated that the right to recourse under Article 25, when read together with the obligation under Article 1(1) and the provisions of Article 8(1), “must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set,

when appropriate, adequate compensation.”[FN161] In addition, the Inter-American Court has held 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 indigence, then that person is exempted from the requirement under the Convention to exhaust domestic remedies.[FN162] While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article 25 of the Convention in the circumstances of the present cases.

[FN161] See Peru Case, *supra*, pp. 190-191.

[FN162] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 30.

315. By failing to make legal aid available to the victims to pursue Constitutional Motions in relation to their criminal proceedings, the State has effectively barred recourse for the victims to a competent court or tribunal in Jamaica for protection against acts that potentially violate their fundamental rights under the Constitution of Jamaica and under the Convention. As a consequence, the State has failed to fulfil its obligations under Article 25 of the Convention as regards the victims in these cases.

316. Accordingly, the Commission concludes that the State has failed to respect the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Article 8(1) of the Convention by denying the victims an opportunity to challenge the circumstances of their convictions under the Constitution of Jamaica in a fair hearing. The Commission also concludes that the State has failed to provide the victims with simple and prompt recourse to a competent court or tribunal for protection against acts that violate their fundamental rights recognized by the constitution or laws of the state concerned or by the Convention, and has therefore violated the rights of these victims to judicial protection under Article 25 of the Convention.

317. In light of the above conclusions, the Commission does not consider it necessary to determine whether the failure of the State to provide legal aid for Constitutional Motions violates Article 24 of the Convention.

V. APPROVAL OF THE ARTICLE 50 REPORT AND IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATIONS

318. The Commission examined this case in the course of its 105th session, and on November 19, 1999, adopted Report N° 131/99, pursuant to Article 50 of the American Convention. In its report, it concluded that Jamaica was responsible for:

- a. violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey); 12.107 (Carl Baker); 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 4(1), 5(1), 5(2) and 8(1), in conjunction with violations of Article 1(1) of the American Convention, by sentencing these victims to a mandatory death penalty.
- b. violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Article 4(6) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to provide these victims with an effective right to apply for amnesty, pardon or commutation of sentence.
- c. violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher) under Articles 7(5) and 8(1) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the delays in trying the victims.
- d. violating the right of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Dwight Fletcher) under Article 7(5) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to bring the victims promptly before a judge subsequent to their detention.
- e. violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 5(1) and 5(2) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, because of these victims' conditions of detention.
- f. violating the rights of the victim in Case 12.126 (Dwight Fletcher) under Article 5(4) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by detaining the victim with convicted persons prior to his trial and conviction.
- g. violating the rights of the victim in Case 12.023 (Desmond McKenzie) under Article 5(6) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by depriving the victim of opportunities for reform and social readaptation.
- h. violating the rights of the victim in Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher), under Articles 8(2)(d) and 8(2)(e) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by denying the victims legal counsel during portions of their criminal proceedings.
- i. violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 8 and 25 of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to make legal aid available to these victims to pursue Constitutional Motions.

319. In addition, the Commission recommended that Jamaica:

- a. Grant the victims in the cases that are the subject of this Report an effective remedy which includes commutation of sentence and compensation.
- b. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the Convention, including and in particular Articles 4, 5 and 8.

c. Adopt such legislative or other measures as may be necessary to ensure that the right under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence is given effect in Jamaica.

d. Adopt such legislative or other measures as may be necessary to ensure that the right to a fair hearing under Article 8(1) of the Convention and the right to judicial protection under Article 25 of the Convention are given effect in Jamaica in relation to recourse to Constitutional Motions.

320. On December 1, 1999, the Commission transmitted Report N° 131/99 to the State, and requested that the Government of Jamaica inform the Commission within two months as to the measures adopted to comply the recommendations made to resolve the situation denounced.

321. By communication dated February 1, 2000, the State informed the Commission that it had not completed its examination of the Commission's report and was therefore unable to respond to the Commission by the stipulated deadline. The State also indicated that it would "submit its response to the report as soon as it has completed its study." As of March 1, 2000, the date of expiration of the 3-month period under Article 51(1) of the Convention, the Commission had not received a response from the State to Report N° 131/99.

VI. CONCLUSIONS

The Commission, based on the foregoing considerations of fact and law, and in the absence of a response from the State to Report N° 131/99, ratifies its conclusions that:

322. The State is responsible for violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey); 12.107 (Carl Baker); 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 4(1), 5(1), 5(2) and 8(1), in conjunction with violations of Article 1(1) of the American Convention, by sentencing these victims to a mandatory death penalty.

323. The State is responsible for violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Article 4(6) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to provide these victims with an effective right to apply for amnesty, pardon or commutation of sentence.

324. The State is responsible for violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher) under Articles 7(5) and 8(1) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the delays in trying the victims.

325. The State is responsible for violating the right of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey) and 12.126 (Dwight Fletcher) under Article 7(5) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to bring the victims promptly before a judge subsequent to their detention.

326. The State is responsible for violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 5(1) and 5(2) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, because of these victims' conditions of detention.

327. The State is responsible for violating the rights of the victim in Case 12.126 (Dwight Fletcher) under Article 5(4) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by detaining the victim with convicted persons prior to his trial and conviction.

328. The State is responsible for violating the rights of the victim in Case 12.023 (Desmond McKenzie) under Article 5(6) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by depriving the victim of opportunities for reform and social readaptation.

329. The State is responsible for violating the rights of the victim in Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher), under Articles 8(2)(d) and 8(2)(e) of the Convention, in conjunction with a violation of Article 1(1) of the Convention, by denying the victims legal counsel during portions of their criminal proceedings.

330. The State is responsible for violating the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under Articles 8 and 25 of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to make legal aid available to these victims to pursue Constitutional Motions.

VII. RECOMMENDATIONS

331. Based on the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE STATE OF JAMAICA:

1. That it grant the victims in the cases that are the subject of this Report an effective remedy which includes commutation of sentence and compensation;
2. That it adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the Convention, including and in particular Articles 4, 5 and 8;
3. That it adopt such legislative or other measures as may be necessary to ensure that the right under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence is given effect in Jamaica;
4. That it adopt such legislative or other measures as may be necessary to ensure that the right to a fair hearing under Article 8(1) of the Convention and the right to judicial protection under Article 25 of the Convention are given effect in Jamaica in relation to recourse to Constitutional Motions.

VIII. PUBLICATION

332. The Commission transmitted the report adopted pursuant to Article 51 of the American Convention to the State and to the Petitioners on March 7, 2000, and gave the State one month to take the necessary measures in order to comply with the Commission's recommendations. The State failed to present a response within the time limit. On April 11, 2000, however, the State delivered to the Commission an "interim response" to the Commission's Report N° 23/00. In responding to the Commission's recommendations, the State indicated that it was not prepared to commute the sentences passed on the six victims in these cases based upon the conclusions set forth by the Commission in its report. It also indicated that prisoners sentenced to death are entitled to offer pleas in mitigation of their sentence through the Prerogative of Mercy procedure under Articles 90 and 91 of the Jamaican Constitution. The State claims that a number of death row prisoners have had their death sentences commuted based on this procedure, in most cases on the basis of the length of stay on death row, and also on the basis of such factors as a supervening mental incapacity, physical injury and recommendations made by the presiding judge in the relevant case. Finally, the State indicated that it has recently promulgated the Jamaican Legal Aid Act, which the State claims improves the legal resources available to poor persons by giving priority to those persons charged with breaches of the criminal law and making provision to encompass representation for persons involved in civil actions and constitutional motions, "as resources permit". According to the State, the Legal Aid Act is expected to result in more rigorous protection of constitutional rights in criminal law matters.

333. Based upon the foregoing considerations, and in conformity with Article 51(3) of the American Convention and Article 48 of its Regulations, the Commission decides to reiterate the conclusions and recommendations in this report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, pursuant to its mandate, shall continue evaluating the measures taken by the Jamaican State with respect to the recommendations at issue, until they have been fully implemented. This will include seeking further information respecting the status and provisions of the Jamaican Legal Aid Act and the manner in which this legislation is applied by the State in relation to recourse to Constitutional Motions in capital punishment cases.

Done and signed by the Inter-American Commission on Human Rights on the 13 day of the month of April, 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, Commissioners.