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Session: Hundred and Eleventh Special Session (3 – 6 April 2001)  
Title/Style of Cause: Leroy Lamey, Milton Montique, Dalton Daley and Kevin Mykoo v. Jamaica  
Doc. Type: Report  
Decided by: Chairman: Claudio Grossman;  
First Vice-Chairman: Juan Mendez;  
Second Vice-Chairman: Marta Altolaguirre;  
Commissioners: Helio Bicudo, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo.  
Dated: 4 April 2001  
Citation: Lamey v. Jamaica, Inter-Am. C.H.R., Report No. 49/01, OEA/Ser.L/V/II.111, doc. 20, rev. (2000)  
Represented by: APPLICANTS: Simons, Muirhead & Burton and Barlow, Lyde & Gilbert  
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## I. SUMMARY

1. This Report concerns four capital punishment petitions brought against the State of Jamaica (hereinafter referred to as "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 referred to as "the Convention"). The petitions were presented to the Inter-American Commission on Human Rights (hereinafter referred to as "the Commission") on behalf of four condemned men on death row, at St. Catherine District Prison, Jamaica (hereinafter referred to as "the victims"), by two firms of Solicitors in London, United Kingdom, Simons, Muirhead & Burton, and Barlow, Lyde & Gilbert (hereinafter referred to as "the Petitioners"). This report addresses the merits of each case.

2. The names of the Petitioners and victims in each of the four 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 victims in each of the four cases, are as follows:

Table 1

Case N°	Petitioners	Victim(s)	Date Petition	Date Case	Violations alleged:
			Received	Opened	
11.826	Simons	Leroy Lamey	24/10/97	31/10/97	1, 4, 5, 7, 8, 24, 25

	Muirhead & Burton				
11.843	Barlow, Lyde & Gilbert	Kevin Mykoo	02/12/97	03/12/97	1, 4, 5, 8, 24, 25
11.846	Simons Muirhead & Burton	Milton Montique	08/12/97	09/12/97	4, 5, 7, 8, 24, 25
11.847	Simons Muirhead & Burton	Dalton Daley	08/12/97	09/12/97	4, 5, 7, 8, 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]

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 [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."

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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 Nos. 11.826 (Leroy Lamey), 11.846 (Milton Montique) and 11.847 (Dalton Daley), the victims were ultimately convicted of more than one non-capital murder committed on the same or a different occasion,[FN4] and the victim in Case N° 11.843 (Kevin Mykoo) was convicted of capital murder in the course or furtherance of robbery.[FN5] Each of the victims in these cases appealed to the Court of Appeal in Jamaica, and subsequently

filed a petition for Special Leave to Appeal to the Judicial Committee of the Privy Council. The victims' death sentences were ultimately sustained on appeal.

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[FN4] In Case N° 11.826 (Leroy Lamey), the victim had previously been convicted of non-capital murder. He was then convicted of a second murder, which, on appeal, was found by the Jamaican Court of Appeal to constitute non-capital murder. As a consequence of his previous conviction for non-capital murder, however, the Jamaican Court of Appeal determined that a death sentence was the punishment required under Section 3B(3) of the Act for the victim's second non-capital murder conviction.

In Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), the victims were convicted on November 7, 1994 of three counts of capital murder and sentenced to death. On appeal, the Judicial Committee of the Privy Council ultimately substituted convictions for non-capital rather than capital murder. Because each defendant was found responsible for more than one non-capital murder, however, the victims' death sentences were maintained.

[FN5] In Case N° 11.843 (Kevin Mykoo), the victim was convicted on July 3, 1994 of murder in the course or furtherance of robbery and sentenced to death. His conviction and sentence were upheld on appeal.

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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(6), 5, 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 7(5), 7(6) and 8(1) 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' treatment and conditions of detention;
- (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 the adequacy of their legal representation;
- (e) violations of Articles 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, 8 and 25 of the Convention, relating to the validity of Jamaica's Governor General Instructions;

6. The Commission had previously determined by telephone conference on November 3, 1998 that these four cases were admissible in accordance with the requirements of the Convention and the Commission's Regulations,[FN6] and by Report 103/00 adopted on October 16, 2000 considered the merits of the cases pursuant to Article 50 of the Convention. As a procedural matter, the Commission decided to consolidate these four cases pursuant to Article 40(2) of the Commission's Regulations for the purpose of determining their merits, on the basis that they involve similar facts and substantially the same issues under the Convention.

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[FN6] See Case N° 11.826 (Leroy Lamey), Report N° 89/98, Annual Report of the IACHR 1998, p. 146; Case N° 11.843 (Kevin Mykoo), Report N° 90/98, Annual Report of the IACHR 1998, p. 152; Case N° 11.846 (Milton Montique), Report N° 88/98, Annual Report of the IACHR 1998, p. 140; Case N° 11.847 (Dalton Daley), Report N° 88/98, Annual Report of the IACHR 1998, p. 140.  
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7. Upon consideration of the merits of the four 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 Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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 Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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 Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Article 7(5) and 7(6) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to promptly bring the victims before a judge following their arrests, and by failing to ensure their recourse without delay to a competent court to determine the lawfulness of their detention;

(d) The State is responsible for violating the rights of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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.

(e) The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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 victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Articles 8(2)(d) and 8(2)(e) in conjunction with violations of Article 1(1) of the Convention, by denying the victims access to legal counsel for prolonged periods following their arrests.

(g) The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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

8. The Commission opened the cases that are the subject of this Report on various dates between October and December 1997, 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 as a Poor Person 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.

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

Table 2

Case N°	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
11.826	31/10/97	02/12/97,05/12/97	17/12/97,08/01/98	10/02/98,19/02/98	20/03/98,02/04/98
11.843	03/12/97	24/12/97,07/01/98	04/02/98,20/02/98	20/03/98,02/04/98	01/05/98,05/05/98 [FN7]
11.846	09/12/97	14/01/98,26/01/98	06/02/98,20/02/98	20/03/98, -	-
11.847	09/12/97	14/01/98,26/01/98	06/02/98,20/02/98	20/03/98, -	

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[FN7] The State in Case N° 11.843 (Kevin Mykoo) delivered a further response to the Petitioners' observations on May 19, 1998, the pertinent parts of which were transmitted to the Petitioners on May 22, 1998.

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10. As the above Table 2 indicates, the Commission received responses to the original petitions from the State in each of the four 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 four cases, the State delivered replies to the Petitioners' observations. In

Case Nos. 11.826 (Leroy Lamey) and 11.843 (Kevin Mykoo), the pertinent parts of the State's observations were transmitted to the Petitioners, with a response requested within 30 days. In Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), the State indicated in its replies that it had no further observations to make in the cases, and therefore no further pertinent parts were transmitted to the Petitioners.

11. Furthermore, in one of the four cases, Case N° 11.843 (Kevin Mykoo), the Petitioners delivered "supplementary" written submissions to the Commission, one on February 4, 1998 and the other on September 21, 1998, which the Commission subsequently transmitted to the State with responses requested within 30 days. In respect of the latter submission, the State delivered a response dated September 30, 1998.

12. During its 102nd Period of Sessions at its Headquarters in Washington, D.C., the Commission scheduled an oral hearing on March 3, 1999, in the four cases that are the subject of this report. The victim's representatives attended the hearing and made submissions to the Commission, and subsequently provided the Commission with written representations dated March 11, 1999 supplementary to their oral presentation. 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

13. In each of the four cases that are the subject of this report, the Commission ultimately adopted precautionary measures pursuant to Article 29(2) of its Regulations, requesting that the state stay the victims' executions until the Commission had an opportunity to fully investigate the alleged facts.

14. In particular, by letter dated November 20, 1997, the Commission requested pursuant to Article 29(2) of the Commission's Regulations that the State stay the execution of the victim in Case N° 11.826 (Leroy Lamey) until the Commission had an opportunity of fully investigate the claims in his case. The Commission reiterated these requests in its Admissibility Report N° 89/98 dated November 3, 1998, and in a subsequent communication to the State dated December 2, 1998 following the reading of a warrant to the victim for his execution on December 8, 1998.

15. Similarly, in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley), the Commission by communications dated, respectively, December 2, 1998, November 20, 1998 and November 20, 1998, requested pursuant to Article 29(2) of the Commission's Regulations that the State stay the victims' executions to avoid irreparable harm to them until the Commission had reached decisions on the merits of the cases. This followed the reading to the victim in Case N° 11.843 (Kevin Mykoo) of a warrant for his execution on December 8, 1998, and the reading of warrants to the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) for their executions on November 26, 1998.

#### C. Friendly Settlement

16. In its decisions in the admissibility reports adopted in the four cases presently under consideration by the Commission, the Commission placed itself at the disposal of the parties with a view to reaching friendly settlements of the matters pursuant to Article 48(1)(f) of the Convention.

17. In addition, by communications dated September 18, 2000 to the Petitioners and to the State, the Commission again placed itself at the disposal of the parties in these four cases, with a view to reaching friendly settlements of the matters. 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.

18. The Commission received only one response to its September 18, 2000 correspondence from the parties within the prescribed seven day period. By letter dated September 25, 2000, the Petitioners in Case N° 11.843 (Kevin Mykoo) confirmed that they accepted the Commission's offer under Article 48(1)(f) of the Convention with a view to reaching a friendly settlement in the case.

19. Accordingly, by note dated September 25, 2000, the Commission informed the State of the Petitioners' interest in pursuing a friendly settlement of the matter, and requested that the State inform the Commission within 7 days as to whether the State was likewise interested in attempting to reach a friendly settlement, in default of which the Commission would continue with consideration of the matter. The Commission did not receive any response from the State within the prescribed period. The Commission did, however, subsequently receive a communication dated October 2, 2000 from the State, in which it indicated in respect of the four cases under consideration that the State was "of the view that there are no outstanding issues that would necessitate the scheduling of friendly settlement proceedings." The State therefore urged the Commission to "continue with its consideration of the cases with a view to delivering its views in a timely manner."

#### D. Jamaican Governor General's Instructions

20. 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, 8 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 on August 7, 1997 (hereinafter referred to as the "Governor General's Instructions").[FN8] 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.[FN9] 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.[FN10] 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.[FN11]

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[FN8] 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").

[FN9] 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).

[FN10] Governor General's Instructions, Sections 2, 3.

[FN11] 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.

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21. The Commission subsequently received information 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. In *Neville Lewis v. Attorney General for Jamaica et al.*, the Jamaican Court of Appeal determined that the Governor General's Instructions were unlawful under Jamaica's domestic law. On page 11 of its decision the Court of Appeal declared that:

...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."

22. Moreover, the Commission has received information that the decision of the Court of Appeal of Jamaica was appealed to the Judicial Committee of the Privy Council, and that in a judgment delivered on September 12, 2000, that Court upheld the finding by the Court of Appeal that the Governor General's Instructions of August 6, 1997 violated the rules of natural justice and were unlawful.[FN12]

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[FN12] J.C.P.C., *Neville Lewis et al. v. The Attorney General of Jamaica and the Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 20000 (12 September 2000), p. 33.

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23. As the Instructions in their current form do not have any legal effect in Jamaica, and accordingly do not apply to 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

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

#### Leroy Lamey (Case 11.826)

25. Leroy Lamey was charged together with his co-Defendant Patrick Ormsby with the July 16, 1992 murder to the deceased, Shawn Donaldson. Mr. Lamey was tried and convicted on October 13, 1993, but on appeal his conviction was quashed and a re-trial was ordered. The victim was re-tried between May 8 and May 16, 1996, found guilty of capital murder, and sentenced to death. He subsequently appealed his conviction and sentence to the Court of Appeal, and in a judgment dated February 19, 1997, the Court of Appeal of Jamaica quashed his conviction for capital murder and substituted it for one of non-capital murder. Mr. Lamey's death sentence was nevertheless maintained under Section 3(1A) of the Offenses Against the Person Act, due to his conviction for non-capital murder on a previous occasion. Mr. Lamey appealed to the Judicial Committee of the Privy Council in May 1997, and on October 23, 1997 his petition was dismissed. In addition, on January 19, 1995, Mr. Lamey was issued a warrant for his execution on January 26, 1995, and on May 22, 1997, he was read a second warrant for his execution on May 27, 1997. Both of these executions were subsequently stayed by the Governor-General of Jamaica, the former on January 18, 1995 and the latter on May 27, 1997.

26. The prosecution alleged that the deceased was in Thompson Street, Arnett Gardens, Jamaica, where three men, including the victim, approached him with guns. Shots were fired and the deceased was killed, although the prosecution could not prove whose bullet killed the deceased. Among the evidence relied upon by the prosecution was the testimony of witness Christopher Smelke, who had appeared as a witness at Mr. Lamey's first trial and whose testimony had resulted in the re-trial. Mr. Smelke had died before the time of the re-trial and, despite counsel's objection, the trial judge allowed his testimony to be read and made an exhibit at Mr. Lamey's second trial.

27. Mr. Lamey did not give or call evidence at trial, but gave an unsworn statement from the dock, in which he denied having been at the scene of the crime.

28. The violations of the Convention alleged on behalf of Mr. Lamey can be categorized as follows: 1) violations of Article 4(1), 4(6), 5, 8 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, time in detention, and the reading to the victim by the State of two warrants of execution; 3) violations of Articles 8(2) relating to the State's rules governing communications between prison inmates and their attorneys; and 4) violation of Articles 24 and 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

Kevin Mykoo (Case 11.843)

29. Mr. Mykoo was charged together with his co-defendant Martin Dixon with the July 3, 1994 murder of the deceased Jamai Vege. Mr. Mykoo was convicted on February 15, 1996 of murder in the course or furtherance of robbery and sentenced to death. He subsequently appealed his conviction and sentence to the Court of Appeal of Jamaica, and his appeal was dismissed on April 14, 1997. A Notice of Intent to Petition the Judicial Committee of the Privy Council was given, but on advice of leading and junior counsel that there were no grounds for such a petition and that any petition was bound to fail, an appeal to that Court was not pursued.

30. The deceased's murder took place in a bar called the Tamarind Tree in Runaway Bay, Jamaica. According to the prosecution, a number of men entered the bar, shot the deceased, and ransacked the premises, taking money, liquor and jewelry. The men then escaped in a black Pathfinder van. The van, and a motorcycle that had preceded the van, were eventually stopped at a roadblock. The van then burst into flame, and there was a shooting incident involving the men in the van and two police detectives. Two days later, Mr. Mykoo was arrested at his home, where the police also seized some jewelry. Later, the victim took the police to a gully and pointed out a gun, to which a spent cartridge found in the bar was later linked.

31. The evidence relied upon by the prosecution included the testimony of a customer at the bar, Noel Brown, who identified the victim and also claimed that some of the jewelry found at Mr. Mykoo's home belonged to him. The prosecution also presented the identification evidence of a bar maid, Surphina Taylor, and the victim was recognized by police witnesses as having been in the Pathfinder vehicle and at the roadblock shooting. Other evidence tendered by the prosecution included a purported admission by the victim that he was present at the roadblock when the Pathfinder van burned out, clothing found at the victim's house that were identified as similar to clothes that the police alleged he was wearing in the Pathfinder van, and statements made by the victim to the police following his arrest, and which were subsequently admitted into evidence, in which he admitted having been a party to the robbery but denied the shooting.

32. At his trial, Mr. Mykoo gave an unsworn statement from the dock to the effect that the jewelry to which witness Noel Brown claimed ownership did not belong to the witness.

33. The violations of the Convention alleged on behalf of Mr. Mykoo can be categorized as follows: 1) violations of Articles 2, 4 and 5 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 victims' treatment while in detention and his conditions of detention; 3) violations of Articles 7(5) and

7(6) in connection with the delay in bringing the victim before a judicial officer following his arrest; 4) violations of Article 8 relating to the delay in permitting the victim to consult an attorney following his arrest, and to the State's laws governing communications between death row inmates and their attorneys; and 5) a violation of Article 25 relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

Milton Montique (Case 11.846) and Dalton Daley (Case 11.847)

34. Mr. Montique and Mr. Daley were both charged with the March 18, 1992 murders of the deceased Juliet Martin, Dolores Campbell and Andrew Blake. Both victims were convicted on three counts of murder committed in the course or furtherance of an act of terrorism on November 7, 1994 and sentenced to death. Mr. Montique and Mr. Daley subsequently appealed their convictions to the Jamaican Court of Appeal, and their appeals were dismissed on October 23, 1995. The victims then lodged a Petition for Special Leave to Appeal to the Judicial Committee of the Privy Council on February 20, 1996, which the Registrar and the Government of Jamaica subsequently agreed to hold in abeyance pending the decision of the Privy Council in another case, *Leroy Lamey v. The Queen*. Following the issuance of its May 20, 1996 judgment in the Lamey case, on July 11, 1996 the Judicial Committee of the Privy Council granted Mr. Montique and Mr. Daley Special Leave to Appeal as Poor Persons, on the limited question of whether there was any evidence to support their convictions for capital murder. Their appeals were allowed on December 8, 1997, with the Privy Council finding that Mr. Montique should not have been found guilty of the capital murder of Juliet Martin and Andrew Blake but rather only the non-capital murder of each of them. Similarly, the Privy Council found that Mr. Daley should not have been found guilty of the capital murder of Dolores Campbell but rather only of her non-capital murder. The defendants' death sentences were nevertheless maintained under Section 3(1A) of the Offences Against the Person Act, as a result of their convictions for more than one non-capital murder on the same occasion.

35. According to the facts underlying the victims' convictions, on the night of March 19, 1992 there was a shooting incident on the ground floor of a four-story apartment block at 9 Blunt Street, Denham Town, Jamaica. According to the prosecution's case, there was only one eyewitness, George Brown, who claimed that he saw three people shot and wounded: Juliet Martin, a female neighbor; Dolores Campbell, another neighbor; and a young boy whom he called Andrew. Brown gave a statement to the police in which he made no mention of having seen the shootings take place, and subsequently gave evidence during the preliminary inquiry and at trial in which he indicated that he had seen Mr. Montique and Mr. Daley fire gun shots around the apartment block. The prosecution also relied upon the evidence of Hyacinth Sterling, the mother of the deceased Juliet Martin, who testified to having seen a group of men, including the victims, load a gun, walk in the direction of Blunt Street, and then heard shots from that direction. Ms. Sterling also picked Mr. Daley out of an identification parade. No identification parade was held for Mr. Montique. Ms. Sterling subsequently identified both of the victims at trial.

36. During the course of the trial, the defense made a submission of "no case to answer" based upon the quality and reliability of the identification evidence. The submission was made in the presence of the jury and was rejected by the trial judge. Neither Mr. Montique nor Mr. Daley gave evidence at trial, but both made unsworn statements from the dock. In his statement, Mr.

Montique alleged that his brother had called him at work on March 18 and that they had gone together to the Hannah Town Police Station in order to call their other brother in Canada. Mr. Montique indicated further that after making the call, he returned to his home on Mulgrave Avenue, and claimed that he knew nothing of the murders. Dalton Daley similarly claimed that he was innocent and knew nothing of the murders.

37. The violations of the Convention alleged on behalf of Mr. Montique and Mr. Daley can be categorized as follows: 1) violations of Articles 4(1), 4(6), 5, 8 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 victims' treatment in detention and their conditions of detention; 3) violations of Articles 7(5) and 7(6) in connection with the delays in bringing the victims before a judicial officer following their arrests; 4) violations of Articles 7(5) and 8(1) in connection with the delays in bringing the victims to trial; 5) violations of Articles 4 and 8 in connection with the delay in permitting the victims to consult with attorneys following their arrests, the failure of the victims' attorneys to properly investigate their alibi defenses, and the State's laws governing communications between death row inmates and their attorneys; and 6) violations of Articles 24 and 25 relating to the absence of legal aid for Constitutional Motions in Jamaica.

## 2. 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

38. All four 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(6), 5, 8, and 24 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. The 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.

39. 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,[FN13] the Republic of South Africa[FN14] and India,[FN15] 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.

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[FN13] Woodson v. North Carolina, 428 U.S. 280 (1976) (U.S. Supreme Court).

[FN14] The State v. Makwanyane and McHunu, Judgement, Case N° CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).

[FN15] Bachan Singh v. State of Punjab, (1980) 2 S.C.C. 684 (Supreme Court of India).  
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40. 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 Article 4(1) of the Convention.

41. Each of the Petitioners also claims that the mandatory death penalty violates the right to humane treatment under Article 5 of the Convention. Cumulatively, 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.

42. The Petitioners in the four cases currently under consideration by the Commission also argue violations of Article 8 of the Convention, because the Constitution of Jamaica does not permit the victims to argue that their executions are unconstitutional as cruel and unusual, nor does it afford the victims a right to a hearing or a trial on the question of whether the penalty should be either imposed or carried out.

43. Finally, the Petitioners in these cases argue that the mandatory nature of the death penalty violates Article 24 of the Convention. Essentially, 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.

ii. Prerogative of Mercy

44. The Petitioners further 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.[FN16] 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. In addition, the Petitioners 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.

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[FN16] 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.

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45. 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. The Petitioners contend in this connection that the process of mercy lacks criteria governing the State's discretion 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.

46. Also according to the Petitioners, in practice decisions as to mercy in Jamaica are taken without any input for the prisoner, and often times the first the prisoner knows that he or she has been denied mercy is when a death warrant is read. They note in this regard that each of the victims in the four present cases was the subject of at least one death warrant, that none of the victims has received a commutation of his sentence, and that in no case was the victim aware that he had been denied clemency until the warrant was read to him.

47. The Petitioners emphasize that the right in Article 4(6) of the Convention to apply for mercy must be interpreted as an effective right. They argue in this respect 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 date upon 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.

b. Articles 4, 5, 7 and 8 - Delay in Victims' Criminal Proceedings

48. The Petitioners in the four cases that are the subject of this Report have alleged violations of one or more of Articles 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 and were denied the right to be tried within a reasonable time. 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.

49. First, in two of the cases, Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), the Petitioners alleged that the State subjected the victims to prolonged pre-trial delays, and thereby failed to try the victims within a reasonable time contrary to Articles 7(5) and 8(1) of the Convention. The delays alleged to have occurred in the 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 3

<b>Case N°</b>	<b>Victim(s)</b>	<b>Date of Arrest</b>	<b>Date of Conviction</b>	<b>Delay between Arrest and Conviction</b>
11.846	Milton Montique	01/04/92	07/11/94	2 yrs. 7 mos.
11.847	Dalton Daley	30/03/92	07/11/94	2 yrs. 7 mos.

50. In each of these cases, the Petitioners have alleged that the delays in bringing the victims to trial were unreasonable. Cumulatively, they submit that the delay in each case is attributable to the State,[FN17] and suggest that the evidence in the victims' criminal cases was not particularly complex, as it essentially consisted of the testimony of a limited number of eye-witnesses. In this regard, the Petitioners reject the State's contention that the delays were attributable to the nature of the cases, and argue that the State has not otherwise offered any adequate explanation for the delays in bringing the victims to trial, which the Petitioners claim are excessive in light of existing international standards.[FN18]

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[FN17] In this respect, the Petitioners cite the case *Pratt and Morgan v. Attorney General of Jamaica* (1994) 2 A.C. 1 (J.C.P.C.), for the proposition that a state bears responsibility for organizing its justice system so that unreasonable delays do not occur.

[FN18] In support of their argument, the Petitioners cite the decisions of the U.N. Human Rights Committee in the cases *de Casariego v. Uruguay*, U.N. Doc. A/36/40, p. 185, *Sequeira v. Uruguay*, U.N. Doc. A/45/40, p. 127, and *Pinkney v. Canada*, U.N. Doc. A/37/40, p. 107.

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51. The Petitioners in these cases also submit that the delay in trying the victims resulted in prejudice to their cases, by undermining their ability to put forward alibi defenses. In particular, they argue that the evidence of identification in each case was weak to begin with, and therefore that any delay could only serve to weaken the witness' powers of recall even further.

52. In addition, in three of the cases presently under consideration by the Commission, Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley), the Petitioners allege that the State is responsible for violations of Article 7(5) and 7(6) of the Convention, by reason of the delay in bringing the victims before a judge following their arrests. In particular, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) claim that the victims in these cases were detained for one month following their arrests prior to being brought before a judicial officer, and the Petitioners in Case N° 11.843 (Kevin Mykoo) allege that Mr. Mykoo was detained by authorities for four months prior to being brought before a judge. Cumulatively the Petitioners in these cases argue that according to prevailing international human rights jurisprudence, a person arrested or detained must be brought "promptly" before a judicial officer, and that such delay must not exceed "a few days".[FN19]

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[FN19] In support of this argument, the Petitioners cite General Comment 8(2) of the U.N. Human Rights Committee, as well as that Committee's decisions in the cases *Jijon v. Ecuador*, Communication N° 277/1988, and *Kelly v. Jamaica*, Communication N° 253/1987.

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53. With respect to Article 7(6) of the Convention, the Petitioners argue that a person deprived of his or her liberty must have recourse to a competent court for the purpose of determining the lawfulness of his or her detention. In the circumstances of the victims in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique), and 11.847 (Dalton Daley), the

Petitioners claim that as they were not brought promptly before a judge pursuant to Article 7(5) of the Convention, they were not in due time afforded the opportunity to obtain on their own initiative a decision by a court as to the lawfulness of their detentions, contrary to Article 7(6) of the Convention.

54. In response to the State's argument that the victim in Case N° 11.843 (Kevin Mykoo) should have brought his allegations of prolonged detention to the attention of the magistrate who dealt with his case, the Petitioners argue that the victim was not required to do so, as this would not have afforded him any grounds for relief in domestic courts. Rather, according to the Petitioners, the victim could only have brought such a claim by way of Constitutional Motion, which the Petitioners claim he could not do because of the absence of legal aid for such proceedings.

a. Article 5 - Treatment in and Conditions of Detention

55. The Petitioners in each of the four cases that are the subject of this report also allege that the treatment received by the victims while in detention, and/or the conditions in which the victims have been detained by the State, together with the time spent there, constitute violations 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 observations, the Petitioners provided 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. Further, the Petitioners in Case N° 11.823 (Leroy Lamey) allege that the State is responsible for further violations of Article 5 of the Convention, in connection with the reading of two warrants of execution to Mr. Lamey.

i. Allegations of Fact

56. 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 (May 1990); Jamaica Prison Ombudsman: Special Report on Prison and Lock Ups (1983); Americas Watch: Death Penalty, Prison Conditions and Police Violence (April 1993); Jamaica Council for Human Rights: A Report on the Role of the Parliamentary Ombudsman in Jamaica (Summer 1994); and Amnesty International: Proposal for an Inquiry into Death and Ill-treatment of Prisoners in St. Catherine's District Prison (December 1993). These reports include information regarding the physical conditions of the prisons and prisoners, the treatment of prisoners by prison staff, the status of medical, educational and work facilities and programs, and the availability and effectiveness of internal complaint mechanisms in various prisons and lock up facilities in Jamaica.

57. According to these reports, conditions of detention facilities in Jamaica are poor, and in many instances fall short of international standards. According to Americas Watch, for example, the conditions in the prisons and lock-ups in 1993 "continued to be extremely poor and in violation of international standards for as long as Americas Watch has been investigating them."

58. 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 cells approximately 8 feet by 5 feet in size, 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 or inadequate medical or psychiatric care is provided to prisoners, and the food and water provided for prisoners are below acceptable standards. The Petitioners also state that there are no adequate or effective complaint mechanisms for dealing with prisoners' complaints.

59. 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.

Leroy Lamey (Case 11.826)

60. The Petitioners in Case N° 11.826 (Leroy Lamey) allege violations of Article 5(1) and 5(2) of the Convention, due to the length and conditions of the victim's detention, as well as the fact that the State read two execution warrants to the victim.

61. In particular, in addition to general conditions of the nature described above, the victim claims that he has not eaten regularly during his time in detention, as the food served in prison is often inedible. He also claims that the State read two warrants of execution to him, one in January 1995 for his execution on January 26, 1995, and the other on May 22, 1997 for his execution on June 10, 1997, as a consequence of which he was subjected to intense mental anguish and prolonged psychological suffering. Contributing to these effects were the circumstances under which the warrants were read, including the fact that the warrants were announced formally and unexpectedly, that the victim was transferred to a condemned cell in an isolated part of the prison adjacent to the gallows, and that he was subjected to various special pre-execution procedures. In light of these circumstances, the Petitioners contend that the State is responsible for violations of the victims' rights under Article 5(1) and 5(2) of the Convention.

62. In response to the State's contention that the alleged victim failed to properly inform the Jamaican Privy Council of his proceedings before international human rights bodies and thereby secure of stay of the issuance of warrants of execution, the Petitioners argue conversely that proper notice had been given to the appropriate State authorities on both occasions of the victim's intention to petition the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person. They further argue that in any event, it is the fact of, and not the reason for, the victim's treatment that lies at the heart of his complaint in this respect.

Kevin Mykoo (Case 11.843)

63. In addition to conditions of detention of the general nature described above, the Petitioners in Case N° 11.843 (Kevin Mykoo) alleged that the State has violated Mr. Mykoo's rights under Article 5(1), 5(2) and 5(4) of the Convention, due to specific instances of ill-treatment he is said to have experienced while in detention.

64. In particular, the Petitioners contend that following his arrest, the victim was detained by authorities for questioning, during which time the police subjected the victim to various forms of ill-treatment. According to the Petitioners, these included an attempt to strangle the victim by putting his head in a car window and raising the window against his neck, threatening to cut off the victim's private parts if he did not answer their questions, beating him with guns, and subjecting him to electric shocks until he signed a confessed statement.

Milton Montique (Case 11.846) and Dalton Daley (Case 11.847)

65. The Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) make similar and specific claims respecting their condition of detention, which they have supported through affidavits sworn by both of the victims.[FN20] According to their affidavits, and consistent with the general conditions described above, both of the victims are detained in the "Gibraltar" block of St. Catherine District Prison, in 8 foot by 5 foot cells where they are held in constant solitary confinement. The lighting in their cells is inadequate, and blocks of concrete serve as their beds, with pieces of foam as mattresses. The victims are provided with buckets to use as toilets, and the cells are not hygienic and are crawling with roaches and other insects. The water and food are below standard, with the inmates often being fed only flour and rice, and the victims are allowed out of their cells for approximately 45 minutes daily, during which time they must "slop out", wash their clothes, and exercise. Access to medical attention is also said to be inadequate. In addition, the victims claim that due to an incident at the prison on March 5, 1997 when prisoners attempted to escape, the death row cells were searched and warders confiscated many of the victims' personal belongings, even though they were not involved in the attempted escape.

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[FN20] See Affidavit of Milton Montique, sworn on December 5, 1997; Affidavit of Dalton Daley, sworn on December 5, 1997.  
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66. Finally, the victim in case N° 11.846 (Milton Montique) claims to have complained to the Superintendent about the treatment that he has received but has received no response, and the victim in Case N° 11.847 (Dalton Daley) claims that following his arrest, the police threw tear gas into his cell and that the fire brigade had to be called to spray water into his cell in order to clear it.

ii. Allegations of Law

67. With respect to the legal standards that should be considered in determining whether treatment and conditions while in detention violate 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." [FN21]

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[FN21] 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.

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68. The Petitioners also cite several comments and 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 U.N. Human Rights Committee's General Comments 7(16) and 10(1) regarding states' obligations in providing humane conditions of detention, as well as decisions of the Committee in such cases as *De Voituret v. Uruguay*, U.N. Doc. A/39/40, in which the Petitioners claim that the Committee found solitary confinement for three months in a cell almost without natural light to violate the detainee's rights. The Petitioners similarly refer to the Greek Case,[FN22] in which, according to the Petitioners, 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.

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[FN22] Greek Case 12 Y.B. 1 (1969)(Eur. Court H.R.)

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69. Moreover, the Petitioners in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique), and 11.847 (Dalton Daley) 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 support of this position, the Petitioners rely upon the finding by the Judicial Committee of the Privy Council in the *Pratt and Morgan v. Attorney General of Jamaica* [1994] 2 A.C. 1 (P.C.) case that prolonged post-conviction detention can render a subsequent execution unlawful.

70. In response to the State's contention in Case N° 11.847 (Dalton Daley) that medical treatment is available to inmates at St. Catherine District Prison, the Petitioners in that case argue that this claim does not meet those aspects of their complaint that relate to such matters as poor food, inadequate sanitation, inhuman housing conditions, and the lack of an effective complaints mechanism for inmates. The Petitioners also contend that the State's reliance upon its status as a "developing" country to excuse these conditions is not well-founded, as in their view the guarantees in the Convention are absolute and cannot depend on economics.

b. Article 8(1) and 8(2) - Right to a Fair Trial

71. The Petitioners in the four cases within this report argue that the State has violated the rights of the victims in these cases to a fair trial under Article 8 of the Convention, based upon the laws in Jamaica governing communications between death row inmates and their attorneys, which the Petitioners allege are inconsistent with Article 8(2)(c) and (d) of the Convention. In addition, the Petitioners in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege further violations of the victims' rights under Article 8(2)(b), (d)

and (e) of the Convention, for the reason that they were kept in custody for prolonged periods before being permitted to consult attorneys. Finally, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) claim violations of the victims' rights under Article 8(1) and 8(2)(d) of the Convention, due to the purported failure of the victims' attorneys to properly investigate their alibi defenses and call witnesses in support.

72. First, the Petitioners in the four cases under consideration allege that Rule 296(4) of the Prison Rules of Jamaica is inconsistent with the victims' rights to access to counsel and to a court under Article 8(2)(c) and (d) of the Convention. Rule 296(4) reads:

All visits to prisoners under sentence of death, whether by legal officers or others, shall take place in the sight and hearing of a prison officer, notwithstanding that such visit may be in relation to an appeal.

73. The Petitioners rely upon a number of decisions of the European Court of Human Rights, including those in *Golder v. U.K.* (1980) 1 E.H.R.R. 524 and *Campbell and Fell v. U.K.* (1984) 7 E.H.R.R., for several propositions. First, they argue that Article 6(1) of the European Convention on Human Rights, governing the right of access to court, permits restrictions upon an individual's right to access court but only where the limitation pursues a legitimate aim and is proportionate to that objective. Further, the Petitioners suggest that unimpeded access to a lawyer for the purpose of receiving advice and assistance in connection with the possible institution of legal proceedings is an inseparable part of the right of access to court. Consequently, the Petitioners claim that a prisoner's right of access to court guaranteed by Article 6(1) is contravened by the application of a general prohibition on privileged oral communications between prisoners and their lawyers prior to the commencement of litigation that is not dependent on specific security considerations.

74. Accordingly the Petitioners claim that Rule 296(4) of the Jamaican Prison Rules is drafted in general and absolute terms and applies to all prisoners sentenced to death, irrespective of whether particular security concerns arise. They further claim that there is nothing inherent in the status of a prisoner as one sentenced to death which gives rise to a need for the imposition of a rule prohibiting privileged communications between solicitor and client. The Petitioners therefore argue that the State is responsible for further violations of Article 8(2) and (d) of the Convention in respect of the victims.

75. The Petitioners in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) also contend that the victims in these cases were held in custody for, respectively, three months, two months, and three months, following their arrests before they were permitted to consult with attorneys, contrary to Article 8(2)(c) and (d) of the Convention. In support of this contention, the Petitioners rely upon questionnaires prepared by the victims, and cite the decision of the U.N. Human Rights Committee in the case *Perdomo and de Lanza v. Uruguay*, U.N. Doc. A/35/40, for the proposition that in order to comply with Article 14(3)(b) of the International Covenant on Civil and Political Rights, a defendant must be given access to his or her lawyer.

76. Finally, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege further violations of Article 8(1) and 8(2)(d) of the Convention, due to the failure of the victims' attorneys to investigate their alibi defenses and to call witnesses in support.

77. In particular, the Petitioners contend that the victims had alibis for the night of the murders. Milton Montique claims that he was at work when he received a telephone call from his brother who wanted to see him in Hannah Town, and that he left work, met his brother in Hannah Town, and went to the Hannah Town Police Station to telephone their brother in Canada. The Petitioners also argue that Mr. Montique told his state-appointed counsel that he had an alibi for the night of the murders and gave him the names of the witnesses who could verify his movements, but that his attorney failed to investigate the alibi and that no evidence was called in support of it.[FN23] Consequently, the only evidence in respect of this alibi at trial was the victim's unsworn statement from the dock, which, according to the Petitioners, would not have been given appropriate weight by the jury. The Petitioners further indicate that in March 1996 they attempted to contact the victim's trial counsel to obtain information concerning the efforts carried out with respect to locating potential witnesses for the victim's defense, but with no result.

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[FN23] See affidavit of Milton Montique, sworn on December 5, 1997, paras. 3-16.  
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78. The Petitioners in Case 11.846 (Milton Montique) also indicate that they have since the victim's trial gathered evidence which suggests that a considerable amount of evidence could have been called in support of the victim's alibi, had his attorney undertaken sufficient inquiries, including: a sworn statement obtained from the victim's brother stating that he and Mr. Montique went to the Hannah Town Police Station to telephone their older brother in Canada; sworn statements from the victim and Mr. Delroy Laing; the evidence of PC Amin, who was not called as a witness at trial, but who, according to Hyacinth Sterling's testimony, said that she must have been mistaken when she identified the victim as the killer because he had seen the victim at the police station on the night of the murders; and a letter to the Petitioners from Dalton Daley's mother and a statement of Paulette Muirhead, indicating that Hyacinth Sterling was not present at the building on Upper Oxford Street on the night of the murders but was staying elsewhere, and thus could not have identified the two defendants, but was only informed of the murders on the following morning.

79. The victim in Case 11.846 (Dalton Daley) similarly claims that he left work at 4:30 p.m. on the day of the murder and that on the way home he met his friend Keith Osbourne and bought some cigarettes from one Aunt Dolly at a stand at the corner of Drummond Street and Oxford Street. He further claims that it took him approximately 1/2 hour to reach his home where he lived with his family and that he spent the evening in his yard, ate at approximately 6:00 p.m., and spent the remainder of the evening watching television with his mother and brothers. At 8:00 p.m., he claims to have laid down, fell asleep, and woke up at 5:30 or 6:00 a.m. the following day and prepared to go to work. He also claims that he told his lawyer that he wanted to present his alibi and corresponding witnesses to the jury but that, after speaking with his

mother, his lawyer told him that he could not run his alibi defense, because the witnesses were family members and therefore the Court would not believe them.[FN24]

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[FN24] See affidavit of Dalton Daley, sworn on December 5, 1997, paras. 3-13.

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80. Based upon these circumstances, the Petitioners argue that the State is responsible for violations of Article 8 of the Convention, and correspondingly Article 4, due to the failure of the victims' court-appointed counsel to investigate their alibis, in that the behavior of their counsel fell below the standards of trial preparation that are internationally recognized as being acceptable. In support of this proposition, the Petitioners point to the case law of domestic courts, including that of the English Court of Appeal, respecting the duty of counsel to fully investigate any alibi his or her client may have.[FN25]

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[FN25] The Petitioners refer, for example, to the decisions in the cases *R. v. Fergus* 98 Cr. App. R. 313 and *R. v. Irwin*, (1987) All E.R. 1085, as well as the American Bar Association's Standards for Criminal Justice, Defence Function, 4-4.1.

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81. The Petitioners also refer to domestic and international jurisprudence respecting the standards governing the conduct of defense counsel more generally. They claim in this respect that Article 8(2) of the Convention, like Article 14 of the International Covenant on Civil and Political Rights, prescribe two basic elements concerning the proper administration of justice, a right to equality before the courts, and the right to a fair and public hearing by a proper tribunal. A fair trial in turn requires, among other things, the effective assistance of counsel.[FN26] Accordingly, the Petitioners argue that Article 8(2)(d) of the Convention should be read so that if the quality of state-appointed counsel's pre-trial preparation or his or her performance in court results in an unfair trial, then Article 8(1) and 8(2)(d) of the Convention is violated.[FN27] The Petitioners also note that although certain jurisprudence suggests that a failure by legal aid counsel must be manifest or sufficiently brought to the state's attention, they claim that this is precisely the protection to which the victims are entitled under Article 8(1) and 8(2) of the Convention.

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[FN26] The Petitioners cite in this regard the U.N. Human Rights Committee decision in the cases *Moraël v. France*, Communication N° 207/86, and *Little v. Jamaica*, Communication N° 283/1988.

[FN27] In this connection, the Petitioners refer to the British cases of *Sankar v. Attorney General of Trinidad and Tobago* [1995] 1 All E.R. 236 (J.C.P.C.) and *R. v. Clinton* [1993] 2 All E.R. 998 (Eng. C.A.), as well as the U.S. Supreme Court's decision in *Strickland v. Washington* 466 U.S. 668 (U.S.S.C.) and the decision of the European Court of Human Rights in *Artico v. Italy*.

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82. Based upon these submissions, the Petitioners claim that in the present cases, state-appointed counsel failed to undertake a cardinal line of defense and thereby deprived the victims of the right to pursue all available lines of defense in violation of Article 8, and that, short of not having a lawyer at all, there can have been no more manifest failure to act on instructions and put the victims' defenses to the jury. The Petitioners also claim in this respect that a clear distinction can be drawn between a decision not to call a particular witness taken after thorough consideration and mature reflection, and a failure to investigate at all, such that the latter conduct "strikes at the irreducible kernel of fairness which is the hallmark of a trial conforming to the standards of the American Convention on Human Rights."

83. The Petitioners therefore alleged that the State is responsible for violations of Article 8(1) and 8(2)(d) of the Convention in respect of the victims in these cases. Further or in the alternative, the Petitioners claim that the actions of counsel deprived the victims' of the right to obtain the attendance or examination of witnesses on their behalf under the same conditions as the witnesses against them, contrary to Article 8(2)(f) of the Convention.

84. In response to the State's argument that the victims should have complained to the General Legal Counsel in Jamaica respecting the conduct of their attorneys, the Petitioners claim that this would not have provided the victims with an effective remedy, as that body's powers are limited to administering professional sanctions to lawyers, and therefore that the victims would nevertheless have remained on death row at risk of execution.

c. Articles 24 and 25 - Unavailability of Legal Aid for Constitutional Motions

85. The Petitioners in the four cases currently under consideration by 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 24 and 25 of the Convention.

86. 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.[FN28] 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.

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[FN28] According to the Petitioners' submissions, Article 25(1) of the Jamaican Constitution provides in part: "...if any person alleges that any of the provisions of Section 14-24 (inclusive) of the Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action in respect of the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

87. 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*[FN29] and the U.N. Human Rights Committee in *Curry v. Jamaica*,[FN30] for the proposition that individuals must be guaranteed effective access to courts in fact as well as in law, which may require legal assistance in the provision of legal aid. 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.

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[FN29] *Airey v. Ireland* [1979] 2 E.H.R.R. 305.

[FN30] *Curry v. Jamaica*, Communication N° 377/1989, at p. 5, paras. 13.3, 13.4.

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88. In response to the State's contention that there is now legislation in Jamaica that provides legal aid for pursuing Constitutional Motions, the Petitioners claim that the fact that there may be legislation before Parliament on legal aid did not assist the victims if they could not take advantage of it, due to the fact that it had not yet been proclaimed in force. Further in this regard, the Petitioners in Case N° 11.843 (Kevin Mykoo) invited the Commission to hold the victim's case in abeyance until the legal aid legislation in Jamaica is in force and he accordingly has an opportunity to pursue a Constitutional Motion before domestic courts.

## B. Position of the State on the Merits

### 1. Articles 4, 5, 8, 24 and 25 - Mandatory Nature of the Death Penalty and the Prerogative of Mercy

89. The State did not make any observations in respect of the issue of the mandatory nature of the death penalty in Jamaica, or the adequacy of the process for exercising the Prerogative of Mercy in Jamaica, in any of the four cases presently under consideration by the Commission.

### 2. Articles 5, 7, and 8 - Delay in the Victims' Criminal Proceedings

90. In response to the allegations of the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) that the victims in these cases were not brought to trial within a reasonable time in violation of Articles 7(5) and 8(1) of the Convention, the State contends that, while the 2 1/2 year delay between arrest and trial was "longer than desirable", preliminary inquiries were held during this period in both cases. The State also rejects the contention that a case involving three murders is simple, but rather that it is expected that more time would have been required to adequately prepare such a case.

91. With respect to the allegations in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) that the State delayed in bringing the victims before a judge following their arrests in violation of Articles 7(5) and 7(6) of the Convention, the State denies that Mr. Daley was detained for a period of one month before being brought before a

judicial officer, that Mr. Montique was detained for one month before being brought before a judge, or that Mr. Mykoo was detained for four months before being brought before a magistrate. In respect of the allegation in the latter case, the State further indicated that it had "investigated the applicant's allegations" in reaching its conclusion, and has contended in all of the cases that there is no evidence to support the Petitioners' allegations on these points.

### 3. Articles 4 and 5 - Treatment in and Conditions of Detention

92. In relation to the allegations in all four cases that are the subject of this report that the victims' treatment while in detention or their conditions of detention violate Articles 4 and 5 of the Convention, the State provided a number of observations.

93. With respect to Case N° 11.843 (Kevin Mykoo), the State argues in respect of the Petitioners' allegation that the victim was subjected to ill-treatment following his arrest that it was open to the victim to raise these allegations at his preliminary inquiry, his trial or his appeal, and therefore that it is not acceptable for the victim to raise these allegations for the first time before the Commission. The State also indicates that there is no proof to support these allegations, and that raising them at this late stage calls into question their accuracy.

94. With respect to the allegations in the same case, as well as those in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), that the conditions and time under which the victims have been held render their death sentences unlawful, the State contends that in the case *Pratt and Morgan v. Attorney General of Jamaica*, the Judicial Committee of the Privy Council found that a specific period of time on death row constitutes cruel and inhuman treatment contrary to Article 17 of the Jamaican Constitution, but that this period had not been reached in the victims' cases. The State also claims in this regard that it cannot be reasonably argued that the victims' detention on death row for more than two years while they exhausted their domestic remedies is excessive. In the State's view, "[a] line must be drawn where a stay on death row, by itself, cannot be categorized as cruel and inhuman treatment, even if it causes some mental trauma to the individual." [FN31]

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[FN31] In support of this position, the State cites the decision of the U.N. Human Rights Committee in the case *Pratt and Morgan v. Jamaica*, in which, according to the State, the Committee held that prolonged judicial proceedings per se do not amount to cruel and inhuman treatment even if they are a source of mental anguish for a prisoner.

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95. Specifically in respect of the allegation by the Petitioners in Case N° 11.826 (Leroy Lamey) that the victim's time in death row and the reading to him of two warrants of execution violated his rights under Article 5 of the Convention, the State denies that these circumstances constitute a breach of the Convention. In addition to referring to the decision of the Judicial Committee of the Privy Council in *Pratt and Morgan*, as noted above, the State argues that in light of the judicially-prescribed time periods within which executions must be conducted, there is a need for the State to act quickly in order not to breach its domestic law, and that when prisoners choose not to use, with dispatch, the remedies available to them, "the State must ensure

that the law take its course." This, according to the State, was the reason that the warrants of execution were issued.

96. In its subsequent observations in this case, the State did not dispute that warrants of execution had been read to the victim on two occasions, or that the victim had on those occasions been moved to a "death cell". The State argues, however, that although the victim had made applications to human rights organizations, he failed to advise the Jamaican Privy Council, the body responsible for issuing warrants of execution, that he had made those applications. According to the State, if the Privy Council is not advised of the steps taken by applicants to pursue appellate or other remedies, the State "remains under a duty to issue death warrants and allow the law to take its course." The State further argues that this position is consistent with the requirements of the Judicial Committee of the Privy Council's decision in Pratt and Morgan, and notes that as soon as the Jamaican Privy Council was advised of the victim's applications, it rescinded both of the death warrants.

97. Finally, in respect of the allegations in Case N° 11.847 (Dalton Daley) that the victim's conditions of detention violate Article 5 of the Convention, the State acknowledges that the conditions are "less than ideal", but indicates that there is now a medical doctor on staff at the prison and that prisoners are transported to the Spanish Town Hospital when the need arises. The State also referred the Commission to its "Report on Conditions in Local Prisons" which, according to the State, identifies the difficulties faced by the State, like other "developing countries", in improving prison conditions. The State did not include a copy of this report with its observations.

#### 4. Articles 4 and 8 - Right to a Fair Trial

98. No observations were received from the State respecting the allegation in these four cases that the State's laws governing communications between death row inmates and their attorneys contravene Article 8(2)(c) and (d) of the Convention.

99. With regard to the allegation in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) that the alleged victims in these cases were held in custody for prolonged periods of time before they were permitted to see attorneys, the State, in its observations in Case N° 11.846 (Milton Montique) denied the allegation on the basis that "[t]here is no evidence to support this allegation." Further, with respect to this point in Case N° 11.843 (Kevin Mykoo), the State contends that if the victim was held for three months before he was permitted to see an attorney, this would be contrary to the Jamaican Constitution and should have been brought to the attention of the magistrate before whom the victim appeared. Having failed to do so, the State says that the Petitioners should not be allowed to now raise the issue for the first time before the Commission, and suggests that their delay in arguing the matter also raises questions regarding the accuracy of the allegations.

100. Finally, with respect to the allegation in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) that the victims' rights under Article 8(1) and 8(2)(d) of the Convention were violated for the purported failure of their trial attorneys to investigate their clients' alibis and call witnesses in support, the State contends that its responsibility is to appoint competent legal aid

counsel to represent persons, and that thereafter, the State cannot be held responsible for the manner in which counsel conducts his case. According to the State, if it is felt that counsel did not conduct a client's case in a professional manner according to established standards, the matter may be referred to the General Legal Council, the professional body responsible for maintaining standards in the legal profession. The State further indicates that this body is not controlled by the State, and that allegations in a complaint made to this body must be complete and sustainable.

#### 5. Articles 24 and 25 - Unavailability of Legal Aid for Constitutional Motions

101. In respect of the Petitioners' arguments pertaining to the alleged absence of legal aid in Jamaica for Constitutional Motions, the State delivered observations in Case Nos. 11.843 (Kevin Mykoo) and 11.846 (Milton Montique). In the former case, the State argued in its initial observations that there was a new Legal Aid Act in Jamaica that provides legal aid for Constitutional Motions, and that the victim in that case could avail himself of that remedy. Subsequent to receiving the Petitioners' response, however, the State indicated in supplementary observations that the Legal Aid Act had been passed by both houses of Parliament and assented to by the Governor General and would come into force on a day appointed by the Minister. The State also rejected the Petitioners' suggestion that the Commission suspend the proceedings before it in order to await the entry into force of the legislation and indicated that the State would regard any such development as a "stalling tactic". Finally, in its observations in Case N° 11.846 (Milton Montique), the State indicated, without further elaboration, that it did not accept that it is a violation of the Convention not to provide legal aid for Constitutional Motions.

#### IV. ANALYSIS

102. As particularized 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(6), 5, 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 7(5), 7(6) and 8(1) 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' treatment and conditions of detention;
- (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 the adequacy of their legal representation;
- (e) violations of Articles 24 and 25 of the Convention, relating to the unavailability of legal aid for Constitutional Motions in Jamaica.

#### A. Standard of Review

103. In undertaking its review of the merits of the Petitioners' claims in these cases, the Commission wishes to recall and reiterate the heightened level of scrutiny that it considers applicable in capital punishment cases. According to this standard of review, the Commission will subject the parties' allegations to an enhanced level of scrutiny in order to ensure that any deprivation of life effected by a State Party pursuant to a death sentence complies strictly with the provisions of the Convention, including in particular the right to life provisions under 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.[FN32] The Commission will therefore analyze the claims in the four cases presently under review in accordance with this standard of review.

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[FN32] See Report N° 38/00 (Baptiste v. Grenada), Annual Report of the IACHR 1999, p. 721, at p. 738; Report N° 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, p. 918, at p. 967.

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B. Articles 4, 5, 8, and 24 - The Mandatory Death Penalty

1. The Victims have been Sentenced to Mandatory Death Penalties

104. The records in the four 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.[FN33] 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 two or more non-capital murders committed on the same or a different occasion.

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[FN33] Case N° 11.823 (Leroy Lamey) (convicted of more than one non-capital murder); Case N° 11.843 (Kevin Mykoo) (convicted of murder in the course or furtherance of robbery); Case N° 11.846 (Milton Montique) (convicted of more than one non-capital murder); 11.847 (Dalton Daley) (convicted of more than one non-capital murder).

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105. 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").[FN34] Article 2(1) of the Act defines capital murder as follows:

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[FN34] Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992 (13 October 1992), N° 14.

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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;[FN35]

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[FN35] 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.

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(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.

106. 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."

107. 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.

108. 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.

109. Accordingly, once the jury found each of the victims in the four cases currently before the Commission guilty of capital or multiple non-capital murders, the death penalty was the only available punishment. The records in several of the cases 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 matters. In Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), for example, the Judicial Committee of the Privy Council stated as follows in maintaining on appeal the victims' death sentences:

The only remaining question is the application to this case of the provisions of section 3(1A) of the principal Act as amended. For the reasons given in this judgment their Lordships consider that Daley was guilty of the non-capital murder of Delores Campbell and that Montique was guilty of the non-capital murder of Juliet Martin and Andrew Blake. But they were each found guilty of three murders in the same trial. The trial judge would have been bound therefore to sentence them to death for the non-capital murders which they had committed. It would not have been open to him in this case to have sentenced them, in respect of the murders, to life imprisonment. [emphasis added]

Their Lordships will therefore humbly advise Her Majesty that these appeals should be allowed to the extent only of substituting, in Daley's case, a verdict of non-capital murder for the jury's verdict of finding him guilty of the capital murder of Delores Campbell, and in Montique's case, verdicts of non-capital murder for the jury's verdicts of finding him guilty of the capital murders of Juliet Martin and Andrew Blake; and that they each should be sentenced to death for their non-capital murders in terms of section 3(1A) of the Offences Against the Person Act 1968 as amended.[FN36]

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[FN36] Dalton Daley and Milton Montique v. The Queen, Privy Council Appeal N° 65 of 1996, Judgment (8 December 1997) (Judicial Committee of the Privy Council), at p. 12.

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110. Crimes of capital murder and multiple non-capital murder in Jamaica can therefore be regarded as being subject to a “mandatory death penalty”, namely a death sentence that the law compels the court 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.

111. According to the legislation, however, this is subject to one exception. 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.

112. 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.

113. As indicated in III.A.3.a of this Report, the Petitioners in all four of the cases before the Commission have alleged that the sentencing of the victims to mandatory death penalties 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.

114. 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.

## 2. Articles 4, 5 and 8 of the Convention and the Mandatory Death Penalty

115. 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.

116. 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.

117. Article 4 of the Convention thus 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.

118. 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”.[FN37]

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[FN37] 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. 52.

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119. 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,[FN38] 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.[FN39] 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[FN40] and commutation of the death sentence.[FN41] 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.[FN42] 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.[FN43]

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[FN38] Article 6 of the ICCPR provides as follows:

Article 6

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.

[FN39] See e.g. U.N.H.R.C., *Baboheram-Adhin et al. v. Suriname*, Communication Nos. 148-154/1983, 4 April 1985, para. 14.3.

[FN40] See e.g. *Anthony McLeod v. Jamaica*, Communication N° 734/1997, U.N.Doc CCPR/C/62/734/1997.

[FN41] See e.g. *Patrick Taylor v. Jamaica*, Communication N° 707/1996, U.N. Doc. CCPR/C/60/D/707/1996.

[FN42] 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/CNB.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 377.

[FN43] See e.g. Case N° 9260 (*Clifton Wright v. Jamaica*), Annual Report of the IACHR 1987-88, 16 September 1988, p. 154.

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120. 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." [FN44] 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.

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[FN44] Woodson v. North Carolina 49 L Ed 2d 944, 961.

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121. 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.[FN45] [emphasis added]

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[FN45] Advisory Opinion OC-3/83, supra, para. 55.

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122. 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.

123. 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.

124. 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.

125. 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.[FN46] 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 or furtherance of a robbery.[FN47] Notwithstanding the breadth of circumstances that might fall within these legal definitions, 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.

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[FN46] 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 between 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).

[FN47] See e.g. *The State v. Kevin Mykoo and Martin Dixon*, Transcript, Criminal Appeal Nos. 24 & 28/96, at pp. 425, 473 (in instructing the jury on the law relevant to the case, defining "murder" as occurring when a person "by his own act caused the death of or inflicted or attempted to inflict grievous bodily harm on the person murdered", and that, to find the defendant guilty of capital murder, it must be shown that he was "present and actively assisting in the furtherance of the common purpose which in this case was to rob"). *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.).

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126. 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.

127. 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.

128. 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.

129. 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.[FN48] 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*.<sup>[FN49]</sup> 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 ultimately 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. In so concluding, the Committee suggested that Canada's decision not to refuse extradition or to seek assurances, in order not to be considered arbitrary, must be shown to have been based upon a reasoned consideration of the circumstances of Mr. Kindler's case:

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[FN48] Webster's Third International Dictionary.

[FN49] 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.[FN50]

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[FN50] Id., para. 14.6.

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130. 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.

131. 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 Article 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.

132. 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.

133. 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.

134. 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.<sup>[FN51]</sup> 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, such as the right to liberty. 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.

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[FN51] 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.”

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135. 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.

136. 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 Article 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.

137. 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.

138. 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 Article 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.

139. 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.

140. 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.

141. 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 be interpreted to require individualized sentencing in death penalty cases.[FN52] 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."[FN53]

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[FN52] 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.

[FN53] Advisory Opinion on the Death Penalty, *supra*, at para. 57.

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142. 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.

143. 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.

### 3. Individualized Sentencing in Other International and Domestic Jurisdictions

144. 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 imposition of capital punishment in accordance with international human rights standards. 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.

145. In the case of *Lubuto v. Zambia*,<sup>[FN54]</sup> 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<sup>[FN55]</sup> that the death penalty be imposed "only for the most serious crimes". The Committee concluded:

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[FN54] *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.

[FN55] Article 6 of the ICCPR provides as follows:  
Article 6

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.
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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.

146. 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.[FN56] [emphasis added]

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[FN56] 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.

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147. 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*<sup>[FN57]</sup> found a mandatory death sentence for first degree murder under the law of North Carolina to violate the Eighth<sup>[FN58]</sup> and Fourteenth<sup>[FN59]</sup> 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.<sup>[FN60]</sup> 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.<sup>[FN61]</sup> 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:

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[FN57] *Woodson v. North Carolina* 49 L Ed 2d 944.

[FN58] 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.”).

[FN59] 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.”).

[FN60] Id., at 950, n. 4.

[FN61] 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.

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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 Ed 43, 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.[FN62]

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[FN62] *Id.* at 961. See also *Roberts (Stanislaus) v. Louisiana*, 428 U.S., 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

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148. In the case of *The State v. Makwanyane and McHunu*,[FN63] the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act N° 51[FN64] 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:[FN65]

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[FN63] *The State v. Makwanyane and McHunu*, Judgment, Case N° CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa).

[FN64] 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.

[FN65] *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.

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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.[FN66] 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.[FN67]

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[FN66] Criminal Procedure Act N° 51 of 1977, section 322(2A) (as amended by section 13 of Act N° 107 of 1990).

[FN67] Id. section 316A(4)(a).

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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.[FN68] Due regard must be paid to personal circumstances and subjective factors which might have influenced the accused person's conduct,[FN69] 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.[FN70] In this process "[e]very relevant consideration should receive the most scrupulous care and attention",[FN71] 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. [FN72]

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[FN68] *S. v Nkwanyana and Others* 1990 (4) SA 735 (A) at 743E-745A.

[FN69] *S v. Masina and Others* 1990 (4) SA 709 (A) at 718G-H.

[FN70] *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.

[FN71] 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).

[FN72] *S v Senonohi* 1990 (4) SA 727 (A) at 734F-G; *S v Nkwanyana*, supra at 749A-D.

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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.[FN73]

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[FN73] Id. at 35-36.

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149. Similarly, in the case of *Bachan Singh v. State of Punjab*,<sup>[FN74]</sup> 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.<sup>[FN75]</sup> 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).”<sup>[FN76]</sup> 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:

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[FN74] *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 475.

[FN75] Id. at 509-510.

[FN76] Id. at 516.

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(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.<sup>[FN77]</sup>

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[FN77] Id. at 515.

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150. 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.[FN78]

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[FN78] Id. at 534.

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151. 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.

#### 4. The Cases Before the Commission

##### a. Mandatory Death Penalty

152. As indicated previously, the victims in the four 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.[FN79] 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 Article 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 Article 3(1) or 3(1A) of the Act, death is the automatic penalty.

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[FN79] R. v. Cunningham [1982] A.C. 566.

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153. 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, which accounts for the absence of evidence of such factors in the records of these cases. The courts sentenced the victims based solely upon the category of crimes for which they had been found responsible.

b. Prerogative of Mercy

154. The Commission is aware of the Governor General's authority under the Constitution of Jamaica to grant a pardon or respite, or to substitute a less severe punishment for that imposed on any person, in death penalty and other cases, on recommendation of the Jamaican Privy Council. The Commission does not, however, 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.[FN80]

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[FN80] The Jamaica (Constitution) Order in Council 1962, Second Schedule, Sections 90, 91.

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155. The Commission is not 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. According to the submissions of the parties in the present cases, an offender does not appear to have a right 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. Rather, the submissions of the Petitioners have indicated 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.[FN81]

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[FN81] 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..

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156. In regard to the latter observation, however, the Commission has received information that in a September 12, 2000 judgment in the case *Neville Lewis et al. v. The Attorney General of Jamaica*, the Judicial Committee of the Privy Council found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review.[FN82] The Judicial Committee of the Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision.[FN83]

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[FN82] *Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.), at p. 23.

[FN83] *Id.*, at 23-24.

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157. Even in light of the judgment in the *Neville Lewis et al.* case, the Commission considers that the process for granting mercy in Jamaica is not consistent with, and therefore cannot serve

as a substitute for, the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences, as outlined in Part IV.B of this report. As explained 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, even as informed by the judgment in the Neville et al. case, does not satisfy these standards, and therefore cannot serve as an alternative for individualized sentencing in death penalty prosecutions.

158. Moreover, to the extent that the victims in the four cases presently being considered by the Commission have not been afforded the procedural protections discussed by the Judicial Committee of the Privy Council in the Neville et al. case, the Commission finds, as it had prior to the Neville et al. judgment,[FN84] 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.

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[FN84] See e.g. Report N° 38/00, (Baptiste v. Jamaica), Annual Report of the IACHR 1999, p. 721, paras. 120-125; Report N° 41/00 (McKenzie et al. v. Jamaica), Annual Report of the IACHR 1999, p. 918, paras. 227-232.  
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159. 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.

160. 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."[FN85] 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.[FN86] 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.[FN87]

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[FN85] 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.").

[FN86] I/A. Comm. H.R., Haitian Center for Human Rights and others (United States), Case N° 10.675 (13 March 1997), Annual Report 1996, para. 155.

[FN87] 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.).

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161. 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.[FN88]

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[FN88] In the State of Ohio, United States, 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).

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162. The information before the Commission indicates that the process in Jamaica for granting amnesty, pardon or commutation of sentence that was available to the victims in these cases did not guarantee them any procedural protections. By their terms, Sections 90 and 91 of the Jamaican Constitution did 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. Indeed, the Petitioners in the four cases presently under consideration by the Commission have indicated that each of the victims has been the subject of at least one death warrant, and that in no case was the victim aware that he had been denied clemency until the warrant was read to him.

c. Conclusion

163. 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 four 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.

164. 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 their 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.

165. 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 their 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.

166. The Commission also concludes that the State has violated Article 4(6) with respect to the victims in these cases, by failing to guarantee them 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 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.

167. 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.

168. 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.

#### C. Articles 5, 7 and 8 - Delays in the Victims' Criminal Proceedings

169. As indicated in Part III.A.2.b of this Report, the Petitioners in three of the four cases that are the subject of the present Report, Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley), 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 the victims' criminal proceedings should be considered to violate Article 5 of the Convention and thereby render the victims' executions unlawful.

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

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.

1. Delay in Being Brought Promptly Before a Judge

171. The Petitioners in the three cases noted above allege that the State is responsible for violations of Article 7(5) and 7(6) of the Convention, by reason of the delay in bringing the victims before a judge following their arrests. In particular, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) claim that the victims in these cases were detained for one month following their arrests before they were brought before a judicial officer, and the Petitioners in Case N° 11.843 (Kevin Mykoo) allege that Mr. Mykoo was detained by authorities for four months prior to being brought before a judge. In response, the State denies that the victims suffered such delays and claims that there is no evidence to support the Petitioners' contentions in this regard.

172. In reviewing the records in these cases, the Commission notes that, while the State had denied the Petitioners' specific allegations in this regard, it has provided no information or evidence as to when the victims were in fact taken before a judicial officer. In light of the clear obligation on state parties under Articles 7(5) of the Convention to bring any person who is detained "promptly" before a judge, the Commission considers that a plain denial by the State is not sufficient to meet the Petitioners' specific allegations as to the timing of his pre-trial process. These allegations have been supported by questionnaires completed by the victims in these cases. Moreover, it is reasonable to expect that the State, as the authority responsible for detaining the victims, would possess documentation or other information establishing precisely when the victims were first taken before a judicial authority, and yet the State has not provided such information to the Commission. Consequently, the Commission concludes, based upon the material before it, that the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) were detained for one month following their arrests before they were brought before a judicial officer, and that the victim in Case N° 11.843 (Kevin Mykoo) was detained by authorities for four months prior to being brought before a judge.

173. In interpreting the requirements of Article 7(5) of the Convention, 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)."[FN89] Furthermore, the Commission noted that:

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[FN89] 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]

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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.[FN90]

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[FN90]Id., 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.

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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." [FN91] 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.[FN92]

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[FN91] Id. at para. 24.

[FN92] Id., at pp. 247-248.

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174. 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,[FN93] 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[FN94] [equivalent to Article 7(5) of the Convention]. Additionally, in the decision of the Committee in the case of Paul Kelly v. Jamaica[FN95], 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.

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[FN93] Peter Grant v. Jamaica, Communication N° 597/1994, U.N. Doc. N° CCPR/C/56/D/597/1994 (1996).

[FN94] 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."

[FN95] U.N.H.R.C., Paul Kelly v. Jamaica, Communication N° 253/1987.

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175. 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:[FN96]

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[FN96] 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").

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[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"....[FN97]

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[FN97] Eur. Court H.R., Case of Brogan and Others, Ser. A, vol. 145, 29 Nov. 1988, at para. 58.

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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.[FN98] 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.[FN99]

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[FN98] Id. at para. 62.

[FN99] Eur. Court H.R., Case of Koster v. The Netherlands, Ser. A, Vol. 221, 28 Nov. 1991, at paras. 24-25.

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176. 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.[FN100]

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[FN100] Jorge Luis Bronstein and others, *supra*.

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177. 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[FN101] and European Convention[FN102] 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.

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[FN101] International Covenant on Civil and Political Rights, Art. 9(3), *supra*.

[FN102] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5(3), *supra*.

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178. In light of the above principles, the Commission therefore finds the State responsible for violations of Article 7(5) of the Convention in respect of the victims in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) or 11.847 (Dalton Daley), with regard to the delay in bringing them before a judge following their arrests. Further, given that the victims were, as a consequence of their detention, deprived of recourse without delay to a competent court to determine the lawfulness of their detention, and in the absence of any information from the State as to the availability of such recourse, the Commission finds the State responsible for violations of Article 7(6) of the Convention in respect of the victims in these same cases.

## 2. Trial within a Reasonable Time

179. In relation to a trial within a reasonable time and the length of detention, the Petitioners in two of the cases within this Report, Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege that the State failed to try the victims within a reasonable time, contrary to Article 7(5) and 8(1) of the Convention. In this regard, the Petitioners refer specifically to the pre-trial delays outlined in Table 4, which is reproduced below, and which are confirmed by the victims' affidavits:

Table 4

Case N°	Victim(s)	Date of Arrest	Date of Conviction	Delay between Arrest and Conviction
11.846	Milton Montique	01/04/92	07/11/94	2 yrs. 7 mos.
11.847	Dalton Daley	30/03/92	07/11/94	2 yrs. 7 mos.

180. The State responded to the allegations relating to the delay in trying the victims in these cases by recognizing that the delays had been "longer than desirable". It suggested, however, that the delays were justified due to the fact that preliminary inquiries had been held in each case, and owing to the complexities of the issues in the cases.

181. 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.[FN103] 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.[FN104]

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[FN103] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, p. 283, para. 70.

[FN104] Id., para. 71.

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182. 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.[FN105] 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.[FN106]

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[FN105] 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.

[FN106] See Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina), *supra*.

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183. 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." [FN107]

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[FN107] Report N° 12/96, Case N° 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.").

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184. In both of the above cases, the victims have been subjected to a pre-trial delay of more than 2 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. [FN108]

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[FN108] See e.g. *Suarez Romero Case*, *supra*, p. 300, para. 73 (finding that a period of delay 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).

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185. 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 these cases 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.[FN109]

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[FN109] 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).

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186. In addition, upon having reviewed the records in these cases, the Commission is not satisfied, based upon the materials available, that the delay is adequately explained based upon the nature of the prosecutions. As the Petitioners point out, the victims' convictions appear to have been based principally upon the evidence of three witnesses who were present at or near the scene of the crime and were interviewed by and available to the police apparently from the time of the incident. The State has failed to point to any particular aspect of the case that would explain why over two and a half years was required to bring the victims to trial based upon this evidence.

187. After considering the information before the Commission in these cases, 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 delays in trying the victims was unreasonable contrary to Articles 7(5) and 8(1) of the Convention. According to the information before the Commission, the victims' prosecutions do not appear to have been particularly complex, and the State has failed to provide the Commission with any information suggesting that the case was sufficiently complex so as to warrant a 2 year and 7 month delay in each of the victim's pre-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 such a delay.

188. Therefore, the Commission finds that the State has violated the right of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) to a trial within a reasonable time, contrary to Articles 7(5) and 8(1) of the Convention.

189. Given its conclusions in Part IV.B.4 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.

#### D. Articles 4 and 5 – Treatment in Detention/Conditions of Detention

190. The Petitioners in the four cases under consideration by the Commission allege that the treatment received by certain of the victims while in detention and 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 N° 11.826 (Leroy Lamey) have also argued that the reading of two warrants of execution to Mr. Lamey constituted further violations of his rights under Article 5(1) and 5(2) of the Convention. In addition, the Petitioners in each of the four cases contend that the violations of the victim's rights under Article 5 of the Convention render his execution unlawful under Article 4 of the Convention.

191. Articles 5(1) and 5(2) of the Convention provide as follows:

5(1) Every person has the rights to have his physical, mental, and moral integrity respected.

5(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.

192. As indicated in Part III.A.2.c of this Report, the Petitioners in the four 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 mattress or other proper 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. 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.[FN110] Similarly the Petitioners claim that no or inadequate medical or psychiatric care is provided to the victims and that there are no or inadequate mechanisms to deal with prisoners' complaints at St. Catherine District Prison.

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[FN110] The affidavit filed by the Petitioners in Case N° 11.846 (Milton Montique) is illustrative of the allegations regarding conditions of detention on death row at St. Catherine District Prison. In his affidavit, the victim states in part as follows:

17. Since my conviction on 7 November 1994, I have been detained on death row at St Catherine District prison in a block called "Gibraltar" which consist of twenty-six cells, each containing one inmate. The size of my cell is eight foot by five foot, and I am constantly detained in solitary confinement. The lighting in my cell is inadequate and in the mornings when I go out of my cell into the sunlight, my eyes are extremely sensitive and take a long time to adjust to the brightness.

18. There is a piece of concrete the authorities call a bunk, but to me its just plain concrete which is shaped like a tomb. I am given a blanket which smells oily. I am also provided with a piece of sponge to use as a mattress. For the first two months after my conviction, I wasn't provided with any form of mattress and therefore had to sleep on the concrete.

19. There are no sanitary facilities within my cell and I am provided with a bucket for use as a toilet. My cell is not hygienic and is full of roaches and other crawling insects. In front of my cell there is an open gutter which is always full of foul smelling liquid which is extremely unhygienic and unsanitary.

20. Although I receive fresh water each day, on occasions the water is not up to standard and sometimes when I drink it it makes me ill and I suffer from diarrhea. The food that is provided is neither up to standard and when we are provided with meat, it is normally spoiled. The main meal each day consists of rice and flour, and occasionally meat. The meat that is provided is often chicken back, which means that we don't really receive any meat, just the bones from the back of the chicken. Generally, the food is insufficient and deplorable. For example, on most days, whatever food is provided cannot be eaten as it is covered in too much salt.

21. I am allowed out of my cell each day for approximately forty-five minutes. In this period I am expected to slop-out, bathe, wash my clothes and exercise.

22. For the last six months I have noticed that a doctor has been coming to the prison once or twice a month. Nevertheless, when I have requested to see a doctor, I often have to wait, and on some occasions, I have been unable to see the doctor at all.

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193. 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.[FN111]

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[FN111] 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

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While the reports are somewhat dated, the Commission notes that the State has not provided the Commission with any information or evidence to suggest that detention conditions have improved since the preparation of these studies.

194. The Petitioners in Case N° 11.843 (Kevin Mykoo) have further alleged that Mr. Mykoo was subjected to violence at the hands of the police following his arrest. In particular, they allege that following his arrest, Mr. Mykoo was detained for questioning, during which time he was subjected to various forms of abuse, including attempts to strangle him in a car window, threatening to cut off his private parts with a knife, beating him with guns, and subjecting him to electric shocks.

195. In addition, the Petitioners in Case N° 11.823 (Leroy Lamey) claim that the State read two warrants of execution to Mr. Lamey, one in January 1995 for his execution on January 26, 1995, and another in May 1997 for his execution on June 10, 1997. The Petitioners contend that as a result, Mr. Lamey was subjected to intense mental anguish and prolonged psychological suffering.

196. In response to these allegations, the State has provided various submissions. In respect of the general evidence concerning prison conditions in Jamaica, the State provided no observations, and consequently has not submitted any information as to whether prison conditions may have improved subsequent to the preparation of the numerous reports by Americas Watch and other groups. With respect to the submissions in Case N° 11.843 (Kevin Mykoo) respecting the victim's ill-treatment following his arrest, the State suggests that the alleged victim should have raised these claims during his preliminary inquiry, his trial or his appeal, and that his failure to do so brings into question the accuracy of these allegations. The Petitioners reject this argument, however, on the grounds that the victims' treatment while in detention could only be properly challenged in the domestic by way of Constitutional Motion, which the victim could not afford to do.

197. The State also rejects the suggestions in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) that the length or conditions of the victims' detentions amount to cruel and inhuman treatment punishment so as to render their executions unlawful contrary to Article 4 of the Convention, and relies upon the decision of the Judicial Committee of the Privy Council in the case *Pratt and Morgan v. Attorney General of Jamaica* in support of its position. Specifically in respect of Case N° 11.847 (Dalton Daley), the State claims that while the conditions are "less than ideal", there is now a doctor on staff at the prison and that prisoners are taken to the Spanish Town Hospital when the need arises, and suggests that the Commission should consider Jamaica's status as a developing country in addressing the Petitioners' allegations respecting prison conditions.

198. Finally, with regard to the Petitioners' contentions in Case N° 11.823 (Leroy Lamey) respecting the reading to the victim of two execution warrants, the State does not dispute that the warrants were read, but suggests that this was necessary in order to implement domestic law, in light of the failure of the victim to notify the Jamaican Privy Council of his proceedings before international human rights bodies. The Petitioners respond conversely that proper notice had been given to the appropriate State authorities on both occasions prior to the reading of the warrants of the victims' intention to petition the Judicial Committee of the Privy Council for Special Leave to Appeal as a Poor Person, and that in any event it was the fact of, and not the reason for, the victims' treatment that lies at the heart of his complaint.

199. With respect to the allegations raised by the Petitioners regarding the victims' general conditions of detention, the Commission considers that the Petitioners have presented compelling documentary and independent evidence, including affidavits from two of the victims, in support of their allegations, and that the State has failed to provide specific or sufficient responses so as to effectively answer the Petitioners' allegations in this regard. Rather, apart from indicating that St. Catherine District Prison has a doctor on staff and that inmates can be taken to the Spanish Town Hospital when the need arises, the State has failed to provide any specific information or evidence rebutting that provided by the Petitioners' concerning conditions of detention in the prison.

200. In such circumstances, in the Commission's view the State cannot be considered to have refuted the Petitioners' cases. In such instances, 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.

201. 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 four 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. 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. In addition, the Petitioners claim that the victims have been given inadequate access to medical treatment, and that there are inadequate mechanisms available to address prisoners' complaints.

202. In the Commission's view, these conditions of detention, when considered in light of the periods of time for which these victims have now been held in detention, 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.[FN112] 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:

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[FN112] I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283.

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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.[FN113]

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[FN113] *Id.*, at pp. 302-3, para. 98.

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203. 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 similar to those to which the victim in the Suarez-Rosero case was subjected. The victims have been held in confined conditions with inadequate hygiene, medical treatment, ventilation and natural light, and are allowed out of their cells infrequently. These observations, together with the length of time for which the victims have now been incarcerated, suggest that the treatment of the victims has failed to meet the minimum standards under Articles 5(1) and 5(2) of the Convention. While the State has raised its status as a developing country as a explanation in Case N° 11.847 (Dalton Daley), the Commission must emphasize that the standards of treatment under Article 5 of the Convention constitute fundamental and universal standards that apply irrespective of the nature of the conduct for which the person in question has been imprisoned[FN114] and regardless of the level of development of a particular State Party to the Convention.[FN115]

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[FN114] 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.

[FN115] 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).

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204. 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 10, 11, 12, 15, 21, 24 and 26 of the United Nations Standard Minimum Rules for the Treatment of Prisoners[FN116] provide for the following basic standards in respect of accommodation, hygiene, exercise, and medical treatment for prisoners:

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[FN116] 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).

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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.

205. 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. Moreover, in the situation of the victim in Case N° 11.823 (Leroy Lamey), the Commission considers that these conditions have been exacerbated by the reading to the victim

of two warrants of execution pursuant to what the Commission has found to constitute an unlawful death sentence. Similarly, in Case N° 11.843 (Kevin Mykoo), the Commission considers that victims' conditions of detention were aggravated by the mistreatment he is alleged to have received following his arrest, which the State does not appear to have investigated and to which it has not otherwise provided a substantive response.

206. Consequently, in respect of all four cases, Case Nos. 11.823 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley), 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.

207. Given its conclusions in Part IV.B.4 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.

#### E. Articles 4 and 8 - Right to a Fair Trial

208. The Petitioners in all of the cases that are the subject of this Report allege violations of Article 8(2) in relation to the law in Jamaica governing communications between death row inmates and their attorneys. Further, the Petitioners in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege that the victims were held for prolonged periods prior to being permitted to see attorneys, in violation of Articles 8(2)(b), (d) and (e) of the Convention. Finally, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege violations of Article 8(1) and 8(2)(d) of the Convention by reason of the failure of the victims' attorneys to investigate and present evidence in support of their claims of alibi.

209. The State provided observations on certain of the Petitioners' contentions. In respect of the Petitioners' allegations in Case Nos. 11.843 (Kevin Mykoo) and 11.846 (Milton Montique) that the victims were held for, respectively, three months and two months prior to being permitted to see an attorney, the State effectively denies these claims, arguing that there is no evidence to support them and, in the case of Mr. Mykoo, that his failure to raise these claims in the context of his domestic proceedings brings into question the accuracy of these assertions. With regard to the purported failure on the part of the trial attorneys in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) to properly investigate and present alibi defenses, the State argues that, while it is obliged to provide counsel to criminal defendants, it cannot be held accountable for the manner in which such counsel performs his or her duties. The State also points out that it was open to the victims to complain to the General Legal Council if they believed their representation to be inadequate.

210. Article 8(1) and 8(2) of the Convention provide as follows:

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.

8(2) Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- (b) prior notification in detail to the accused of the charges against him;
- (c) adequate time and means for the preparation of his defense;
- (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- (e) 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 period established by law;
- (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- (g) the right not to be compelled to be a witness against himself or to plead guilty; and
- (h) the right to appeal the judgment to a higher court.

211. After carefully reviewing the victims' allegations and the information in the records before it, the Commission first finds that the claims respecting the Jamaican Prison Rules have not been properly substantiated. In particular, while the Petitioners have challenged the validity of Jamaican Prison Rule 296(4) generally under the Convention, they have not referred to or substantiated a specific occasion in which this provision has been applied to a particular individual, whether the victims in these cases or otherwise, so as to contravene his or her rights under the Convention. In this regard, the Commission must point out that its contentious jurisdiction, like that of the Inter-American Court of Human Rights, is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.[FN117] As the Commission has no evidence before it as to the application of Rule 296(4) of the Jamaican Prison Rules in the circumstances of a particular case, it finds no violations of the Convention in this regard.

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[FN117] See I/A Court H.R., Advisory Opinion OC-14/94, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Series A (9 December 1994), paras. 45-49.

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212. With respect to the claims in Case Nos. 11.843 (Kevin Mykoo), 11.946 (Milton Montique) and 11.847 (Dalton Daley) that the victims were the subject of prolonged delays prior to being permitted to see attorneys, the Commission observes that the State has disputed the

accuracy of the Petitioners' contentions in this regard in Case N° 11.843 (Kevin Mykoo), and neither party in this case has presented compelling independent or corroborating documentation or information from which the Commission may determine whether the victim sought access to an attorney following his arrest and, if so, when such access was granted. As a consequence, the Commission considers that it does not have sufficient information to make a determination as to whether the victim suffered the violation of Article 8 of the Convention in this regard.

213. Conversely, in Case 11.846 (Milton Montique) the Commission notes that the Petitioner's claim was supported by an affidavit sworn by the victim, in which he confirmed that he did not see his trial attorneys until two months before his trial.[FN118] Further, the State delivered no observations respecting this allegation in Case N° 11.847 (Dalton Daley). Accordingly, in each of these cases, the Commission finds as matters of fact and based upon the records before it that the victim in Case N° 11.846 (Milton Montique) was detained for a period of approximately 28 months, from the date of his arrest on April 1, 1992 until two months prior to the commencement of his trial in November 1994, before being permitted to see his trial attorneys, and that the victim in Case N° 11.847 (Dalton Daley) was kept in custody for three months before he was permitted to contact or see a lawyer.

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[FN118] Affidavit of Milton Montique, *supra*, para. 10.

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214. With respect to the applicable legal principles, Article 8(2)(d) of the Convention provides that 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.[FN119] 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.[FN120]

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[FN119] See similarly U.N.H.R.C., *Paul Kelly v Jamaica*, Communication N° 253/1987 (1991).

[FN120] See *McKenzie et al. v. Jamaica*, Annual Report of the IACHR 1999, paras. 304-305.

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215. In the circumstances of Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley), the Commission considers that, while the time within which a defendant should be given access to an attorney following his or her arrest may depend upon the circumstances of a particular case, delays of the length suffered by the victims are well beyond those which may be considered

prima facie reasonable or permissible, and the State has offered no explanation for the delays.[FN121] As a consequence, the Commission finds that the rights of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Article 8(2)(d) and 8(2)(e) of the Convention have been violated, by reason of the delay in permitting them access to attorneys following their arrests and detention by the State.

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[FN121] See e.g. Eur. Com. H.R., Case N° 11526/84, September 5, 1988, 57 D.R. 47 (finding that an applicant's inability to consult with an attorney for three days prior to appearing before an investigating judge not to infringe the right to legal assistance under Article 6(3)(c) of the European Convention).

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216. With respect to the claims by the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) relating to the purported failure of their trial counsel to properly investigate and present the victims' alibi defenses, after carefully considering these claims on the records available, the Commission cannot find the State responsible for violations of the Convention in this regard. The Commission notes in this connection that the State fulfilled its burden of providing both of the victims in these cases 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.[FN122] 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.[FN123]

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[FN122] 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).  
[FN123] *Kamasinski v. Austria*, supra.

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217. In the two cases under consideration, however, the records do not suggest that the victims made it known to State officials that they considered their legal representation to be inadequate, prior to or during their trials. Moreover, in the Commission's view, it is not apparent on the information available that it would have been clear or should have been manifest to the trial judge that the behavior of the victims' attorneys was incompatible with the interests of justice.[FN124] In the court's perception, the absence of evidence of an alibi or other defense on the part of the defendants would not necessarily have been regarded as a consequence of negligence on the part of the attorneys, but more probably would have been presumed to be a function of the proper exercise of defense counsels' professional judgment as to the availability or merit of such a defense. Based upon these considerations, therefore, the Commission does not find violations of the Convention in respect of these allegations.

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[FN124] See e.g. Anthony McLeod v. Jamaica, supra, at para. 6.1.  
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218. Given its conclusions in Part IV.B.4 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.

F. Articles 8, 24 and 25 – Unavailability of Legal Aid for Constitutional Motions

219. The Petitioners in the four cases that are the subject of this Report argue that legal aid is not effectively available for Constitutional Motions before the courts in Jamaica, and therefore that the victims have been denied from pursuing Constitutional Motions, contrary to their rights under Articles 24 and 25 of the Convention, which read as follows:

24 All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

25(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

(2) The States Parties undertake:

- (a) To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- (b) To develop the possibilities of judicial remedy; and
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

220. More particularly, as noted in Part III.A.2.e of this Report, the Petitioners 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 Petitioners also claim that the victims are indigent, and the State does not provide legal aid to pursue Constitutional Motions in Jamaica. 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.

221. The State delivered responses to these allegations only in Case Nos. 11.843 (Kevin Mykoo) and 11.846 (Milton Montique). In the latter case, the State expressed the view, without further elaboration, that the Convention does not require it to provide legal aid for Constitutional Motions, and in both cases the State suggested that legislation had recently been enacted in

Jamaica, but apparently not yet proclaimed into force, which would extend legal aid to assist individuals in bringing Constitutional Motions.

222. 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, given that the State's Legal Aid Act has not, according to the record in these cases, been proclaimed in force. Further, the Commission finds, in the absence of allegations or evidence to the contrary, that the victims in the cases at issue are indigent and are therefore not otherwise able to secure legal representation for Constitutional Motions.

223. 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 Supreme 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.[FN125] 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 individuals.[FN126]

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[FN125] 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 Loren Laroye Riebe Star and others v. Mexico, Annual Report of the IACHR 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.).

[FN126] 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).

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224. 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.”[FN127] 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.[FN128] 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.

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[FN127] See *Raquel Martin de Mejia v. Peru*, Annual Report of the IACHR 1995, pp. 190-191.  
[FN128] 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.

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225. 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 those 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 fulfill its obligations under Article 25 of the Convention as regards the victims in these cases.

226. Accordingly, the Commission concludes that the State has failed to respect the rights of the victims in the four cases under consideration in this report, Case Nos. 11.823 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique), and 11.847 (Dalton Daley), under Article 8(1) of the Convention by denying them 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 their rights to judicial protection under Article 25 of the Convention.

227. 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. ACTIONS TAKEN SUBSEQUENT TO REPORT N° 103/00

228. The Commission examined this case in the course of its 108th period of sessions, and on October 16, 2000, adopted Report N° 103/00, pursuant to Article 50 of the American Convention.

229. On October 17, 2000, the Commission transmitted Report N° 103/00 to the State, and requested that the Government of Jamaica inform the Commission within two months as to the measures adopted to comply with the recommendations made to resolve the situation denounced.

230. As of December 17, 2000, the date of expiration of the prescribed two-month period, the Commission had not received a response from the State to Report 103/00.

#### 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° 103/00, ratifies its conclusions that:

231. The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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.

232. The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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.

233. The State is responsible for violating the rights of the victims in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Article 7(5) and 7(6) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to promptly bring the victims before a judge following their arrests, and by failing to ensure their recourse without delay to a competent court to determine the lawfulness of their detention.

234. The State is responsible for violating the rights of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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.

235. The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Article 5(1) and 5(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the victims' conditions of detention.

236. The State is responsible for violating the rights of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) under Articles 8(2)(d) and 8(2)(e) in conjunction with violations of Article 1(1) of the Convention, by denying the victims access to legal counsel for prolonged periods following their arrests.

237. The State is responsible for violating the rights of the victims in Case Nos. 11.826 (Leroy Lamey), 11.843 (Kevin Mykoo), 11.846 (Milton Montique) and 11.847 (Dalton Daley) 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

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. Grant the victims in the cases that are the subject of this report an effective remedy which includes commutation of sentence and compensation.
2. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in violation of the rights and freedoms guaranteed under the Convention, including Articles 4, 5 and 8, and in particular, to ensure that no person is sentenced to death pursuant to a mandatory sentencing law.
3. 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. Adopt such legislative or other measures as may be necessary to ensure that the victims' rights to humane treatment under Article 5(1) and 5(2) of the Convention, particularly in relation to their conditions of detention, are given effect in Jamaica.
5. 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

238. On February 22, 2001, the Commission transmitted Report N° 5/01 adopted pursuant to Article 51 of the Convention to the State and to the Petitioners pursuant to Article 51(2) of the Convention and granted the State a period of one month within which to comply with the

Commission's recommendations. The State failed to present a response within the time limit prescribed by the Commission.

239. Based upon the foregoing considerations, and in the absence of a response by the State to Report N° 5/01, the Commission in conformity with Article 51(3) of the American Convention and Article 48 of its Regulations decides to ratify the conclusions and reiterate the 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, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the State of Jamaica with respect to the above recommendations until they have been complied with by Jamaica.

Done and signed in the city of Santiago, Chile, on the 4 day of the month of April, 2001. (Signed): Claudio Grossman, Chairman; Juan Mendez, First Vice-Chairman; Marta Altolaguirre, Second Vice-President; Hélio Bicudo, Robert K. Goldman, Peter Laurie, and Julio Prado Vallejo, Commissioners. The concurring opinion of Dr. Hélio Bicudo is included immediately after this report.

#### CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO

In the 108th period of sessions I expressed my opinion that the death penalty has been abolished in the inter-American system of human rights. In Case 12.028 (Grenada), concerning the mandatory death sentence imposed on Mr. Donnason Knights, I presented my argument in favor of this understanding. In the present case, although I am in general agreement as to the findings, reasoning and motives of the report, I would like to insist on my position that the death penalty has already been abolished by the evolution of the normative standards of the Inter-American system. For this reason I present the following separate opinion:

1. The American Declaration of the Rights and Duties of Man (hereinafter American Declaration), approved at the Ninth International American Conference, which took place in Santa Fe de Bogota in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) and, moreover, that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor" (Article II).

2. Article 4 of the American Convention on Human Rights (hereinafter American Convention), approved on November 22, 1969 in San Jose, Costa Rica, states that "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."

3. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."

4. However, death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by member states only for the most serious crimes.

5. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.

6. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.

7. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all member states in order to approve a more general article, the one about the right to life.

8. Before analyzing what it means for some states to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" (Article 2).

9. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

10. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

11. The OAS member states, by adopting the Convention on Forced Disappearance of Persons, reaffirm that "the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights."

12. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its

reservation to this section at the moment of its ratification but currently there is an international consensus opposed to that reservation based on Article 19(c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

13. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter "IACHR" or "Commission") had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission's recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the inter-American system of protection of human rights.[FN129]

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[FN129] Press Release N° 9/00, Washington, D.C. June 28, 2000:

"The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission.

In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case N° 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr. Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report N° 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United

States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life.”

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14. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belem do Pará), approved in Belem do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states “ Every woman has the right to be free from violence in both the public and private spheres” and Article 4 states that “Every woman has the right to have her life respected”. Regarding the duties of states, the Convention of Belem do Pará establishes that states should “refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation”. Therefore, if every woman has the right to life, and the right to be free from violence, and the state is denied the practice of violence against women, it seems that the Convention of Belem do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is “positive discrimination” or “affirmative action”, because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience de facto inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights—such as the right to life—we cannot argue positive discrimination. All persons are equal before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

15. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law.

Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

16. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

17. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

18. Article 37 of the Convention on the Rights of Child states: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

19. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a declaration of customary law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

20. As mentioned above, the imposition of the death penalty against women, is not a case in which positive discrimination could be applied because Article 37(a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

21. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore states that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

22. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, universalism—which international law attempts to embody—reappears today, specially after the end of WWII and the creation of the UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body

of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal positive law (Cf. Teoria do Ordenamento Jurídico, Universidade de Brasília, 1991, p. 164).

23. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered as antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

24. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[FN130]

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[FN130] Op.cit 2, p.92.

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25. According to the chronological criteria the new law prevails over the previous law—*lex posteriori derogat priori*. According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

26. It is impossible to argue that death penalty as described in the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

27. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83)

28. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

29. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of

the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights “Pact of San Jose, Costa Rica” might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights. (author’s translation from the original in Spanish, Acts and documents, OAS-serv. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

30. In agreement with these assertions, the Commission’s Rapporteur made clear, on this article, his firm tendency towards the abolition of this penalty. (Acts and documents, supra, n.296)

31. Moreover, the rule of law (Estado de derecho) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

32. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

33. In truth, all punishment enacted by the legislator constitutes species of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

34. The right and obligation to punish which belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

35. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

36. With what objective criterion or with what rational measure (for ratio means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

37. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for

instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of “proportion” is submerged in the face of death.

38. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in *O Direito como experiencia*).

39. Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the “death penalty” is a “*contradictio in terminis*” (cf. *O Direito como Experiencia*, 2nd edition, Saraiva, São Paulo, Brazil)

40. The jurist Hector Faundez Ledesma writes on this topic: “as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.”

41. “The same understanding”, continues the jurist, “is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose” (*El Sistema Interamericano de Protección de los Derechos Humanos*, 1996, pp. 92-93).

42. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of “restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party”. In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987)

43. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty international to the IACHR, in Washington, on March 5th, 1999).

44. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to

his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held – by many important scholars – to be a part of the body of international customary law and a binding norm (*jus cogens*) – as defined in Article 53 of the Vienna Convention on the Law of Treaties. *Mutatis Mutandi*, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also be observed by the only two states that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

45. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the *Soering Case*–Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty–made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour europeenne des droits de l’homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

46. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment–totally unpredictable, by the way–of the execution of the punishment, the so called “death row syndrome”, was considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

47. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the state’s action will not be considered a breach of the fundamental right to life.

48. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

49. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that Article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

50. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities' general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

51. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment, within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

52. For its part, the Inter-American Court on Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. Repertorio de Jurisprudencia del Sistema Interamericano de Derechos Humanos, 1998, Washington College of Law, American University, 1/102).

53. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, 'the Convention is a living instrument which ... must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field" (par. 102).

54. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Article 3 of the European Convention); "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." (Article 5(2) of the American Convention on Human Rights).

55. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that "The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (art. 3) makes no provision for exceptions (...)the only relevant concepts are 'torture' and 'inhuman or degrading treatment', to the exclusion of 'inhuman or degrading punishment'".(par. 163-164)

56. More recently, in its Advisory Opinion OC-16, of October 1st, 1999, requested by Mexico, the Inter-American Court of Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that "no one

shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it. (par. 134)

57. Is it reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

58. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cançado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

59. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that "The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection." (Concurring vote, par.4)

60. The author of the concurring vote also warns that "In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised" (ibid, par. 10)

61. In this sense the European Court on Human Rights, in its *Tyrer vs. United Kingdom Case* (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is "a living instrument which ... must be interpreted in the light of present-day conditions".

62. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the affirmation of an idea of objective justice.

63. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has—as a basic postulate—the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The representatives at the meeting warned that the

non-compliance by the states in respect of their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a “double standard” that would punish the states that duly complied with their obligations. (Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol 1, Fabris Ed. 1997, pp. 199-200)

64. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: “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”. It follows also that, according to the doctrine of “*effet utile*”, the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

65. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: “Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian “Communities”, Advisory Opinion, 1930, P.C.I.J., Series B, N° 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, N° 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, N° 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47]. (par.35)

66. In view of the considerations presented here, it can be said that the norm of Article 4, section 2 of the American Convention has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the international law of human rights, with the result that it is prohibitive, for domestic law—even if older than the American Convention—to apply cruel punishment, such as the death penalty.

67. This result also follows from the principle of the international law of human rights that all action must have as its basic goal the protection of victims.

68. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

Done and signed in the city of Santiago, Chile, on the 4th day of the month of April, 2001.  
(Signed): Dr. Hélio Bicudo, Commissioner.