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Decided by: President: Dean Claudio Grossman;
First Vice-President: Prof. Juan Mendez;
Second Vice-President: Lic. Marta Altolaguirre;
Commissioners: Prof. Helio Bicudo, Prof. Robert K. Goldman, Dr. Peter Laurie, Prof. Julio Prado Vallejo.
The concurring opinion of Dr. Helio Bicudo is included immediately after this report.
Dated: 3 December 2001
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Represented by: APPLICANT: law firm of Campbell Chambers
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I. SUMMARY

1. This Report concerns a petition lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission") on June 21, 1999 by the law firm of Campbell Chambers (hereinafter "the Petitioners") against the State of Jamaica (hereinafter "Jamaica" or "the State"). The petition was filed on behalf of Joseph Thomas, an inmate on death row at St. Catherine District Prison, and alleges violations of Articles 4, 5 and 8 of the American Convention on Human Rights (hereinafter "the Convention") in connection with the criminal proceedings against Mr. Thomas. This report addresses the admissibility of the petition pursuant to Articles 46 and 47 of the American Convention, as well as the merits of the case.

2. Joseph Thomas was convicted and sentenced to death by hanging on October 11, 1996 for capital murder pursuant to Section 3(1) of Jamaica's 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, section 3(1) of the Act prescribes the death penalty as the only punishment for persons convicted of capital murder.[FN2]

[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.'"

3. The Petitioners allege that the State has violated Mr. Thomas' rights under the American Convention on each of the following grounds, particulars of which are provided in Part III.A of this Report:

- (a) violations of Articles 4(1), 4(2), and 5 of the Convention, relating to the mandatory nature of the death penalty imposed upon Mr. Thomas;
- (b) a violation of Article 4(6) of the Convention, relating to the process available to Mr. Thomas to seek amnesty, pardon or commutation of sentence in Jamaica;
- (c) violations of Article 5 of the Convention, relating to Mr. Thomas' conditions of detention and the method of execution in Jamaica;
- (d) violations of Article 8 of the Convention, relating to the absence of an identification parade following Mr. Thomas' arrest and the directions given by the trial judge to the jury during Mr. Thomas' trial.

4. The Commission had not previously made an admissibility determination pursuant to Articles 46 and 47 of the Convention in Mr. Thomas' case. After having considered the matter, the Commission decided to declare admissible the claims presented on behalf of Mr. Thomas.

5. In addition, upon consideration of the merits of Mr. Thomas' complaint, the Commission reached the following conclusions:

- (a) The State is responsible for violating Mr. Thomas' rights under Articles 4(1), 5(1), 5(2) and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.
- (b) The State is responsible for violating Mr. Thomas' rights under Article 4(6) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by failing to provide Mr. Thomas with an effective right to apply for amnesty, pardon or commutation of sentence.
- (c) The State is responsible for violating Mr. Thomas' rights under Articles 5(1) and 5(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of his conditions of detention.
- (d) The State is responsible for violating Mr. Thomas' rights under Articles 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the directions given by the judge to the jury during Mr. Thomas' trial.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petition and Observations

6. Following the receipt of Mr. Thomas' petition on June 21, 1999, the Commission opened Case N° 12.183 and transmitted the pertinent parts of the petition to the State on June 22, 1999, with a request that the State supply information with respect to the communication within 90 days as established in the Commission's Rules of Procedure.

7. By communication dated September 16, 1999, which was received by the Commission on September 20, 1999, the Commission received information from the State respecting Mr. Thomas' petition. By note dated September 22, 1999, the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with response requested within 30 days. In a communication dated August 16, 2000, the Commission reiterated its request for information from the Petitioners.

8. By letter dated August 22, 2000 and received by the Commission on the same date, the Petitioners delivered a response to the State's observations on Mr. Thomas' petition. In a note dated August 24, 2000, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days. In a communication dated January 12, 2001, the Commission reiterated its request for the State to provide information on the Petitioners' observations.

9. In a note dated February 21, 2001 and received by the Commission on the same date, the State provided a response to the Petitioners' observations of August 22, 2000. By communication dated February 22, 2001, the Commission transmitted the pertinent parts of the State's response to the Petitioners, with a response requested on or before March 2, 2001.

10. The Commission did not receive any observations from the Petitioners on the State's February 21, 2001 response on or before the specified date.

B. Precautionary Measures

11. Contemporaneously with the transmission of the pertinent parts of the petition in this case to the State, the Commission requested pursuant to Article 29(2) of its Rules of Procedure that the State take precautionary measures to stay Mr. Thomas' execution until such time as the Commission had an opportunity to examine his case and the threat of irreparable harm to Mr. Thomas no longer persists. This request was made on the basis that if the State was to execute Mr. Thomas before the Commission had an opportunity to examine his case, any eventual decision would be rendered moot in terms of available remedies and irreparable harm would be caused to Mr. Thomas.

C. Friendly Settlement

12. By communications dated February 12, 2001 to the Petitioners and to the State, the Commission placed itself at the disposal of the parties, with a view to reaching a friendly

settlement pursuant to Article 48(1)(f) of the Convention on the basis of respect for the human rights recognized therein. The Commission also requested that the parties provide the Commission with a response to the Commission's offer within 7 days of receipt of the communication, in the absence of which the Commission would continue with consideration of the matter.

13. In a note dated February 16, 2001, the State indicated that, in its view, there were no outstanding issues that necessitated friendly settlement proceedings, and urged the Commission to continue with its consideration of the case "with a view to delivering its views in a timely manner." Based upon the State's position, the Commission considered that a friendly settlement would not be possible in the case.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Background to the case

14. According to the record in this case, Joseph Thomas was arrested and charged with the murders of Arthur McFarlane and Junior Spencer on January 31, 1995. Mr. Thomas' preliminary inquiry took place on November 8, 1995, and he was subsequently tried for the murders in October 1996. On October 11, 1996, Mr. Thomas was convicted of two offenses of capital murder and sentenced to death by hanging. He subsequently appealed his conviction to the Court of Appeal of Jamaica, and his appeal was dismissed on December 17, 1997. Mr. Thomas then lodged a petition for Special Leave to Appeal as a Poor Person to the Judicial Committee of the Privy Council, and the Privy Council dismissed his petition on April 15, 1999.

15. The prosecution alleged that on the evening of May 29, 1993, Mr. Thomas was one of two gunmen who entered and robbed the premises at 41 Killarney Avenue, St. Andrew, Jamaica, during the course of which Mr. McFarlane and Mr. Spencer were killed. The prosecution's case was based in part upon the testimony of witnesses William Spencer and Rohan Spencer, who claimed that they were on or near the premises at the time of the incident and identified Mr. Thomas as one of the gunmen. Police witnesses confirmed during the trial that no identification parade had been provided for following Mr. Thomas' arrest.

16. In his defense, Mr. Thomas gave sworn evidence that his name was Clive Stewart, and not "Joe", Joseph" or "Joseph Thomas" as certain prosecution witnesses had claimed. He also contended that he only became aware of the May 1993 incident on December 26, 1994 when he was arrested by one Inspector Aires of the Special Anti-Crime Task Force. On that occasion Mr. Thomas claimed to have been detained for three days at the remand center before being released. He alleged that he was again arrested nine days later on January 7, 1995 and was detained at the Special Anti-Crime Task Force headquarters at Ruthren Road and kept in custody. Mr. Thomas also testified that while he was detained, items of his personal property including photographs and notebooks were taken from him. He also claimed that he had a discussion with one Sergeant Payne about an identification parade, but that none was held. Further, he denied knowing or even speaking to prosecution witnesses William Spencer and Rohan Spencer.

17. The Petitioners raise four principal allegations on behalf of Mr. Thomas: (a) violations of Articles 4(1), 4(2), and 5 of the Convention, relating to the mandatory nature of the death penalty imposed upon Mr. Thomas; (b) a violation of Article 4(6) of the Convention, relating to the process available to Mr. Thomas to seek amnesty, pardon or commutation of sentence in Jamaica; (c) violations of Article 5 of the Convention, relating to Mr. Thomas' conditions of detention and the method of execution in Jamaica; and (d) violations of Article 8 of the Convention, relating to the absence of an identification parade following Mr. Thomas' arrest and the directions given by the trial judge to the jury during Mr. Thomas' criminal proceedings.

2. Position of the Petitioners on Admissibility

18. The Petitioners in Mr. Thomas' case submit that his petition is admissible in accordance with Articles 46 and 47 of the American Convention.

19. The Petitioners first claim that Mr. Thomas has exhausted all available domestic remedies as required under Article 46(1)(a) of the Convention. They contend that Mr. Thomas unsuccessfully appealed his conviction to the Court of Appeal of Jamaica, and sought Leave to Appeal as a Poor Person to the Judicial Committee of the Privy Council, the highest appellate body in Jamaica, which was denied on April 15, 1999.

20. In addition, the Petitioners indicate that Mr. Thomas has not pursued a Constitutional Motion in the domestic courts of Jamaica, because he is indigent and legal aid is not available for proceedings of this nature. As a consequence, the Petitioners claim that Mr. Thomas has been denied access to and has been prevented from exhausting domestic remedies, as provided for under Article 46(2)(b) of the Convention. In support of their position, the Petitioners rely upon decisions of the United Nations Human Rights Committee, in which the Committee has rejected the State's argument that Constitutional Motions must be pursued in order to exhaust domestic remedies.[FN3]

[FN3] The Petitioners cite the decisions of the U.N. Human Rights Committee in *Little v. Jamaica*, Communication N° 283/1988, U.N. Doc. N° CCPR/C/43/D/283/1988, *Reid v. Jamaica*, Communication N° 725/1987, U.N. Doc. N° CCPR/PR/C/39/D/725/1987; *Collins v. Jamaica*, Communication N° 356/1989, U.N. Doc. N° CCPR/C/47/D/356/1989, *Smith v. Jamaica*, Communication N° 282/1988, U.N. Doc. CCPR/C/47/D/282/1988, *Campbell v. Jamaica*, Communication N° 248/1987, U.N. Doc. N° CCPR/C/44/D/248/1987, and *Kelly v. Jamaica*, Communication N° 253/1987, U.N. Doc. N° CCPR/C/41/D/253/1987.

21. The Petitioners have also indicated in respect of their challenge to the mandatory death penalty in Jamaica that sections 17 and 26 of the Constitution of Jamaica are drafted so as to immunize from attack laws and punishment that were lawful before Independence, which include the mandatory death penalty.[FN4] Therefore, according to the Petitioners it is not possible to argue before any domestic court that the death penalty is unconstitutional because of

its mandatory nature or because it is cruel, unless the way in which it is to be carried out would not have been lawful before Independence.

[FN4] The Constitution of Jamaica, 23 July 1962, enacted as the Jamaica (Constitution) Order in Council, Second Schedule, Ch. III , Section 17(2) (providing in respect of protection from inhuman treatment that "[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day"); Section 26(8) (providing that "[n]othing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter [including the right to life and protection from inhuman treatment]; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.").

22. Further, according to the Petitioners, the subject matter of Mr. Thomas' case has not been submitted for examination under any other procedure of international investigation or settlement.

3. Position of the Petitioners on the Merits

a. Articles 4 and 5 of the Convention - Mandatory Nature of the Death Penalty

23. The Petitioners allege that the State acted contrary to Articles 4(1), 4(2), and 5(2) of the American Convention by sentencing Mr. Thomas to a mandatory death penalty for the crime of capital murder. In particular, the Petitioners argue that the imposition of the death penalty in Mr. Thomas' case violates the Convention because it is not reserved for the most serious offenses as required by Article 4(2) of the Convention, and because executing an individual without an individualized sentencing hearing is cruel and violates his rights under Article 5(2) of the Convention.

24. In making these submissions, the Petitioners emphasize that, while the Convention does not prohibit the death penalty, the conditions governing the use of the death penalty must be read strictly as against the countries seeking to use capital punishment and so as to confer the greatest possible protection on the Applicant.

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

26. The Petitioners submit further that as matter of common sense, it is not possible to say that the murder of a prison officer is more serious than and will always be more serious than, for example, the murder of a child. It therefore follows, argue the Petitioners, that the mandatory

death penalty produces arbitrary results contrary to Article 4(1) of the Convention, as there is no mechanism whereby like cases are treated alike and unlike cases distinguished.

27. In addition, it is argued on behalf of Mr. Thomas that the mandatory death penalty violates the prohibition against cruel and unusual punishment or treatment under Article 5 of the Convention. They suggest in this respect that the standards underlying Article 5 of the Convention require the consideration of the character and record of an individual offender and the circumstances of the particular offense as an indispensable part of the process of implementing the death penalty.

28. In support of their position that the mandatory death penalty for 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^[FN5] and India,^[FN6] where the death penalty has been retained. According to the Petitioners, these authorities support the proposition that States that wish to retain the death penalty must provide for some form of "individualized sentencing," where defendants 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. They also suggest that the death sentence should be imposed only in the most exceptional cases where there is no reasonable prospect of reformation and the objects of punishment would not be achieved by any other sentence.

[FN5] Woodson V. North Carolina, 428 U.S. 280 (1976) (U.S. Supreme Court).

[FN6] Bachan Singh V. State of Punjab, (1980) S.C.C. 475 (Supreme Court of India).

29. The Petitioners therefore argue that the sentence of death imposed upon Mr. Thomas is cruel, inhuman and degrading and an arbitrary and disproportionate punishment which cannot be a justification for depriving some one of their life, and therefore violates Articles 4 and 5 of the Convention.

30. In response to the State's observations of September 16, 1999 respecting the mandatory nature of the death penalty, the Petitioners contend that the cases of Pratt v. Attorney General of Jamaica and Jones v. Attorney General of the Commonwealth of The Bahamas cited by the State do not address the Petitioners' argument regarding the mandatory nature of the death penalty, as these cases concerned the provisions of the domestic constitutions that do not contain any provisions similar to Article 4(2) of the Convention. They also emphasize that Article 4(2) of the Convention provides that the death penalty is only lawful under the Convention if the conditions under the article are fulfilled, and it is for the Government that seeks to justify a death sentence to establish that all of those conditions have been satisfied.

b. Article 4(6) of the Convention – Prerogative of Mercy

31. The Petitioners submit that Mr. Thomas' right contained in Article 4(6) of the Convention to apply for mercy has been violated, as he has no right to a fair hearing before the

Jamaican Privy Council. In this respect, the Petitioners explain that the power of the Executive in Jamaica to commute death sentences through the exercise of the Prerogative of Mercy is regulated by Sections 90 and 91 of the Constitution of Jamaica. According to the Petitioners, the Governor-General of Jamaica has the power to commute any death sentence under Section 90(1) of the Constitution, but must act in accordance with the advice and recommendation of the Jamaican Privy Council pursuant to Section 90(2) of the Constitution.[FN7]

[FN7] Sections 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.

32. The Petitioners further assert in their June 21, 1999 petition that under Jamaican domestic law, a prisoner has no right to a fair hearing before the Jamaican Privy Council. They allege that the Jamaican Privy Council is free to regulate its own procedure, and in so doing does not have to afford the prisoner a fair hearing, and does not have regard to any procedural protections for the prisoner such as the right to make written or oral submissions, or the right to be supplied with the material on which the Jamaican Privy Council will make its decision. The Petitioners state further than the functions of the Jamaican Privy Council under sections 90 and 91 of the Constitution are not susceptible to judicial supervision or control.

33. In this respect, the Petitioners cite the decisions of the Judicial Committee of the Privy Council in the cases *Reckley v. Minister of Public Safety* (N° 2) [1996] 2 W.L.R. 281 and *de Freitas v. Benny* [1976] A.C. 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, and observe that these decisions have been heavily criticized by a number of distinguished commentators.

34. In this context, the Petitioners submit that the right to apply for mercy under Article 4(6) of the Convention must be interpreted so as to be an effective right, which in turn requires the State to afford a condemned individual certain procedural rights, including the right to be notified of the period during which the Jamaican Privy Council considers his or her case, the right to be supplied with the materials before the Privy Council and the right to submit materials and representations prior to the hearing. The Petitioners also claim that condemned prisoners should be afforded the right to an oral hearing before the Privy Council, and to place before the Privy Council and to have it consider the decisions and recommendations of international human rights bodies. According to the Petitioners, these requirements follow from the plain wording of Article 4(6) of the Convention, and are consistent with the requirement under Article 4(2) that the death penalty should be imposed "only for the most serious crimes."

35. Based upon these submissions, the Petitioners contend that Mr. Thomas' right to apply for mercy under Article 4(6) of the Convention is violated under Jamaican domestic law.

36. In response to the State's observations of September 16, 1999 on the Prerogative of Mercy, the Petitioners point out that Mr. Thomas' final avenue of appeal in the domestic courts was rejected by the Judicial Committee of the Privy Council on April 15, 1999, and that in May 1999, before it was even possible for Mr. Thomas to be notified of the decision, a warrant of execution was signed. Accordingly, they say that Mr. Thomas was precluded from making representations to the Jamaican Privy Council and that he was given no information as to when the Jamaican Privy Council was considering his case.

c. Article 5 of the Convention - Conditions of Detention and Method of Execution

(i) Conditions of Detention

37. The Petitioners allege that the conditions in which Mr. Thomas has been detained by the State constitute a violation of his rights under Article 5 of the Convention to be free from cruel, inhuman or degrading punishment or treatment. In their submissions, the Petitioners provide information as to the general conditions of detention facilities in Jamaica, as well as information regarding the particular conditions of detention experienced by Mr. Thomas.

(a) Factual Allegations Regarding Conditions of Detention

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

of medical, educational and work facilities and programs in various prisons and lock up facilities in Jamaica.

39. According to the Petitioners, these reports indicate that detention facilities in Jamaica are poor, and in many instances fall short of the standards prescribed by the United Nations Minimum Standards for the Treatment of Prisoners. They cite, for example, Amnesty International's 1993 conclusion that "the general conditions prevailing in St. Catherine's District Prison constitute cruel, inhuman and degrading treatment. The conditions and facilities in prisons fall far short of the standards set out in the United Nations Standard Minimum Rules for the Treatment of Prisons, particularly those sections relating to the provision of adequate cell space, bedding, lighting, sanitary installations, and medical services."

40. The Petitioners further report that all death row inmates in Jamaica are situated 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 generally speaking, death row inmates are deprived of a mattress or other bedding, that inmates' cells suffer from inadequate sanitation, ventilation and light, and that prisoners experience poor standards of personal hygiene. In addition, the Petitioners claim that inadequate medical and psychiatric care is available to prisoners, and that inmates condemned to death spend long periods in their cells, have no work or education facilities, and are often the subject of ill-treatment by prison guards.

41. With respect to the conditions of detention alleged to have been experienced by Mr. Thomas personally, the Petitioners claim, based in part on an affidavit sworn by Mr. Thomas, that his conditions of pre-trial and post-conviction detention both constitute violations of Article 5 of the Convention. In relation to Mr. Thomas' pre-trial detention conditions from his arrest on January 20, 1997 until his conviction on July 25, 1997, the Petitioners quote from a February 22, 1997 letter written by Mr. Thomas to his attorney, which read in part:

I have been incarcerated for some five weeks now...the jail is a living hell. The conditions we are kept in are way below humane standards. Sleeping on the cold floor, being fed food that is improperly [sic] looked after, toilets built to flush, but haven't functioned in that order for years. And so as a result one has to mess on other peoples waste, daily. These toilets are cleaned by a man five days a week, Monday through Friday. And the stench is quite hazardous and I do believe may even be toxic; yet has to be tolerated for five mornings a week. Especially on Monday mornings, it is quite unbearable as Saturday and Sundays filth really starts to stink. I don't think I can survive much longer in here under these conditions.

42. With respect to Mr. Thomas' post-conviction conditions of detention, the Petitioners claim that Mr. Thomas is locked in his cell for 23 hours per day. They also allege that he is deprived of a mattress or other bedding and sleeps on a concrete bunk, and must use a bucket for sanitation. According to the Petitioners, Mr. Thomas' cell has inadequate ventilation and does not have any electric light, and the food provided to prisoners is inadequate. Further, the Petitioners allege that no medical or psychiatric care is provided to prisoners, and there is no adequate complaints mechanism to address prisoner complaints.

(b) Legal Allegations Regarding Conditions of Detention

43. In respect of the legal standards that should be considered in determining whether prison conditions constitute violations of Article 5 of the Convention, the Petitioners 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." [FN8] The petitioners also cite several comments and decisions of the UN Human Rights Committee and the European Court of Human Rights regarding humane treatment in the context of prison conditions. These include the UN Human Rights Committee's General Comment on Article 10(1) of the International Covenant on Civil and Political Rights, which states that the "humane treatment and respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware in other respects the modalities and conditions of detention may vary with the available resources they must always be applied without discrimination." The Petitioners also refer to the Greek Case, [FN9] in which the European 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.

[FN8] 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.

[FN9] Eur. Court H.R., Greek Case 12 Y.B. 1 (1969).

(ii) Method of Execution in Jamaica

44. The Petitioners argue that the execution of the death sentence by hanging, as provided for under Jamaican law, constitutes cruel and inhuman treatment or punishment per se in violation of Articles 5(1) and 5(2) of the Convention. In this regard, the Petitioners submit that whereas Article 4 of the Convention allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided by law must be designed in such a way as to avoid conflict with Article 5 of the Convention. [FN10]

[FN10] The Petitioners cite in this regard the decision of the UN Human Rights Committee in the case Ng v. Canada, Communication N° 469/1991, in which the Committee stated that when imposing capital punishment in accordance with Article 7 of the International Covenant on Civil and Political Rights, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering."

45. In support of their arguments, the Petitioners provided detailed accounts of the physical, physiological and psychological effects of hanging upon a condemned prisoner, as described in the affidavits of Dr. Albert Hunt dated July 1, 1997 and Dr. Francis Smith dated March 24, 1996.

Based upon this evidence, the Petitioners allege that the execution of Mr. Thomas' death sentence by hanging would violate Article 5(2) of the Convention because:

- (a) death by hanging constitutes inhuman and degrading treatment because it does not result in instantaneous death, and there is an impermissibly high risk that Mr. Thomas will suffer an unnecessarily painful and tortuous death by strangulation;
- (b) the pressure in the brain will increase and this is normally accompanied by severe headaches. The increased pressure can be seen as engorgement of the face, eyes and tongue;
- (c) the obstruction of the windpipe raises the carbon dioxide concentration in the blood which makes the person want to inspire, but he cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangulation. However, the person cannot cry out nor can he react normally to distress and pain by moving his limbs violently as they are tied;
- (d) the skin beneath the rope in the neck is stretched by the fall and this will be painful; and
- (e) the humiliating effects of hanging on the body clearly amount to degrading treatment and punishment.

46. In the Petitioners' submission, the execution of Mr. Thomas by hanging in these circumstances would not meet the test of "least possible physical and mental suffering," and would therefore constitute cruel and inhuman treatment, in violation of Article 5 of the Convention.

d. Article 8 of the Convention - Right to a Fair Trial

47. The Petitioners contend further that the State has violated Mr. Thomas' rights under Article 8 of the Convention on the ground that the trial judge's directions to the jury violated Mr. Thomas' right to be presumed innocent until and unless proven guilty according to law after a fair trial before an impartial tribunal.

48. The Petitioners point in particular to the following portion of the trial judge's direction to the jury:

Now as I said, the prosecution has to prove the death of the deceased. Well, I do not anticipate you have any problem there that it was the accused who killed him and perhaps here, I should indicate to you the principle of what is known as, design.

49. The Petitioners argue that this direction violated Mr. Thomas' right to be presumed innocent, and that this together with the failure to hold any identification procedure prior to the holding of a preliminary inquiry resulted in violations of Mr. Thomas' rights under Article 8 of the Convention. In relation to the latter omission, the Petitioners complain that the trial judge directed the jury as follows:

There is no need for you to ponder why an identification parade was not held. The evidence makes that quite clear. None was held. You are not to ponder over the police system or lack of it if you consider there is any lack of system. What you have to do is focus your attention on

what you have. Apply your common sense and intelligence to what you have and determine by this means the guilt or otherwise of the accused person.

50. Based upon these aspects of Mr. Thomas' criminal proceedings, the Petitioners allege that the State is responsible for infringing his rights under Article 8 of the Convention.

B. Position of the State

1. Position of the State on Admissibility

51. In its September 16, 1999 observations in this matter, the State made the following statement in relation to the admissibility of Mr. Thomas' petition:

The Ministry at this time defers its right to address the admissibility of the applicant's petition, however, in the interests of time it will address the merits of the applicant's petition.

52. The State has not subsequently provided the Commission with any further observations on the admissibility of Mr. Thomas' complaint.

2. Position of the State on the Merits

a. Articles 4 and 5 of the Convention - Mandatory Nature of the Death Penalty

53. The State does not deny that the death penalty in Jamaica is mandatory for capital murder under the Jamaican Offenses Against the Person Act for capital murder. Nonetheless, the State points out that section 17(2) of the Constitution of Jamaica preserves punishments that pre-date independence as lawful and shields them from constitutional challenge as constituting torture or inhuman or degrading treatment or punishment. Section 17 of the Constitution of Jamaica states:

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

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

54. In this connection, the State refers to several decisions of the Judicial Committee of the Privy Council, including *Pratt and others v. Attorney General for Jamaica and others* [1993] 4 All E.R. 769, in which, according to the State, the Privy Council held that the purpose of section 17(2) of the Jamaican Constitution is to preserve all descriptions of punishment lawful immediately before Independence and to prevent them from being attacked under section 17(1) as inhumane or degrading punishment. The State also notes that in the case *Larry Raymond Jones and others v. Attorney General of the Commonwealth of the Bahamas* [1995] 1 W.L.R. 892, where the Bahamian Penal Code provided the death penalty as the mandatory punishment for murder, it was held that to hang the applicants in that case in accordance with the sentence of death that was imposed on them would not infringe their constitutional rights.

55. The State indicated in its submissions to the Commission that it adopts the rulings of the Judicial Committee of the Privy Council in these cases, and consequently, that, as Mr. Thomas was duly convicted of capital murder and sentenced to death, the mandatory nature of the death penalty is not arbitrary, cruel, inhuman, degrading or a breach of Mr. Thomas' right not to be arbitrarily deprived of his life.

56. Furthermore, the State submits that the existence of Article 4(2) of the Convention and Article 6 of the Optional Protocol to the UN International Covenant on Civil and Political Rights are further evidence that the international community does not regard the death penalty as inhuman or degrading punishment. With respect to Article 4(2) of the Convention in particular, the State denies that the imposition of the death penalty in Jamaica is not reserved for the most serious offenses. Rather, the State argues that a conviction for murder is one of the most serious crimes and is precisely the reason why it attracts one of the most serious penalties.

57. The State also contends that the death penalty for murder has long been recognized in countries that imposed that penalty both before the Convention and after, and represents a "classic" example of the most serious crimes under Article 4(2) of the Convention. The State therefore characterizes the Petitioners' argument in this regard as, at best, a "specious" attempt to challenge the validity of capital punishment in Jamaica. The State emphasizes that it is the elements of the offense that attract the penalty and clearly refers to the circumstances in which the offender committed the offense. According to the State, in this context the characterization of murder as a serious crime is even more clearly demonstrated and its individualized application manifest.

58. In conclusion, the State submits that once an offender has been given an opportunity to prove his or her innocence and fails, then the person should face the full circumstances of the law.

b. Article 4(6) of the Convention – Prerogative of Mercy

59. In relation to the right to seek amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, the State denies that the right to apply for mercy in Jamaica under Articles 90 and 91 of the Jamaican Constitution is illusory or ineffective. Rather, the State argues that the Constitution prescribes principles that guide the Governor General in the exercise of discretion and refers in this regard to section 90(1)(c) and 91(1) and (2) of the Constitution of Jamaica.[FN11]

[FN11] See supra, note 7.

60. The State argues in particular that there is nothing in the procedures of the Jamaican Privy Council that precludes Mr. Thomas from making all of the submissions that form the basis of the present case before the Commission, and in fact applicants and international organizations frequently make representations on behalf of condemned men. According to the State, this

opportunity remains available and will be fairly considered and the fact that the procedures do not provide for an oral hearing does not constitute a violation of any fundamental rule of fairness. The State bases its submissions in this regard on the proposition that the Prerogative of Mercy is a purely discretionary act exercised by the Governor General, to which no legal rights attach. The State cites the decision of the Judicial Committee of the Privy Council in *de Freitas v. Benny*,^[FN12] in which Lord Diplock stated in dictum that "[m]ercy is not the subject of legal rights. It begins where legal rights end." The State also refers to the case *Reckley v. Ministry of Public Safety and Immigration and others* N° 2 [1996] 1 All E.R. 562, in which, according to the State, the Judicial Committee of the Privy Council held that the constitutional provisions under which the Advisory Committee in the Bahamas was established and its functions regulated were such that the principles of fairness did not give condemned men the right to make representations or to be supplied with the material that was before the Advisory Committee.

[FN12] *de Freitas v. Benny* [1976] 2 A.C. 239.

61. With respect to the Petitioners' contention that Mr. Thomas has a right to place before the Jamaican Privy Council and have it consider the findings and recommendations of international human rights organizations, the State submits that in the case of *Thomas and Hilaire v. Attorney General of Trinidad and Tobago*,^[FN13] the Judicial Committee of the Privy Council held that there is a general right accorded to all litigants not to have the outcome of any pending appeal or legal process preempted by executive action and that the execution of a condemned person when the matter is being considered by a human rights body would be in breach of due process or the common law right to constitutional protection provided by the principle of procedural fairness. The State emphasizes, however, that this issue can only be considered in the context of the length of time it takes for the Commission to submit its recommendations, such that applicants will not be entitled to sustain that position if the determination of the Commission is delayed for an indefinite period. The State further submits that Mr. Thomas' contention is premature, as no steps have been taken to execute him.

[FN13] *Darren Roger Thomas and Haniff Hilaire v. Cipriani Baptiste and others*, Privy Council Appeal N° 60 of 1998 (21 January 1999).

62. In addition, the State points out that in the case *Patrick Taylor et al. v. Attorney General of Jamaica*, Sup. Ct. Civil Appeal Nos. 13, 15, 16/99, the appellants failed in their attempt before the Court of Appeal of Jamaica to prove that they had the same procedural rights which Mr. Thomas now claims by virtue of the American Convention. According to the State, the Court of Appeal essentially found that the dictum of Lord Diplock in the *de Freitas v. Benny* case, supra, placed the appellant's procedural rights on the matter of the Prerogative of Mercy beyond argument. The State indicates in its observations that it adopts this jurisprudence for the purposes of the case before the Commission, and reiterates that the right to apply for mercy in Jamaica is not illusory or ineffective.

c. Article 5 of the Convention - Conditions of Detention and Method of Execution in Jamaica

63. The State raises several arguments in relation to the Petitioners' allegations regarding Mr. Thomas' conditions of detention. First, the State contends that notwithstanding the contents of the reports from international and domestic monitoring bodies, a generalized position cannot be adopted each time a complaint is lodged by an inmate. Rather, complaints must be dealt with individually and each case must be considered on its individual merits.

64. Further, the State argues that even if the Petitioners' allegations are proven to be true, they could not by themselves result in the commutation of Mr. Thomas' death sentence. The State relies in this regard on the decision of the Judicial Committee of the Privy Council in the Thomas and Hilaire Case, *supra*, in which the applicants alleged that they had been detained in cramped and foul smelling cells and deprived of exercise or access to the open air for long periods of time. According to the State, the Judicial Committee of the Privy Council held in this case that even if the conditions of detention alleged by those applicants constituted cruel and unusual treatment or punishment, commutation of sentence would not be the appropriate remedy. The Privy Council also held that it would be otherwise if the condemned men had been subjected to solitary confinement, shackled, flogged or tortured.

65. Also on the issue of prison conditions, the State relies upon the decision of the Jamaican Court of Appeal in the Patrick Taylor et al. Case, *supra*, in which the applicant is said to have alleged the following conditions of detention: when he was first arrested he was assaulted; when he was re-arrested he remained in handcuffs for three days; he was beaten while in lock up; while awaiting trial he shared a cell with 25 other men; there was no light in his cell and his exercise each day was limited to 42 minutes; although he was supplied with soap and toilet tissue, neither toothbrush nor toothpaste was provided for use; he was given food and drink in plastic bags; and the food consisted of very small rations and was poorly cooked.

66. According to the State, the Jamaican Court of Appeal held that Mr. Taylor's conditions "did not amount to torture, or to the infliction of punishment or other treatment," and therefore that the prison conditions as alleged did not present any matter for argument to secure a commutation of death sentence.

67. The State similarly relies upon the views of the UN Human Rights Committee in the case *F. Deidrick v. Jamaica*, Communication N° 619/1995, in which the Committee is said to have determined that the conditions of detention alleged by the complainant did not raise an issue under Article 7 or 10(1) of the International Covenant on Civil and Political Rights and were therefore inadmissible. According to the State, the conditions of detention alleged by the applicant in that case included the fact that he was held on death row for 8 years, confined to his cell for 22 hours per day, spent most of his waking hours isolated from other men with nothing whatsoever to keep him occupied, and was forced to spend much of his time in enforced darkness.

68. Finally, with respect to specific allegations by the Petitioners regarding Mr. Thomas' access to medical treatment, the State claims that St. Catherine District Prison houses a medical

center that is staffed with two registered medical practitioners, a general practitioner and a psychiatrist. There is also a registered dentist, and a matron who is a registered nurse, a qualified social worker and several medical orderlies who assist the doctors. The general practitioner attends at the medical center daily and when he is not on duty he is on call. The dentist attends the medical center three days every week.

69. The State claims that when a prisoner makes a complaint of a medical nature, arrangements are made with a medical orderly for that prisoner to be taken to see a doctor at the very earliest opportunity. If the complaint is serious and a doctor is not on duty at the time or cannot be located, the prisoner is immediately dispatched to the Spanish Town General Hospital, which is located close to the prison.

70. Based upon these submissions, the State denies that St. Catherine District Prison has no medical or psychiatric care for prisoners.

71. In its observations of February 21, 2001, the State provided further submissions on the issue of prison conditions. In particular, the State referred to and relied upon three affidavits, one dated November 11, 1998 by Zepheniah Page, a warder employed at St. Catherine District Prison, a second dated November 11, 1998 by Melbourne Jones, a Superintendent employed at the same prison, and a third dated November 26, 1998 by Dr. Raymoth Notice, a medical doctor also employed at the prison. The contents of the affidavits indicate that they were prepared for use in litigation before the Supreme Court of Jamaica in the matter of Neville Lewis v. The Attorney General of Jamaica and the Superintendent of the St. Catherine District Prison. The affidavits provide information concerning the conditions of detention of the applicant in that case, Neville Lewis, on death row at St. Catherine District Prison in Jamaica.

72. Based upon these affidavits, the State contends that the conditions of detention of death row prisoners at St. Catherine's District Prison include the following:

- (a) On admission to the prison each prisoner convicted of capital murder and sentenced to death is given a slop pail, a jug for holding water, a drinking cup and a blanket and then taken to a cell block where condemned prisoners are kept.
- (b) Each prisoner is kept in a separate cell. Each cell is approximately 9 feet long, 6 feet wide and 10 feet high. The walls and floor of the cells are made of concrete. The floor is very smooth. The walls are painted but the inmates paste pictures from magazines and newspaper on the walls. Inside each cell is a covered mattress made from foam like any mattress, which can be bought in any department store. In the cell there is a concrete elevation on which the mattress is placed.
- (c) Each prisoner on death row is issued monthly with toilet paper, bath soap and toothpaste. On request, each prisoner is entitled to a bible, other reading material and stationary.
- (d) The cells are in rows and they face each other and are separated by a corridor approximately 13 feet wide. There are bright florescent lamps in the ceiling along the corridor. These lights are never turned off. Each cell has a socket above the door on the outside of the cells. Some inmates place wires inside the sockets to light bulbs inside their cells and others attach the wires to hot plates, which they use for cooking.

(e) There are open spaces at the two sides of the building where the inmates are housed. The space on one side is about 9 feet x 120 feet and on the other side is about 36 feet x 110 feet. At the front there is an open space 27 feet x 45 feet. The ventilation in the cells is very good as air flows freely through the doors of the cells.

(f) Each prisoner cleans his cell daily under the supervision of a warder. The prisoners are supplied with disinfectant. Cleaning the cells entails wiping the floor clean with a sponge or a cloth. The prisoners sweep the corridor, which runs along the cells, daily.

(g) The slop pail, which is issued to the prisoners, has a cover. If a prisoner uses the pail during the day, he may request permission from a warder on duty to empty the pail in a general area provided for that purpose. Permission for doing so is often granted. A pipe with running water is at the place where pails are emptied and each prisoner is given disinfectant to wash his bucket when he empties it. If a prisoner uses the pail in the night, he is allowed to empty it the following morning when the warder arrives on duty.

(h) Condemned men are allowed to keep radios in their cells, provided the radio is operated with batteries. The light reflected in the cells is adequate for prisoners to read during the day or at night.

(i) There is a daily routine for each prisoner on the condemned cells. At approximately 8:30 am the warder unlocks the cell door and allows the prisoner to empty his slop pail. He is allowed to wash his face and brush his teeth. He is then returned to his cell and he is given breakfast. After breakfast, he is allowed to exercise in the open area at the side of the building and take his bath. He may also, if he wishes, be allowed to see the doctor, attend at the administrative office, his attorney-at-law, religious adviser or any other visitor. The time spent varies depending on the circumstances. He is then returned to his cell, where he is given lunch. In the afternoon the cell is unlocked and the process is repeated, (i.e. empty slop pail, exercise, etc.). He is then returned to his cell and given another meal. The cell is then locked until the following morning.

(j) The inmates are given special care and attention. The warders develop special relationships with them and there is no rigid enforcement of any rules regarding the time spent in activities outside their cells.

(k) They are allowed to play football in the open space on a regular basis, although there is an unwritten rule that no more than two prisoners should be unlocked at any one time.

(l) There is a senior officer at the prison who communicates with the prisoners on a daily basis to take note of any complaints which they may have and to assess the general conditions of the cells and the working areas. Reports are submitted to the Superintendent who has responsibility for the prison and for the welfare of the prisoners. This process is carried out not only to ensure that prisoners are taken care of but also to ensure that warders are performing their duties.

(m) All complaints are dealt with promptly.

(n) If a prisoner is abused he sometimes refuses to leave his cell and demands that he see the Superintendent who has responsibility for the prison. In any such circumstance, the Superintendent goes to see the prisoner, takes his complaint, and takes appropriate actions against the offender, generally to the satisfaction of the complaining prisoner.

73. With respect to the Petitioners' contentions regarding the method of execution in Jamaica, the State argues that the inclusion of Article 4(2) in the American Convention, which provides for the imposition of the death penalty under certain conditions, demonstrates that the Convention must contemplate that persons will suffer some form of ill treatment when carrying

out a sentence of death, but that this cannot per se be considered inhuman. In particular, the State indicates that it is unaware of any form of execution that does not involve some form of treatment that could not be arguably considered by some to be inhuman. The State suggests further that the physical effects of carrying out of a sentence of death by hanging is thought to cause immediate loss of consciousness which in turn "minimizes the discomfort" to the prisoner. The State therefore denies that this form of execution is contrary to Article 5 of the Convention.

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

74. In respect of the Petitioners' allegations of violations of Mr. Thomas' rights under Article 8 of the Convention based upon the trial judge's directions to the jury, the State submits that where the conduct of a trial is in question, such questions should be left for examination by the appellate courts. The State relies in this regard on the decision of the UN Human Rights Committee in the case of Trevor Walker and Lawson Richards, in which, according to the State, the Committee held that it is generally for the appellate courts of states parties to the Covenant to evaluate the facts and evidence in any particular case, and that it is for the appellate courts and not the Committee to review specific instructions to the jury by the judge in a trial by jury unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality.

75. Accordingly, the State argues that decisions taken in criminal trials must be left to the appellate courts and not to the Commission, unless it can be proven that the conduct during the trial led to a denial of justice. In Mr. Thomas' case, the State indicates that the directions of the trial judge to the jury were already considered and dismissed by the Court of Appeal, that the conduct of Mr. Thomas' trial did not lead to a denial of justice, and therefore there has been no breach of Article 8 of the Convention.

IV. ANALYSIS

A. Competence of the Commission

76. The State deposited its instrument of accession to the American Convention on August 7, 1978,[FN14] and the Petitioners allege that the State has violated Articles 4, 5, and 8 of the Convention, in respect of acts or omissions that transpired after the State's accession to the Convention. Mr. Thomas is a natural person, and the Petitioners were authorized under Article 44 of the Convention to lodge a petition on his behalf with the Commission. The Commission therefore finds that it is competent to consider the Petitioners' complaint.

[FN14] Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.92 doc.31 rev.3 (3 May 1996), p. 53.

B. Admissibility

77. The Commission has considered the admissibility of the present complaint pursuant to Articles 46 and 47 of the Convention and makes the following determinations.

78. As noted in Part III.B.1 of this Report, the State in its observations of September 16, 1999 indicated that it would "defer" its right to address the issue of admissibility, and would proceed to address the merits of the petition "in the interest of time." The State has subsequently made no submissions respecting the admissibility of Mr. Thomas' complaint.

1. Duplication

79. According to Articles 46(1)(c) and 47(d) of the Convention, the admissibility of a petition is subject to the requirement that the subject of the petition is not pending in another international proceeding for settlement and is not substantially the same as one previously studied by the Commission or by another international organization. The Petitioners in Mr. Thomas' case have indicated that the subject of their complaint has not been submitted for examination by any other procedure of international investigation or settlement. The State has not contested the issue of duplication. The Commission therefore finds no bar to consideration of this case under Articles 46(1)(c) or 47(d) of the Convention.

2. Exhaustion of Domestic Remedies

80. Article 46(1)(a) of the Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally accepted principles of international law." When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 46(2) of the Convention specifies that this exception to exhaustion applies if: (1) the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; (2) the party alleging the violation has been denied access to remedies under domestic law or has been prevented from exhausting them; or (3) where there has been unwarranted delay in rendering a final judgment. When a victim alleges that he or she is unable to prove exhaustion as provided for in Article 46(2) of the Convention, Article 37(3) of the Commission's Rules of Procedure provides that the burden shifts to the State to demonstrate that the remedies under domestic law have not been previously exhausted.[FN15]

[FN15] See similarly I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

81. Exhaustion of domestic remedies also need not be demonstrated by a victim in the event that the State against which the complaint is lodged waives this requirement. In this regard, the Inter-American Court of Human Rights has held that the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, because the rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had an opportunity to remedy them by internal means. According to the Court, the

requirement is thus considered a means of defense and, as such, waivable, even tacitly. Further, a waiver, once effected, is irrevocable.[FN16]

[FN16] I/A Court H.R., Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C N° 25, para. 40.

82. Given the absence of any observations from the State on the issue of exhaustion of domestic remedies in this case, the Commission finds that the State explicitly or tacitly waived any challenge with regard to the exhaustion of remedies by Mr. Thomas in domestic proceedings. The Commission therefore does not consider the present case to be inadmissible by reason of Article 46(1)(a) of the Convention.

3. Timeliness of the Petition

83. Article 46(1)(b) of the Convention provides that the admission of a petition is subject to the requirement that the petition be lodged with the Commission in a timely manner, namely within a period of six months from the date on which the party alleging violations of his rights was notified of the final judgment.

84. The record before the Commission indicates that the Judicial Committee of the Privy Council dismissed Mr. Thomas' petition for Special Leave to Appeal on April 15, 1999 and that the Petitioners' lodged the present petition with the Commission on June 21, 1999 and therefore within 6 months from the date of final judgment. The State has not contested the issue of timeliness. Accordingly, the Commission finds no bar to consideration of this case by reason of Article 46(1)(b) of the Convention.

4. Colorable Claim

85. Article 47(b) of the Convention requires a petition to be declared inadmissible if it does not state facts that tend to establish a violation of the rights guaranteed by the Convention. Article 47(d) of the Convention deems inadmissible any communication where the statements of the petitioner or the State indicate that the petition is manifestly groundless or out of order.

86. The Petitioners in the present case have alleged that the State has violated Mr. Thomas' rights under Articles 4, 5 and 8 of the Convention. In addition, the Petitioners have provided factual allegations, described in Part III.A.1 of this Report, that, in the Commission's view, tend to establish that these alleged violations may be well-founded.

87. The Commission therefore finds that the Petitioners have presented colorable claims of violations of Mr. Thomas' rights under the Convention for the purposes of Articles 47(b) and 47(c) of the Convention.

5. Conclusions on Admissibility

88. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the Convention, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Joseph Thomas in the present case.

C. The Merits

89. As detailed in Part III.A.1 of this Report, the Petitioners in the present case have alleged the following violations of the Convention in respect of Mr. Thomas:

- (a) violations of Articles 4(1), 4(2), and 5 of the Convention, relating to the mandatory nature of the death penalty imposed upon Mr. Thomas;
- (b) a violation of Article 4(6) of the Convention, relating to the process available to Mr. Thomas to seek amnesty, pardon or commutation of sentence in Jamaica;
- (c) violations of Article 5 of the Convention, relating to Mr. Thomas' conditions of detention and the method of execution in Jamaica;
- (d) violations of Article 8 of the Convention, relating to the absence of an identification parade following Mr. Thomas' arrest and the directions given by the trial judge to the jury during Mr. Thomas' criminal proceedings.

1. Standard of Review

90. In response to the various standards that the parties have suggested should guide the Commission in determining the issues before it, the Commission wishes to clarify that it will undertake its review of the merits of the Petitioners' claims in accordance with the Commission's heightened scrutiny test. 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 Articles 4, 5 and 8 of the Convention.[FN17] This heightened scrutiny test is, as the Commission has previously recognized, consistent with the restrictive approach to the death penalty provisions of human rights treaties taken by the Commission and other international authorities.[FN18] The heightened scrutiny test is also not precluded by the Commission's fourth instance formula, according to which the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless a petitioner's allegations entail a possible violation of any of the rights set forth in the Convention.[FN19] The Commission will therefore apply the heightened scrutiny standard in determining the complaints in the present case.

[FN17] See *Baptiste v. Grenada*, Report N° 38/00, Annual Report of the IACHR 1999, p. 721, at p. 738; *McKenzie et al. v. Jamaica*, Report N° 41/00, Annual Report of the IACHR 1999, p. 918, at p. 967.

[FN18] See e.g. *McKenzie et al. Case*, supra, para. 169.

[FN19] See *Santiago Marzioni v. Argentina*, Report N° 39/96, Annual Report of the IACHR 1996, p. 76, paras. 48-52. See also *Clifton Wright v. Jamaica*, Case N° 9260, Annual Report of the IACHR 1987-88, p. 154.

2. Articles 4, 5 and 8 of the Convention - The Mandatory Nature of the Death Penalty

a. Mr. Thomas has been Sentenced to a Mandatory Death Penalty

91. The record in the present case indicates that Mr. Thomas was convicted of capital murder and sentenced to death. It also indicates that the death 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.

92. More particularly, as indicated in Part I of this Report, Mr. Thomas was convicted of two offenses of capital murder under Jamaica's Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992.[FN20] Section 2(1) of this Act defines capital murder as follows:

[FN20] Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992 (13 October 1992), N° 14.

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

(a) the murder of-

- (i) a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;
- (ii) a correctional officer acting in the execution of his duties or of a person assisting a correctional officer so acting;
- (iii) a judicial officer acting in the execution of his duties; or
- (iv) any person acting in the execution of his duties, being a person who, for the purpose of carrying out those duties, is vested under the provisions of any law in force for the time being with the same powers, authorities and privileges as are given by law to members of the Jamaica Constabulary Force,

or the murder of any such member of the security forces, correctional officer, judicial officer or person for any reason directly attributable to the nature of his occupation;[FN21]

[FN21] 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 Defense Force to the extent that such member has been assigned to act in aid of the Police;

(c) the Island Special Constabulary Force;

(d) the Rural Police.

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

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

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

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

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

(i) robbery;

(ii) burglary or housebreaking;

(iii) arson in relation to a dwelling house; or

(iv) any sexual offence;

(e) any murder committed pursuant to an arrangement whereby money or anything of value-

(i) passes or is intended to pass from one person to another or to a third party at the request or direction of that other person; or

(ii) is promised by one person to another or to a third person at the request or direction of that other person,

as consideration for that other person causing or assisting in causing the death of any person or counselling or procuring any person to do any act causing or assisting in causing that death;

(f) any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public.

93. Section 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 Section 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." [FN22]

[FN22] In addition, Section 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 on the same or a different occasion, 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.

94. The Act therefore prescribes death as the mandatory punishment for all individuals convicted of capital murder. Capital murder in turn includes murder committed in the course or furtherance of certain other offences, including robbery, burglary, housebreaking, and arson in relation to a dwelling house. Accordingly, once the jury found Mr. Thomas guilty of capital murder, the death penalty was the only available punishment. The State has not denied the mandatory nature of Mr. Thomas' punishment.

95. Therefore, as the Commission has determined in previous cases, [FN23] the crimes of capital murder in Jamaica can be regarded as being subject to a "mandatory death penalty", namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death once a conviction for capital murder has been rendered. This is subject to one exception, however. Section 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. [FN24]

[FN23] See McKenzie et al. Case, supra, para. 178.

[FN24] Sections 3(2) to 3(6) of the Act prescribe a specific procedure by which a jury is to determine whether a defendant is pregnant for the purposes of section 3(1) of the Act:

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.

96. Therefore, the penalty for a female offender who is convicted of capital murder, but who is found by a jury to be pregnant, is a sentence of imprisonment with or without hard labor for life rather than a sentence of death.

97. As indicated in III.A.3.a of this Report, the Petitioners have alleged that Mr. Thomas' sentencing to a mandatory death penalty violates one or more of Articles 4(1), 4(2), and 5(2) of the American Convention, principally because the sentencing process in Jamaica does not provide an opportunity for offenders to present mitigating factors concerning their personal circumstances or those of their offense in determining whether the death penalty is an appropriate punishment.

b. Mr. Thomas' Mandatory Death Sentence under Articles 4, 5 and 8 of the Convention

98. In previous cases involving the application of capital punishment under the Offenses Against the Person Act in Jamaica, the Commission has evaluated the mandatory nature of the death penalty under that legislation in light of Article 4 (right to life),[FN25] Article 5 (right to humane treatment)[FN26] and Article 8 (right to a fair trial)[FN27] of the Convention and the principles underlying those provisions. It has also considered the mandatory death penalty in light of pertinent authorities in other international and domestic jurisdictions, to the extent that

those authorities may inform the appropriate standards to be applied under the American Convention.[FN28] Based upon these considerations and analysis, the Commission has reached the following conclusions.

[FN25] 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.

[FN26] 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.

[FN27] Article 8(1) of the Convention provides: “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.”

[FN28] See e.g. Convention, Art. 29 (providing, inter alia, that no provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said

states is a party, or to exclude or limit the effect that the American Declaration of the Rights or Duties of Man and other international acts of the same nature may have.).

99. First, the Commission has found that the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation, to ensure that the law strictly controls and limits the circumstances in which a person may be deprived of his life by authorities of the state. This includes strict compliance with standards of due process.[FN29]

[FN29] McKenzie et al. Case, supra, para. 186-187, citing I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Annual Report 1984, p. 31, para. 52 (finding that the text of Article 4 of the Convention as a whole reveals a clear tendency to restrict the scope of the death penalty both as far as its imposition and its application are concerned.); Anthony McLeod v. Jamaica, Communication N° 734/1997, U.N.Doc CCPR/C/62/734/1997. See similarly Baptiste Case, supra, paras. 74-75.

100. In addition, the Commission has identified a general recognition by domestic and international authorities 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. The Commission has accordingly determined that the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the American Convention.[FN30]

[FN30] McKenzie et al. Case, supra, para. 188, citing, inter alia, Woodson v. North Carolina 49 L Ed 2d 944, 961 (finding 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.”).

101. Finally, the Commission has observed that under the express terms of Article 4 of the Convention, certain circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and as a consequence must be taken into account in sentencing an individual to death.[FN31]

[FN31] Id, para. 189, citing Advisory Opinion OC-3/83, supra, para. 55 (observing with regard to Article 4 of the Convention that “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.”).

102. In the context of these interpretive rules and principles, the Commission has also previously evaluated mandatory death penalty legislation under Articles 4, 5 and 8 of the Convention, and has concluded that imposing the death penalty through mandatory sentencing, as Jamaica has done in respect of crime of capital murder, 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.[FN32] The Commission observes in this regard that a majority of the UN Human Rights Committee recently reached a similar conclusion in the context of Article 6(1) of the International Covenant on Civil and Political Rights.[FN33]

[FN32] *Id.*, paras. 193-207. See similarly *Baptiste Case*, *supra*, paras. 80-94.

[FN33] UNHRC, *Eversley Thompson v. St. Vincent and the Grenadines*, Communication N° 806/1998 (October 18, 2000).

103. The Commission has determined that imposing the death penalty in a manner that 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 his 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.[FN34]

[FN34] *McKenzie et al. Case*, *supra*, para. 207.

104. In reaching this conclusion, the Commission has identified a principle common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through “individualized” sentencing.[FN35] 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. 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.

[FN35] McKenzie et al. Case, supra, paras. 208, 212-219, citing Woodson v. North Carolina 49 L Ed 2d 944 (U.S.S.C.); The State v. Makwanyane and McHunu, Judgment, Case N° CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa); Bachan Singh v. State of Punjab (1980) 2 S.C.C. 475 (Supreme Court of India). See also Baptiste Case, supra.

105. Finally, the Commission has previously observed that 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 has therefore considered 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.[FN36]

[FN36] McKenzie et al. Case, supra, para. 210.

106. Applying these findings in the context of the case presently before it, the Commission has confirmed that Mr. Thomas was convicted of two offenses of capital murder under Jamaica's Offences Against the Person Act. Once an offender is found guilty of capital murder under that Act, section 3(1) of the Act requires a court to impose the death penalty. With the exception of the provisions in sections 3(2) to 3(6) of the Act governing pregnant offenders, no provisions in the Act have been identified 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 section 3(1) of the Act, death is the automatic penalty.

107. Consequently, the Commission concludes that once Mr. Thomas was found guilty of his 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. There was no opportunity for the trial judge or the jury to consider such factors as Mr. Thomas' character or record, the nature or gravity of Mr. Thomas' crimes, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate punishment. Mr. Thomas was likewise precluded from making representations on these matters, as a consequence of which there is no information on the record as to potential mitigating factors that might have been presented to the trial court. The court sentenced Mr. Thomas based solely upon the category of crimes for which he had been found responsible.

108. In this context, and in light of the Commission's prior analysis of mandatory death penalties under the Convention, the Commission concludes that the State violated Mr. Thomas' rights under Articles 4(1), 5(1), 5(2), and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.

109. With respect to Article 4(1) of the Convention, the Commission concludes that the trial court was compelled under the State's legislation to impose a death sentence upon Mr. Thomas, with no discretion to consider Mr. Thomas' personal characteristics and the particular circumstances of his offenses to determine whether death was an appropriate punishment. Mr. Thomas was 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 his case. Rather, the death penalty was imposed upon Mr. Thomas automatically and without principled distinction or rationalization as to whether it was an appropriate form of punishment in the particular circumstances of his case. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and Mr. Thomas' execution and death at the hands of the State are imminent, his conviction having been upheld on appeal to the highest court in Jamaica. The Commission therefore concludes that the State has by this conduct violated Mr. Thomas' right under Article 4(1) of the Convention not to be arbitrarily deprived of his life, and therefore that Mr. Thomas' death sentence is unlawful.[FN37]

[FN37] See similarly McKenzie et al. Case, supra, para. 234; Baptiste Case, supra, para. 127.

110. The Commission further concludes that the State, by sentencing Mr. Thomas to a mandatory penalty of death absent consideration of his individual circumstances, has failed to respect Mr. Thomas' physical, mental and moral integrity contrary to Article 5(1) of the Convention, and has subjected him to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced Mr. Thomas to death solely because he was convicted of a predetermined category of crime. Accordingly, the process to which Mr. Thomas has been subjected would deprive him of his most fundamental right, his right to life, without considering his personal circumstances and the particular circumstances of his offenses. Not only does this treatment fail to recognize and respect Mr. Thomas' integrity as an individual human being, but in all of the circumstances has subjected him to treatment of an inhuman or degrading nature. Consequently, the State has violated Article 5(1) and 5(2) of the Convention in respect of Mr. Thomas.[FN38]

[FN38] See similarly McKenzie et al. Case, supra, para. 235; Baptiste Case, supra, para. 128.

111. Finally, the Commission concludes that the State has violated Article 8(1) of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, by subjecting him to a mandatory death sentence. By denying Mr. Thomas an opportunity to make representations and present evidence to the trial judge as to whether his crime permitted or warranted the ultimate penalty of death, under the terms of Article 4 of the Convention or otherwise, the State also denied Mr. Thomas the right to fully answer and defend the criminal accusations against him, contrary to Article 8(1) of the Convention.[FN39]

[FN39] See similarly McKenzie et al. Case, supra, para. 237; Baptiste Case, supra, para. 130.

112. It follows from the Commission's findings that, should the State execute Mr. Thomas pursuant to his death sentence, this would constitute further egregious and irreparable violations of Articles 4 and 5 of the Convention.

3. Article 4(6) of the Convention and the Prerogative of Mercy in Jamaica

113. Article 4(6) of the Convention provides that "[e]very 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."

114. The Petitioners in the present case have also contended that the process for granting amnesty, pardon or commutation of sentence in Jamaica is not consistent with Article 4(6) of the Convention because it does not provide for certain procedural rights which the Petitioners assert are integral to render this rights effective. In this connection, 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.[FN40]

[FN40] The Jamaica (Constitution) Order in Council 1962, Second Schedule, Sections 90, 91.

115. In addressing this issue, the Commission first observes that in the case of McKenzie et al. v. Jamaica, the Commission determined that the process for exercising the Prerogative of Mercy under Sections 90 and 91 of the Jamaican Constitution did not guarantee the condemned prisoners in that case an effective or adequate opportunity to participate in the mercy process, as required under Article 4(6) of the Convention.[FN41]

[FN41] McKenzie et al. Case, supra, paras. 227-232.

116. In reaching this conclusion, the Commission interpreted the right to apply for amnesty, pardon or commutation of sentence under Article 4(6), when read together with the State's obligations under Article 1(1) of the Convention, as encompassing certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections were held to include the right on the part of condemned prisoners to submit a request 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.[FN42] It was also held to entail the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. [FN43]

[FN42] Id., para. 228.

[FN43] Id. The Commission reasoned that 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, which the Commission has interpreted, 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. See Haitian Center for Human Rights and others v. United States, Case N° 10.675 (13 March 1997), Annual Report of the IACHR 1996, para. 155. The Commission also observed 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 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.).

117. In making this determination in the McKenzie et al. Case, the information before the Commission indicated that neither the legislation nor the courts in Jamaica guaranteed the

prisoners in those cases any procedural protection in relation to the exercise of the Prerogative of Mercy. Rather, the petitioners and the State in that case indicated that according to domestic jurisprudence at that time, the exercise of the power of pardon in Jamaica involved an act of mercy that was not the subject of legal rights and therefore is not subject to judicial review, and cited in support the decision of the Judicial Committee of the Privy Council in the Reckley Case, *supra*.

118. Since adopting its report in the McKenzie et al. Case, 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.[FN44] 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.[FN45]

[FN44] 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.

[FN45] *Id.*, at 23-24.

119. Notwithstanding the determination in the Neville Lewis Case, however, there is no information in the present case indicating that the State has extended the legal requirements articulated in that decision to Mr. Thomas. Rather, the record only indicates that Mr. Thomas has been denied clemency on at least one occasion, when a warrant of execution was read to him in May 1999, without having had any opportunity to make representations to the Jamaican Privy Council. Accordingly, based upon the information available, the Commission finds that the procedure available to Mr. Thomas to seek amnesty, pardon or commutation of sentence has not guaranteed him an effective or adequate opportunity to participate in the mercy process.

120. The Commission therefore concludes that the State has violated Mr. Thomas' rights under Article 4(6) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by denying him an effective right to apply for amnesty, pardon or commutation of sentence.

4. Articles 4 and 5 of the Convention – Conditions of Detention/Method of Execution

121. The Petitioners have alleged that the conditions in which Mr. Thomas has been detained by the State constitute a violation of his rights under Article 5(1) of the Convention to have his physical, mental and moral integrity respected, as well as his right under Article 5(2) of the Convention not to be subjected to cruel, unusual or degrading punishment or treatment.

122. As described in Part III.A.3.c of this Report, the Petitioners have made numerous allegations respecting Mr. Thomas' pre-trial and post-conviction conditions of detention, based in part upon an affidavit sworn by Mr. Thomas. They claim that between his arrest in January 1995 and his trial in October 1996, Mr. Thomas was detained in inhuman circumstances, as his cell had inadequate sanitation, he was forced to sleep on the floor, and he was fed sub-standard food. Since his conviction in October 1996, the petitioners contend that Mr. Thomas has been held on death row in St. Catherine District Prison where he is locked in his cell for 23 hours per day. They also allege that Mr. Thomas is deprived of a mattress or other bedding and sleeps on a concrete bunk, and must use a bucket for sanitation. According to the Petitioners, Mr. Thomas' cell has inadequate ventilation and does not have any electric light, and the food provided to prisoners is poor. Further, the Petitioners allege that no medical or psychiatric care is provided to prisoners, and there is no adequate complaints mechanism to deal with prisoner complaints.

123. The Petitioners claim further that their allegations are corroborated by more general sources of information concerning prison conditions in Jamaica, including 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.

124. The State has contended that notwithstanding the content of these reports, a generalized position should not be adopted every time a complaint is lodged with the Commission, but rather each complaint must be considered individually.

125. Moreover, the State has provided a significantly different version of conditions of detention on death row in St. Catherine's District Prison, by reference to affidavits sworn in November 1998 respecting the conditions of detention of another death row inmate, Neville Lewis. Based upon these affidavits, the State disputes Mr. Thomas' characterization of his conditions of detention. The State contends, for example, that death row inmates are provided with foam mattresses, that they are permitted to place light bulbs inside of their cells, that the ventilation in the cells is very good, and that the prisoners clean their cells every day under the supervision of a warder.

126. The State also contends that a senior officer at the prison is charged with communicating with prisoners on a daily basis to take note of any complaints, that complaints made by prisoners are dealt with promptly, and that on some occasions the Superintendent will hear a prisoner's complaint and take appropriate actions to remedy it. Concerning medical conditions, the State contends that St. Catherine District Prison houses a medical center that is staffed by two registered medical practitioners, a general practitioner and a psychiatrist, and that the general practitioner attends at the medical center daily and when he is not on duty he is on call.

127. Based upon the record before it, the Commission is faced with contradictory versions of Mr. Thomas' conditions of detention. The Commission must therefore determine which characterization of Mr. Thomas' detention conditions is more reliable and therefore should be accepted as accurate. The Commission observes in this regard that the Petitioners have provided the Commission with specific details concerning Mr. Thomas' personal situation in detention prior to and following his conviction, and have supported those details through evidence from

Mr. Thomas. In response the State has submitted general affidavit evidence that does not specifically address Mr. Thomas' situation, but rather provides details concerning the general and specific circumstances of another death row inmate, Neville Lewis. The State has done so despite the fact that in its observations, the State indicated that it undertook to investigate the specific conditions of detention complained of by Mr. Thomas.

128. While it appears that Mr. Thomas is detained in the same facility as Mr. Lewis, the Commission should, as the State itself has pointed out, avoid taking a generalized approach when it comes to the issue of prison conditions in the context of individual cases. Rather, the Commission should endeavor to determine each complaint on its individual circumstances. In the present case, however, the State has not provided any evidence specifically rebutting or otherwise addressing Mr. Thomas' treatment during his pre-trial or post-conviction detention. Rather, the State has provided information concerning the general and specific detention conditions of another inmate, without specific evidence relating to Mr. Thomas' situation.

129. Weighing this information on the record, and in the absence of contradictory evidence from the State relating specifically to Mr. Thomas' treatment, the Commission accepts as established the Petitioners' allegations with respect to Mr. Thomas' pre-trial and post-conviction conditions of detention. According to Mr. Thomas, prior to his trial, he was held in a cell with inadequate sanitation, due in part to the absence of functioning toilets. In addition, he was forced to sleep on the floor, and he was fed sub-standard food. Since his conviction in October 1996, Mr. Thomas's detention conditions have included the following:

- (a) he has been locked in cell on death row at St. Catherine District Prison for 23 hours per day;
- (b) he has been deprived of a mattress or other bedding and sleeps on a concrete bunk;
- (c) he has been deprived of adequate hygiene and must use a bucket for sanitation;
- (d) his cell has inadequate ventilation;
- (e) his cell has no electric light;
- (f) he has no access to adequate medical or psychiatric care;
- (g) he is provided with inadequate food;
- (h) he does not have access to an adequate mechanism for dealing with prisoner complaints.[FN46]

[FN46] Affidavit of Joseph Thomas, paras. 14-22.

130. Mr. Thomas' characterization of his conditions of detention is corroborated by more general sources of information provided by the Petitioners concerning prison conditions in Jamaica. These 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. The reports provide information regarding such matters as the 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.[FN47]

[FN47] 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.

131. The Commission must next determine whether Mr. Thomas' conditions of detention, as determined by the Commission, are inconsistent with Articles 5(1) or 5(2) of the Convention. After carefully considering the information available, the Commission has found that Mr. Thomas' detention conditions, when considered in light of the lengthy period of more than 4 years for which he has been detained prior to the disposition of his appeals, fail to satisfy the standards of humane treatment under Article 5(1) and 5(2) of the Convention.

132. In reaching this conclusion, the Commission has evaluated Mr. Thomas' conditions in light of previous decisions of this Commission and by the Inter-American Court of Human Rights, in which similar conditions of detention were found to violate Article 5 of the Convention.[FN48] Similar to these previous cases, the record in the present case indicates that Mr. Thomas has been held in solitary confinement on death row, in confined conditions with inadequate hygiene, ventilation and natural light. In addition, the Petitioners claim that Mr. Thomas is allowed out of his cell infrequently, and does not have access to any work or education facilities. The Petitioners' information also indicates that prisoners are often the subject of abuse by prison guards. These observations, together with the length of time over which Mr. Thomas has been held in detention, indicate that Mr. Thomas' treatment has failed to meet the minimum standards under Article 5(1) and 5(2) of the Convention. As the Commission has observed in previous cases, these standards apply irrespective of the nature of the conduct for which the person in question has been imprisoned[FN49] and regardless of the level of development of a particular State Party to the Convention.[FN50]

[FN48] In its merits judgment in the Suárez Rosero Case, for example, the Inter-American Court found that the treatment of the victim, who had been held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons, without necessary hygiene facilities, constituted cruel, inhuman or degrading treatment

or punishment contrary to Article 5(2) of the Convention. I/A Court H.R., Suárez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283. See similarly McKenzie et al. Case, supra, paras. 270-291.

[FN49] See e.g. McKenzie et al. Case, supra, para. 288, citing Eur. Court H.R., Ahmed v. Austria, Judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, p. 220, para. 38.

[FN50] Id., citing 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).

133. A comparison of Mr. Thomas' prison conditions with international standards for the treatment of prisoners also suggests that his treatment has failed to respect minimum requirements of humane treatment. In particular, Rules 10, 11, 12, 15, and 21 of the United Nations Standard Minimum Rules for the Treatment of Prisoners,[FN51] which in the Commission's view provide reliable benchmarks as to minimal international standards for the humane treatment of prisoners, prescribe for the following basic standards in respect of accommodation, hygiene, medical treatment and exercise:

[FN51] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (N° 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (N° 1) at 35, U.N. Doc E/5988 (1977).

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

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

- (a) the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
- (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

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

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

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

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

134. It is evident based upon the Petitioners' allegations that the State has failed to meet these minimum standards of proper treatment of prisoners. The cumulative impact of such conditions, together with the length of time for which Mr. Thomas has been incarcerated in connection with his criminal proceedings, cannot be considered consistent with the right to humane treatment under Article 5 of the Convention.[FN52]

[FN52] See similarly European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Second General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991, Ref. CPT/Inf. (92) 3 (13 April 1992), paras. 44-50 (criticizing prison conditions involving overcrowding, the absence of at least one hour of exercise in the open air every day for prisoners, and the practice of prisoners discharging human waste in buckets, and stating that the Committee is "particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners.").

135. Consequently, the Commission finds that the conditions of detention to which Mr. Thomas has 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.

136. The Petitioners have also contended that execution by hanging constitutes cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and claim that hanging is therefore inconsistent with the requirements under Article 4(2) of the Convention governing the implementation of capital punishment. Given its conclusions in Part IV.C.2 of this Report that Mr. Thomas' death sentence contravenes 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 method of execution employed in Jamaica constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention.

5. Article 8 of the Convention - Right to a Fair Trial

137. The Petitioners have alleged that the State is responsible for violations of Article 8 of the Convention in respect of Mr. Thomas, based upon the absence of an identification parade following his arrest and the directions given by the trial judge to the jury during Mr. Thomas' criminal proceeding.

138. In particular, the Petitioners allege that the trial judge violated his obligation of impartiality in instructing the jury before their deliberations as follows:

Now, as I said, the prosecution has to prove the death of the deceased. Well, I do not anticipate you having any problem there that it was the accused who killed him and perhaps here I should indicate the principle of what is known as common design. When two or more persons join together to commit an offense, commit a crime, that offense is committed, then each person takes an active or participates in the offense is guilty of the crime. That is the broad principle. So if you accept that there were two persons taking part - this is the prosecution's case, in a planned robbery, it does not matter which of them is charged with the fatal act. If they were acting in concert, both of them would be guilty of the crime - of the offense. [emphasis added]

According to the Petitioners, this, in addition to the failure of the police to hold an identification parade following Mr. Thomas' arrest, deprived Mr. Thomas of his right to be presumed innocent and therefore violated his right to a fair trial under Article 8 of the Convention.

139. In response, the State contends that it is generally for domestic appellate courts to examine the issues when the conduct of a trial is in question, including review of the specific instructions to a jury by a trial judge. The State further implies that the error alleged by the Petitioners in this case, if proved, could not be considered to have manifestly violated the trial judges' obligation of impartiality. Consequently, the State argues that it would be inappropriate for the Commission to determine violations of the Convention in relation to the judge's jury instructions in Mr. Thomas' case.

140. In addressing this issue, the Commission acknowledges its approach, as articulated in previous cases, that it is generally for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality.[FN53] Based upon the record in the present case when evaluated in the context of the Commission's prevailing jurisprudence, however, the Commission considers that the judge manifestly violated his obligation of impartiality during Mr. Thomas' trial, and therefore that the matter is properly the subject of review by the Commission.

[FN53] See e.g. McKenzie et al. Case, supra, para. 298.

141. The Commission recognizes in this respect that its evaluation and conclusions on this matter differ from those of the Court of Appeal of Jamaica. In its review of Mr. Thomas' case, the Jamaican Court of Appeal rejected Mr. Thomas' contention that the trial judge was "less than even-handed" in instructing the jury, as cited above, that he "[did] not anticipate you having any

problem there that it was the accused who killed [the deceased]." According to its judgment, the Court of Appeal reached this conclusion on the basis that the trial judge's directions prior and subsequent to the impugned statement were in law correct and repaired the "lapse" complained of by Mr. Thomas. The Court of Appeal therefore concluded that:

[t]he evidence of the prosecution witness was forthright and convincing and the summing up of the learned trial judge was fair, balanced and presented with clarity to the jury. The defence was adequately addressed. We find no merit in the ground advanced by [the Appellant] and the application is accordingly refused.[FN54]

[FN54] R. v. Joseph Thomas, Supreme Court Criminal Appeal N° 126/96, Judgment of the Court of Appeal of Jamaica, December 17, 1997.

142. In contrast to the Court of Appeal, however, the task of the Commission is not to assess whether the judge was "even-handed " in his directions to the jury, but rather whether Mr. Thomas' rights to be tried by an impartial tribunal and to be presumed innocent were strictly respected. In making this determination, the Commission must according to its jurisprudence apply an objective standard under Article 8 of the Convention as to whether Mr. Thomas' trial was tainted by a reasonable apprehension of bias. And as indicated previously, the Commission must conduct this review with a heightened level of scrutiny, to ensure strict compliance with due process and other pertinent standards under the American Convention.

143. The Commission notes in this respect that among the requirements for a fair trial under Article 8 of the Convention are impartiality on the part of a tribunal and, in the context of a criminal prosecution, that a defendant be presumed innocent until proven guilty. In systems that employ a jury system, these requirements apply both to judges and to juries. The Commission has previously recognized in this connection that the international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality." [FN55] According to this standard, it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors. [FN56] In a previous capital case involving the United States, for example, the Commission addressed the question of whether the jury before which the defendant in that case was tried had a reasonable appearance of bias. Although the complainant had failed to obtain relief before domestic courts, the Commission evaluated Mr. Andrews' circumstances under the pertinent provisions of the American Declaration of the Rights and Duties of Man and concluded that:

[FN55] William Andrews v. United States, Case 11.139, Annual Report of the IACHR 1997, para. 159, citing Eur. Court H.R., Piersack v. Belgium, 5 H.R.R. 169 (1982); Eur. Court H.R., Gregory v. United Kingdom, 16 H.R.L.J. 238 (1995).

[FN56] Id., fn 96.

in assessing the totality of the facts in an objective and reasonable manner the evidence indicates that Mr. Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to voir dire the jury tainted the trial and resulted in him being convicted, sentenced to death, and executed. The record before the Commission reflects ample evidence of "racial bias." [FN57]

[FN57] Id., para. 165.

The European Court of Human Rights has similarly examined the objective impartiality of judges and juries in criminal trials, in the context of Article 6 of the European Convention on Human Rights. [FN58]

[FN58] See e.g. Eur. Court H.R., *Remli v. France*, Judgment (Merits and Just Satisfaction), April 23, 1996, R.J.D. 1996-11, N° 8, paras. 43-48.

144. After carefully reviewing the allegations and information presented by the parties on this issue in the present case, the Commission considers that, viewed objectively, the comments by the trial judge were such that, even when read in conjunction with his directions on the law, they gave rise to a clear and real danger of bias on the part of the court trying Mr. Thomas, so as to compromise his right to be presumed innocent and to be tried by an impartial tribunal. The trial judge's words may reasonably be interpreted as suggesting that he had reached a conclusion as to Mr. Thomas' responsibility for the deaths for which he had been charged. Further, the comments were made in the course of the trial and before the jury had rendered a final decision as to Mr. Thomas' guilt or innocence. The Commission also finds that the trial judge's comments, coming as they did from the judicial authority responsible for the conduct of the trial as a whole, can reasonably be considered to have had a influential and prejudicial impact on the jury's deliberations; indeed, on their face they could be read to have encouraged the jury to find Mr. Thomas guilty of the charges against him. [FN59] Finally, the trial judge did not take distinct steps to clarify his comments or otherwise clearly negate the risk that his words would be interpreted by the jury as a prejudgment of Mr. Thomas' guilt. In the Commission's view, general directions as to the burden and standard of proof would not have been sufficient for this purpose, particularly to the extent that such directions preceded the trial judge's controversial statement. In this connection, the significance of maintaining confidence on the part of the public and the accused in the impartiality of a tribunal adjudicating a criminal prosecution cannot be overemphasized, all the more so when the result of the proceeding will determine whether the defendant lives or dies.

[FN59] In the case *Gregory v. United Kingdom*, supra, the European Court of Human Rights recognized the influence of a judge's directions on a jury. In this case, a note was received from the jury during its deliberations in the applicant's case stating "jury showing racial overtones one member to be excused." In response, the judge consulted counsel and addressed the jury

respecting their obligation to decide the case without prejudice and according to the evidence. The European Court concluded that a firmly-worded direction by an experienced judge was in the circumstances sufficient to dispel doubts as to the jury's impartiality.

145. In these circumstances, and in light of the heightened scrutiny test applicable in capital cases, the Commission finds violations of Article 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the manner in which the judge instructed the jury during Mr. Thomas' trial.

146. The Commission also finds in this connection that this serious violation of due process should be considered to have deprived Mr. Thomas' criminal proceedings of their efficacy from the outset and thereby invalidate Mr. Thomas' conviction. Consequently, a re-trial in accordance with due process or, where this is not possible, release, is the appropriate remedy in the circumstances of Mr. Thomas' case.[FN60]

[FN60] See I/A Court H.R., Castillo Petruzzi et al., Judgment of May 30, 1999, para. 219 (finding that in circumstances in which the acts upon which a judgment stands are affected by serious defects that deprive them of the efficacy they should normally have, "the judgement shall not subsist. It will lack its vital support: a process carried out according to Law. The institution of procedural restitution (reposición del procedimiento) is well known for causing certain acts to be considered invalid and allowing for the repetition of the procedural steps taken as from the step where the violation that caused the invalidation first occurred. This may require issuing a new judgment. The invalidity of the process conditions the validity of the judgment."). Translation of the Commission.

V. ACTS TAKEN SUBSEQUENT TO REPORT N° 41/01

147. The Commission examined this case in the course of its 110th regular session and on March 6, 2001 adopted Report N° 41/01 pursuant to Article 50 of the American Convention.

148. Also on March 9, 2001, the Commission transmitted Report N° 41/01 to the State, and requested that the Government of Jamaica inform the Commission within two months as to the measures adopted to comply the recommendations made to resolve the situation denounced.

149. As of May 9, 2001, the date of expiration of the prescribed two-month period, the Commission had not received a response from the State to Report N° 41/01.

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° 41/01, ratifies its conclusions that:

150. The State is responsible for violating Mr. Thomas' rights under Articles 4(1), 5(1), 5(2) and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.

151. The State is responsible for violating Mr. Thomas' rights under Article 4(6) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by failing to provide Mr. Thomas with an effective right to apply for amnesty, pardon or commutation of sentence.

152. The State is responsible for violating Mr. Thomas' rights under Articles 5(1) and 5(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of his conditions of detention.

153. The State is responsible for violating Mr. Thomas' rights under Articles 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the manner in which the judge instructed the jury during Mr. Thomas' trial.

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 Mr. Thomas an effective remedy, which includes a re-trial in accordance with the due process protections prescribed under Article 8 of the Convention or, where a re-trial in compliance with these protections is not possible, his release, and compensation.
2. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in contravention of the rights and freedoms guaranteed under the Convention, including and in particular Articles 4, 5 and 8.
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 conditions of detention in which Mr. Thomas is held comply with the standards of humane treatment mandated by Article 5 of the Convention.

VIII. PUBLICATION

154. On October 25, 2001, the Commission transmitted the content of this report, adopted as Report N° 112/01 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 inform the Commission of the measures taken to comply with the Commission's recommendations. The State failed to present a response within the time limit prescribed by the Commission.

155. Based upon the foregoing considerations, and in the absence of a response by the State to Report N° 112/01, 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 on the 3rd day of the month of December, 2001. Dean Claudio Grossman, President; Prof. Juan Méndez, First Vice-President; Lic. Marta Altolaguirre, Second Vice-President; Prof. Hélio Bicudo, Prof. Robert K. Goldman, Dr. Peter Laurie and Prof. Julio Prado Vallejo, Commissioners. The concurring opinion of Dr. Hélio Bicudo is included immediately after this report.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the inter-American system.
2. 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, 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 1) 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 2).
3. 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. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”
4. 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.”
5. 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.
6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.
7. 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.

8. 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.

9. 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).

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

11. 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?

12. 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."

13. 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.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was executed 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.[FN61]

[FN61] Press Release No. 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 No. 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.”

15. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belem do Para), approved in Belém 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 Para 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 Belém 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.

16. 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.)

17. 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.

18. 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.)

19. 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.”

20. 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.

21. 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.

22. 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.

23. 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).

24. 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?

25. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[FN62]

[FN62] Op.cit 2, p.92.

26. 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.

27. It is impossible to argue that death penalty as described in 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.

28. 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)

29. 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.

30. 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).

31. 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).

32. 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?

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

34. 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.

35. 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.

36. 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.

37. 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?

38. 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 face of death.

39. 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*).

40. 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, Sao Paulo, Brasil)

41. The jurist Héctor Faúndez 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.”

42. “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 Proteccion de los Derechos Humanos*, 1996, pp. 92-93).

43. 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 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 of Human Rights, 1987).

44. 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).

45. 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.

46. 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 européenne des droits de l’homme*, 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. For its part, the Inter-American Court of 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).

54. 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).

55. 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).

56. 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)

57. 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, “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)

58. It is 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.

59. 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.

60. 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)

61. 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)

62. 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”.

63. 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.

64. 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)

65. 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.

66. 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, No. 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, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 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)

67. 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.

68. 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.

69. 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 on the 3rd day of December, 2001. Hélio Bicudo.