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Title/Style of Cause:	Denton Aitken v. Jamaica
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Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran.
Dated:	21 October 2002
Citation:	Aitken v. Jamaica, Case 12.275, Inter-Am. C.H.R., Report No. 58/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANT: Saul Lehrfreund
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I. SUMMARY

1. On April 28, 2000, the Inter-American Commission on Human Rights (the “Commission”) received a petition from Mr. Saul Lehrfreund of the London, United Kingdom law firm of Simons Muirhead & Burton (the “Petitioners”) on behalf of Denton Aitken, a death row inmate in the State of Jamaica (“Jamaica” or the “State”).

2. The petition alleged that the State tried and convicted Mr. Aitken for the crime of capital murder and sentenced him to death by hanging on October 31, 1997 pursuant to Jamaica's Offences Against the Person Act, 1864, as amended by the Offences Against the Person (Amendment) Act 1992. The petition also alleged that the State is responsible for violating Mr. Aitken's rights under the American Convention on Human Rights (the “Convention”) in connection with the criminal proceedings against him based upon the following grounds:

- (a) violations of Articles 4(1), 4(2), 5(1) and 5(2) of the Convention, relating to the mandatory nature of the death penalty imposed upon Mr. Aitken;
- (b) a violation of Article 4(6) of the Convention, relating to the process available to Mr. Aitken to seek amnesty, pardon or commutation of sentence in Jamaica;
- (c) violations of Articles 5(1) and 5(2) of the Convention, relating to Mr. Aitken's conditions of detention and the method of execution in Jamaica;
- (d) violations of Articles 8(2)(c), 8(2)(e) and 4(2) of the Convention, relating to the adequacy of legal representation provided to Mr. Aitken during his trial;
- (e) violations of Articles 24 and 25 of the American Convention, relating to Mr. Aitken's inability to pursue a Constitutional Motion in Jamaica.

3. The Commission had not previously made an admissibility determination pursuant to Articles 46 and 47 of the Convention concerning the complaints presented in Mr. Aitken's petition. After having considered the matter, the Commission has decided to declare admissible the claims presented on behalf of Mr. Aitken.

4. In addition, upon consideration of the merits of Mr. Aitken's complaint, the Commission reached the following conclusions:

(a) The State is responsible for violating Articles 4(1), 5(1), 5(2) and 8(1) of the Convention in respect of Mr. Aitken, 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 Article 4(6) of the Convention in respect of Mr. Aitken, in conjunction with violations of Articles 1(1) and 2 of the Convention, by failing to provide him with an effective right to apply for amnesty, pardon or commutation of sentence.

(c) The State is responsible for violating Articles 5(1) and 5(2) of the Convention in respect of Mr. Aitken, 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 Articles 8(1) and 25 of the Convention in respect of Mr. Aitken, in conjunction with violations of Article 1(1) of the Convention, by reason of the denial to Mr. Aitken of recourse to a Constitutional Motion for the determination of his rights under domestic law and the Convention in connection with the criminal proceedings against him;

(e) The State is not responsible for violations of Article 4 or 8 of the Convention relating to the adequacy of his legal representation at trial.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petition and Observations

5. Following the receipt of Mr. Aitken's petition on April 28, 2000, the Commission opened Case N° 12.275 and transmitted the pertinent parts of the petition to the State on May 2, 2000, with a request that the State supply information with respect to the communication within 90 days as established in the Commission's prior Regulations. [FN1]

[FN1] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission's Rules of Procedure, the Rules entered into force on May 1, 2001.

6. By note dated August 16, 2000, the Commission reiterated its request for information from the State in relation to Mr. Aitken's case. In a communication dated September 20, 2000, the State requested that the Commission grant it additional time to prepare a response in Mr. Aitken's case, in light of the September 12, 2000 decision of the Judicial Committee of the Privy Council in the matter *Neville Lewis v. Jamaica*. [FN2] By note dated September 22, 2000, the

Commission granted the State's request for an extension of time to deliver its observations, to 30 days from the date of the Commission's communication.

[FN2] In its judgment in the Neville Lewis case, the Judicial Committee of the Privy Council found, contrary to its previous jurisprudence, that an individual's petition for mercy under the Jamaican Constitution is open to judicial review, and that the procedure for mercy must be exercised by procedures that are fair and proper. *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.).

7. By communication dated October 5, 2000, which was received by the Commission on October 6, 2000, the Commission received information from the State respecting Mr. Aitken's petition. By note dated October 10, 2000 the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a 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 November 9, 2000 and received by the Commission on the same date, the Petitioners delivered a response to the State's observations on Mr. Aitken's petition. In a note dated November 13, 2000, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

9. In a note dated December 15, 2000 and received by the Commission on December 19, 2000, the State provided a response to the Petitioners' observations of November 9, 2000. By communication dated December 20, 2000, the Commission transmitted the pertinent parts of the State's response to the Petitioners, with a response requested within 30 days of receipt.

10. In a communication dated January 19, 2001 and received by the Commission on January 22, 2001, the Petitioners delivered observations on the State's December 15, 2000 response.

11. Commission in a note dated January 24, 2001 transmitted the pertinent parts of the Petitioners' reply to the State with a response requested within 30 days. In a communication dated February 21, 2001 and received by the Commission on February 22, 2001, the Commission received the State's response to the Petitioners' reply.

B. Precautionary Measures

12. Contemporaneously with the transmission of the pertinent parts of the petition in this matter to the State, the Commission requested pursuant to Article 29(2) of its Regulations that the State take precautionary measures to stay Mr. Aitken's execution until such time as the Commission had an opportunity to examine his case and the threat of irreparable harm to Mr. Aitken no longer persisted. This request was made on the basis that if the State was to execute Mr. Aitken 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. Aitken. The Commission did not receive a response from the State to its request for precautionary measures.

C. Friendly Settlement

13. By communications dated May 21, 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 30 days of receipt of the communication, in the absence of which the Commission would continue with consideration of the matter.

14. In a note dated May 31, 2001, the State indicated that, in its view, there were no outstanding issues that would necessitate the scheduling of 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."

15. In a letter dated June 15, 2001, the Petitioners informed the Commission that in the circumstance of the case the commutation of Mr. Aitken's death sentence was the only appropriate way of reaching a friendly settlement in the matter, but that should the State undertake to commute Mr. Aitken's death sentence the Petitioners would consider that a friendly settlement pursuant to Article 48(1)(f) of the Convention had been reached. By note dated June 18, 2001, the Commission informed the Petitioners that, in light of the State's position on the Commission's offer, it was apparent that a friendly settlement of the matter was not possible and therefore that the Commission would continue to process the matter in accordance with the provisions of the American Convention and the Commission's Rules of Procedure.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Background to the Case

16. According to the record in this case, Denton Aitken was arrested and charged with the July 1, 1996 murder of Curtis Russell in the course or furtherance of a robbery. Mr. Aitken was subsequently tried for the murder from October 29 to October 31, 1997. On October 31, 1997, Mr. Aitken was convicted 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 June 28, 1999. Mr. Aitken 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 March 6, 2000.

17. The prosecution alleged that in the afternoon of July 1, 1996, Mr. Aitken was one of two gunmen who entered the business premises of Curtis Russell, robbed him of a firearm and an unspecified amount of money and shot him in the course of that enterprise. The prosecution's

case was based in part upon the testimony of two eyewitnesses. The first, Christopher Burton, an off-duty police officer, testified that at approximately 4:00 p.m. on July 1, 1996, he was at his garage in the vicinity of Russell's shop he observed Russell enter the shop and subsequently saw two other men enter the shop, one of whom he identified as some one he knew both as Denton Aitken and "Talbert." He claimed to have known Aitken for about three years and that he saw Aitken at least once a week in the Cockburn Garden area. Burton also testified that as the two individuals entered the shop, Aitken removed a hand gun from his waist and that three or four second later he heard an explosion and saw the men running from the shop, with Aitken carrying two hand guns and the other man carrying money in notes in one hand and a hand gun in the other. Burton then entered the shop where he saw Russell bleeding on the floor.

18. The second eyewitness, Neville Haynes, testified that he and three other individuals were working at Russell's gas shop on the day in question, when two men approached and asked him for the price of a gas cylinder. The men entered the shop, following which Haynes heard voices, went to the shop door, and saw a man with a gun. Haynes then turned and ran and heard two gunshots as he fled. Haynes also indicated that he could not remember the faces of either of the two men. As a consequence, the only evidence tying Aitken to the murder was Christopher Burton's eyewitness testimony.

19. In his defense, Mr. Aitken gave an unsworn statements from the dock indicated that he knew nothing of the offense with which he was charged. He also challenged the credibility, good faith and accuracy of the prosecution's identification evidence.

2. Position of the Petitioners on Admissibility

20. The Petitioners in Mr. Aitken's case submit that his petition is admissible. In particular, the Petitioners claim that Mr. Aitken has exhausted all available domestic remedies because his lack of private means and unavailability of legal aid prohibit him from pursuing a Constitutional Motion before the Supreme Court of Jamaica. [FN3]

[FN3] In support of their submissions, 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. Further, according to the Petitioners, the subject matter of Mr. Aitken's 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

22. The Petitioners allege that the State acted contrary to Articles 4(1), 4(2), 5(1) and 5(2) of the American Convention by sentencing Mr. Aitken 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. Aitken's case violates the American 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 Articles 5(1) and 5(2) of the Convention.

23. In making these submissions, the Petitioners emphasize that, while the Convention does not prohibit the death penalty, this does not relieve a state of its obligation to administer capital punishment in a way that is neither arbitrary nor cruel.

24. 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. In this regard, the Petitioners submit 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.

25. In addition, it is argued on behalf of Mr. Aitken that the mandatory death penalty violates the prohibition against cruel and unusual punishment or treatment under Article 5 of the Convention. The Petitioners suggest in this respect that Article 5 of the Convention is based on the idea that each human being has rights that must be respected even when punishment is to be inflicted.

26. 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 [FN4] and India, [FN5] where the death penalty has been retained. They also rely upon previous decisions by this Commission in cases such as *Haniff Hilaire v. Republic of Trinidad and Tobago*, Report N° 66/99 and *Rudolph Baptiste v. Grenada*, Report N° 38/00. 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.

[FN4] *Woodson V. North Carolina*, 428 U.S. 280 (1976) (U.S. Supreme Court).

[FN5] *Bachan Singh V. State of Punjab*, (1980) S.C.C. 475 (Supreme Court of India).

27. In their January 19, 2001 response to the State's December 15, 2000 observations, the Petitioners also argue that the availability in Jamaica of the exercise of the Prerogative of Mercy is not consistent with the standards under Articles 4, 5 and 8 of the American Convention applicable to the mandatory death sentences and is therefore not an adequate substitute for individualized sentencing in capital cases.

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

28. The Petitioners submit that Mr. Aitken's 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. [FN6]

[FN6] 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.

29. The Petitioners also assert 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.

30. 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) [FN7] and *de Freitas v. Benny* [FN8] 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.

[FN7] *Reckley v. Minister of Public Safety* (N° 2) [1996] 2 W.L.R. 281.

[FN8] *de Freitas v. Benny* [1976] A.C.

31. 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."

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

33. In response to the State's observations of October 5, 2000 respecting the Prerogative of Mercy, the Petitioners note that in a judgment of September 12, 2000 in the case of *Neville Lewis v. Jamaica*, the Judicial Committee of the Privy Council clearly expressed, established and applied the fundamental principle that public authorities which make such important decisions as to whether or not a person sentenced to death should be executed must observe basic rules of fairness that include a real opportunity for a condemned person to make representations to the mercy committee and to know what material and recommendations were being considered in the making of the decision.

34. The Petitioners further submit that whether or not the Jamaican Privy Council has already met to consider the exercise of the Prerogative of Mercy does not affect the substance of Mr. Aitken's complaint, as until September 12, 2000 the domestic law in Jamaica did not provide Mr. Aitken with requisite rights in respect of the potential application of mercy in his case.

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

(i) Conditions of Detention

35. The Petitioners allege that the conditions in which Mr. Aitken 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. Aitken.

36. 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.

37. According to the Petitioners, these reports indicate that detention facilities in Jamaica are poor and have not been remedied by the Jamaican government. 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."

38. The Petitioners also indicate 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. The Petitioners further claim that any complaint mechanisms that exist in the facilities do not adequately address prisoners' grievances.

39. With respect to the conditions of detention alleged to have been experienced by Mr. Aitken personally, the Petitioners claim, based in part on an affidavit sworn by Mr. Aitken on March 17, 2000, that his post-conviction detention on death row has subjected him to cruel, inhuman or degrading punishment or treatment contrary to Article 5 of the Convention.

40. In particular, the Petitioners claim that Mr. Aitken is locked in his cell for 23 ½ hours per day and is only allowed out of his cell for approximately 30 minutes per day when he is expected to empty his slop pail, bathe and take exercise. They also indicate that Mr. Aitken is deprived of a mattress or other bedding and sleeps on a concrete bunk. According to the Petitioners, Mr. Aitken is deprived of adequate sanitation and has to use a bucket as a toilet, which he is only allowed to empty once per day. In addition, Mr. Aitken's cell is said to have inadequate ventilation and is therefore hot and uncomfortable, and the food provided to Mr. Aitken is "deplorable and inadequate." Moreover, the Petitioners claim that despite numerous requests by Mr. Aitken, he has seen neither a doctor nor a dentist since his conviction on October 31, 1997.

41. In light of these conditions of detention, the Petitioners contend that the State is responsible for violations of Mr. Aitken's rights under Article 5 of the Convention. The Petitioners rely in this connection 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." [FN9] 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 in part 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." The Petitioners refer additionally to the Greek Case, [FN10] 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.

[FN9] 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.

[FN10] Eur. Court H.R., Greek Case 12 Y.B. 1 (1969).

42. Based upon these submissions, the Petitioners argue that Mr. Aitken's treatment has violated this right under Article 5 of the Convention to be free from cruel, inhuman or degrading treatment or punishment.

43. In their January 19, 2001 response to the State's December 15, 2000 observations in this matter, the Petitioners contend that the affidavits relied upon by the State are the same affidavits relied upon by Jamaica in the case of Neville Lewis before the domestic courts in Jamaica. The Petitioners argue that the affidavits do not specifically respond to Mr. Aitken's complaint as set out in his affidavit of March 17, 2000. The Petitioners also claim that in the Neville Lewis Case before the Judicial Committee of the Privy Council, the very same affidavit were not accepted by

the Privy Council to refute the Appellants' allegations that the treatment in prison and the prison conditions in which the Appellants were detained amounted to inhumane or degrading treatment.

(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. [FN11]

[FN11] 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. Harold Hillman dated April 28, 1999, 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. Aitken's 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. Aitken 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. Aitken 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 Adequate Time and Means for Preparing a Defense

47. The Petitioners contend that the State has violated Mr. Aitken's rights under Article 8 of the Convention on the ground that he was not provided with adequate time and means for the preparation of his defense, as a consequence of the conduct of the attorney afforded to Mr. Aitken by the State.

48. The Petitioners allege in particular that according to Mr. Aitken it was very difficult for him to give instructions to his lawyer because the only conferences that he had with his attorney were at Court during the conduct of his trial. The Petitioners also claim they wrote to Mr. Aitken's trial attorney on numerous occasions requesting information about the preparation of Mr. Aitken's defense, but that as of the date of their petition the attorney had not replied. Further, according to Mr. Aitken he was assaulted on his arrest and he would have wanted his attorney to investigate those beatings as well as his alibi defense. [FN12]

[FN12] Affidavit of Denton Aitken dated March 17, 2000, paras. 6, 7.

49. The Petitioners cite several authorities in support of their proposition that the State has a particular obligation in a death penalty case to take measures to ensure that court-appointed counsel is effective, and that capital cases should not proceed unless the accused is assisted by competent and effective counsel. The Petitioners allege that in the present case such assistance was not afforded to Mr. Aitken, resulting in violations of his rights under Articles 8(2)(c) and (e) and 4(2) of the Convention.

(e) Articles 24 and 25 of the Convention – Denial of Access to Constitutional Motions

50. The Petitioners argue that the State does not provide legal aid for Constitutional Motions, and that this results in a denial of access to court and a denial of effective remedies in violation of Articles 24 and 25 of the Convention.

51. More particularly, the Petitioners recognize that Article 25(1) of the Constitution of Jamaica provides individuals with the legal right to bring a Constitutional Motion before the Supreme Court. [FN13] They argue, however, that there is no practical opportunity for the victims to pursue a Constitutional Motion because the proceedings are extremely expensive and beyond Mr. Aitken's financial means, and because no legal aid is available for these motions. Consequently, the Petitioners submit that the State's failure to provide legal aid for Constitutional Motions denies the victims access to the courts and hence to an effective remedy for violations of the Constitution or of the American Convention. The Petitioners also submit in this regard that the principle of effective access to courts is even more indispensable in capital cases, where a defendant's life and liberty are at stake.

[FN13] According to the Petitioners' submissions, Article 25(1) of the Jamaican Constitution provides that "if any person alleges that any of the provisions of Section 14-24 (inclusive) of the

Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action in respect of the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

52. In support of their arguments, the Petitioners cite decisions of other international human rights tribunals, such as the decision of the European Court of Human Rights in *Airey v. Ireland* [FN14] and the U.N. Human Rights Committee in *Curry v. Jamaica*, [FN15] for the proposition that individuals must be guaranteed effective access to courts in fact as well as in law, which may require legal assistance in the provision of legal aid. The Petitioners claim that the unavailability of legal aid in Jamaica in fact deprives the victims of effective access to the courts, and that the State is responsible for violations of Articles 24 and 25 of the Convention.

[FN14] *Airey v. Ireland* [1979] 2 E.H.R.R. 305.

[FN15] *Curry v. Jamaica*, Communication N° 377/1989, at p. 5, paras. 13.3, 13.4.

B. Position of the State

1. Position of the State on Admissibility

53. As of the date of this report, the Commission had not received any observations from the State on the admissibility of Mr. Aitken's complaint. As a consequence, the State may properly be considered to have implicitly or tacitly waived its right to object to the admissibility of the Petitioners' claims.

2. Position of the State on the Merits

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

54. The State denies that the imposition of the death penalty in Jamaica is not reserved for the most serious offenses as provided for under Article 4(2) of the Convention. 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. 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.

55. The State also argues that the reformed system of capital punishment contained in Jamaica's Offenses Against the Person Act 1992 is sufficient to comply with Article 5 of the

Convention, as it is restricted to the most serious crimes in conformity with Article 4(2) of the Convention and nothing in Article 5 of the Convention can be construed so as to derogate from the express provisions of Article 4.

56. In this connection, the State contends that a legislature is vested with the authority to assess the situations which have arisen or which may arise and must form a judgment as to what laws are necessary and desirable for the purpose of maintaining peace, order and good government. The State therefore argues that it cannot be for the courts or the Commission without possessing evidence on which a decision of the legislature has been based to overrule and nullify the decision.

57. In this respect and in response to the Commission's previous findings on this issue, the State confirms that the Constitution has vested in the Jamaican Privy Council the power to determine whether the death penalty will be carried out in an individual case. In addition, the individual circumstances are among the factors taken into account in determining whether the sentence should be implemented. Accordingly, the State submits that there is no basis for the assertion that because of the mandatory nature of the death penalty in Jamaica, the alleged victim could be deprived of consideration based upon this personal circumstances and the circumstances of his particular case.

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. [FN16] In particular, the State contends that under the provisions of the Jamaican Constitution, any person sentenced to death for an offense against the law of Jamaica automatically has his or her case heard by the Jamaican Privy Council to determine whether the Prerogative of Mercy should be exercised in his or her favor, accordingly dispensing with the need for a condemned prisoner to "apply" for mercy.

[FN16] See *supra*, note 6.

60. The State also argues that during the process of determining whether to exercise the Prerogative of Mercy, the Jamaican Privy Council has before it 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. Further, the sentence of death is stayed during the process.

61. Finally, the State argues that there is no factual basis upon which the alleged victim can legitimately complain since the Jamaican Privy Council has not yet considered the exercise of the Prerogative of Mercy and has not denied the alleged victim any rights contrary to recommendations made by international bodies such as the Commission. The State therefore contends that the issue at this stage is “purely academic, hypothetical and premature and should be dismissed.”

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

62. The State raises several arguments in relation to the Petitioners’ allegations regarding Mr. Aitken’s 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.

63. The State indicated in its observations of October 10, 2000 that it would have Mr. Aitken’s conditions of detention investigated and the results submitted to the Commission. In its subsequent observations, 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.

64. Based upon these affidavits, the State contends that the conditions of detention of death row prisoners at St. Catherine 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 requests permission from a warder on duty and is allowed to empty the pail in a general area provided for that purpose. 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 in day and 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 made by prisoners 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.

(o) the St. Catherine District Prison houses a Medical Center that is staffed by two registered practitioners, a general practitioner and a psychiatrist. There is also a registered dentist. A matron who is also a registered nurse, a qualified social worker and several medical orderlies assist these doctors.

(p) The general practitioner attends the Medical Center daily and when he is not on duty, he is on call. The dentist attends at the medical Center three days every week.

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

65. Based upon these submissions, the State denies that conditions at St. Catherine District Prison are poor, that there are no adequate complaint mechanisms, or that there is no medical or other care provided to prisoners.

66. In its observations of December 15, 2000, the State emphasized that the general reports upon which the Petitioners rely were conducted between 1983 and 1993, while in the view of the State the affidavits presented on its behalf were prepared in 1998 and reflect a more accurate description of the conditions at St. Catherine District Prison.

67. The State also indicated that it conducted its investigations into the conditions that Mr. Aitken has complained of and that the "reports received lead us to conclude that the conditions of the prison as they are described in the Ministry's last communication apply equally to the applicant."

68. 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. Aitken's 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 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.

69. 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 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.

70. According to the State, the Jamaican Court of Appeal held that Mr. Taylor's conditions did not amount to torture, or to inhuman or degrading 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.

71. The State similarly relies upon the views of the UN Human Rights Committee in the case *F. Deidrick v. Jamaica*, [FN17] 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 people with nothing whatsoever to keep him occupied, and was forced to spend much of his time in enforced darkness. As some of Mr. Aitken's allegation as to his conditions of detention are similar to those in the Deidrick Case, the State denies that the Petitioners' claims constitute a breach of Article 5 of the Convention or of the UN Minimum Standard Rules for the Treatment of Prisoners.

[FN17] *F. Deidrick v. Jamaica*, Communication N° 619/1995.

72. With respect to the Petitioners' contentions regarding the method of execution in Jamaica, the State argues that Article 5 of the Convention must be read subject to Article 4, which provides for the imposition of the death penalty. In light of the presence of these two provisions, the State contends that the Convention by providing in one article for the imposition of the death penalty cannot at the same time condemn its implementation by reference to another provision.

73. The State also argues that the Petitioners have failed to identify an acceptable form of execution that would not be considered to conflict with Article 5 of the Convention. On this basis, the State denies that the carrying out of the death penalty by hanging conflicts or breaches the provisions of Article 5 of the Convention. [FN18]

[FN18] The State indicated in this regard that it adopts the decisions of the Judicial Committee of the Privy Council in *Pratt and Morgan and Larry Raymond Jones* and states that as Mr. Aitken was duly convicted of capital murder and sentenced to death by hanging, his sentence is not arbitrary, cruel, inhuman, degrading or in breach of Articles 5(1) or 5(2) of the Convention.

(d) Articles 8 – Inadequate Legal Representation

74. In respect of the Petitioners' allegations regarding the adequacy of Mr. Aitken's legal representation during his trial, the State denies that there has been a breach of Article 8(2)(e) of the Convention based upon the quality of Mr. Aitken's legal representation. In making this argument, the State relies on the jurisprudence of the UN Human Rights Committee in the case of *D. Taylor v. Jamaica*, in which, according to the State the Committee held that a state cannot be held responsible for any alleged deficiencies in the defense of the accused or alleged errors committed by the defense lawyer, unless it was manifest to the trial judge that the lawyer's behavior was not compatible with the interests of justice.

(e) Articles 24 and 25 – Denial of Access to Court

75. The State argues that Article 24 and 25 of the Convention dealing with the right to equal protection and the right to judicial protection do not place an obligation on State Parties to provide legal aid for Constitutional Motions. Rather, the State argues that Article 8(2)(e) of the Convention only places an obligation on State Parties to provide legal aid for criminal proceedings, and as a Constitutional Motion is not a criminal proceeding, the State denies that there has been a breach of the Convention.

76. The State also observes that by virtue of section 3 of the Poor Prisoners' Defense Act, a Resident Magistrate or a Judge of the Supreme Court is obliged to grant an accused who is financially unable to retain counsel a legal aid certificate which entitles him to free legal aid in the preparation and conduct of his defense. [FN19]

[FN19] In its observations, the State describes Section 3 of the Poor Prisoners' Defense Act as follows: "Where it appears to a certifying authority, (certifying authority is defined as a Resident Magistrate or a Judge of the Supreme Court), that the means of a person charged with or as the case may be convicted of a scheduled offense are insufficient to enable that person to obtain legal aid, the certifying authority shall grant in respect of that person a legal aid certificate which, shall entitle him to free legal aid in preparation and conduct of his defense in the appropriate proceedings or in such of the appropriate proceedings as may be specified in the legal aid certificate and to have counsel or solicitor assigned to him for that purpose in the prescribed manner."

IV. ANALYSIS

A. Competence of the Commission

77. The State deposited its instrument of accession to the American Convention on August 7, 1978. [FN20] The Petitioners allege that the State has violated Articles 4, 5, 8, 24 and 25 of the American Convention, in respect of acts or omissions that transpired after the State's accession to the Convention. Mr. Aitken 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 Mr. Aitken's complaint.

[FN20] Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.8 (22 May 2001), p. 48.

B. Admissibility

78. As indicated in Part III.A.2, the Commission has not previously determined the admissibility of the complaints in Mr. Aitken's petition. Rather, in light of the exceptional circumstances of this matter as a death penalty case and the fact that the parties have had

numerous opportunities to present observations on the admissibility and merits of the Petitioners' claims, and consistent with its past practice in petitions of this nature, [FN21] the Commission decided to consider the admissibility of the Petitioners' claims together with the merits.

[FN21] See e.g. Desmond McKenzie et al. v. Jamaica, Case N° 12.023, Annual Report of the IACHR 1999; Garza v. United States, *supra*.

1. Duplication

79. According to Articles 46(1)(c) and 47(d) of the Convention and Article 33 of the Commission's Rules of Procedure, 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. Aitken's 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 and Article 31(1) of the Commission's Rules of Procedure specify that, in order for a case to be admitted, remedies of the domestic legal system must have been pursued and exhausted in accordance with generally accepted principles of international law.

81. Exhaustion of domestic remedies need not be demonstrated by a victim, however, 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. [FN22]

[FN22] 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 implicitly or tacitly waived any challenge with regard to the exhaustion of remedies by Mr. Aitken 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 or Article 31 of its Rules of Procedure.

3. Timeliness of the Petition

83. Article 46(1)(b) of the Convention and Article 32 of the Commission's Rules of Procedure provide 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 decision that exhausted domestic remedies.

84. The record before the Commission indicates that the Judicial Committee of the Privy Council dismissed Mr. Aitken's petition for Special Leave to Appeal on March 6, 2000 and that the Petitioners lodged the present petition with the Commission on April 28, 2000 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 or Article 32 of its Rules of Procedure.

4. Colorable Claim

85. Article 47(b) of the Convention and Article 34(a) of the Commission's Rules of Procedure require a petition to be declared inadmissible if it does not state facts that tend to establish a violation of the rights guaranteed by the Convention or other applicable instruments. Article 47(d) of the Convention and Article 34(b) of the Commission's Rules of Procedure deem 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. Aitken's rights under Articles 4, 5, 8, 24 and 25 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. Aitken's rights under the Convention for the purposes of Articles 47(b) and 47(c) of the Convention and Articles 34(a) and (b) of the Commission's Rules of Procedure.

5. Conclusions on Admissibility

88. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the Convention and Articles 31 to 34 of the Commission's Rules of Procedure, and without prejudging the merits of the matter, the Commission decides to declare as admissible the claims presented on behalf of Denton Aitken in respect of Articles 4, 5, 8, 24 and 25 of the Convention.

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. Aitken:

- (a) violations of Articles 4(1), 4(2), 5(1) and 5(2) of the Convention, relating to the mandatory nature of the death penalty imposed upon Mr. Aitken;
- (b) a violation of Article 4(6) of the Convention, relating to the process available to Mr. Aitken to seek amnesty, pardon or commutation of sentence in Jamaica;
- (c) violations of Article 5(1) and (2) of the Convention, relating to Mr. Aitken's conditions of detention and the method of execution in Jamaica;
- (d) violations of Articles 8(2)(c), 8(2)(e) and 4(2) of the Convention, relating to the adequacy of Mr. Aitken's legal representation at trial;
- (e) violations of Articles 24 and 25 of the Convention relating to Mr. Aitken's inability to pursue a Constitutional Motion before the courts in Jamaica.

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. [FN23] 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. [FN24]

[FN23] 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.

[FN24] See e.g. McKenzie et al. Case, supra, para. 169.

91. The Commission also wishes to note that its application of a heightened level of scrutiny in capital cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless a petitioner's allegations entail a possible violation of any of the rights set forth in the Convention. [FN25] As the Petitioners' allegations entail independent violations of Articles 4, 5, 8, 24 and 25 of the American Convention, the fourth instance formula has no application in the present matter.

[FN25] See Santiago Marzióni 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. Aitken has been Sentenced to a Mandatory Death Penalty

92. The record in the present case indicates that Mr. Aitken was convicted of capital murder in Jamaica 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.

93. More particularly, as indicated in Part I of this Report and confirmed by the State in its observations, Mr. Aitken was convicted of the crime of capital murder under Jamaica's Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992. [FN26] Section 2(1)(d)(i) of this Act defines capital murder as including the following:

[FN26] 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-

[. . .]

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

(i) robbery;

94. 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." [FN27]

[FN27] 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.
-

95. 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. Aitken guilty of capital murder, the death penalty was the only available punishment. The Commission notes that the State has not denied the mandatory nature of Mr. Aitken's punishment, but rather argues that the exercise of the Prerogative of Mercy is sufficient to take into account the individual circumstances of Mr. Aitken's case.

96. Therefore, as the Commission has determined in previous cases, [FN28] 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. There is, however, an exception. 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. [FN29]

[FN28] See McKenzie et al. Case, supra, para. 178.

[FN29] 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.

97. 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.

98. As indicated in Part III.A.3.a, the Petitioners have alleged that Mr. Aitken's 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. Aitken's Mandatory Death Sentence under Articles 4, 5 and 8 of the Convention

99. 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), Article 5 (right to humane treatment) and Article 8 (right to a fair trial) 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. Based upon these considerations and analysis, the Commission has reached the following conclusions.

100. 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. [FN30]

[FN30] 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.

101. 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. [FN31]

[FN31] 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.”).

102. Finally, the Commission has noted and relied upon the determination by the Inter-American Court of Human Rights in its Advisory Opinion OC-3/83 that under the terms of Article 4 of the Convention, “certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account” by States Parties that have not abolished the death penalty. [FN32]

[FN32] *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.”).

103. In the context of these interpretive rules and principles, the Commission has 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 Articles 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those provisions. [FN33] The Commission observes in this regard that subsequent to its determination that the mandatory death

penalty was inconsistent with the rights protected in the inter-American system, other international and regional tribunals have reached similar conclusions. A majority the UN Human Rights Committee, for example, has found the implementation of a death sentenced based upon a mandatory sentencing law to violate the right not to be arbitrarily deprived of one's life under Article 6(1) of the International Covenant on Civil and Political Rights. [FN34] In addition, a majority of the Eastern Caribbean Court of Appeal has found the mandatory death penalty in Saint Vincent and Saint Lucia to constitute inhuman or degrading punishment or other treatment contrary to the constitutions of those states. [FN35]

[FN33] *Id.*, paras. 193-207. See similarly *Baptiste Case*, *supra*, paras. 80-94.

[FN34] UNHRC, *Eversley Thompson v. St. Vincent and the Grenadines*, Communication N° 806/1998 (October 18, 2000).

[FN35] Eastern Caribbean Court of Appeal, *Newton Spence v. The Queen*, *Peter Hughes v. The Queen*, Criminal Appeal Nos. 20 of 1998 and 14 of 1997, Judgment, 2 April 2001.

104. 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. [FN36]

[FN36] *McKenzie et al. Case*, *supra*, para. 207.

105. 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. [FN37] 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.

[FN37] *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*.

106. The Commission has also 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. [FN38]

[FN38] McKenzie et al. Case, *supra*, para. 210.

107. Applying these findings in the context of the case presently before it, the Commission has confirmed that Mr. Aitken was convicted of the offense 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 his or her case. Upon satisfying the elements of section 3(1) of the Act, death is the automatic penalty.

108. Consequently, the Commission concludes that once Mr. Aitken 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. Aitken's character or record, the nature or gravity of Mr. Aitken's crime, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate punishment. Mr. Aitken 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 in Mr. Aitken's circumstances. The court sentenced Mr. Aitken based solely upon the category of crime for which he had been found responsible.

109. 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. Aitken's 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.

110. 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. Aitken, with no discretion to consider Mr. Aitken's personal characteristics and the particular circumstances of his offenses to determine whether death was an appropriate punishment.

Likewise, Mr. Aitken was 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. Aitken 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. Aitken's 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. Aitken's right under Article 4(1) of the Convention not to be arbitrarily deprived of his life. [FN39]

[FN39] See similarly McKenzie et al. Case, supra, para. 234; Baptiste Case, supra, para. 127.

111. The Commission further concludes that the State, by sentencing Mr. Aitken to a mandatory penalty of death absent consideration of his individual circumstances, has failed to respect Mr. Aitken's 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. Aitken to death solely because he was convicted of a predetermined category of crime. Accordingly, the process to which Mr. Aitken 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 offense. Not only does this treatment fail to recognize and respect Mr. Aitken's 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. Aitken. [FN40]

[FN40] See similarly McKenzie et al. Case, supra, para. 235; Baptiste Case, supra, para. 128.

112. 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. Aitken 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. Aitken the right to fully answer and defend the criminal accusations against him, contrary to Article 8(1) of the Convention. [FN41]

[FN41] See similarly McKenzie et al. Case, supra, para. 237; Baptiste Case, supra, para. 130.

113. Also consistent with its previous findings, and contrary to the State's submissions, the Commission considers that the exercise of the Prerogative of Mercy by the Jamaican Privy

Council is not consistent with, and therefore cannot serve as a substitute for, the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences. As explained above, these requirements include legislative or judicially-prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in Jamaica, even as informed by the minimal requirements of fairness prescribed in the Judicial Committee of the Privy Council's Neville Lewis et al. judgment, does not satisfy these standards and therefore cannot serve as an alternative for individualized sentencing in death penalty prosecutions.

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

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

115. 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."

116. 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 that process 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. [FN42]

[FN42] See supra, note 6, setting out sections 90 and 91 of the Jamaica (Constitution) Order in Council 1962, Second Schedule.

117. 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. [FN43]

[FN43] McKenzie et al. Case, supra, paras. 227-232.

118. More particularly, 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. [FN44] 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. [FN45]

[FN44] *Id.*, para. 228.

[FN45] *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.).

119. 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 that matter 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*.

120. The Petitioners in the present case confirmed that subsequent to the Commission's decision in the *McKenzie et al.* Case, the Judicial Committee of the Privy Council issued a judgment on September 12, 2000 in the case *Neville Lewis et al. v. The Attorney General of Jamaica*, in which it found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review. [FN46] 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. [FN47]

[FN46] *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.

[FN47] *Id.*, at 23-24.

121. 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. Aitken. Rather, the Petitioners have contended that until the issuance of the Neville Lewis decision, the domestic law of Jamaica did not provide Mr. Aitken with the rights prescribed in that case and therefore that the substance of his case is not affected by whether or not the Jamaican Privy Council already met to consider the exercise of the Prerogative of Mercy in his case. The State has not provided the Commission with any additional information regarding whether or in what manner the Prerogative of Mercy might be considered in the circumstances of Mr. Aitken's case, in light of the Neville Lewis Case or otherwise. Accordingly, based upon the information available, the Commission finds that the procedure available to Mr. Aitken to seek amnesty, pardon or commutation of sentence has not guaranteed him an effective or adequate opportunity to participate in the mercy process.

122. The Commission therefore concludes that the State has violated Mr. Aitken's 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

123. The Petitioners have alleged that the conditions in which Mr. Aitken 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.

124. As described in Part III.A.3.c of this Report, the Petitioners have made numerous allegations respecting Mr. Aitken's conditions of detention on death row, based in part upon an affidavit sworn by Mr. Aitken. They claim that at the time of his arrest he was beaten by police officers. They state further that since his conviction in October 1997, Mr. Aitken has been held on death row in St. Catherine District Prison where he is locked in his cell for 23 ½ hours per day and is only allowed out of his cell for approximately 30 minutes per day when he is expected to empty his slop pail, bathe and take exercise. They also indicate that Mr. Aitken is deprived of a mattress or other bedding and sleeps on a concrete bunk. According to the Petitioners, Mr. Aitken is deprived of adequate sanitation and must use a bucket as a toilet, which he is only allowed to empty once per day. In addition, Mr. Aitken's cell is said to have inadequate ventilation and is therefore hot and uncomfortable, and the food provided to Mr. Aitken is "deplorable and inadequate." Moreover, the Petitioners claim that despite numerous requests by Mr. Aitken, he has seen neither a doctor nor a dentist since his conviction on October 31, 1997.

125. The Petitioners claim further that their allegations are corroborated by more general sources of information 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.

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

127. 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. Aitken's 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.

128. 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.

129. Based upon the record before it, the Commission is faced with contradictory versions of Mr. Aitken's conditions of detention. The Commission must therefore determine which characterization of Mr. Aitken's 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. Aitken's personal situation in detention following his conviction, and have supported those details through evidence from Mr. Aitken. In response the State has submitted general affidavit evidence that does not specifically address Mr. Aitken's situation, but rather provides details concerning the general and specific circumstances of another death row inmate, Neville Lewis.

130. While it appears that Mr. Aitken 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, the State has not provided any evidence specifically rebutting or otherwise addressing Mr. Aitken's 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 the alleged victim's situation.

131. Weighing this information on the record, and in the absence of contradictory evidence from the State relating specifically to Mr. Aitken's treatment, the Commission accepts as established the Petitioners' allegations with respect to Mr. Aitken's post-conviction conditions of detention. According to Mr. Aitken, since his conviction in October 1997, his conditions have included the following:

- (a) he has been locked in cell on death row at St. Catherine District Prison for 23 ½ 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 which he is only entitled to empty once a day;
 - (d) his cell has inadequate ventilation and is therefore hot and uncomfortable;
 - (e) his cell has no electric light;
 - (f) despite numerous requests, he has not had access to a doctor or dentist since his conviction in October 1997;
 - (g) he is provided with inadequate food;
 - (h) he does not have access to an adequate mechanism for dealing with prisoner complaints.
- [FN48]

[FN48] Affidavit of Denton Aitken, sworn on March 17, 2000, paras. 10-17.

132. Mr. Aitken's 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. [FN49]

[FN49] 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

133. The Commission must next determine whether Mr. Aitken's 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. Aitken's detention conditions, when considered in light of the lengthy period of nearly four years for which he has been detained on death row, fail to satisfy the standards of humane treatment under Articles 5(1) and 5(2) of the Convention.

134. In reaching this conclusion, the Commission has evaluated Mr. Aitken's 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. [FN50] As in these previous cases, the record in the present case indicates that Mr. Aitken 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. Aitken 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 and Mr. Aitken contends that he was assaulted by police officers upon his arrest in July 1996. These observations, together with the length of time over which Mr. Aitken has been held in detention, indicate that Mr. Aitken's treatment has failed to meet the minimum standards under Articles 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 [FN51] and regardless of the level of development of a particular State Party to the Convention. [FN52]

[FN50] In its merits judgment in the Suarez 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., Suarez Rosero Case, Judgment, 12 November 1997, Annual Report 1997, at p. 283. See similarly McKenzie et al. Case, *supra*, paras. 270-291.

[FN51] 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.

[FN52] *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).

135. A comparison of Mr. Aitken's 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, [FN53] 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:

[FN53] 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. (Nº 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (Nº 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.

136. It is evident based upon the Petitioners' allegations that the State has failed to satisfy these minimum standards of proper treatment of prisoners. The cumulative impact of such conditions, together with the length of time for which Mr. Aitken 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. [FN54]

[FN54] 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.").

137. Consequently, the Commission finds that the conditions of detention to which Mr. Aitken 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 Mr. Aitken, in conjunction with the State's obligations under Article 1(1) of the Convention.

138. 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. Aitken's 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 for the purpose of this complaint whether the method of execution employed in Jamaica constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention. The Commission nevertheless reserves its competence to determine in an appropriate case in the future whether hanging is a particularly cruel, inhuman or degrading punishment or treatment in comparison with other methods of execution.

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

139. The Petitioners have alleged that the State is responsible for violations of Article 8 of the Convention in respect of Mr. Aitken, based upon the adequacy of legal representation provided to him at trial.

140. In particular, the Petitioners allege that according to Mr. Aitken it was very difficult for him to give instructions to his lawyer because the only conferences that he had with his attorney were at Court during the conduct of his trial. The Petitioners also claim that they wrote to Mr. Aitken's trial attorney on numerous occasions requesting information about the preparation of Mr. Aitken's defense, but that as of the date of their petition the attorney had not replied.

141. In response, the State contends that it is not responsible for any alleged violations in this regard, because according to the jurisprudence of the UN Human Rights Committee a state cannot be held responsible for any alleged deficiencies in the defense of the accused or alleged errors committed by the defense lawyer unless it was manifest to the trial judge that the lawyer's behavior was incompatible with the interests of justice.

142. In addressing this issue, the Commission notes that according to Article 8(2)(d) of the Convention, every person accused of a criminal offense has the right to defend himself personally or to be assisted by legal counsel of his own choosing. Article 8(2)(e) of the Convention provides every such person the inalienable right to be assisted by counsel provided by the State, paid or not paid as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time limit established by law. Strict compliance with these and other guarantees of due process are particularly fundamental in the context of trials involving capital offenses. The Commission also considers that these rights apply to all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, leading to his committal for trial, and at all stages of the trial itself. In order for these rights to be effective, a defendant must be provided with an opportunity to retain counsel as soon as reasonably practicable following their arrest or detention. The State's obligations in this regard involve not only making legal aid available, but facilitating reasonable opportunities for the defendant to contact and consult with his or her counsel. [FN55]

[FN55] See McKenzie et al. Case, *supra*, paras. 304-305.

143. After carefully considering Mr. Aitken's claims relating to the effectiveness of the representation by his trial counsel, the Commission does not find that the Petitioners have adequately substantiated these allegations. The information available does not suggest, for example, that Mr. Aitken made it known to State officials prior to or during his trial that he considered his legal representation to be inadequate, or that the conduct of Mr. Aitken's attorney was sufficiently ineffective that it would have been clear or should have been manifest to the trial judge that the behavior of Mr. Aitken's attorney was incompatible with the interests of justice. [FN56] Based upon these considerations, the Commission does not find violations of Articles 4 or 8 of the Convention in respect of this aspect of Mr. Aitken's petition.

[FN56] See similarly Eur. Court H.R., *Kamasinski v. Austria*, 19 December 1989, Series A N° 168, para. 65; UNHRC, *Young v. Jamaica*, Communication N° 615/1995 (1997). See also *McKenzie et al. Case*, *supra*, para. 301, 302; *Lamey et al. Case*, *supra*, para. 216, 217.

6. Articles 8, 24 and 25 of the Convention – Denial of Access to Constitutional Motions

144. The Petitioners argue that Mr. Aitken does not have the financial means to pursue a Constitutional Motion in respect of violations of his rights under the Jamaican Constitution and that legal aid is not effectively available for Constitutional Motions before the courts in Jamaica,

and therefore that Mr. Aitken has been denied recourse to domestic protection against acts that violate his fundamental rights contrary to Articles 24 and Article 25 of the Convention. These provisions read as follows:

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

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

(2) The States Parties undertake:

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

145. More particularly, as noted previously, the Petitioners have claimed that Constitutional Motions before the domestic courts in Jamaica often involve sophisticated and complex questions of law which require the assistance of counsel. The Petitioners also claim that Mr. Aitken is indigent, and the State does not provide legal aid to pursue Constitutional Motions in Jamaica. As a consequence, the Petitioners allege that the State's failure to provide legal aid in order to present Constitutional Motions constitutes a denial of Mr. Aitken's access to the court and to effective remedies, in fact as well as in law.

146. In its response to this contention, the State argues that Article 24 and 25 of the Convention do not place an obligation on State Parties to provide legal aid for Constitutional Motions. Rather, the State argues that Article 8(2)(e) of the Convention only places an obligation on State Parties to provide legal aid for criminal proceedings, and as a Constitutional Motion is not a criminal proceeding, the State denies that there has been a breach of the Convention.

147. In light of the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by Mr. Aitken in his proceeding before the Commission such as the mandatory nature of his death sentence and his right to due process are procedurally and substantively complex and cannot be effectively raised or presented by a victim in the absence of legal representation. The Commission also finds, in the absence of evidence to the contrary, that Mr. Aitken lacks the financial means to bring a Constitutional Motion on his own, and, based upon the observations of both the Petitioners and the State, that Jamaica does not provide legal aid to individuals in Jamaica to bring such motions.

148. Based upon these submissions and the Commission's existing jurisprudence, the Commission considers that the State is subject to an obligation under the American Convention to provide individuals with effective access to Constitutional Motions, which may in certain circumstances require the provision of legal assistance. In particular, the Commission considers

that a Constitutional Motion in the Supreme Court of Jamaica must, as a proceeding for the determination of an individual's rights, conform with the requirements of a fair hearing in accordance with Article 8(1) of the Convention. Moreover, in the circumstances of the present case where the Supreme Court would be called upon to determine Mr. Aitken's rights in the context of his trial, conviction and sentencing for a criminal offense, the Commission considers that the requirements of a fair hearing mandated by Article 8(1) of the Convention should be interpreted in a manner consistent with the principles in Article 8(2) of the Convention, including the right under Article 8(2)(e) to the effective assistance of counsel. [FN57] Accordingly, when a convicted person seeking constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State. In the present case, the effective unavailability of legal aid has denied Mr. Aitken the opportunity to challenge the circumstances of his criminal conviction under the Constitution of Jamaica in a fair hearing, and therefore has contravened his right to a fair hearing under Article 8(1). [FN58]

[FN57] See I/A Court H.R., Constitutional Court Case, Judgment of January 31, 2001, Ser. C No. 7, paras. 69, 70 (finding that the minimum guarantees established under Article 8(2) of the Convention are not limited to judicial proceedings in a strict sense, but also apply to proceedings involving the determination of rights and obligations of a civil, labor, fiscal or other nature.). See also I/A Comm. H.R., *Loren Laroye Riebe Star and others v. Mexico*, Report N° 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

[FN58] See similarly *Currie v. Jamaica*, *supra*, para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

149. Moreover, Article 25 of the Convention provides individuals with the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his or her fundamental rights recognized by the constitution or laws of the State concerned or by the Convention. The Commission has stated that the right to recourse under Article 25, when read together with the obligation under Article 1(1) and the provisions of Article 8(1), "must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation." [FN59] In addition, the Inter-American Court has held that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized, and a person is unable to obtain such services because of his indigence, then that person is exempted from the requirement under the

Convention to exhaust domestic remedies. [FN60] While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article 25 of the Convention in the circumstances of the present cases.

[FN59] See Case N° 10.970 (Mejia v. Peru), Annual Report of the IACHR 1995, pp. 190-191.

[FN60] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 30.

150. By failing to make legal aid available to Mr. Aitken to pursue a Constitutional Motion in relation to his criminal proceedings, the State has effectively barred his recourse to a competent court or tribunal in Jamaica for protection against acts that potentially violate his fundamental rights under the Constitution of Jamaica and under the Convention. As a consequence, the State has failed to fulfill its obligations under Article 25 of the Convention in respect of Mr. Aitken.

151. Accordingly, the Commission concludes that the State has failed to respect Mr. Aitken's rights under Article 8(1) of the Convention by denying him an opportunity to challenge the circumstances of his trial, conviction and sentencing under the Constitution of Jamaica in a fair hearing. The Commission also concludes under the present circumstances that the State has failed to provide Mr. Aitken with simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by the Convention, and has therefore violated his rights to judicial protection under Article 25 of the Convention.

152. In light of the above conclusions, the Commission does not consider it necessary to determine whether the State is responsible for a violation of Article 24 of the Convention in relation to Mr. Aitken's denial of recourse to a Constitutional Motion in Jamaica.

V. PROCEEDINGS SUBSEQUENT TO REPORT 117/01

153. The Commission examined this case in the course of its 113th regular session and on October 15, 2001 adopted Report N° 117/01 pursuant to Article 50 of the American Convention.

154. On October 25, 2001, the Commission transmitted Report N° 117/01 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.

155. As of December 25, 2001, the date of expiration of the prescribed two-month period, the Commission had not received a response from the State to Report N° 117/01.

156. Of pertinence to the issues raised in the present case, on June 21, 2002 the Inter-American Court of Human Rights issued its judgment in the Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. [FN61] In its judgment, the Court found, inter alia, that

the mandatory death penalty under Trinidad and Tobago's Offenses Against the Person Act of 1925 violated the victims' right to life under Articles 4(1) and 4(2) in conjunction with Article 1(1) of the Convention, because it "automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness," and "prevents a judge from considering the basic circumstances in establishing the degree of culpability and individualizing the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different." [FN62]

[FN61] I/A Court H.R., Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment of June 21, 2002, available at <http://www.corteidh.or.cr/T_y_t/Serie_c_94_ing.doc>.
[FN62] Id., para. 103.

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° 117/01, ratifies its conclusions that:

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

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

159. The State is responsible for violating Articles 5(1) and 5(2) of the Convention in respect of Mr. Aitken, in conjunction with violations of Article 1(1) of the Convention, by reason of his conditions of detention.

160. The State is responsible for violating Articles 8(1) and 25 of the Convention in respect of Mr. Aitken, in conjunction with violations of Article 1(1) of the Convention, by reason of the denial to Mr. Aitken of recourse to a Constitutional Motion for the determination of his rights under domestic law and the Convention in connection with the criminal proceedings against him.

161. The State is not responsible for violations of Articles 4 or 8 of the Convention in connection with the adequacy of his legal representation at 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. Aitken an effective remedy which includes commutation of sentence and compensation;
2. Adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed in 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. Aitken is held comply with the standards of humane treatment mandated by Article 5 of the Convention;
5. Adopt such legislative or other measures as may be necessary to ensure that the right to a fair hearing under Article 8(1) of the Convention and the right to judicial protection under Article 25 of the Convention are given effect in Jamaica in relation to recourse to Constitutional Motions in accordance with the Commission's analysis in this report.

VIII. PUBLICATION

162. On March 18, 2002, the Commission transmitted the content of this report, adopted as Report N° 31/02 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.

163. Based upon the foregoing considerations, and in the absence of a response by the State to Report N° 31/02, the Commission in conformity with Article 51(3) of the American Convention and Article 48 of its Regulations decides to ratify the conclusions and reiterate the recommendations in this Report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the State of Jamaica with respect to the above recommendations until they have been complied with by Jamaica.

Done and signed in the city of Washington, D.C., U.S.A., on the 21st day of the month of October 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vicepresident; José Zalaquett, Second Vicepresident; Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts and Susana Villarán, Commissioners.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO [FN63]

[FN63] When the preliminary merits report in this matter was approved pursuant to Article 50 of the Convention, the Commission's composition included Prof. Hélio Bicudo, who at that time adopted a separate opinion. Accordingly, Prof. Bicudo's separate opinion has been included with

the final report in this case approved under Article 51 of the Convention, even though Prof. Bicudo's term as a Commission Member expired on December 31, 2001.

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, reaffirms 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. [FN64]

[FN64] 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 No. 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 Belem do Para, 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 Belem do Para 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. [FN65]

[FN65] 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 the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

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 Hector Faundez Ledesma writes on this topic: “ as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance,

and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual.”

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 Protección 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 the virtue of the laws of any State Party”. In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987)

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

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 on Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that "in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that " no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it." (par. 134)

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 Cancado 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. (Cancado 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 Inter-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 and signed by the Inter-American Commission on Human Rights, in the city of Washington, D.C., October 15, 2001. (Signed): Hélio Bicudo.