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Title/Style of Cause: Whitley Myrie v. Jamaica
Doc. Type: Decision
Decided by: President: Juan Mendez;
First Vice-President: Marta Altolaguirre;
Second Vice-President: Jose Zalaquett;
Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare Roberts,
Susana Villaran.
Dated: 20 February 2003
Citation: Myrie v. Jamaica, Petition 729/2001, Inter-Am. C.H.R., Report No. 7/03,
OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by: APPLICANT: Ashurst, Morris, Crisp (a firm of Solicitors)
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I. SUMMARY

1. On October 22, 2001, the Inter-American Commission on Human Rights (the “Commission”) received a petition from Ashurst, Morris, Crisp, a firm of Solicitors in London, United Kingdom (the “Petitioners”) against the Government of Jamaica (the “State” or “Jamaica”). The petition was presented on behalf of Mr. Whitley Myrie, who is serving a life sentence in St. Catherine’s District Prison, Jamaica. The petition stated that on October 2, 1991, Mr. Myrie was convicted of capital murder by the St. James Circuit Court in Kingston, Jamaica and sentenced to death, and that the Court of Appeal of Jamaica subsequently classified the murder as non-capital and reduced his sentence from death to life imprisonment with a minimum term to serve without parole of 15 years.

2. In their petition, the Petitioners have alleged that the State violated Mr. Myrie’s rights under Articles 1, 4, 5, 8, 12, 24 and 25 of the American Convention on Human Rights (the “Convention”) and Articles I, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (the “American Declaration”) because of his conditions of detention during the course of his criminal proceedings, the failure of the State to protect against irregularities in Mr. Myrie’s trial, and the failure to make legal aid effective available to pursue a Constitutional Motion in the domestic courts in connection with his criminal proceedings. The State contends that the petition is inadmissible because Mr. Myrie has failed to exhaust domestic remedies in accordance with Article 46(1)(a) of the Convention by way of a Constitutional Motion before the domestic courts in Jamaica.

3. As set forth in this Report, having examined the contentions of the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to admit the claims in the present petition with respect to Articles 1, 2, 5, 8, 24 and 25 of the American Convention, and continue with the analysis of the merits of the case.

II. PROCEEDINGS BEFORE THE COMMISSION

4. Following receipt of the Petitioners' complaint, which was designated as petition 729/2001, the Commission decided to transmit the pertinent parts of the petition to the Government of Jamaica by means of a note dated November 12, 2001, with a request for the State's observations within a period of two months in accordance with Article 30(3) of the Commission's Rules of Procedure. Also by note dated November 12, 2001, the Commission informed the Petitioners that the pertinent parts of their petition had been transmitted to the State.

5. By note dated January 11, 2002 and received by the Commission on January 15, 2002, Jamaica acknowledged receipt of the Commission's November 12, 2001 communication and requested a one-month extension within which to deliver its observations in the matter, which the Commission granted in a note to the State dated January 15, 2002.

6. In a subsequent communication dated February 25, 2002 and received by the Commission on February 26, 2002, Jamaica delivered its response to the Petitioners' petition, which the Commission transmitted to the Petitioners by note dated February 27, 2002 with a response requested within 30 days.

7. By letter dated March 28, 2002 and received by the Commission on the same date, the Petitioners delivered a reply to the State's February 25, 2002 observations on their petition. The Commission transmitted the pertinent parts of the Petitioners' reply to the State by note dated April 2, 2002, with a request for a response within 30 days.

8. In a note to the Commission dated April 26, 2002, the State requested an extension of time within which to deliver its response to the Petitioners' March 28, 2002 reply. By letter dated April 29, 2002, the Commission granted the State an extension of time of 30 days within which to deliver its observations.

9. In a communication dated May 28, 2002 and received by the Commission on June 10, 2002, the State delivered a response to the Petitioners' March 28, 2002 reply, which the Commission transmitted to the Petitioners for their information by note dated June 17, 2002.

10. The Petitioners, in a letter dated August 29, 2002, provided the Commission with observations on the State's note of May 28, 2002. In the same communication, the Petitioners requested a hearing before the Commission during its next period of sessions pursuant to Articles 59 to 62 of the Commission's Rules of Procedure.

11. By notes dated September 16, 2002, the Commission informed the Petitioners and the State that it had decided to convene a hearing on the admissibility of the petition, to be held on October 17, 2002 during the Commission's 116th regular period of sessions. In a subsequent

communication dated October 2, 2002, the State requested a postponement of the hearing due to the fact that the country's parliamentary elections had been scheduled for October 16, 2002 and that the Solicitor General/Attorney General's Chamber, as the legal representative of the Electoral Office before the Electoral Court, would be fully engaged in these responsibilities during that period.

12. In a communication dated October 4, 2002 the Commission informed the State that, while it appreciated the circumstances underlying the State's request for a postponement, the Petitioners had informed the Commission that they had finalized their arrangements for attending the hearing and would not be able to cancel their plans without incurring lost expenses, and that in light of this circumstance, as well as the fact that the Commission's next regular period of session would not take place until the spring of 2003, the Commission had decided to proceed with the hearing on October 1, 2002. The Commission also informed the State that in order to ensure that Jamaica had an opportunity to present its views to the Commission on the issues for the hearing, the government was invited to submit to the Commission, if possible prior to the October 17, 2002 hearing, written information as to the admissibility of the complaint, including information pertaining to the allegations contained in the Petitioners' August 29, 2002 written request for a hearing in the matter.

13. By note dated October 16, 2002 and received by the Commission on the same date, the State provided further observations on the admissibility of the Petitioners' claims, which the Commission subsequently provided to the Petitioners at the October 17, 2002 hearing before the Commission.

14. The October 17, 2002 hearing proceeded as scheduled, with the representatives of the Petitioners and an official with the Permanent Observer Mission of Jamaica to the Organization of American States in attendance. The Petitioners provided the Commission with oral and written representations concerning the admissibility of the complaints in their petition and responded to questions posed by the Commission Members in attendance at the hearing. The Commission Members also posed questions to the State of Jamaica, which the State's representative undertook to transmit to the appropriate authorities for a response within a reasonable period of time following the hearing.

15. By note dated November 4, 2002 and received by the Commission on the same date, the State delivered written responses to the questions posed by the Commission to the State during the October 17, 2002 hearing. The Commission transmitted the State's responses to the Petitioners by communication dated November 8, 2002, with a request for a response within 30 days.

16. In a letter dated December 19, 2002, the Petitioners delivered observations on the State's communication of November 4, 2002, the pertinent parts of which the Commission transmitted to the State by note dated January 3, 2003 with a request for observations within 30 days.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

17. The Petitioners claim that the St. James Circuit Court in Kingston convicted Mr. Myrie of the capital murder of Dennis Grubb on October 2, 1991 and sentenced him to death. The Court of Appeal of Jamaica refused his application for leave respecting his conviction for murder on January 11, 1993 but classified his offense as non-capital murder and reduced his sentence from death to life imprisonment with a minimum term to serve before parole of 15 years. Subsequently, Mr. Myrie's application for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed on April 24, 2001.

18. The Petitioners further argue that although Mr. Myrie has not pursued a Constitutional Motion before the courts in Jamaica pursuant to Section 25 of the Constitution of Jamaica, this is not a remedy that is available to him within the meaning of Article 46(1)(a) of the American Convention. In particular, the Petitioners claim that constitutional redress under Section 25 of the Constitution is effectively denied to Mr. Myrie due to the high cost and procedural complexity of instituting such a motion. They also claim that the legal costs involved in seeking constitutional redress are well beyond Mr. Myrie's means, that he does not have the resources to secure private representation for this purpose, and that legal aid is not provided for such motions. Citing jurisprudence from this Commission and from the Inter-American Court of Human Rights, the Petitioners argue that where, as a matter of fact or law, a victim is denied access to the remedies under domestic law then the requirement that the victim exhaust domestic remedies is excused.[FN1]

[FN1] Petition dated October 22, 2001, paras. 5.2-5.9, citing, inter alia, I/A Court H.R., Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Ser. A N° 11 (1990), para. 17; Case 12.042, Report N° 38/99, Mervyn Edmund v. Trinidad and Tobago, Annual Report of the IACHR 1999.

19. In this context, the Petitioners contend that the infrequent granting of legal aid for Constitutional Motions, combined with Mr. Myrie's status as an indigent and the very few pro bono lawyers in Jamaica, render Mr. Myrie unable to exhaust domestic remedies.

20. Also in connection with the exhaustion of domestic remedies requirement, the Petitioners provided extensive submissions concerning the State's reliance on the Public Defender (Interim) Act 1999 of Jamaica (the "Act"). In particular, the Petitioners dispute the State's contention that all constitutional remedies are effectively available to Mr. Myrie by virtue of this legislation which, according to the State, authorizes the Public Defender to receive complaints from any person who claims that his or her constitutional rights have been, are being or are likely to be infringed as a result of an action by an authority or a member thereof, to provide them with ready access to professional advice and, where necessary, legal representation, and to investigate that complaint. The Petitioners claim that as a matter of fact and law, the Act does not constitute or provide an effective remedy.

21. First, the Petitioners argue that as a matter of law, the terms of the Public Defender (Interim) Act 1999 fail to provide access to a remedy in respect of the claims raised before the Commission. According to the Petitioners, Section 13(2)(b)(i) of the Act precludes the Public Defender from investigating Mr. Myrie's complaints of an unfair trial because it prohibits the Public Defender from investigating "the commencement or conduct of civil or criminal proceedings in any court of law in Jamaica." The Petitioners state that this is consistent with the common law approach which generally discourages collateral attacks on final decisions in litigation, and indeed dispute the State's suggestion that a Constitutional Motion itself might be used as a method of attacking a criminal conviction.[FN2] Similarly, the Petitioners claim that Mr. Myrie's complaints regarding his prison conditions appear to fall outside of the legislation because they relate to "inaction" on the part of a public authority, and not "action" as referred to Section 13(1)(a)(ii) of the Act. The Petitioners add in this regard that the large number of reports over the years concerning prison conditions in Jamaica call into question the extent to which the Public Defender could effectively remedy Mr. Myrie's complaints concerning his conditions of detention.

[FN2] Petitioners' observations of December 19, 2002, citing *Hinds v. Attorney-General of Barbados* [2002] 2 W.L.R. 470, for the proposition that constitutional challenge cannot be used as a method of attacking a criminal conviction.

22. The Petitioners also challenge the legislation as an ineffective and unavailable remedy on the basis that the Public Defender has absolute discretion to decide whether to undertake or continue an investigation and whether or not to provide legal aid. In this regard, the Petitioners dispute the State's contention that the Public Defender does not have discretion in undertaking investigations or in providing legal aid, and refer in this regard to the terms of Section 15(2) of the Act which explicitly provides the Public Defender with "absolute" discretion in undertaking or continuing an investigation, the exercise of which is, according to the Petitioners, effectively unchallengeable before the courts in Jamaica.

23. Further, the Petitioners criticize the fact that the Act does not require Parliament to make funds available for the Public Defender to carry out his duties or that such funds be sufficient for this purpose. The Petitioners point out in this regard that the sections of Jamaica's Legal Aid Act 1997 dealing with constitutional motions have not yet been brought into force and that there is nothing to indicate that the Public Defender legislation will be any more effective. The Petitioners add that to the extent that the State asserts that the Public Defender acts as a facilitator of access to Constitutional Motions, his or her effectiveness will always necessarily be subject to the availability of sufficient funds in the form of legal aid for each and every person making a complaint for such remedies to be considered available as a matter of fact.

24. In addition to questioning the interpretation and effect of the terms of the Public Defender (Interim) Act 1999, the Petitioners contend that the burden rests on Jamaica to show that the remedy is available as a matter of fact, and claim that Jamaica has not provided adequate statistics to justify the assertion that the remedy under the Act is available in practice. According to the Petitioners, this would include information showing the number of complaints made to the

Public Defender, the number of investigations carried out by the Public Defender, the occasions on which legal aid has been granted, the amount of legal aid granted by the Public Defender, the amount of funds if any provided by Parliament for this purpose, the basis on which they have been provided, and the effectiveness of the recommendations suggested by the Public Defender and the success of their application.

25. In response to the statistical information provided by the State prior to and following the October 17, 2002 hearing in this matter, the Petitioners argue that the information is both ambiguous and incomplete. They claim, for example, that the State has failed to provide any information concerning the three complaints in respect of which the State claims legal aid has been provided between April 2000 and December 2002, and that in any event authorizing legal aid in 3 out of 1,776 complaints during this period of time cannot be considered an adequate percentage.

26. Finally, the Petitioners argue that despite the fact that the Public Defender is able to commence investigations on his own initiative, and notwithstanding that he has been made aware of the circumstances of Mr. Myrie's complaints, the Public Defender has not exercised his initiative to investigate the allegations in Mr. Myrie's case.

27. With regard to the six month requirement, the Petitioners argue that Mr. Myrie's application for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed on April 24, 2001 and therefore less than six months from the October 22, 2001 lodging of their petition with the Commission.

28. Further, the Petitioners assert that the subject matter of the petition is not pending in another international proceeding and has not previously been determined or examined by the Commission or any other international governmental organization of which Jamaica is a member.

29. With respect to the substance of their complaints against the State, the Petitioners raise three principal allegations. First, they allege that the State is responsible for violations of Mr. Myrie's right to humane treatment contrary to Articles 5(1), 5(2) and 5(4) of the Convention and Article XXV of the Declaration by reason of his conditions of detention while in custody at the Barnett Street police station, on remand at St. Catherine's District Prison, on death row at St. Catherine's District Prison following his conviction and, following his appeal, at the General Penitentiary and at St. Catherine's Prison where he is serving his life sentence. In support of their allegations, the Petitioners have provided particulars concerning the conditions of Mr. Myrie's detention at each of these institutions, in relation to such matters as the nature and quality of basic accommodations, hygiene, and medical treatment.

30. Second, the Petitioners contend that the State is responsible for violations of Mr. Myrie's right to a fair trial under Article 8 of the Convention and Article XXVI of the Declaration, by permitting Mr. Myrie's conviction to be based in part upon improperly obtained evidence, namely a confession that he was forced to sign under threat. The Petitioners also challenge as prejudicial the trial judge's decision to allow the jury to remain during a voir dire and contend that the trial judge erred in giving reasons in the presence of the jury for finding that there was no

case to answer against Mr. Myrie's co-defendants. Further, the Petitioners argue that the trial judge erred in allowing the trial to continue in the absence of Mr. Myrie's trial attorney and by failing to allow the character of the deceased to be examined, and also claim that Mr. Myrie's counsel was incompetent.

31. Finally, the Petitioners argue that the State is responsible for violations of Articles 24 and 25 of the American Convention and Articles II, XVII and XXVI of the Declaration by denying Mr. Myrie an effective remedy for the violations of the Constitution of Jamaica and of the Convention which Mr. Myrie is alleged to have suffered. The Petitioners rely in this regard on their previous contention that Mr. Myrie has no procedural opportunity to pursue a Constitutional Motion due to the procedural complexity of the legal issues, the costs of instituting such proceedings, and the fact that the State does not provide legal aid for such motions.

B. Position of the State

32. With respect to the admissibility of the Petitioners' petition, the State claims that Mr. Myrie has failed to exhaust domestic remedies in accordance with Article 46(1)(a) of the Convention, because he has not pursued a Constitutional Motion before the domestic courts in Jamaica. In particular, the State asserts that Section 25 of the Constitution of Jamaica permits persons to apply to the Supreme Court of Jamaica for redress and for the Supreme Court to hear and determine an application for the purpose of enforcing or securing the enforcement of protection of the rights and freedoms under the Constitution.

33. Further in this connection, the State advised the Commission that on August 16, 2000, the Public Defender (Interim) Act 1999 came into operation in Jamaica and that this legislation has provided Mr. Myrie with effective access to domestic remedies that he is obliged to exhaust before coming to the Commission. The State provided the Commission with a copy of this legislation, the pertinent parts of Sections 13, 14 and 15 of which read as follows:

13. (1) Subject to this section, the Public Defender shall investigate any action taken where he is of the opinion-

(a) that any person or body of persons –

(i) has sustained injustice as a result of any action taken by an authority or an officer or member of such authority, in the exercise of the administrative functions of that authority; or

(ii) has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority;

[. . .]

14. (1) A complaint to the Public Defender may be made by any person or body of persons, whether incorporated or not, who claims –

(a) to have sustained an injustice referred to in paragraph (a)(i) of subsection (1) of section 13;

- (b) to have suffered, to be suffering or to be likely to suffer an infringement referred to in paragraph (a)(ii) of that subsection; or
- (c) to have sustained an injustice referred to in paragraph (b) of that subsection,

but such complaint shall not be made by a local authority or a body constituted for the purposes of the public service or a local authority.

[. . .]

15. (1) An investigation pursuant to –

- (a) subsection (1)(a)(i) and (b), (3) and (4) of section 13 may be undertaken by the Public Defender on his own initiative or on a complaint made to him pursuant to section 14; or
- (b) subsection (1)(a)(ii) of section 13 may be undertaken by the Public Defender on a complaint made to him pursuant to section 14.

(2) The Public Defender may, in his absolute discretion, determine whether to undertake or continue an investigation and in particular, but without prejudice to the generality of the foregoing, may refuse to undertake or continue any investigation if he is of the opinion that –

- (a) the subject matter of the complaint is trivial;
- (b) the complaint is frivolous or vexatious or not made in good faith;
- (c) the complainant has deferred for too long in making his complaint to the Public Defender;
- (d) the complainant does not have sufficient interest in the subject matter of the complaint; or
- (e) having regard to all of the circumstances of the case, no investigation or further investigation is necessary.

(3) Where the Public Defender decides not to undertake or continue the investigation of a complaint, the Public Defender shall inform the complainant in writing of his decision and give reasons therefor.

(4) The Public Defender in the discharge of his functions, shall determine whether there is a prima facie case in respect of which the complainant can institute proceedings but shall not represent any complainant in any court or in any tribunal.

(5) The Public Defender shall ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation.

(6) For the purposes of subsection (5), the Public Defender shall –

- (a) determine whether the complainant is in need of legal aid;
- (b) authorize payment of such legal aid out of funds provided by Parliament to the Public Defender for that purpose;

- (c) compile a list of attorneys-at-law who, in his opinion, are experienced in constitutional matters; and
- (d) invite the complainant to select an attorney-at-law from the list or if no such selection is made, the Public Defender may recommend an attorney-at-law whose name is on that list.

34. The State claims that the Act creates a facility in the form of the Office of the Public Defender, through which a person who has suffered, is suffering or is likely to suffer an infringement of his or her constitutional rights may have the matter investigated pursuant to Sections 13 and 14 of the Act. The State alleges further that pursuant to Section 15 of the Act, the Public Defender may undertake an investigation on a complaint submitted to him pursuant to Section 14 and, according to Section 15(5), “[t]he Public Defender shall ensure that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation.” According to Section 15(6), for the purposes of Section 15(5), the Public Defender shall, inter alia, determine whether the complainant is in need of legal aid, and authorize payment of such legal aid out of funds provided by Parliament to the Public Defender for that purpose.

35. In support of its arguments, the State provided the Commission with an affidavit from Howard Hamilton, the Public Defender for Jamaica, sworn on February 22, 2002 which indicates, inter alia, that he was appointed Public Defender on April 14, 2000 and that he had not received a complaint or allegations from Mr. Whitley Myrie pursuant to Section 14 of the Public Defender (Interim) Act 1999. He also categorically denies that Mr. Myrie had been denied access through the Office of the Public Defender to remedies under domestic law or from exhausting them, and that pursuant to Section 13 of the Act he is able to begin a separate investigation into the allegations of Mr. Myrie “without delay upon a complaint being received by my Office regarding same.”

36. In response to the Petitioners’ contentions concerning the effectiveness of the Public Defender (Interim) Act as a domestic remedy, the State denies that Section 13(2)(b)(i) of the Act precludes the Public Defender from investigating Mr. Myrie’s complaints of an unfair trial. Rather, the State claims that Section 13(4) of the Act provides that the Public Defender shall not be precluded from conducting an investigation in respect of any matter by reason of the fact that it is open to the complainant to apply to court for redress under Section 25 of the Constitution. The State asserts that Section 20 of the Constitution of Jamaica guarantees the right to a fair hearing of persons charged with criminal offenses for persons who have instituted proceedings for the determination of the existence or extent of civil rights and obligations and therefore that Section 13(1)(a)(ii) of the Act provides the Public Defender with jurisdiction to investigate Mr. Myrie’s fair trial complaints.

37. Similarly, the State denies that the Public Defender cannot investigate allegations of inhumane treatment in relation to prison conditions. Rather, according to the State, the reference to the term “action” in Section 13(1)(a)(ii) includes both an act of commission and an act of omission.

38. Further, the State denies that the Public Defender’s discretion to investigate a complaint means that he is not under a positive obligation to investigate a complaint. Rather, the State

asserts that Sections 15(2) and 15(3) must be read in conjunction with Section 13(1)(a)(ii) of the Act and that the purpose of providing the Public Defender with absolute discretion under Section 15(2) is to preclude political interference. Also in this regard, the State denies that the provision of legal aid is in the sole discretion of the Public Defender. The State argues that according to Section 15(5) of the Public Defender (Interim) Act 1999, the Public Defender “shall ensure” that any person who alleges that his constitutional rights have been or are likely to be infringed is provided with ready access to professional advice and where necessary to legal representation, and that this provision must be read in conjunction with Section 15(6) of the Act, which expressly provides for the Public Defender to authorize the payment of legal aid where it has been determined that the complainant is in need thereof.

39. The State also denies that the Parliament in Jamaica is not obliged to make public funds available to the Public Defendant. Rather, Section 22(2) of the Public Defender (Interim) Act requires the Public Defender to submit to the Minister for approval an estimate of revenue and expenditure for the financial year.

40. With regard to the Petitioners’ allegations as to the proof of the availability in fact of the Public Defender as an effective remedy, the State denies that it has failed to provide evidence indicating that the Public Defender is an effective remedy. Rather, the State contends that “the Act is new and therefore if every victim refuses to pursue the remedies made available to them under this Act, there will consistently be no cases for the Public Defender to exercise the functions provided for under the Act.” Further, in its observations of October 16, 2002, the State provided the Commission with additional information concerning the implementation of the Act since April 2000 by way of an affidavit sworn on October 16, 2002 by Kenneth Angier, an attorney-at-law and Crown Counsel in the Jamaican Attorney General’s Chambers. The pertinent parts of Mr. Angier’s affidavit read as follows:

3. I am informed by Mr. Cory Mills the Deputy Public Defender and do verily believe that the procedure for handling complaints is as follows:

(a) All complaints received are entered numerically in a register. This assists in having a comprehensive knowledge of all files as it relates to their origin, nature of complaint, authority and how the complaint has been disposed of.

(b) On receipt of complaints for those requiring legal representation steps are taken to assist the complainant immediately by providing legal advice and representation as each case dictates.

4. I am further informed by Mr. Cory Mills, the Deputy Public Defender and do verily believe that Since [sic] April 2000 the Office of the Public Defender has received a total of One Thousand Seven Hundred and Seventy Six (1776) complaints from members of the public in general and inmates of our penal institutions in particular and that the Office has conducted ten investigations on our own volition.

5. I am further informed by Mr. Cory Mills, the Deputy Public Defender and do verily believe that the complaints received were disposed of as follows:

APRIL – DECEMBER 2000

GENERAL PUBLIC	390
Rejected	44
Referred	15
<i>Actively Investigated</i>	331
Of the amount actively investigated	
Justified	166
Discontinued	55
Not justified	53
Pending	57
PRISONERS	131
Rejected	6
Referred	2
<i>Actively Investigated</i>	123
Of the amount actively investigated	
Justified	75
Discontinued	16
Not justified	5
Pending	27

JANUARY– DECEMBER 2001

GENERAL PUBLIC	521
Rejected	53
Referred	28
<i>Actively Investigated</i>	40
Of the amount actively investigated	
Justified	128
Discontinued	62
Not justified	59
Pending	191
PRISONERS	186
Rejected	10
Referred	6
<i>Actively Investigated</i>	170
Of the amount actively investigated	
Justified	97
Discontinued	10
Not justified	13
Pending	50

JANUARY – DECEMBER 2002 **392**

GENERAL PUBLIC	
Rejected	57
Referred	16
<i>Actively Investigated</i>	319
Of the amount actively investigated	
Justified	47
Discontinued	24

Not justified	40
Pending	208
PRISONERS	156
Rejected	11
Referred	5
<i>Actively Investigated</i>	140
Of the amount actively investigated	
Justified	22
Discontinued	2
Not justified	8
Pending	108

Additionally:

- (a) Forty-six of the complaints received relate to constitutional rights and three have been, are being prepared or are currently in the process of being adjudicated by the Courts.
- (b) The financial cost of legal representation in court is borne by the Government. Since April 2000 approximately Six Hundred Thousand Dollars (\$600,000.00) has been paid out for legal services.
- (c) Where payments have had to be made they have been provided upon our request to the Ministry of Finance.
- (d) The budgetary estimate for the 2002/2003 fiscal year was \$25,642,000.00 and was based partly upon our request as well as the availability of funds for the purpose.

41. The State argues that the information in Mr. Augier's affidavit "clearly demonstrates" the effectiveness of this remedy, given the data relating to the disposition of complaints to the Public Defender. Further, in response to the questions posed by the Commission Members during the October 17, 2002 hearing in this matter, the State provided the following responses:

1. Does the Public Defender (Interim) Act have retroactive application, such that the Public Defender could investigate events that occurred prior to the coming into force of the Act?
Affirmative: The Public Defender can investigate events that occurred prior to the coming into operation of the Act.
2. Is it the State's position that the Public Defender himself constitutes an effective remedy for the purposes of the exhaustion of domestic remedies requirement, or that the Public Defender provides an avenue for accessing a domestic remedy, namely a Constitutional Motion?
The Latter: The Public Defender provides an avenue for accessing a domestic remedy, namely a Constitutional Motion.
3. Does the Public Defender (Interim) Act oblige the Public Defender in any circumstances to investigate a complaint or to authorize legal aid for a complainant to pursue a Constitutional Motion, and if so, in what manner and under what circumstances?
Affirmative: The Public Defender (Interim) Act obliges the Public Defender to investigate a complaint in accordance with Section 13 of the Act. The Public Defender is obliged to authorize legal aid for a complaint to pursue a Constitutional Motion in accordance with Section 15(5) of the Act and in accordance with the circumstances in Section 15(6) of the Act.

4. Does section 13(1)(a)(ii) of the Public Defender (Interim) Act provide the Public Defender with jurisdiction to investigate fair trial or due process violations alleged to have occurred in the course of a criminal trial?

Affirmative.

5. Could the State please confirm whether the figures provided in the State's observations of October 16, 2002 are accurate, in particular whether it is true, as indicated in the Affidavit of Kenneth Augier, that the Public Defender authorized legal aid in only 3 out of 1,776 complaints received by him since April 2000?

Affirmative: The figures indicated in the Affidavit of Kenneth Augier are accurate. Of the Forty-Six (46) complaints related to constitutional rights, received by the Public Defender, three (3) complaints have received authorized legal aid to proceed. Of the 1,776 complaints received by the Public Defender, only 46 related to constitutional rights.

6. Has Mr. Myrie's complaint been submitted to any other proceeding for settlement before an intergovernmental organization of which Jamaica is a member?

Negative.

7. Is it possible for an individual to bring a Constitutional Motion after a criminal trial has been completed that alleges violations of the right to due process and to a fair trial during that trial, or must a defendant bring a Constitutional Motion of this nature before the presiding judge during the course of the trial in question?

Affirmative: The general rule is for the court to deal with the issues there and then or on appeal. Nevertheless, there are cases where these issues do not come until after the trial. The Supreme Court does have the jurisdiction to hear such matters after the trial is completed. However the exercise of that jurisdiction will depend on the circumstances why the individual did not raise the issue before the trial judge or the Court of Appeal. If the breach was unforeseen, then the courts will readily exercise their jurisdiction under Section 25 of the Constitution. If foreseen, the Court will be reluctant in those circumstances, dependent on the gravity of the breach.

42. Finally, the State contends that Mr. Myrie has failed to make a complaint to the Public Defender, that the Public Defender cannot act if he has no complaint from an alleged victim under Section 14 of the Act, and therefore that the effectiveness of the remedy in Mr. Myrie's case cannot be determined.

IV. ANALYSIS

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

43. The Commission is competent to examine the petition in question. Under Article 44 of the Convention and Article 23 of the Rules of Procedure of the Commission, the Petitioners are authorized to file complaints alleging violations of rights protected under the American Convention. The alleged victim, Whitley Myrie, is a person whose rights were protected under the Convention, the provisions of which the State had undertaken to respect. Jamaica has been subject to the jurisdiction of the Commission, under the terms of the Convention since August 7, 1978, the date on which it deposited its instrument of ratification.

44. Inasmuch as the Petitioners have filed complaints alleging violations of Articles 4, 5, 8, 12, 24, 25 and 1(1) of the American Convention, the Commission is competent *ratione materiae* to examine the complaint.

45. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred on and after the date when Jamaica ratified the American Convention. Also for this reason, the Commission considers that the Convention, and not the American Declaration, is the governing instrument in respect of this complaint.

46. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the alleged victim was under the jurisdiction of the State of Jamaica at the time the alleged events occurred, which reportedly took place within the territory of that State.

B. Admissibility of petition

1. Duplication of Procedures

47. According to both the Petitioners and the State, the matters complained of in this petition have not previously been submitted for examination or settlement by the Commission or any other intergovernmental organization of which Jamaica is a member. The Commission therefore finds no bar to the admissibility of the petition under Article 46(1)(c) or 47(d) of the Convention.

2. Exhaustion of Domestic Remedies

48. Article 46(1)(a) of the Convention specifies that, in order for a case to be admitted, “remedies under domestic law [must] have been pursued and exhausted in accordance with generally accepted principles of international law.” When domestic remedies are unavailable as a matter of fact or law, however, the requirement that they be exhausted may be excused. Article 46(2) of the Convention specifies that this exception applies if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated, if the party alleging the violation has been hindered in his or her access to domestic remedies, or if there has been an unwarranted delay in the issuance of a final judgment.

49. Further, when the petitioner alleges that he or she is unable to prove exhaustion, Article 31(3) of the Commission’s Rules of Procedure provides that the burden then shifts to the State to demonstrate that the remedies under domestic law have not previously been exhausted unless it is otherwise evident from the record.[FN3]

[FN3] See also I/A Court H.R., Velásquez Rodríguez Case, Merits, Judgment of July 29, 1988, Ser. C N° 4, para. 59.

50. In the present case, the Petitioners have alleged that Mr. Myrie has exhausted the rights of appeal available to him under Jamaican law. They have also acknowledged that he has not pursued a Constitutional Motion pursuant to Article 25 of the Constitution of Jamaica, but argue

that he has been precluded from doing so because he requires the assistance of an attorney but cannot afford to retain one, and legal aid is not effectively available from the Jamaican state to pursue such remedies, either directly through the Legal Aid Act, or indirectly through the Office of the Public Defender.

51. For its part, the State has not contested the Petitioners' contention that a Constitutional Motion relating to the issues raised before the Commission would require legal representation in order to be effectively pursued and that the Mr. Myrie is indigent and is not therefore not able to retain legal assistance with his own resources. The State has nevertheless argued that Mr. Myrie's claims are inadmissible because Mr. Myrie has failed to lodge a complaint with the Office of the Public Defender in Jamaica. In this regard, the State claims that the Public Defender provides an effective remedy respecting complaints such as those raised by Mr. Myrie by facilitating access to Constitutional Motions before the Supreme Court of Jamaica under Section 25 of the Constitution of Jamaica. According to the State, any person whose rights have been, are being or are likely to be violated may file a complaint with the Public Defender. Also according to the State, the Public Defender is obliged to investigate any such complaint and, in relation to complaints which allege violations of constitutional rights, is obliged to provide such complainants with legal aid to pursue a Constitutional Motion in accordance with Section 15(5) of the Act and the circumstances in Section 15(6) of the Act. The State therefore contends that a complaint to the Public Prosecutor provides an avenue to an effective remedy that Mr. Myrie is obliged to pursue before coming to the Commission.

52. In light of the parties' positions, the central issue before the Commission is whether a petition to the Public Defender provides a domestic remedy that Mr. Myrie is required to pursue and exhaust in accordance with generally recognized principles of international law or whether it can be said, as the Petitioners have argued, the Mr. Myrie has been denied access to the remedies under domestic law or has been prevented from exhausting them.

53. In addressing this issue, the Commission recalls that in order for a petitioner to be required to exhaust a particular remedy in accordance with Article 46 of the Convention and generally recognized principles of international law, that remedy must be both available and effective as a matter of law and as a matter of fact. As the Inter-American Court of Human Rights has specifically recognized, if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies.[FN4] As there is no debate in the present proceeding concerning the necessity of legal assistance to pursue Constitutional Motions in respect of the matters raised before the Commission or as to Mr. Myrie's indigency, the Commission must determine whether the State has met the burden of establishing that the Public Defender (Interim) Act 1999 nevertheless provides Mr. Myrie with access to effective relief before the Jamaican courts.

[FN4] OC-11/90, supra, para. 30.

54. At the outset, the Commission wishes to commend the State of Jamaica for enacting the Public Defender (Interim) Act 1999 as a significant step forward in facilitating access by victims of human rights violations to a mechanism of investigation. The institution of the public defender constitutes an entrenched component of the justice systems in many of the countries of the Hemisphere and, in the Commission's view, often plays a vital role in defending human rights and ensuring accountability on the part of public authorities.

55. After evaluating the observations and information provided by the parties in this matter, however, the Commission is not satisfied that the Public Defender (Interim) Act 1999 has been shown to render domestic remedies effectively available to indigent individuals such as Mr. Myrie.

56. The Commission's decision in this regard is based upon two characteristics of the Public Defender regime in particular. First, despite the State's submissions on the point, the Commission must conclude on the information available that the Public Defender has a considerable degree of discretion in determining whether to grant a complainant legal aid to pursue a Constitutional Motion. This conclusion is borne out by the terms of the Act itself, Section 15(2) of which provide the Public Defender with "absolute discretion" to determine whether to undertake or continue an investigation, and Section 15(4) of which requires the Public Defender to determine whether there is a prima facie case in respect of which a complainant could institute proceedings. A logical reading of these provisions subjects a complainant's request for legal assistance to two discretionary decisions by the Public Defender, whether the complaint should be investigated and, if so, whether the complainant has made out a prima facie case to warrant the institution of proceedings.

57. That the Public Defender's decision on the granting of legal aid is discretionary is also illustrated by the statistics provided by the State itself, which indicate that of 1,776 complaints filed by the general public and prisoners between April 2000 and December 2002, 46 concerned constitutional rights, and that legal aid was authorized in only 3 of those 46 cases. Not only do these statistics suggest the existence of a discretion on the part of the Public Defender to undertake or continue investigations into complaints and to grant or deny legal aid to those complaints that raise issues of constitutional rights, they also illustrate that legal aid is in fact authorized in a very small number of the constitutional complaints brought to the Public Defender. The fact that legal proceedings have been authorized in only 3 out of 46 constitutional complaints that were lodged with the Public Defender, without more, suggests that the Public Defender's discretion is not being exercised in a manner that renders Constitutional Motions effectively available in fact to those who claim to be the victims of violations of their constitutional rights and freedoms. While this does not mean that a reasonable discretion might not properly be exercised in granting or denying legal aid assistance based, for example, on the financial situation of the applicant or the frivolous nature of a given complaint, it cannot be exercised in such a manner as to render access to Constitutional Motions illusory.

58. Based upon these findings, the Commission considers that where, as in the present case, legal assistance is required to pursue a Constitutional Motion before the courts in Jamaica, this remedy has not been shown in the circumstances of this matter to be effectively available to indigent complainants such as Mr. Myrie, through the Office of the Legal Defender or otherwise.

59. Based upon the information presented, the Commission finds that Mr. Myrie has been denied access to the remedies under domestic law or has been prevented from exhausting them, and consequently the requirement of exhaustion of domestic remedies does not apply to his complaints pursuant to Article 46(2) of the Convention.

3. Timeliness of the Petition

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

61. As in the case of exhaustion of domestic remedies, however, Article 46(2)(a) of the Convention provides that the six month period under Article 46(1)(b) of the Convention shall not be applicable when "the party alleging violation of his rights has been denied access to the remedies or has been prevented from exhausting them."

62. Given the Commission's finding that that Mr. Myrie is exempt from pursuing a Constitutional Motion in respect of the rights alleged to have been violated in the Petitioners' petition, the six month period does not apply to the Petitioners' petition. The State has not contested the issue of the six-month period, and the Commission is satisfied in the circumstances of the matter that the petition was filed within a reasonable time. The Commission therefore finds no bar to the admissibility of the petition under Article 46(1)(b) of the Convention.

4. Colorable Claim

63. Articles 47(b) and 47(c) of the Convention require the Commission to consider a petition to be inadmissible if the petition does not state facts that tend to establish a violation of the rights guaranteed by the Convention, or if the statements of the petitioner or of the state indicate that the petition is manifestly groundless or obviously out of order.

64. The Petitioners allege that the State has violated Mr. Myrie's rights under Articles 1, 4, 5, 8, 12, 24 and 25 of the Convention, while the State provided no observations concerning the substance of the Petitioners' allegations. The Petitioners have provided specific factual contentions, particularized in Part III.A of this Report, that, if true, tend in the Commission's view to establish violations of certain provisions of the Convention, namely Articles 1, 5, 8, 24 and 25. At the same time, the Commission is not satisfied that the Petitioners have alleged facts that, if true, would tend to establish violations of Articles 4 or 12 of the Convention.

65. In addition, the Commission considers that the facts alleged by the Petitioners, if true, may also disclose a violation of Article 2 of the Convention, to the extent that the alleged absence in Jamaica of an effective remedy for violations of the human rights protected under Jamaican domestic law and the American Convention may establish a violation of the State's obligation to give domestic legal effect to the rights and freedoms under the Convention. Although the Petitioners have not alleged a violation of Article 2 in their petition, the Commission may on its own motion identify a potential infringement of this provision for the

purposes of the proceeding before it, based upon the well-established principle *iura novit curia*.^[FN5]

[FN5] See similarly I/A Court, Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment of June 21, 2002, Ser. C N° 94, para. 152.

66. Based upon the information on the record, and without prejudging the merits of the matter, the Commission finds that the Petitioners' petition contains factual allegations that, if proved, tend to establish violations of the rights guaranteed by Articles 1, 2, 5, 8, 24 and 25 of the Convention. Consequently, the petition is not barred as inadmissible under Articles 47(b) or 47(c) of the Convention, with the exception of the claims under Articles 4 and 12 of the Convention.

V. CONCLUSIONS

67. The Commission concludes that it has the competence to examine this case, and that the petition is admissible in accordance with Articles 46 and 47 of the Convention.

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

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to Articles 1, 2, 5, 8, 24 and 25 of the Convention.
2. To declare the present case inadmissible with respect to Articles 4 and 12 of the American Convention.
3. To transmit this Report to the Parties.
4. To continue with the analysis of the merits of the case.
5. To publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C. on the twentieth day of the month of February, 2003. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Robert K. Goldman, Julio Prado Vallejo, Clare Roberts and Susana Villarán, Commissioners.