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Title/Style of Cause:	Whitley Myrie v. Jamaica
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Decided by:	First Vice-President: Clare K. Roberts; Second Vice-President: Susana Villaran; Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo, Florentin Melendez
Dated:	12 October 2004
Citation:	Myrie v. Jamaica, Case 12.417, Inter-Am. C.H.R., Report No. 41/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by:	APPLICANT: a firm of Solicitors "Ashurst, Morris, Crisp"
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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”) 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 available to pursue a Constitutional Motion in the domestic courts in connection with his criminal proceedings.

3. The State did not provide any observations on the merits of the Petitioners’ petition.

4. In Report 7/03 dated February 20, 2003, the Commission decided to admit Mr. Myrie’s petition and to continue with the analysis of the merits of his case. As set forth in the present Report, having examined the information and arguments concerning the merits of the petition, the Commission has concluded that the State is responsible for violating Mr. Myrie’s right to

humane treatment under Articles 5(1) and 5(2) of the Convention due to his conditions of detention, his right to a fair trial under Articles 8(1) and 8(2) of the Convention due to the State's failure to ensure that Mr. Myrie was provided with competent and effective counsel during his trial, and his rights to a fair trial and to judicial protection under Articles 8 and 25 of the Convention by reason of the State's failure to provide Mr. Myrie with legal assistance to pursue a Constitutional Motion for protection against acts that violate his fundamental rights.

5. Based upon these conclusions, the Commission has recommended that the State grant Mr. Myrie an effective remedy, which includes a re-trial in accordance with due process protections prescribed under Article 8 of the Convention or, where a re-trial in compliance with these protections is not possible, his release, and compensation. The Commission has further recommended that the State take the legislative or other measures as may be necessary to ensure Mr. Myrie's right to humane treatment in relation to his conditions of detention, that criminal defendants who choose to be represented by counsel are provided with competent and effective legal representation, and that the right to a fair hearing and the right to judicial protection are given effect in Jamaica in relation to recourse to Constitutional Motions.

II. PROCEEDINGS SUBSEQUENT TO ADMISSIBILITY REPORT 7/03

6. In Report 7/03 adopted on February 20, 2003, the Commission declared that Mr. Myrie's petition was admissible in respect of Articles 1, 2, 5, 8, 24 and 25 of the American Convention and that it would continue with its analysis of the merits of these claims. Report 7/03 was transmitted to the State and to the Petitioners by note dated March 12, 2003. In the same notes, in accordance with Article 38(1) of the Commission's Rules of Procedure, the Commission requested that the Petitioners provide any additional observations that they may have on the merits of the case within a period of two months. Pursuant to Article 38(2) of its Rules, the Commission also placed itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter in accordance with Article 48(1)(f) of the American Convention and requested that the parties inform the Commission expeditiously whether they were interested in pursuing a friendly settlement of the case.

7. The Commission did not receive any additional observations from the Petitioners on the merits of the petition within the two month period prescribed under Article 38(1) of the Commission's Rules. Accordingly, by note dated July 25, 2003, the Commission requested that the State of Jamaica submit any additional observations that it may have on the merits of the Petitioners' petition within a period of two months, in accordance with Article 38(1) of the Commission's Rules. 8. As of the date of the present report, the Commission had not received any observations from the State on the merits of the Petitioners' petition.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

9. 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. On January 11, 1993, the Court of Appeal of Jamaica refused his application for leave respecting his

conviction for murder 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. Mr. Myrie's application for Special Leave to Appeal to the Judicial Committee of the Privy Council was subsequently dismissed on April 24, 2001.

10. Concerning the background to Mr. Myrie's criminal proceedings, the Petitioners claim that according to the Prosecution's case, Mr. Myrie, together with three other individuals, Teddy Williams, Walton James and Arthur Gillette, killed Dennis Grubb on August 11, 1990 when Mr. Grubb and his common law wife, Sheila Barrett, returned to their home from a party. The prosecution's main witness was Ms. Barrett, who testified that, on the night of Mr. Grubb's murder, she saw Mr. Myrie with a machete and heard his co-defendants speaking about a fight with Mr. Grubb. She also claimed that Mr. Myrie and his co-defendants came to their home on that night asking for Mr. Grubb, and that she later heard them run into the bushes where Mr. Grubb's body was later found.

11. According to the police evidence called at trial, Mr. Myrie provided a statement to the police, and Mr. Myrie was cautioned before the statement was taken. A hearing, known as a *voir dire*, was subsequently held during the trial and in the presence of the jury to determine the admissibility of Mr. Myrie's statement, following which the trial judge held that the statement was made by Mr. Myrie voluntarily and the statement was read out to the jury. In the statement, Mr. Myrie was said to claim that on the evening of the party, as he was leaving the event, Mr. Grubb threatened him and slashed him with a machete. Mr. Myrie then ran back to the party to try to find a District Constable. The only person he could find was Widcliffe Williams, so he told him what happened and then went back up the road where he saw Mr. Grubb again. Mr. Grubb was holding a machete and tried to hit the victim with it but slipped, and Mr. Myrie grabbed the machete from Mr. Grubb, gave Mr. Grubb a "couple of chops," and ran home with the machete.

12. The petition also claims that during the trial, Mr. Myrie gave an unsworn statement from the dock in which he stated:

My name is Whitley Myrie. I live at Salt Spring, St. James. I am a farmer, age 30. I am not guilty of murder. Dennis attacked me with a machete and he and I get into collusion, and I have to defend myself.

13. With respect to the substance of their complaints against the State, 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 because of his conditions of detention, the failure of the State to protect against irregularities in Mr. Myrie's trial, and the failure to make legal aid available to pursue a Constitutional Motion in the domestic courts in connection with his criminal proceedings.

14. First, the Petitioners 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 due to 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 subsequent to his conviction and, following his appeal, at the General Penitentiary and at St. Catherine's Prison where he is serving his life sentence.

15. 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. In particular, they claim that during his 3 months in custody at the Barnett Street Police Station, from August 1990 to November 1990, Mr. Myrie was detained in a small cramped cell with other individuals, was provided with poor quality food which was at times inedible, and was denied the opportunity to exercise daily. They claim further that the conditions of his cell were unsanitary and foul smelling.

16. The Petitioners also indicate that, while held on remand at St. Catherine's Prison for the 10-month period between November 1990 until the start of his trial on September 30, 1991, there were no cells available and consequently Mr. Myrie was confined to a small cramped passageway with other prisoners. The passageway was hot and uncomfortable as the only ventilation was from a door at the end of the passageway, and it contained no proper sanitation facilities and was therefore constantly foul smelling and contained bugs, food scraps and excretions. Mr. Myrie was not provided with any furniture or bedding and he had to sleep on the floor, and his washing facilities included a hose. He was denied any proper opportunity to exercise and the food was inedible and consequently he often went without eating. The Petitioners also claim that Mr. Myrie suffered from poor health and it was difficult to see a doctor, family visits were limited in time and frequency, he was not allowed to make telephone calls, and there were no educational facilities or books.

17. During Mr. Myrie's detention on death row following his conviction, the Petitioners claim that he was subjected to many of the same conditions as his previous detention, relating to such matters as the size and condition of his cell, lack of proper medical treatment, poor sanitation, limited access to his family, and inadequate and unhygienic food and water. They also claim that Mr. Myrie was subjected to mental and physical torture while on death row, as he suffered from nightmares, was unable to sleep, and became very anxious, scared and depressed. Moreover, the petition states that there was no adequate or effective mechanism for dealing with prisoner complaints and that he was locked in his cell for 23 hours per day and denied the opportunity to engage in any reasonable exercise routine, and that this extended confinement aggravated the stress and anxiety experienced by Mr. Myrie while on death row.

18. The Petitioners describe similar conditions experienced by Mr. Myrie during his detention in the General Penitentiary from January 11, 1993 to March 2000 and in St. Catherine's Prison from March 2000 to the date of his petition. During his seven year period in the General Penitentiary, for example, Mr. Myrie claims to have been confined in a four foot by eight foot cell with, on average, three other prisoners. There was only a "slop pail" for use as a toilet, and Mr. Myrie spent an average of 23 hours per day in this cell with no regular exercise routine. The petition also indicates that a riot broke out at the General Penitentiary in August 1997, where several inmates were killed and attacked, and during which time Mr. Myrie feared for his safety due to a lack of security and supervision. Similarly, a serious prison riot occurred at St. Catherine's Prison on May 21, 2000, in which 300 prisoners were reportedly beaten by warders and soldiers. Mr. Myrie claims that during this time, he was taken out of his cell at

gunpoint and beaten by warders and soldiers, and that his injuries were sufficiently serious that he was eventually taken to the hospital.

19. In further support of their allegations, the Petitioners refer to reports by a number of international human rights organizations, including Americas Watch, the Jamaica Prisons Ombudsman, the Jamaica Council for Human Rights, and Amnesty International, which have condemned conditions of imprisonment at St. Catherine's Prison and the General Penitentiary, and the circumstances surrounding the riots of 1997 and 2000.

20. Based upon these factual allegations, the Petitioners argue that the State is responsible for violations of the right to humane treatment contrary to Articles 5(1), 5(2), 5(4) and 5(6) of the American Convention, in conjunction with a violation of Article 1(1) of the Convention. In particular, the Petitioners contend that the guiding principle underlying Article 5 of the Convention as a whole is the importance of the fundamental respect for individual human dignity and integrity, and emphasize that the standards of treatment under Article 5 apply regardless of the nature of the offense for which the individual concerned is imprisoned and do not depend on the level of development of the detaining state.

21. In support of their claims, the Petitioners cite Rules 31, 38, 86-91, 140-152, 163-167 and 173 of the Jamaican Correctional Institution (Adult Correctional Center) Rules 1991 concerning such matters as medical treatment, provision of adequate accommodation, clothing, bedding and food, and the availability of an effective complaints mechanism, which the Petitioners claim have not been respected by Jamaica. Similarly, the Petitioners cite Rules 8, 9(1), 10, 11, 12, 13, 14, 15, 16, 19, 20(1), 21(1), 22(1), 22(2), 22(3), 24, 25(1), 25(2), 26(1), 26(2), 35(1), 36(1), (2), (3), (4), 57, 71(2), 71(3) and 77 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, which provide for basic standards in respect of accommodation, hygiene, exercise and medical treatment for prisoners, and which the Petitioners claim have not been respected by Jamaica concerning the cell and prison conditions that Mr. Myrie has endured since his arrest. Further, the Petitioners claim that these conditions have been exacerbated by the length of time during which Mr. Myrie has been detained, namely 11 years.

22. In addition to the provisions of the above instruments, the Petitioners have referred to case law of the inter-American, European and United Nations human rights systems, which they assert supports their contention that Mr. Myrie's conditions have failed to satisfy the standards under Article 5 of the American Convention. Among the decisions cited by the Petitioners are the reports in the cases of *McKenzie et al. v. Jamaica*[FN1] and *Lamey et al. v. Jamaica*,[FN2] in which this Commission found the conditions of detention experienced by the prisoners in those complaints to violate Articles 5(1) and 5(2) of the Convention. The Petitioners also refer to the judgment of the Inter-American Court of Human Rights in the *Suarez Rosero Case*,[FN3] in which the Court found that overcrowded and unhygienic conditions of detention devoid of natural light and ventilation over a prolonged period of time failed to meet the standards under Article 5. Similarly, the Petitioners cite interpretations by the European Commission and Court of Human Rights of Article 3 of the European Convention on Human Rights[FN4] as well as conclusions of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Prisoners[FN5] concerning conditions of detention involving overcrowding, the absence of at least one hour of exercise a day in open air, and the use of slop

pails in cells. Finally, the Petitioners refer to the General Comments of the UN Human Rights Committee on Articles 7 and 10 of the International Covenant on Civil and Political Rights[FN6] as well as its views in several individual cases,[FN7] which the Petitioners allege were critical of conditions similar to those experienced by Mr. Myrie.

[FN1] Petitioners' petition, para. 15.14, citing McKenzie et al. v. Jamaica, Case N° 12.023, Report N° 41/00, Annual Report of the IACHR 1999.

[FN2] Petitioners' petition, para. 15.15, citing Lamey et al. v. Jamaica, Case N° 11.826, Report N° 49/01, Annual Report of the IACHR 2000.

[FN3] Petitioners' petition, para. 15.16, citing I/A Court H.R., Suarez Rosero Case, Judgment of 12 November 1997, Ser. C, N° 35.

[FN4] Petitioners' petition, para. 15.18, citing Greek Case, 12 YBI (1969); Cyprus v. Turkey, Application Nos. 6780/74 and 6950/75.

[FN5] Petitioners' petition, para. 15.19, citing European Committee for the Prevention of Torture and Inhuman and 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 (1992), April 13, paragraphs 44-50.

[FN6] Petitioners' petition, paras. 15.21, 15.22, citing UNHRC, General Comment 7(16) on Article 7 of the ICCPR; UNHRC, General Comment on Article 10 of the ICCPR.

[FN7] Petitioners' petition, paras. 15.23, 15.24, 15.25, citing UNHRC, Ambrosini v. Uruguay (Doc. A/37/40), Carballa v. Uruguay, Doc. A/36/40; Antonaccio v. Uruguay, Doc. A/37/40; De Voituret v. Uruguay, Doc. A/39/40; Wright v. Madagascar, Doc. A/38/40; Pinto v. Trinidad and Tobago, Doc. A/45/40; Clyde Neptune v. Trinidad and Tobago, Communication N° 523/1992.

23. Based upon their factual and legal observations, the Petitioners contend that the State is responsible for infringing Mr. Myrie's physical and mental integrity and subjecting him to cruel, inhuman and degrading treatment in violation of Article 5 of the Convention.

24. The Petitioners also contend that the State is responsible for violations of Mr. Myrie's right to a fair trial under Article 8 of the Convention, on several grounds. The Petitioners first argue that Mr. Myrie was convicted based upon evidence that was improperly obtained contrary to Article 8(1) of the Convention, because he was forced to sign a confession statement under threat, which was subsequently used as evidence at trial. In his statement, Mr. Myrie is said to have admitted striking Mr. Grubb with a machete but claimed to have done so in self defense. According to Mr. Myrie, his statement was taken under the following circumstances:

On 24 August 1990 I was taken to the Criminal Investigation Branch office at 9 Sewell Avenue, Montego Bay where I was interviewed by Detective Inspector John Morris. Detective Inspector Morris asked me if I was able to read or write. I told him that I was unable to read but could write my name. During the interview Constable Francis Morris was behind me and pushed what was either a gun or a stick into my back. I was so frightened that I was unable to turn around. I was forced to sign a statement that was used as evidence at my trial.

25. In addition, the Petitioners claim that Mr. Myrie's right to a fair hearing with due guarantees under Article 8(1) of the Convention was also violated due to the trial judge's decision to allow the jury to remain during the voir dire to determine whether the statement given by Mr. Myrie on August 24, 1990 was given voluntarily and was therefore admissible. During the voir dire, Mr. Myrie and Inspector Morris gave evidence. Although Mr. Myrie claimed that he had been poked three times with a stick and was induced to make his statement, the trial judge concluded that the statement had been given voluntarily, finding "I do not accept what the accused man has said; I accept the evidence of Inspector John Morris that this accused man voluntarily gave the statement and there was no inducement at all, and I will admit the statement into evidence as voluntarily made." Mr. Myrie's defense counsel failed to ask for the jury to be removed during the voir dire. To the contrary, he requested for the jury to remain, despite the fact that under domestic law, a judge's decision on a voir dire to determine the admissibility of a confession should not be revealed to the jury, since to do so might cause unfair prejudice to the jury by conveying the impression that the judge had reached a concluded view on the credibility of the witness and defendant.[FN8]

[FN8] Petitioners' petition, para. 16.5.

26. The Petitioners claim that the trial judge should not have acceded to the defense counsel's request that the jury remain, because the decision ultimately was for the judge to make and in the circumstances the only reasonable decision should have been to exclude the jury. They also claim that this submission is supported by the jurisprudence of domestic appeal courts in considering similar circumstances.[FN9] The Petitioners therefore argue that Mr. Myrie was prejudiced because the jury heard the trial judge make specific findings about Mr. Myrie's credibility and the voluntariness of the statement, and at the same time the trial judge directed the jury that it was for them to decide whether the statement was made voluntarily. According to the Petitioners, this confusion was compounded by the trial judge's erroneous direction that the jury was entitled to rely on the confession even if they considered that it was not voluntarily given, notwithstanding the fact that a statement is only admissible if the prosecution proves beyond a reasonable doubt that it was given voluntarily.[FN10]

[FN9] Petitioners' petition, paras. 16.6-16.7.

[FN10] Petitioners' petition, para. 16.5.

27. In addition, the Petitioners argue that Mr. Myrie was denied a fair hearing because 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 Teddy Williams, Walton James and Arthur Gillette. Specifically, the Petitioners claim that in ruling that there was no case to answer against the three co-defendants, the judge told the jury the following, after which he improperly reviewed the evidence against the three men to indicate why in his view it was weak:

It is the duty of the prosecution to adduce such evidence as will satisfy all the ingredients of the charge made against the accused persons, and if at the close of the prosecutions they have failed to do so, then it is the duty of the court to defense counsel (sic) and to direct you, Madam Foreman and members of the jury, to return a verdict of not guilty.

28. Relying in part on domestic case law, the Petitioners argue that this irregularity prejudiced Mr. Myrie because the jury was told that there was not sufficient evidence with regard to the three co-defendants, which the jury may well have understood to mean that there was sufficient evidence to convict Mr. Myrie. At no stage did the judge explain to the jury what the proper test was that he was applying in reaching the conclusion that there was no case to answer, and in the Petitioners' view, the direction quoted above may well have left the opposite impression.

29. Further, the Petitioners argue that the trial judge erred in allowing the trial to continue in the absence of Mr. Myrie's trial attorney, contrary to Article 8(1) and 8(2)(d) of the Convention. They claim that on the second day of the trial, Mr. Myrie's counsel was not present, but nevertheless the trial judge permitted the trial to proceed, during which time:

(a) witness Patrick Barrett indicated that he saw the deceased out by the gate prior to going to get his uncle and confirmed that he saw people scattering down the road and that the deceased had something in his hand;

(b) District Constable Rupert Samuels gave all his evidence in chief without Mr. Myrie's attorney being present, including the evidence that Mr. Myrie placed a machete to his throat and threatened him.[FN11]

[FN11] Petitioners' petition, paras. 16.17-16.18, citing Trial Transcript, pp. 75-89.

30. The Petitioners claim that the failure of the trial judge to postpone the trial to allow Mr. Myrie's attorney to be present constituted a material irregularity that led to evidence seriously damaging to Mr. Myrie's case going unchallenged. They also claim that this irregularity was obvious to the Court, particularly in the context of a capital trial, and that Mr. Myrie was therefore deprived of proper representation during his trial, contrary to Article 8 of the Convention.

31. In addition, the Petitioners argue that the trial judge decided not to allow the character of the deceased to be examined and that this decision deprived Mr. Myrie of his right to a fair trial, contrary to Article 8(1) and (2) of the American Convention. They claim that this prevented relevant and admissible evidence as to the circumstances in which Mr. Grubb's death may have occurred from being heard by the jury. In particular, the Petitioners state that the question to be decided by the jury was whether Mr. Myrie acted in lawful self-defense by genuinely fearing for his own safety so as to feel that he had to act as he did. They assert that as a consequence, the question of whether the deceased was a violent man was clearly relevant to this issue, and therefore that the trial judge's failure to allow these questions harmed Mr. Myrie's defense in a very real manner.

32. Further, the Petitioners contend that Mr. Myrie was deprived of his right to a fair trial contrary to Articles 8(1) and 8(2)(d) and (e) of the Convention due to the incompetence of his trial counsel, Mr. Fairclough. The Petitioners contend that the performance of Mr. Myrie's counsel fell far below the standard required of counsel defending a murder trial, contrary to Mr. Myrie's right to counsel and hence to a fair trial under Section 20 of the Jamaican Constitution.[FN12] In particular, they claim that on the second day of the trial, Mr. Myrie's counsel was absent at the beginning of proceedings, apparently for the reason that he had not been feeling well on that day and on the day prior. In these circumstances, the Petitioners argue that counsel should not have commenced trial or, had he become ill during trial, he should have sought to have the jury discharged. The Petitioners also assert that it must be seriously open to question as to whether Mr. Fairclough's performance during the trial was affected by his illness. In addition, the Petitioners claim that Mr. Myrie's counsel left the defendant without representation for a significant part of a two day trial for a capital offense without asking for or receiving an adjournment. Other alleged errors on the part of trial counsel included asking that the voir dire take place before the jury for no conceivable strategic reason, failing to ask that the jury retire when it became apparent that the other defendants were going to be discharged, and failing to pursue with any vigor the issue of the deceased's violent character.

[FN12] According to the Petitioners, Article 20(1) and (6) of the Jamaican Constitution provide as follows:

20(1) Wherever a person is charged with a criminal offense he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(6) Every person charged with a criminal offense –

- (a) Shall be informed as soon as reasonably practicable, in a language he understands, of the nature of the offense charged;
 - (b) shall be given adequate time and facilities for the preparation of his defence;
 - (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
 - (d) Shall be afforded the facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same condition as those applying to witnesses called by the prosecution; and
 - (e) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the English language.
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33. Based upon these errors and the corresponding denial of Mr. Myrie's right to a fair trial, the Petitioners argue that Mr. Myrie's conviction itself is unsafe and therefore must be vacated.[FN13] They also argue that, as Mr. Myrie was convicted after the introduction of inadmissible evidence during the trial, and misdirections and failures to direct the jury by the trial judge, these defects, separately or cumulatively, have lead to Mr. Myrie's conviction when his guilt was not proved according to the applicable law.

[FN13] Petitioners' petition, para. 16.28, citing *Mohammed v. The State* [1999] 2 A.C. 111.

34. Finally, the Petitioners argue that Mr. Myrie has been denied access to a court and has been denied an effective remedy for the violations of the Constitution of Jamaica and the American Convention to which he is alleged to have been subjected, contrary to Articles 24 and 25 of the Convention. The Petitioners state in this regard that section 25(1) of the Constitution of Jamaica gives any person the right to apply to the Supreme Court for redress in respect of alleged constitutional violations, but that, due to a lack of funds, this is not a right of access that can be exercised by Mr. Myrie. They argue that Constitutional Motions give rise to complex and intricate issues of law that require an accused to be assisted by an attorney and that the costs of instituting proceedings in the High Court are extremely expensive and beyond Mr. Myrie's means. The Petitioners also argue that Jamaica does not provide legal aid for Constitutional Motions and that it is virtually impossible for those in prison to secure the services of counsel who are willing to carry out such work pro bono in support of their arguments in this regard, the Petitioners cite decisions of this Commission as well as the European Court of Human Rights and the UN Human Rights Committee indicating that a right of access to a court means access in fact as well as in law.[FN14]

[FN14] Petitioners' petition, paras. 17.3-17.6, citing Case 11.855, Admissibility Report, Anthony Garcia (Trinidad and Tobago) (September 25, 1998); *Golder v. UK* (1975) A-18; UNHRC, *Currie v. Jamaica*, Communication N° 377/1989.

35. The Petitioners argue that constitutional proceedings in the context of Mr. Myrie's case should be considered criminal in nature, given that they arise because of earlier criminal proceedings and might serve to vacate his sentence. Whether classified as criminal or civil, however, the Petitioners argue that Mr. Myrie should have legal aid in order to pursue them, as the complexity of constitutional proceedings means that he is unable to argue them himself and should have the assistance of professional lawyers. They refer in this connection to the Commission's decision in the case of *Leroy Lamey et al.*, in which it was recognized that constitutional motions dealing with the issues raised in that matter would be procedurally and substantively complex and could not effectively be raised or presented by the petitioners in the absence of legal representation, and that the State's obligation in respect of legal assistance for constitutional motions flows from Articles 8 and 25 of the Convention.

36. Based upon the foregoing submissions, the Petitioners contend that the State is responsible for violations of Mr. Myrie's rights under Articles 24 and 25 of the American Convention by denying him the ability to seek, on a basis of equality, simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights.

B. Position of the State

37. As indicated above, in its communication to the State dated July 25, 2003, the Commission requested that the State submit any additional observations that it may have on the merits of the Petitioners' petition within a period of two months, in accordance with Article 38(1) of the Commission's Rules of Procedure. As of the date of the present report, the Commission had not received any observations from the State.

IV. ANALYSIS

38. The Petitioners have raised three principal issues in their petition. First, they allege that the State is responsible for violating Mr. Myrie's right to humane treatment under Article 5 of the Convention because of his conditions of detention. Second, they allege that the State is responsible for violating Mr. Myrie's right to a fair trial under Article 8 of the Convention because of irregularities in his trial committed by the judge and his State-appointed trial attorney. Third, the Petitioners claim that the State is responsible for violating Mr. Myrie's rights to a fair trial and to judicial protection under Articles 8, 24 and 25 of the Convention by failing to make legal aid available to him to pursue a Constitutional Motion before the domestic courts for the protection of his fundamental rights.

39. At this point in its analysis, the Commission notes that despite its requests, the State has not provided the Commission with any observations, information or evidence concerning the merits of the Petitioners' allegations. Consequently, in accordance with Article 39 of its Rules of Procedure, the Commission will presume the facts alleged by the Petitioners to be true, except where the evidence may lead to a different conclusion.

A. Article 5 of the Convention - Conditions of Detention

40. The Petitioners have first alleged 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 because 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.

41. As described in Part III.A of this Report, the Petitioners have made numerous allegations respecting Mr. Myrie's conditions of detention at the various facilities in which he has been incarcerated. In particular, they claim that during his pre-trial and post-conviction proceedings, which began with his arrest in August 1990 and continued to the lodging of his petition, he was held in cramped and overcrowded quarters with poor ventilation and inadequate sanitation. They claim that Mr. Myrie was not provided with proper furniture or bedding and that the food he received was of poor quality and frequently inedible. The Petitioners also indicate that Mr. Myrie was denied access to regular exercise, nor did he have access to educational and reading materials. Further, the petition refers to two riots that occurred during Mr. Myrie's incarceration, the first at the General Penitentiary in August 1997 and the second at St. Catherine's Prison in May 2000. During these events, Mr. Myrie feared for his safety, stating that "[o]n the first day of the riot, 20 August 1997, 2 inmates were killed. The police and army were brought in but did not

regain control of the prison until 23 August 1997. By this time several prisoners had been burned or stabbed to death in their cells. I just spent these days in fear of my life as there was no one to ensure my safety. As a result of these riots, I spent the entire time at this prison wondering whether I would be the next person killed. It was extremely frightening to live every day like this.” In addition, during the second riot, Mr. Myrie claims to have been removed from his cell at gunpoint and beaten by guards and soldiers, suffering injuries that required him to be taken to the hospital.

42. The Petitioners argue that their allegations are corroborated by more general sources of information concerning prison conditions in Jamaica. These include reports by Americas Watch, the Jamaica Prisons Ombudsman, the Jamaica Council for Human Rights, and Amnesty International, which have condemned conditions of imprisonment at St. Catherine’s Prison and the General Penitentiary and the circumstances surrounding the riots of 1997 and 2000 in these facilities.

43. The Commission must evaluate whether the conditions described by Mr. Myrie disclose violations of the State’s obligations under the American Convention, in particular its obligation under Article 5 of the Convention not to subject Mr. Myrie to inhumane treatment. As indicated above, in the absence of any information from the State concerning Mr. Myrie’s conditions of detention, the Commission will evaluate these claims on the basis that the facts alleged by the Petitioners are true, unless the evidence leads to a different conclusion. After carefully considering the information available, the Commission has found that Mr. Myrie’s detention conditions failed to satisfy the standards mandated by Articles 5(1) and 5(2) of the Convention.

44. In reaching this conclusion, the Commission has assessed the details of Mr. Myrie’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.[FN15] Like the defendants in these cases, the record in the present complaint indicates that Mr. Myrie had been held in confined and crowded conditions with inadequate hygiene or ventilation since August 1990. This included 13 months in pre-trial detention, 15 months on death row following his conviction, and nearly 9 years in confinement following the commutation of his sentence by the Court of Appeal. During this period, he has been denied proper nutrition and hygiene, and has not had access to regular exercise, reading or educational facilities. Moreover, Mr. Myrie’s life and physical integrity were placed in jeopardy during the prison riots in 1997 and 2000, during which time prison authorities were not in control of parts of the facility, and he was the subject of severe physical abuse at the hands of state functionaries during the second riot in 2000. These observations, together with the length of time over which Mr. Myrie has been held in detention, indicate that his 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[FN16] and regardless of the level of development of a particular State Party to the Convention.[FN17]

[FN15] In its merits judgment in the Hilaire, Constantine and Benjamin et al. Case, for example, the Inter-American Court found that the conditions of detention of the victims constituted cruel

and inhumane treatment contrary to Articles 5(1) and 5(2) of the Convention. These conditions included confinement in grossly overpopulated and unhygienic conditions that lacked sufficient ventilation and natural light and were located in close proximity to the execution chamber. The prisoners were also denied adequate nutrition, medical services or recreation, which the Court found exacerbated the state of mental anguish in which they lived. I/A Court H.R., Hilaire, Constantine and Benjamin et al. (Trinidad and Tobago), Judgment of 21 June 2002, Ser. C N° 94, paras. 84, 168-170. See similarly McKenzie et al. Case, supra, paras. 270-291.

[FN16] 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.

[FN17] 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).

45. A comparison of Mr. Myrie'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,[FN18] which the Commission has previously indicated provide reliable benchmarks as to minimum international standards for the humane treatment of prisoners, prescribe the following basic standards in respect of accommodation, hygiene, and exercise:

[FN18] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (N° 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (N° 1) at 35, U.N. Doc E/5988 (1977).

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

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

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

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

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

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

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

46. 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. Myrie 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.

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

B. Article 8 of the Convention – Right to a Fair Trial

48. The Petitioners also contend that the State is responsible for violations of Mr. Myrie's right to a fair trial under Article 8 of the Convention, on several grounds. They first argue that Mr. Myrie was forced to sign a confession statement under threat, which was subsequently used as evidence at trial. Second, they allege that the trial judge made several fundamental errors in the manner in which he conducted Mr. Myrie's trial. Third, the Petitioners contend that the performance of Mr. Myrie's attorney fell far below the standard required of counsel defending a murder trial.

49. Concerning the alleged use of a coerced confession, Mr. Myrie has described the taking of his statement as follows:

On 24 August 1990 I was taken to the Criminal Investigation Branch office at 9 Sewell Avenue, Montego Bay where I was interviewed by Detective Inspector John Morris. Detective Inspector Morris asked me if I was able to read or write. I told him that I was unable to read but could write my name. During the interview Constable Frank Morris was behind me and pushed what was either a gun or a stick into my back. I was so frightened that I was unable to turn around. I was forced to sign a statement and this was used as evidence at my trial.

50. The record also indicates that in his statement, Mr. Myrie was said to claim that on the evening of the party, as he was leaving the event, Mr. Grubb threatened him and slashed him with a machete. Mr. Myrie then ran back to the party to try to find a District Constable. The only person he could find was Widcliffe Williams so he told him what happened and then went back up the road where he saw Mr. Grubb again. Mr. Grubb was holding a machete and tried to hit the victim with it but slipped, and Mr. Myrie grabbed the machete from Mr. Grubb, gave Mr. Grubb a “couple of chops” and ran home with the machete.

51. According to the petition, a voir dire was held before the trial judge concerning the voluntariness of Mr. Myrie’s statement. During this hearing, both Mr. Myrie and Inspector Morris gave evidence, and the trial judge ultimately concluded that he accepted the testimony of the police officer over that of Mr. Myrie and concluded that the statement was made voluntarily. The Petitioners therefore appear to argue before the Commission that this decision was erroneous and that the statement should not have been entered into evidence.

52. Concerning the procedures in Mr. Myrie’s trial, the Petitioners challenge several aspects of the manner in which the trial judge conducted the proceeding. They argue that the judge erred in permitting the jury to remain in the courtroom during the hearing in which the voluntariness of Mr. Myrie’s statement was determined. They also contend that the trial judge should not have given reasons in the presence of the jury for his finding that there was no case to answer against Mr. Myrie’s three co-defendants. The Petitioners claim that the trial judge erred by permitting the trial to continue during a period when Mr. Myrie’s attorney was not present in the courtroom. Finally, the Petitioners argue that Mr. Myrie suffered prejudice as a result of the trial judge’s decision not to allow the character of the deceased to be raised as an issue during the course of the trial.

53. The third due process issue raised by the Petitioners is the contention that Mr. Myrie was the victim of a violation of his right to a fair trial under Articles 8(1) and 8(2)(d) and (e) of the Convention due to the substandard performance of his state-appointed counsel. They base their claims of incompetence on several incidents during the course of Mr. Myrie’s trial. They claim that Mr. Myrie’s counsel was absent for some portion of the trial due to ill health and, in light of this, should have either postponed the commencement of the trial or sought to have the jury discharged. The Petitioners also claim that Mr. Myrie’s lawyer left him without representation for a significant part of his two-day trial without asking for or receiving an adjournment, and that during this time potentially damaging evidence was introduced by the prosecution. In addition, the Petitioners claim that Mr. Myrie’s lawyer failed to take certain measures to protect Mr. Myrie from prejudice, by asking that the hearing on the voluntariness of Mr. Myrie’s statement take place before the jury, failing to ask that the jury retire when it became apparent that the other defendants were going to be discharged, and failing to pursue forcefully the issue of whether evidence as to the deceased’s violent character should have been admissible during the trial.

54. Based upon the forgoing alleged violations of Article 8 of the Convention, the Petitioners contend that Mr. Myrie’s conviction itself is unsafe and therefore must be set aside.

55. In evaluating the Petitioners' contentions concerning the admissibility of Mr. Myrie's statement and the conduct of the trial judge, the Commission must take into account its approach, as articulated in previous cases, that it is generally for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality.[FN19]

[FN19] McKenzie et al. Case, supra, para. 298. The Commission notes in this regard that Mr. Myrie appealed his conviction and sentence to the Jamaica Court of Appeal, and on January 11, 1993, the Court of Appeal dismissed his appeal but classified the murder as non-capital and reduced his sentence from death to life imprisonment with a minimum term to serve before parole of 15 years. In rendering its decision, the Court considered elements of the manner in which the trial judge conducted the trial, including the judge's instructions to the jury. See R. v. Whitley Myrie, Judgment of January 11, 1993, Supreme Court Criminal Appeal N° 128/91 (Court of Appeal of Jamaica).

56. With respect to the allegations concerning Mr. Myrie's statement, the Commission notes that the Petitioners have presented before the Commission the same account given by Mr. Myrie concerning the taking of his statement that had been presented to the trial judge. According to the record, the trial judge received evidence from both Mr. Myrie and the police officer who took the statement, Inspector John Morris. After considering the matter, the trial judge accepted the evidence of Inspector Morris and found that Mr. Myrie had given the statement voluntarily.[FN20] There is no information on the record indicating that the trial judge's decision in this regard was arbitrary or was otherwise characterized by a denial of justice. The Commission therefore finds no grounds upon which to reach a different decision as to the admissibility of Mr. Myrie's statement than that of the trial judge, who had the benefit of considering all of the pertinent evidence. Accordingly, the Commission does not find a violation of Article 8 of the Convention in connection with the use of Mr. Myrie's statement at trial.

[FN20] See R. v. Whitley Myrie, Transcript of Trial Proceedings before the Honorable Mr. Justice Patterson, October 1991, pp. 109-116, 122-137.

57. The Commission has also carefully reviewed the Petitioners' allegations concerning other aspects of the manner in which the trial judge conducted Mr. Myrie's trial, including their claim that he failed to instruct the jury in accordance with the requirements of domestic law, permitted the jury to remain in the courtroom during both the voir dire and when ruling that there was no case to answer against Mr. Myrie's co-defendants, and permitted Mr. Myrie's trial to proceed in the absence of his trial attorney. After evaluating these claims in light of the standard of review indicated above, the Commission has concluded that the procedures followed during Mr. Myrie's trial disclose a denial of justice in two respects, namely the fact that the trial judge allowed the voir dire on the admissibility of Mr. Myrie's statement to be held in the presence of the jury, and that the trial judge continued with the trial during periods when Mr. Myrie's attorney was absent.

Concerning the former issue, the evidence indicates that the trial judge permitted the jury to remain in the courtroom during the voir dire on Mr. Myrie's statement. According to the record, this approach was inconsistent with established domestic jurisprudence requiring the absence of a jury during a voir dire in order to protect a defendant from unfair prejudice,[FN21] with no apparent justification for this irregularity.[FN22] Moreover, the Commission considers that in the circumstances, it is evident that Mr. Myrie may have suffered prejudice as a result of the continued presence of the jury. In determining whether the statement was admissible, the trial judge received conflicting testimony from Mr. Myrie and Inspector John Morris and ultimately accepted Inspector Morris' account of Mr. Myrie's interrogation. Under these circumstances, the jury may have been left with the impression that a final conclusion as to Mr. Myrie's credibility had been reached by the trial judge. The Commission also notes that the issue of the jury's presence during the voir dire was not addressed by the Court of Appeal in its judgment of January 11, 1993.[FN23]

[FN21] Petitioners' petition, paras. 16.5.

[FN22] See *R. v. Whitley Myrie*, Transcript of Trial Proceedings before the Honorable Mr. Justice Patterson, October 1991, p. 121-122.

[FN23] *R. v. Whitley Myrie*, Judgment of January 11, 1993, Supreme Court Criminal Appeal N° 128/91 (Court of Appeal of Jamaica).

58. Concerning the conduct of Mr. Myrie's attorney, the Petitioners have claimed that on the second day of the trial, Mr. Myrie's counsel was absent at the beginning of proceedings, apparently for the reason that he had not been feeling well on that day and the day prior. Moreover, they claim that the trial judge permitted the proceedings to continue despite the absence of Mr. Myrie's attorney, during which time potentially damaging evidence was introduced by the prosecution. This included testimony by witness Patrick Barrett, who indicated that he saw the deceased on the evening of Mr. Grubb's murder and that he saw people scattering down the road and that the deceased had something in his hand. It also included the testimony of District Constable Rupert Samuels, who gave all his evidence in chief without Mr. Myrie's attorney being present and claimed, inter alia, that Mr. Myrie placed a machete to his throat and threatened him.[FN24]

[FN24] Petitioners' petition, paras. 16.17-16.18, citing Trial Transcript, supra, pp. 75-89.

59. In these circumstances, the Commission considers that it should have been manifestly evident to the trial judge that conducting the voir dire in the presence of the jury would potentially prejudice the fairness of Mr. Myrie's trial contrary to Article 8(1) of the Convention. Similarly, it should have been evident to the trial judge that continuing with the trial in the absence of Mr. Myrie's trial attorney would potentially prejudice Mr. Myrie and deprive him of his right to effective representation, including his right under Article 8(2)(c) of the Convention to adequate time and means for the preparation of his defense, and his right under Article 8(2)(f) of

the Convention to examine witnesses present in the court, which rights could only be properly and effectively exercised through the presence of counsel.

60. On this basis, the Commission finds that Mr. Myrie suffered a denial of justice as a consequence of the manner in which the trial judge conducted his criminal proceedings, contrary to Articles 8(1) and 8(2) of the American Convention, in conjunction with a violation of Article 1(1) of the Convention.

61. The Commission has also considered the Petitioners' allegations concerning the competence of Mr. Myrie's trial attorney. In this respect, 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 as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time limit established by law. Strict compliance with these and other guarantees of due process are particularly fundamental in the context of trials involving capital offenses. The Commission also considers that these rights apply at all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, leading to his committal for trial, and at all stages of the trial itself.[FN25]

[FN25] See McKenzie et al. v. Jamaica, Annual Report of the IACHR 1999, paras. 304-305. See similarly U.N.H.R.C., Paul Kelly v. Jamaica, Communication N° 253/1987 (1991).

62. In the present case, the Commission notes that the State provided Mr. Myrie with legal representation for the criminal proceedings against him. As with all rights under the Convention, however, the right to legal representation must be guaranteed in a manner that renders it effective and therefore requires not only that counsel be provided, but that defense counsel be competent in representing the defendant. The Commission has also recognized that the State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel, owing to the independence of the legal profession from the State and the State's corresponding lack of knowledge or control over the manner in which a defense attorney may represent his or her client.[FN26] National authorities are, however, required under Article 8(2)(c) of the Convention to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. [FN27]

[FN26] See Leroy Lamey et al. v. Jamaica, Case N° 11.826, Report N° 49/01, Annual Report of the IACHR 2000, paras. 216-217. See similarly Eur. Court H.R., Kamasinski v. Austria, 19 December 1989, Series A. N° 168 para. 65; U.N.H.R.C., Young v. Jamaica, Communication N° 615/1995 (1997).

[FN27] Id.

63. In the present case, the record does not suggest that Mr. Myrie made it known to State officials that he considered his legal representation to be inadequate, prior to or during his trial. However, in the Commission's view, it is apparent on the basis of information available that it would or should have been manifest to the trial judge that the behavior of Mr. Myrie's trial attorney was incompatible with the interests of justice.[FN28] In particular, as noted above, the information available indicates that Mr. Myrie's attorney failed to request that the jury retire during the voir dire on the admissibility of Mr. Myrie's statement; rather, contrary to established jurisprudence and with no apparent justification, he requested that the jury remain during the voir dire and thereby potentially caused Mr. Myrie prejudice by possibly leaving the jury with the impression that the trial judge had reached a final conclusion as to Mr. Myrie's credibility. In addition, Mr. Myrie's attorney was absent from the courtroom for portions of the trial, including a period when evidence potentially significant to Mr. Myrie's guilt was adduced. According to the Petitioners, Mr. Myrie's attorney did not request an adjournment or otherwise attempt to accommodate his inability to appear. In the Commission's view, these circumstances should have led the trial judge to take positive measures to ensure that Mr. Myrie received adequate legal representation. Rigorous compliance with Mr. Myrie's right to competent counsel was also compelled by the fact that he was being tried for a crime for which, if convicted, he would be sentenced to death. As with the jury's presence during the voir dire, the Commission notes that the conduct of Mr. Myrie's trial attorney was not a matter that was addressed by the Court of Appeal in its judgment of January 11, 1993.[FN29]

[FN28] See e.g. Anthony McLeod v. Jamaica, *supra*, at para. 6.1.

[FN29] R. v. Whitley Myrie, Judgment of January 11, 1993, Supreme Court Criminal Appeal N° 128/91 (Court of Appeal of Jamaica).

64. In these circumstances, the Commission finds further violations of Articles 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, based upon the inadequacy of Mr. Myrie's legal representation during his trial.

65. Finally, in the absence of any observations or information to the contrary, the Commission considers that these serious violations of due process should be considered to have deprived Mr. Myrie's criminal proceedings of their efficacy from the outset and thereby invalidate Mr. Myrie's conviction. Consequently, a re-trial in accordance with due process or, where this is not possible, release, is the appropriate remedy for the violations of Mr. Myrie's right to a fair trial under Article 8 of the Convention.[FN30]

[FN30] See I/A Court H.R., Castillo Petruzzi et al., Judgment of May 30, 1999, para. 219 (finding that in circumstances in which the acts upon which a judgment stands are affected by serious defects that deprive them of the efficacy they should normally have, "then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding in which the violation that caused the

invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process").

C. Articles 8 and 25 of the Convention – Right to Judicial Protection

66. The Petitioners argue that Mr. Myrie 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. Myrie has been denied recourse to domestic protection against acts that violate his fundamental rights contrary to Articles 24 and 25 of the Convention. These provisions of the Convention 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.

67. 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. Myrie is indigent, and the State does not as a matter of practice 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. Myrie's access to the court and to effective remedies, in fact as well as in law.

68. The State has not provided any information refuting the Petitioners' arguments in this regard or otherwise indicating that Constitutional Motions or other recourse to a competent court or tribunal is effectively available to Mr. Myrie for protection against acts that violate his fundamental rights under domestic law or the American Convention.

69. In light of the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by Mr. Myrie in his proceeding before the Commission, such as the propriety of his conditions of detention and his right to a fair trial, are procedurally and substantively complex and cannot be effectively raised or presented before a domestic court in the absence of legal representation. The Commission also finds, in the absence

of evidence to the contrary, that Mr. Myrie lacks the financial means to bring a Constitutional Motion on his own, and that Jamaica does not provide legal aid to individuals in Jamaica to bring such motions.

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

71. In particular, 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." [FN31]

[FN31] See *Mejia v. Peru*, Case N° 10.970, Annual Report of the IACHR 1995, pp. 190-191.

72. Moreover, in the circumstances of the present case, where the Supreme Court would be called upon to determine Mr. Myrie'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. [FN32] 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. Myrie the opportunity to challenge the circumstances of his incarceration and criminal conviction under the Constitution of Jamaica and the American Convention, and therefore has contravened his right to a fair hearing under Article 8(1). [FN33]

[FN32] See *McKenzie et al. Case*, supra. See also I/A Court H.R., Constitutional Court Case, Judgment of January 31, 2001, Ser. C N° 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.).

[FN33] See also *Hilaire, Constantine and Benjamin et al. Case*, supra, para. 148. 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).

73. By denying Mr. Myrie an opportunity to challenge the circumstances of his trial, conviction and sentencing under the Constitution of Jamaica in a fair hearing, and by failing to make legal aid available to Mr. Myrie 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 Articles 25, 8 and 1(1) of the Convention in respect of Mr. Myrie.[FN34]

[FN34] See also Hilaire, Constantine and Benjamin et al. Case, supra, para. 148.

V. PROCEEDINGS SUBSEQUENT TO REPORT 34/02

74. The Commission examined this case in the course of its 118th regular session and on October 8, 2003 adopted Report N° 50/03 pursuant to Article 50 of the American Convention.

75. On October 27, 2003, the Commission transmitted Report N° 50/03 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.

76. The Commission did not receive a response from the State to Report N° 50/03.

VI. CONCLUSIONS

The Commission, based on the foregoing considerations of fact and law, ratifies its conclusions that:

77. The State is responsible for violating Mr. Myrie's rights under Articles 5(1) and 5(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, because of his conditions of detention.

78. The State is responsible for violating Mr. Myrie's rights under Articles 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, due to the trial judge's failure to ensure that the jury was not present during the voir dire on Mr. Myrie's statement, and the trial judge's failure to postpone the trial when Mr. Myrie's counsel was not present and thereby denying Mr. Myrie full due process during his trial.

79. The State is responsible for violating Mr. Myrie's rights under Articles 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to provide him with the assistance of competent and effective counsel during his trial.

80. The State is responsible for violating Mr. Myrie's rights under Articles 25 and 8 of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to provide Mr. Myrie with effective access to a Constitutional Motion for the protection of his fundamental rights.

VII. RECOMMENDATIONS

81. 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. Myrie an effective remedy, which includes a re-trial in accordance with the due process protections prescribed under Article 8 of the Convention or, where a re-trial in compliance with these protections is not possible, his release, and compensation.

2. Adopt such legislative or other measures as may be necessary to ensure that Mr. Myrie's conditions of detention comply with international standards of humane treatment under Article 5 of the American Convention and other pertinent instruments, as articulated in the present report.

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

VIII. PUBLICATION

82. By communication dated March 17, 2004, the Commission transmitted the content of this report, adopted as Report N° 34/04 pursuant to Article 51(1) of the Convention, to the State and to the Petitioners in accordance with Article 51(2) of the Convention and granted 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.

83. Based upon the foregoing considerations, and in the absence of a response by the State to Report N° 34/04, the Commission in conformity with Article 51(3) of the American Convention and Article 45(3) of its Rules of Procedure 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., on the 12th day of the month of October, 2004.
(Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Paulo Sérgio Pinheiro, Freddy Gutiérrez Trejo and Florentín Meléndez, Commissioners.