

REPORT N° 58/02

MERITS

CASE 12.275

DENTON AITKEN

JAMAICA

October 21, 2002

I. SUMMARY

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

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

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

3. The Commission had not previously made an admissibility determination pursuant to Articles 46 and 47 of the Convention concerning the complaints presented in

Mr. Aitken's petition. After having considered the matter, the Commission has decided to declare admissible the claims presented on behalf of Mr. Aitken.

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

- (a) The State is responsible for violating Articles 4(1), 5(1), 5(2) and 8(1) of the Convention in respect of Mr. Aitken, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.
- (b) The State is responsible for violating Article 4(6) of the Convention in respect of Mr. Aitken, in conjunction with violations of Articles 1(1) and 2 of the Convention, by failing to provide him with an effective right to apply for amnesty, pardon or commutation of sentence.
- (c) The State is responsible for violating Articles 5(1) and 5(2) of the Convention in respect of Mr. Aitken, in conjunction with violations of Article 1(1) of the Convention, by reason of his conditions of detention.
- (d) The State is responsible for violating Articles 8(1) and 25 of the Convention in respect of Mr. Aitken, in conjunction with violations of Article 1(1) of the Convention, by reason of the denial to Mr. Aitken of recourse to a Constitutional Motion for the determination of his rights under domestic law and the Convention in connection with the criminal proceedings against him;
- (e) The State is not responsible for violations of Article 4 or 8 of the Convention relating to the adequacy of his legal representation at trial.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Petition and Observations

5. Following the receipt of Mr. Aitken's petition on April 28, 2000, the Commission opened Case N° 12.275 and transmitted the pertinent parts of the petition to the State on May 2, 2000, with a request that the State supply information with respect to the communication within 90 days as established in the Commission's prior Regulations. [1]

6. By note dated August 16, 2000, the Commission reiterated its request for information from the State in relation to Mr. Aitken's case. In a communication dated September 20, 2000, the State requested that the Commission grant it additional time to prepare a response in Mr. Aitken's case, in light of the September 12, 2000 decision of

the Judicial Committee of the Privy Council in the matter *Neville Lewis v. Jamaica*. [2] By note dated September 22, 2000, the Commission granted the State's request for an extension of time to deliver its observations, to 30 days from the date of the Commission's communication.

7. By communication dated October 5, 2000, which was received by the Commission on October 6, 2000, the Commission received information from the State respecting Mr. Aitken's petition. By note dated October 10, 2000 the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days. In a communication dated August 16, 2000, the Commission reiterated its request for information from the Petitioners.

8. By letter dated November 9, 2000 and received by the Commission on the same date, the Petitioners delivered a response to the State's observations on Mr. Aitken's petition. In a note dated November 13, 2000, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days.

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

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

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

B. Precautionary Measures

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

C. Friendly Settlement

13. By communications dated May 21, 2001 to the Petitioners and to the State, the Commission placed itself at the disposal of the parties, with a view to reaching a friendly settlement pursuant to Article 48(1)(f) of the Convention on the basis of respect for the human rights recognized therein. The Commission also requested that the parties provide the Commission with a response to the Commission's offer within 30 days of receipt of the communication, in the absence of which the Commission would continue with consideration of the matter.

14. In a note dated May 31, 2001, the State indicated that, in its view, there were no outstanding issues that would necessitate the scheduling of friendly settlement proceedings, and urged the Commission to continue with its consideration of the case "with a view to delivering its views in a timely manner."

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

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Background to the Case

16. According to the record in this case, Denton Aitken was arrested and charged with the July 1, 1996 murder of Curtis Russell in the course or furtherance of a robbery. Mr. Aitken was subsequently tried for the murder from October 29 to October 31, 1997. On October 31, 1997, Mr. Aitken was convicted of capital murder and sentenced to death by hanging. He subsequently appealed his conviction to the Court of Appeal of Jamaica, and his appeal was dismissed on June 28, 1999. Mr. Aitken then lodged a petition for Special Leave to Appeal as a Poor Person to the Judicial Committee of the Privy Council, and the Privy Council dismissed his petition on March 6, 2000.

17. The prosecution alleged that in the afternoon of July 1, 1996, Mr. Aitken was one of two gunmen who entered the business premises of Curtis Russell, robbed him of a firearm and an unspecified amount of money and shot him in the course of that enterprise. The prosecution's case was based in part upon the testimony of two eyewitnesses. The first, Christopher Burton, an off-duty police officer, testified that at approximately 4:00 p.m. on July 1, 1996, he was at his garage in the vicinity of Russell's

shop he observed Russell enter the shop and subsequently saw two other men enter the shop, one of whom he identified as some one he knew both as Denton Aitken and "Talbert." He claimed to have known Aitken for about three years and that he saw Aitken at least once a week in the Cockburn Garden area. Burton also testified that as the two individuals entered the shop, Aitken removed a hand gun from his waist and that three or four second later he heard an explosion and saw the men running from the shop, with Aitken carrying two hand guns and the other man carrying money in notes in one hand and a hand gun in the other. Burton then entered the shop where he saw Russell bleeding on the floor.

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

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

2. Position of the Petitioners on Admissibility

20. The Petitioners in Mr. Aitken's case submit that his petition is admissible. In particular, the Petitioners claim that Mr. Aitken has exhausted all available domestic remedies because his lack of private means and unavailability of legal aid prohibit him from pursuing a Constitutional Motion before the Supreme Court of Jamaica. [3]

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

3. Position of the Petitioners on the Merits

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

22. The Petitioners allege that the State acted contrary to Articles 4(1), 4(2), 5(1) and 5(2) of the American Convention by sentencing Mr. Aitken to a mandatory death penalty for the crime of capital murder. In particular, the Petitioners argue that the imposition of the death penalty in Mr. Aitken's case violates the American Convention because it is not reserved for the most serious offenses as required by Article 4(2) of the

Convention, and because executing an individual without an individualized sentencing hearing is cruel and violates his rights under Articles 5(1) and 5(2) of the Convention.

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

24. The Petitioners first argue that the requirement under Article 4(2) of the Convention that the death penalty be imposed only for the most "serious offenses" should be interpreted so as to encompass more than the elements of a criminal offense, and in particular should be interpreted to require consideration of all factors of a criminal offense, including those referable to an individual applicant. In this regard, the Petitioners submit that as matter of common sense, it is not possible to say that the murder of a prison officer is more serious than and will always be more serious than, for example, the murder of a child. It therefore follows, argue the Petitioners, that the mandatory death penalty produces arbitrary results.

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

26. In support of their position that the mandatory death penalty for capital murder contravenes the American Convention, the Petitioners refer to decisions of the highest courts of several common law countries, including the United States of America [4] and India, [5] where the death penalty has been retained. They also rely upon previous decisions by this Commission in cases such as *Haniff Hilaire v. Republic of Trinidad and Tobago*, Report N^o 66/99 and *Rudolph Baptiste v. Grenada*, Report N^o 38/00. According to the Petitioners, these authorities support the proposition that States that wish to retain the death penalty must provide for some form of "individualized sentencing," where defendants are permitted to present mitigating factors concerning the particular circumstances of the case and the personal characteristics of the offender in determining whether the death penalty is an appropriate punishment. They also suggest that the death sentence should be imposed only in the most exceptional cases where there is no reasonable prospect of reformation and the objects of punishment would not be achieved by any other sentence.

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

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

28. The Petitioners submit that Mr. Aitken's right contained in Article 4(6) of the Convention to apply for mercy has been violated, as he has no right to a fair hearing before the Jamaican Privy Council. In this respect, the Petitioners explain that the power of the Executive in Jamaica to commute death sentences through the exercise of the Prerogative of Mercy is regulated by Sections 90 and 91 of the Constitution of Jamaica. According to the Petitioners, the Governor-General of Jamaica has the power to commute any death sentence under Section 90(1) of the Constitution, but must act in accordance with the advice and recommendation of the Jamaican Privy Council pursuant to Section 90(2) of the Constitution. [6]

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

30. In this respect, the Petitioners cite the decisions of the Judicial Committee of the Privy Council in the cases *Reckley v. Minister of Public Safety (Nº 2)* [7] and *de Freitas v. Benny*[8] for the proposition that the exercise of the power of pardon involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review, and observe that these decisions have been heavily criticized by a number of distinguished commentators.

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

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

33. In response to the State's observations of October 5, 2000 respecting the Prerogative of Mercy, the Petitioners note that in a judgment of September 12, 2000 in

the case of *Neville Lewis v. Jamaica*, the Judicial Committee of the Privy Council clearly expressed, established and applied the fundamental principle that public authorities which make such important decisions as to whether or not a person sentenced to death should be executed must observe basic rules of fairness that include a real opportunity for a condemned person to make representations to the mercy committee and to know what material and recommendations were being considered in the making of the decision.

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

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

(i) Conditions of Detention

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

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

37. According to the Petitioners, these reports indicate that detention facilities in Jamaica are poor and have not been remedied by the Jamaican government. They cite, for example, Amnesty International's 1993 conclusion that "the general conditions prevailing in St. Catherine's District Prison constitute cruel, inhuman and degrading treatment. The conditions and facilities in prisons fall far short of the standards set out in the United Nations Standard Minimum Rules for the Treatment of Prisons, particularly

those sections relating to the provision of adequate cell space, bedding, lighting, sanitary installations, and medical services.”

38. The Petitioners also indicate that all death row inmates in Jamaica are situated on death row in St. Catherine’s District Prison, which was built in the 18th Century and was formerly a slave market. The Petitioners submit that generally speaking, death row inmates are deprived of a mattress or other bedding, that inmates’ cells suffer from inadequate sanitation, ventilation and light, and that prisoners experience poor standards of personal hygiene. In addition, the Petitioners claim that inadequate medical and psychiatric care is available to prisoners, and that inmates condemned to death spend long periods in their cells, have no work or education facilities, and are often the subject of ill-treatment by prison guards. The Petitioners further claim that any complaint mechanisms that exist in the facilities do not adequately address prisoners’ grievances.

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

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

41. In light of these conditions of detention, the Petitioners contend that the State is responsible for violations of Mr. Aitken’s rights under Article 5 of the Convention. The Petitioners rely in this connection upon several provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners. These include Article 10, which states that all accommodation provided for the use of prisoners shall “meet all requirements of health, due regard being paid to climatic conditions and particularly cubic content of air, minimum floor space, lighting, heating and ventilation.” [9] The Petitioners also cite several comments and decisions of the UN Human Rights Committee and the European Court of Human Rights regarding humane treatment in the context of prison conditions. These include the UN Human Rights Committee’s General Comment on Article 10(1) of the International Covenant on Civil and Political Rights, which states in part that the “humane treatment and respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources.” The Petitioners refer additionally to the *Greek Case*, [10] in which

the European Court of Human Rights found that prison conditions may amount to inhuman treatment, where those conditions involve overcrowding, inadequate toilet and sleeping arrangements, inadequate food and recreation, and incommunicado detention.

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

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

(ii) Method of Execution in Jamaica

44. The Petitioners argue that the execution of the death sentence by hanging, as provided for under Jamaican law, constitutes cruel and inhuman treatment or punishment *per se* violation of Articles 5(1) and 5(2) of the Convention. In this regard, the Petitioners submit that whereas Article 4 of the Convention allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided by law must be designed in such a way as to avoid conflict with Article 5 of the Convention. [11]

45. In support of their arguments, the Petitioners provided detailed accounts of the physical, physiological and psychological effects of hanging upon a condemned prisoner, as described in the affidavits of Dr. Harold Hillman dated April 28, 1999, Dr. Albert Hunt dated July 1, 1997 and Dr. Francis Smith dated March 24, 1996. Based upon this evidence, the Petitioners allege that the execution of Mr. Aitken's death sentence by hanging would violate Article 5(2) of the Convention because:

- (a) death by hanging constitutes inhuman and degrading treatment because it does not result in instantaneous death, and there is an impermissibly high risk that Mr. Aitken will suffer an unnecessarily painful and tortuous death by strangulation;
- (b) the pressure in the brain will increase and this is normally accompanied by severe headaches. The increased pressure can be seen as engorgement of the face, eyes and tongue;

- (c) the obstruction of the windpipe raises the carbon dioxide concentration in the blood which makes the person want to inspire, but he cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangulation. However, the person cannot cry out nor can he react normally to distress and pain by moving his limbs violently as they are tied;
- (d) the skin beneath the rope in the neck is stretched by the fall and this will be painful; and
- (e) the humiliating effects of hanging on the body clearly amount to degrading treatment and punishment.

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

(d) Article 8 of the Convention - Right to Adequate Time and Means for Preparing a Defense

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

48. The Petitioners allege in particular that according to Mr. Aitken it was very difficult for him to give instructions to his lawyer because the only conferences that he had with his attorney were at Court during the conduct of his trial. The Petitioners also claim they wrote to Mr. Aitken's trial attorney on numerous occasions requesting information about the preparation of Mr. Aitken's defense, but that as of the date of their petition the attorney had not replied. Further, according to Mr. Aitken he was assaulted on his arrest and he would have wanted his attorney to investigate those beatings as well as his alibi defense. [12]

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

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

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

51. More particularly, the Petitioners recognize that Article 25(1) of the Constitution of Jamaica provides individuals with the legal right to bring a Constitutional Motion before the Supreme Court. [13] They argue, however, that there is no practical opportunity for the victims to pursue a Constitutional Motion because the proceedings are extremely expensive and beyond Mr. Aitken's financial means, and because no legal aid is available for these motions. Consequently, the Petitioners submit that the State's failure to provide legal aid for Constitutional Motions denies the victims access to the courts and hence to an effective remedy for violations of the Constitution or of the American Convention. The Petitioners also submit in this regard that the principle of effective access to courts is even more indispensable in capital cases, where a defendant's life and liberty are at stake.

52. In support of their arguments, the Petitioners cite decisions of other international human rights tribunals, such as the decision of the European Court of Human Rights in *Airey v. Ireland* [14] and the U.N. Human Rights Committee in *Curry v. Jamaica*, [15] for the proposition that individuals must be guaranteed effective access to courts in fact as well as in law, which may require legal assistance in the provision of legal aid. The Petitioners claim that the unavailability of legal aid in Jamaica in fact deprives the victims of effective access to the courts, and that the State is responsible for violations of Articles 24 and 25 of the Convention.

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

[2] In its judgment in the *Neville Lewis* case, the Judicial Committee of the Privy Council found, contrary to its previous jurisprudence, that an individual's petition for mercy under the Jamaican Constitution is open to judicial review, and that the procedure for mercy must be exercised by procedures that are fair and proper. *Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison*, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.).

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

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

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

[6] Sections 90 and 91 of the Constitution of Jamaica provide as follows:

90.(1) The Governor General may, in Her Majesty's name and on Her Majesty's behalf-

- (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
- (c) substitute a less severe form of punishment for that imposed on any person for such an offence;
- or
- (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

[7] *Reckley v. Minister of Public Safety* (Nº 2) [1996] 2 W.L.R. 281.

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

[9] The Petitioners additionally allege violations of Articles 11(a), 11(b), 12, 13, 15, 19, 22(1), 22(2), 22(3), 24, 25(1), 25(2), 26(1), 26(2), 35(1), 36(1), 36(2), 36(3), 36(4), 57, 71(2), 72(3) and 77 of the United Nations Standard Minimum Rule for the Treatment of Prisoners.

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

[11] The Petitioners cite in this regard the decision of the UN Human Rights Committee in the case *Ng v. Canada*, Communication Nº 469/1991, in which the Committee stated that when imposing capital punishment in accordance with Article 7 of the International Covenant on Civil and Political Rights, the execution of the sentence "must be carried out in such a way as to cause the least possible physical and mental suffering."

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

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

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

[15] *Curry v. Jamaica*, Communication Nº 377/1989, at p. 5, paras. 13.3, 13.4.