
**Peter Blaine v. Jamaica, Case 11.827, Report No. 96/98, Inter-Am. C.H.R.,
OEA/Ser.L/V/II.95 Doc. 7 rev. at 312 (1998).**

REPORT No. 96/98 CASE 11.827 PETER BLAINE JAMAICA December 17, 1998

I. SUMMARY

1. On September 29, 1997, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition filed on behalf of Peter Blaine, a prisoner on death row in the St. Catherine District Prison in Jamaica, alleging the responsibility of the State of Jamaica (hereinafter "Jamaica") for violations of Articles 1, 5(1), 5(2), 8(1) and 8(2) of the American Convention on Human Rights (hereinafter "the American Convention").
2. The petitioner, Karen Aston, of the law firm Allen & Overy, reported that Mr. Blaine had been convicted of capital murder on October 14, 1994 by the Home Circuit Court in Kingston, Jamaica, and applications for appeal to the Court of Appeal and the Privy Council had been unsuccessful. The claims set forth in the initial petition related primarily to the trial and appeal of Mr. Blaine, and the conditions of his post-conviction detention. More specifically, the petitioner alleges that Mr. Blaine was not permitted adequate time for the preparation of his defense at trial, and was denied effective representation on appeal, in violation of the due process guarantees of Article 8(2) of the American Convention. She asserts that the conditions of his post-conviction detention violate the standards of Article 5, particularly with respect to inadequate infrastructure, hygiene facilities, and medical care. The petitioner complains of instances of ill treatment at the hands of prison guards, most specifically, a beating alleged to have taken place on March 5, 1997. In a supplemental petition, she added a series of claims related to the legal and procedural framework of the proceedings against Mr. Blaine, principally concerning the mandatory nature of the death penalty in cases of capital murder, the procedure for applying for amnesty or pardon, and the Governor General's Instructions.¹
3. The petitioner reports that the only judicial remedy theoretically still available, the presentation of a constitutional motion, is effectively unavailable because Jamaica does not provide legal aid to assist indigents such as Mr. Blaine in the filing of a motion of that nature. The fact that the remedy is unavailable, she argues, also constitutes a violation of Mr. Blaine's right to judicial guarantees under Article 8.
4. The record indicates that, on May 3, 1996, Mr. Blaine had filed a petition before the United Nations Human Rights Committee ("UNHRC") complaining of violations of the International Covenant on Civil and Political Rights ("ICCPR"). The UNHRC issued its views on the petition on July 17, 1997, finding a

violation of Article 10(1) of the ICCPR with respect to the conditions to which the applicant had been subjected while in pre-trial detention. The petitioner asserts that the matters raised before the IACHR have not been submitted before the UNHRC or another intergovernmental procedure.

5. The petitioner contends that the appropriate remedy for the violations alleged is release. She argues that the conditions of Mr. Blaine's post-conviction detention are so violative of minimum standards under the Convention and other instruments that execution pursuant to such conditions would equate to cruel and unusual punishment. Given the risk that the sentence against Mr. Blaine was subject to being carried out at any point, the initial petition asked that the IACHR address the State to request the adoption of precautionary measures to stay his execution pending the Commission's decision, pursuant to Article 29 of its Regulations.

6. The State of Jamaica controverts the admissibility of the claims concerning the trial and appeal of Mr. Blaine, which it characterizes as duplicative of those filed before the UNHRC. It maintains that the claims concerning the conditions of Mr. Blaine's post-conviction detention, and the arguments raised with respect to the legal and procedural framework of capital punishment are unfounded as a matter of fact and law. Further, the State maintains that an indigent applicant wishing to file a constitutional motion does not require legal aid: an applicant may invoke the remedy pro se; and the legal system of Jamaica does not require that legal aid be given in such cases.

II. PROCESSING BEFORE THE COMMISSION

7. The Commission acknowledged receipt of the petition by means of a note of October 2, 1997. Pursuant a request of the petitioner (aimed at compliance with timelines established in the Governor General's Instructions), on October 7, 1997, the Commission informed the State of Jamaica that a petition concerning Mr. Blaine had been received and was under study pursuant to the applicable Regulations.

8. On October 14, 1997, the petitioner reiterated her petition that the Commission request a stay of execution, noting that, according to the Instructions, where a stay is not requested within 30 days of the filing of such a petition, execution will not be postponed.

9. The Commission opened Case 11.827 on October 31, 1997, and transmitted the pertinent parts of the petition to the Government of Jamaica in a note of that same date, with a response requested within 90 days. The petitioner was notified that this action had been taken.

10. On October 31, 1997, the State submitted a note indicating that it considered the laws and procedures of Jamaica applicable to the case, including the Governor General's Instructions.

11. On November 19, 1997, the Commission addressed the State, pursuant to Article 29 of its Regulations, to request the adoption of precautionary measures to stay the execution of Mr. Blaine until such time as it could fully investigate the petition. The petitioner was notified that this request had been made.

12. The State's response to the Commission's request for information on the petition was received on November 26, 1997. The contents were transmitted to the petitioner on December 1, 1997, with observations requested within 30 days of receipt.

13. By means of a note of December 15, 1997, the State transmitted a brief supplemental response to the petitioner's allegations. This was transmitted to the petitioner on December 17, 1997, for any additional

observations.

14. The petitioner submitted observations on December 23, 1997, along with a supplemental complaint alleging a series of additional claims under Articles 4(3), 4(6), 5(1), 5(2), 24 and 25 of the American Convention. The pertinent parts of both documents were transmitted to the State by means of a note of December 24, 1997, with observations requested within 30 days.

15. Pursuant to the January 16, 1998 request of the petitioner, the Commission scheduled a hearing on the case during its 98th period of sessions. That request having been withdrawn on January 26, 1998, the Commission decided to strike the hearing from its schedule and notified the parties accordingly.

16. The State responded to the petitioner's observations and supplemental petition by means of a note dated January 27, 1998. This was transmitted to the petitioner on February 20, 1998, with a response received on March 27, 1998.

17. In the interim, the petitioner had filed a brief additional submission of observations, dated February 2, 1998. This was transmitted to the State on February 24, 1998, which acknowledged receipt on March 30, 1998.

18. The petitioner's submission of March 27, 1998 was transmitted to the State on April 2, 1998, with any observations requested within 30 days. The State's acknowledgement of receipt was received on April 23, 1998.

19. The petitioner submitted an additional piece of information by means of a brief note of May 26, 1998, the contents of which were transmitted to the State on July 23, 1998.

20. On July 17, 1998, the Commission reiterated its November 19, 1997 request for precautionary measures to stay Mr. Blaine's execution. The petitioner was duly notified that this action had been taken.

21. In a note of August 13, 1998, the State acknowledged receipt of the July 23, 1998 communication, and indicated that the specific matter at issue was under investigation. This information was transmitted to the petitioner on August 18, 1998.

22. On November 17, 1998, the petitioner informed the Commission that Jamaica had issued a warrant for the execution of Peter Blaine to be carried out on November 26, 1998. She asked that the request for precautionary measures in the case be reiterated. On November 20, 1998, the Commission addressed the State of Jamaica to reiterate its request that the execution of Mr. Blaine be stayed until the claims pending before it had been fully investigated.

23. On December 14, 1998, the petitioner forwarded to the Commission a copy of a constitutional motion filed on behalf of Mr. Blaine against the Attorney General of Jamaica and the Superintendent of the St. Catherine District Prison subsequent to the reading of the above mentioned warrant establishing a November 26, 1998 execution date. On December 16, 1998, the petitioner filed a brief submission of additional arguments on one of her claims.

III. THE POSITIONS OF THE PARTIES

A. The Position of the Petitioner

24. The petitioner alleges that the State of Jamaica is responsible for violations of Mr. Blaine's rights under Articles 1, 4(3), 4(6), 5(1), 5(2), 8(1), 8(2), 24 and 25 of the American Convention, most essentially in relation to his trial and appeal, the conditions of his post-conviction detention, and the legal and procedural framework applicable to the capital sentence issued against him. According to the petitioner, Mr. Blaine was formally charged with the murder of Victor Higgs on July 21 or 22, 1994, and the trial was initiated on October 14, 1994. Mr. Blaine and his co-defendant, Neville Lewis,² were convicted of capital murder by the Home Circuit Court in Kingston, Jamaica that same day. The Court of Appeals of Jamaica refused Mr. Blaine's application for leave to appeal on July 31, 1995, and his application for special leave to appeal to the Judicial Committee of the Privy Council in England was dismissed on May 2, 1996.

25. First, the petitioner claims that Mr. Blaine did not have an adequate opportunity to prepare his defense, in violation of Article 8(2) of the Convention. She reports that Mr. Blaine only met the attorney assigned to represent him twice before trial, once when they were introduced, and again at the preliminary hearing. She alleges that Mr. Blaine therefore had no time to review evidence or otherwise prepare for trial with his attorney.

26. She further asserts that Mr. Blaine was denied effective representation on appeal in violation of Article 8(2). She alleges that the trial transcript omitted the sworn evidence given by Mr. Blaine on the voir dire in relation to his caution statement. Because of that omission, both the Court of Appeal and his own counsel were reportedly unaware that the evidence had been given, leading his counsel to drop the first ground of the appeal (concerning whether the caution statement had been coerced) without having consulted Mr. Blaine. This failure to consult, she asserts, equates to ineffective assistance of counsel.

27. Second, the petitioner maintains that the conditions of Mr. Blaine's post-conviction detention violate Articles 5(1) and 5(2) of the American Convention, as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners. She specifically alleges that, since his conviction, Mr. Blaine has been: locked in his cell for 23 hours a day; deprived of appropriate bedding and must sleep on a concrete platform; deprived of adequate hygiene facilities, ventilation and light in his cell; deprived of adequate medical and psychiatric care; and provided with inadequate food. She also complains of the absence of an effective internal complaint mechanism within the prison.

28. In addition, she alleges that Mr. Blaine was severely beaten by prison guards on March 5, 1997, requiring treatment by a doctor. She reports that Mr. Blaine and other prisoners had been beaten in retaliation for the attempted escape of four other inmates. In her May 26, 1998 communication, the petitioner named two guards whom Mr. Blaine alleges beat him. Following the alleged incident, guards reportedly confiscated and destroyed personal items belonging to Mr. Blaine and other prisoners, including, in the case of the former, certain legal documents, correspondence, clothing, shoes and hygiene items. The petitioner also complains that, in September of 1997, when Mr. Blaine's co-defendant, Neville Lewis, was moved from his cell in preparation for execution (which was later stayed), guards "repeatedly intimidated the Applicant by pretending to take him to the condemned cell and threatening they would 'hang him soon.'" She alleges, without further details, that Mr. Blaine has been mistreated by prison guards on subsequent occasions. The petitioner argues that the conditions of Mr. Blaine's post-conviction detention are so violative of minimum standards under the Convention and other instruments, that execution pursuant to having been held under such circumstances would equate to inhuman and degrading punishment.

29. Third, the petitioner raises a series of claims concerning the death sentence issued against Mr. Blaine and Article 4 of the Convention. She argues that the moratorium on executions put into effect in Jamaica in 1988 constituted a de facto abolition of that penalty. In the petitioner's view, ending that moratorium should be read as a post-abolition reestablishment of the death penalty, prohibited by Article 4(3). She

claims that the process to apply for pardon in Jamaica is flawed because an applicant has no right to be heard by the Jamaican Privy Council (the body charged with reviewing such cases), and no right to see, challenge or respond to the information before that body. She contends that, as a result, the process is arbitrary and violates Article 4(6) of the Convention. She adds that, because the prerogative of mercy is always exercised in favor of women, but only rarely in favor of men, the procedure is incompatible with the guarantee of equal protection established in Article 24 of the Convention.

30. With respect to the mandatory nature of the death penalty for capital murder, the petitioner indicates that a person convicted of capital murder has no opportunity to present mitigating evidence regarding sentencing. This means that a person so convicted is sentenced in relation to the definition of the crime, rather than the specific circumstances of his culpability. According to the petitioner, "the requirement that the death penalty is imposed in every case of capital murder is cruel, inhuman and degrading and is an arbitrary and disproportionate punishment." Moreover, she asserts, the imposition of a uniform sentence "for acts of unequal culpability is substantive inequality," and contravenes the guarantee of equal protection set forth in Article 24 of the Convention.

31. Fourth, the petitioner submits that the Instructions of the Governor General, which address how the State of Jamaica will respond to petitions presented before the IACHR and UNHRC concerning persons sentenced to death, are incompatible with the norms of the American Convention because adherence to the timetables imposed could result in the judicially ordered execution of a person whose petition is pending before the IACHR. She contends that execution during the pendency of a petition would constitute an arbitrary deprivation of life, and that the timetables imposed by the Instructions impede their right of petition and the ability of the Commission to carry out its fact-finding and other procedures in the case. She alleges that these claims implicate Articles 4, 5, 8, 24 and 25 of the Convention.

32. Finally, the petitioner contends that the fact that the Jamaican legal system does not provide indigent persons, such as Mr. Blaine, with legal aid to file a constitutional motion denies him access to judicial guarantees, in violation of Article 8(1) of the American Convention. She notes that constitutional proceedings are complex and require the assistance of an attorney to be effectively exercised. She contends that, in the absence of legal aid, a potential applicant is dependent on pro bono legal assistance, which she characterizes as virtually non-existent in Jamaica.

B. The Position of the State

33. The State of Jamaica maintains that the claims raised by the petitioner with respect to Article 8 of the American Convention are inadmissible pursuant to Article 47(d) of the American Convention, which provides that the Commission shall consider inadmissible a petition which is "substantially the same as one previously studied" by itself or another international organization. The State asserts that the communication filed before the UNHRC concerning Mr. Blaine raised substantially the same issues concerning his trial and defense as those before the IACHR. The State specifically notes that the UNHRC examined the issue of the time available to the applicant to prepare his defense, and declared the claim inadmissible (under the ICCPR). Further, the State points out that the UNHRC considered the question of whether evidence had been omitted from the trial transcript and found that the voir dire had been comprehensive, and that it was "unclear ... whether any part of the transcript could have been suppressed."

34. With respect to the claims raised in relation to prison conditions and Article 5 of the American Convention, the State invited "the Commission to revisit its own findings following [its] site visit and investigation into the prison conditions in Jamaica in 1993. While the conditions are still not ideal, efforts have been made since that time to improve the conditions, within the limitation of available resources."

35. In responding to the claims concerning the beating and confiscation of possessions alleged to have taken place on March 5, 1997, the State initially reported that the Foreign Ministry had ordered an investigation. It subsequently reported that the information gathered showed no evidence that Mr. Blaine had been severely beaten. The State indicated that "[h]e alleges that he was assaulted but required no medical attention. The investigating authority has been hampered ... as the applicant was unable to identify any of the persons involved...." Under those circumstances, the State contends there is insufficient evidence to support the allegations. On July 23, 1998, the State was provided with information supplied by the petitioner naming two prison guards allegedly involved in the incident of March 5, 1997. In a communication of August 13, 1998, the State indicated that this information was under investigation, and that the results would be transmitted as soon as they became available. The State requested that the Commission continue with its examination.

36. The State indicates that a search for contraband materials was in fact carried out at the time referred to by the petitioner. As a result of that search, some of Mr. Blaine's legal documents had inadvertently been destroyed. The State maintains that this was done with no malice intended, and notes that Mr. Blaine informed the authorities that his lawyer had later replaced the documents. "Other contraband items were removed from the applicant's cell." They contend that Mr. Blaine had been aware that the items were prohibited by the prison rules, and that he had breached those rules. The State denies any breach of Article 5(1) or 5(2).

37. The State contends that the claims raised with respect to Article 4 are unfounded in fact or law. While the implementation of the death penalty was suspended for a period of time in Jamaica while the Government considered whether to abolish the penalty, the decision was ultimately taken to restrict it to a lesser number of offenses, an "approach consistent with the spirit of the American Convention...." With respect to the procedures to apply for mercy, the State maintains that Mr. Blaine had been entitled to submit an application and had done so. The State notes that the Jamaican Privy Council charged with reviewing petitions for mercy makes every effort to ensure that it has the relevant information before it, and the applicant is not precluded from filing written submissions. The State denies that this procedure is incompatible with the guarantees of Articles 5 and 24 of the Convention. Further, it denies that the imposition of the death penalty in all cases of capital murder is inconsistent with the Convention, and notes that the Jamaican Privy Council has the competence to impose a lesser sentence on the basis of information it deems mitigating.

38. With respect to the petitioner's argument that an indigent petitioner would require legal aid to submit a constitutional motion and effectively exercise that remedy, the State of Jamaica maintains that, under its system, mandatory legal representation is only required in criminal matters which are of a certain degree of seriousness. This includes, for example, murder. "There is no legal requirement for mandatory representation when an accused is charged in civil or constitutional matters. Thus, there is no obligation to grant legal aid to an accused for constitutional motions under the Convention." Additionally, they note that the absence of legal aid is not an absolute bar to the filing of a constitutional motion, and cite the case of *Pratt and Morgan v. Attorney General* in support of that proposition.³

IV. ANALYSIS

A. Competence of the Commission

39. In accordance with its mandate, the Commission is competent to examine the subject matter of this complaint, as it concerns alleged violations of Articles 1, 4, 5, 8, 24 and 25 of the American Convention. Jamaica has been a party to that Convention since its ratification of August 7, 1978, and the allegations at issue concern events subsequent to that date. The petitioner has locus standi to appear pursuant to the terms of Article 44 of the Convention. In her submissions, the petitioner has stated certain claims which,

if consistent with other requirements and shown to be true, could tend to establish the violation of a right protected by the American Convention.

B. Requirements to Admit a Petition

Duplication

40. In accordance with Articles 46(c) and 47(d) of the American Convention, the Commission shall consider inadmissible a petition which is substantially the same as one pending before another international proceeding, or which has been previously studied by itself or another international organization.⁴ Mr. Blaine had presented a petition before the UNHRC on May 3, 1996, complaining of violations of Articles 7, 9, 14 and 5 of the ICCPR, principally in relation to: (1) the conduct of the trial, assistance of counsel, and the use of statements that were allegedly coerced, and (2) prison conditions in pre-trial detention and beatings allegedly administered to coerce a confession. In its decision of July 17, 1997, the UNHRC established a violation of Article 10(1), and determined that the other claims were inadmissible or had not been shown to demonstrate any violation.

41. The claims previously raised before the UNHRC which are most pertinent to the current inquiry concern Mr. Blaine's right of defense at trial and on appeal. The petitioner argues that the claims raised before the UNHRC concerning Mr. Blaine's right of defense at trial focussed on the amount of time that passed before he was assigned counsel, with his inability to confer adequately with counsel noted as a consequence of that delay. The petitioner contends that, in contrast, the claims before the IACHR focus on the inability of Mr. Blaine to confer adequately with counsel before trial. The petitioner makes a similar argument that her claims before the IACHR with respect to the adequacy of representation on appeal have a different emphasis than those before the UNHRC. With respect to both sets of claims, the petitioner contends that, because the UNHRC refused to admit them as pleaded, they were never examined on the merits and so were not previously "considered."

42. Where a matter is first presented before one international proceeding, and is then essentially replicated and placed before another, the issue of duplication may be readily identified and disposed of. Where successive petitions do not clearly replicate each other, further analysis may be required. The fact that a communication involves the same person as a previously presented petition is just one element of duplication. Regard must also be had to the nature of the claims presented and the facts adduced in support thereof. The presentation of new facts and/or sufficiently distinct claims about the same person could, under certain circumstances, and with other applicable requirements having been met, provide the basis for consideration.⁵ It may also be noted that, where a second presentation of claims concerns rights which were not covered by the subject matter jurisdiction of the body before which a first petition was presented, the matter will not, in principle, be barred as duplicative.⁶

43. While the Commission has had occasion to apply Articles 46(c) and 47(d) in its practice, it has not previously explained in detail what is meant by a matter which is "substantially the same," and finds it pertinent to clarify what is required in this regard under the terms of Article 47(d) of the Convention, and Article 39 of its Regulations. Having examined the jurisprudence of the European human rights system, as well as that of the UNHRC, and consistent with its own past practice, the Commission observes that a prohibited instance of duplication involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof. This essentially means that a petitioner cannot file a petition before the UNHRC complaining of the violation of a protected right or rights based on a factual predicate, and then present a complaint before this Commission involving identical or integrally related rights and facts which were or could have been raised before the UNHRC.

44. To illustrate, in *Ajinaja v. the United Kingdom*, the applicant had alleged before the European

Commission on Human Rights that he had been unlawfully arrested, convicted and detained in violation of Articles 3, 4 and 5 of the European Convention. Pursuant to the rejection of that petition as manifestly ill-founded, the petitioner submitted a second application alleging violations of his right of defense under Article 6. The European Commission determined that the second petition represented a reformulation of complaints which clearly could have been presented in the original petition.⁷ Both petitions concerned the right to basic due process guarantees and relied on the same factual basis. Similarly, in *V.O. v. Norway*, the applicant had complained unsuccessfully before the European Commission about alleged violations of his rights in domestic custody proceedings. He then petitioned the UNHRC on the same facts and violations, arguing that the emphasis of the European Commission's analysis had been misplaced, and that the construction of the rights concerned differed in some respects under the jurisdiction of the Committee. The UNHRC deemed the petition inadmissible based on the identity between the legal claims and facts presented before it with those previously presented before the European Commission.⁸

45. Claims brought regarding the same individual, but concerning facts and guarantees not previously presented, and which are not reformulations, do not raise issues with respect to *res judicata*, and will not in principle be barred by the prohibition of duplication of claims. Expressed in positive terms, newly presented claims not challenging the effect of a previous decision as *res judicata* would, assuming compliance with other requirements, be admissible. For example, where an applicant has brought allegations concerning his or her right to due process at trial and appeal before the UNHRC, and is then subjected to repeated beatings in prison at the hands of guards, he or she could elect to complain about the latter situation before the IACHR. The legal claims and guarantees concerned would be distinct from those pending before the UNHRC, as would the facts alleged in support thereof.

46. In the case of Mr. Blaine, certain legal claims put forward, first before the UNHRC and then before the IACHR, concern the same specific due process guarantees in the prosecution carried out against him and the corresponding appeals. With respect to the petitioner's claims concerning Mr. Blaine's right of defense, it is evident that they rest on the same basic factual allegations and arguments in both instances. The petitioner's contention before the IACHR that the arguments before the UNHRC emphasized different aspects of those facts is unavailing. Because the claims and factual allegations raised before the IACHR concerning the trial and appeal are substantially the same as those raised before and considered by the UNHRC, they are inadmissible in the present case.

47. Further, the claims raised by Mr. Blaine concerning the mandatory nature of the death penalty in cases of capital murder and the procedures to apply for mercy likewise involve due process guarantees and arise directly out of his prosecution and appeals. Challenges on these grounds could have been raised in domestic proceedings, but apparently were not (raising questions concerning the exhaustion of domestic remedies), and could thereafter have been raised before the UNHRC with the other due process violations alleged in relation to the trial and appeal. As stated, where a petitioner has filed claims concerning a specific guarantee and factual basis before one international organization, the rules prohibit the admissibility of claims concerning those same guarantees and facts by this Commission.

48. With respect to the claims before the IACHR concerning Mr. Blaine's post-conviction detention, it will be recalled that the conditions of Mr. Blaine's pre-trial detention--limited to the specific period of his incarceration between his indictment and trial--were raised before and decided by the UNHRC. The alleged conditions of his post-conviction detention, which involve a different site, time frame, and distinct allegations of fact and law, and which are reportedly ongoing, were not raised before that body. Because the claims concerning the alleged conditions of post-conviction detention are legally and factually distinct from those concerning pre-trial detention before the UNHRC, they are not barred as duplicative. This analysis holds true with respect to the allegations concerning mistreatment at the hands of prison guards on March 5, 1997 and subsequently. These claims were not raised in form or substance

before the UNHRC. It will be noted that the State has not argued that these claims are duplicative.

49. The remaining claims, which concern the Instructions of the Governor General and the question of access to judicial guarantees, were not raised in form or substance before the UNHRC, and the State has raised no claim with respect to duplication in this regard. The Instructions were in fact issued subsequent to the decision of the UNHRC on Mr. Blaine's communication, and the relevant aspects of the petitioner's claims in this regard concern Mr. Blaine's right to petition the IACHR, and the ability of the latter to complete its investigation of the claims deemed admissible. The Commission finds no bar to consideration of these claims under Articles 46(c) and 47(d) of the Convention.

Timeliness

50. In accordance with Article 46(b) of the Convention, the admission of a petition is subject to the requirement that it be presented in a timely manner, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. Where no such judgment has been issued because it has not been possible to exhaust internal remedies, Article 38 of the Commission's Regulations establishes that the deadline for presentation shall be "within a reasonable period of time, in the Commission's judgment, as from the date on which the alleged violation of rights has occurred, considering the circumstances of each specific case."

51. The claims raised concerning Mr. Blaine's right to due process under Article 8, and the other questions directly related to the death sentence issued against him have already been dismissed as duplicative of those previously examined by the UNHRC, and need be considered no further. None of the remaining claims have been the subject of a final judgment of the Jamaican courts. For the purposes of analysis, these claims may be dealt with in two parts, the first concerning situations the petitioner maintains are ongoing, and the second relating to what are alleged to have been specific events. The former consists of the claims concerning the conditions of Mr. Blaine's post-conviction detention, the Governor General's Instructions, and the lack of access to judicial guarantees resulting from the absence of legal aid. In each instance, the petitioner claims that Mr. Blaine's rights under the Convention have been and continue to be violated. While denying the substance of the claims, the State has not questioned the timeliness of their presentation.

52. As noted, the six months rule applies to matters which have been the subject of a final decision, ensuring legal certainty and stability once a decision has been taken. The six-months rule does not apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis.⁹ As the foregoing claims concern a set of alleged conditions (post-conviction detention) and a set of norms and consequences which continue to apply and unfold (the Governor General's Instructions and the alleged lack of access to judicial guarantees), their admissibility is not barred by the six-months rule.

53. The second part of the analysis concerns the allegations that Mr. Blaine was beaten or otherwise mistreated at the hands of prison guards. With respect to these alleged instances, most particularly that of March 5, 1997, the petitioner contends that the domestic remedies normally applicable in such a case, starting with a prison complaint system, were not effectively operational. The State has denied the substance of the claims, but was continuing to investigate them as of the date of the present report. It has not challenged the timeliness of presentation. Given the dates of the several incidents alleged, the September 29, 1997 filing of the petition before the IACHR, the information and arguments on record, and the fact that the alleged beating of Mr. Blaine remains under investigation by the State, the Commission considers this complaint to have been timely filed.

Exhaustion of Domestic Remedies

54. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [shall] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the state concerned the opportunity to resolve disputes within its own legal framework.

55. In relation to this requirement, the claims before the Commission may be broken down into two groups. With respect to the first group, consisting of claims relating to conditions of post-conviction detention and mistreatment by prison guards, the petitioner argues that the remedy appropriate to resolve the situation denounced is a complaint process within the prison system. She alleges that Mr. Blaine complained to prison authorities on various occasions, and requested specific corrective action, but to no avail because there is no effective prison complaint system. The State denies the substance of these claims but does not controvert the arguments of the petitioners with respect to this aspect of admissibility.

56. With respect to the second group of claims, concerning the Governor General's Instructions and access to judicial guarantees, the record before the Commission continues to reflect the respective positions of the parties prior to the filing of the constitutional motion referred to in paragraph 23 above. The petitioner had argued that the remedy normally applicable to these claims, a constitutional motion, was essentially unavailable to Mr. Blaine because, as an indigent person, he could not obtain legal counsel to assist him in vindicating the rights alleged to have been violated. The petitioner contended that the failure of the Jamaican system to grant legal aid under these circumstances was not only a procedural impediment, but a substantive violation of the Convention, as Mr. Blaine was thus unable to access the judicial guarantees set forth in Article 8.

57. The State of Jamaica had argued that, under its system, mandatory legal representation is only required in criminal matters which are of a certain degree of seriousness, such as murder. "There is no legal requirement for mandatory representation when an accused is charged in civil or constitutional matters. Thus, there is no obligation to grant legal aid to an accused for constitutional motions under the Convention." They maintained that the absence of legal aid did not prevent an applicant from filing a constitutional motion, and cited the case of *Pratt and Morgan v. Attorney General* in support of that proposition.

58. When domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.¹⁰ Article 46(2) of the Convention specifies that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment through domestic recourses. Consequently, when a petitioner alleges that he or she is unable to prove exhaustion, Article 37 of the Commission's Regulations establishes that the burden then shifts to the Government to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged.¹¹

59. Article 46(2)(b) applies when remedies exist, but are either denied to the claimant or he or she is unable to invoke them. While Article 46(2)(b) does not directly address the question of legal aid for indigent claimants, the Inter-American Court has established that "if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies."¹² In deciding whether legal representation is required, regard must be had to the circumstances of the particular case--"its significance, its legal character, and its context in a particular legal system."¹³ Whether the internal system of the country concerned provides for legal aid as a matter of domestic law is not dispositive; rather, the analysis turns on whether

legal representation is necessary for the recourse to be exercised effectively.

60. Accordingly, in prior cases involving issues related in part to those raised presently, the Commission has found that the absence of legal aid to file a constitutional motion may render that recourse essentially unavailable to an indigent applicant.¹⁴ While, as a practical matter, an applicant acting alone could file a constitutional motion, a proceeding involving the interpretation and application of constitutional provisions may well involve sophisticated and/or complex questions of law.

61. Because the absence of legal aid may impede the invocation of a constitutional remedy to the extent that it is essentially unavailable to an indigent applicant, resort to that recourse may not have been required as a condition for admitting the present case. However, now that the remedy has been invoked, apparently through the assistance of pro bono legal counsel, its potential efficacy must be evaluated.¹⁵ In this regard, the Commission observes that it has no information on the record to show that this remedy is incapable of producing the results for which it was designed with respect to the two sets of claims identified above. Given that the barrier to exhaustion complained of has been surmounted; that these claims have not been raised before the Jamaican judiciary previously; and that there are no indicia of undue delay or other grounds for excuse on the record, the Commission concludes that it cannot admit the present case while the constitutional motion remains pending.

CONCLUSIONS

62. In accordance with the foregoing analysis of the requirements of Articles 46 and 47 of the American Convention and the applicable provisions of its Regulations, the Commission concludes that it is unable to continue with the processing of this case at the present time. The claims concerning Article 8 which relate to Mr. Blaine's right of defense, as well as those which concern Article 4 and the application of the death penalty in his case are inadmissible due to the prohibition of duplication set forth in Article 47 (d) of the Convention.

63. The remaining claims concern Articles 1, 5, 8, 24 and 25, and relate to the conditions of Mr. Blaine's post-conviction detention, alleged instances of mistreatment at the hands of prison guards, the Instructions of the Governor General insofar as they relate to the question of the right of petition, and the question of access to judicial guarantees. While these claims are not barred by the prohibition of duplication or the requirement of timely presentation, they may not be admitted at this time because of the pendency of the constitutional motion filed on Mr. Blaine's behalf. The finding with respect to these claims is made without prejudice, and the Commission observes that, if the petitioner continues to believe that the relevant facts constitute a violation once the constitutional recourse has been decided, she may resubmit her claims.

64. On the basis of the findings of fact and law set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare inadmissible the claims presented on behalf of Mr. Blaine with respect to Articles 8 and 4, concerning his right to due process, and the other claims connected to that right and the application of the death penalty, on the basis that they essentially duplicate matters considered by the UNHRC. The other claims, which relate to Articles 1, 5, 8, 24 and 25, are inadmissible at this time due to the pendency of the constitutional motion filed on behalf of Mr. Blaine.

2. To transmit this report to the State of Jamaica and the petitioner.

3. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights (IACHR), in the city of Washington, D.C., on the 17th day of the month of December in the year 1998. (Signed): Carlos Ayala Corao, Chairman; Robert K. Goldman, First Vice Chairman; Jean Joseph Exume, Second Vice Chairman; Commissioners Alvaro Tirado Mejia, Claudio Grossman and Henry Forde.

Footnotes

1 These "Instructions" were issued by the Governor General on August 7, 1997. They establish a series of procedures and timelines which the State will apply in dealing with petitions presented before the IACHR and/or United Nations Human Rights Committee ("UNHRC") concerning persons sentenced to capital punishment.

2 A petition filed before the IACHR on behalf of Mr. Lewis is under study as Case 11.825.

3 Pratt and Morgan v. The Attorney General of Jamaica (1994) 2 AC 1 (setting forth holding of Judicial Committee of the Privy Council that prolonged delay in implementation of death penalty constitutes cruel and unusual treatment in contravention of the Jamaican Constitution).

4 This refers to an organization which is competent to take decisions on the specific facts set forth in the petition, and measures in favor of the effective settlement of the dispute concerned. See, e.g., IACHR, Reso. 33/88, Case 9786 (Peru), in OEA/Ser.L/V/II.76, Doc. 10, 18 Sept. 1989, at consideranda d – h.

5 See, e.g., Eur. Comm. H.R., App. 10785/84, Dec. of July 18, 1986, D&R 48/102; App. 12164/86, Dec. of Oct. 12, 1988, D&R 58/63; App. 24088/94, Dec. of Oct. 12, 1994, D&R 79/138.

6 See, e.g., Eur. Comm. H.R., App. 24088/94, Dec. of 10.12.95, D&R 79/138 (dismissing claims presented in prior petition, but accepting that new claim arising in relation to those previously presented was not barred in principle where the legal arguments, guarantees concerned and facts were distinct [dismissed on other ground]).

7 See, Eur. Comm. H.R., App. 13365/87, Dec. of Mar. 8, 1988, D&R 55/294.

8 UNHRC, App. 168/1984, in Selected Decisions of the Human Rights Committee under the Optional Protocol, CCPR/C/OP/2, at p. 48 (involving construction of reservation under Article 5(2) of the Optional Protocol).

9 See, e.g., Eur. Comm. H.R. Apps. 7151/75, 7152/75, Dec. of Mar. 5, 1979, D&R 15/15 (distinguishing between cases in which the complaint is directed at a specific decision or event, and those concerning a continuing situation).

10 See IACtHR, Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para. 17.

11 See, IACtHR, Velásquez Rodríguez Case, Judgment of June 26, 1987, Ser. C No.1, at para. 88.

12 Advisory Opinion OC-11/90 supra, at para. 30.

13 Id., para. 28.

14 See mutatis mutandis, IACHR, Report 90/98, Case 11.843, Mykoo v. Jamaica. This is consistent with various holdings of the UNHRC on this question. See, e.g., Comm. No. 459/1991, Wright and Harvey v. Jamaica (views of 17 March 1994), Report of the UNHRC (1997), GAOR Off. Recs. 51st Sess. Supp. 40 (A/51/40), Vol. II, at p. 35, 38 para. 6.2; Comm. No. 445/1991, Champagnie et al. v. Jamaica (views of 18 July 1994), Report of the UNHRC (1994), GAOR Off. Recs. 49th Sess. Supp. 40 (A/49/40), Vol. II, at p. 136, 139 para. 5.2.

15 See generally, IACtHR, Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C No. 4, at paras. 64-68 (defining what constitutes an adequate domestic remedy).