

REPORT Nº 61/06
CASE 12.447
PUBLICATION
DERRICK TRACEY
JAMAICA
July 20, 2006

I. SUMMARY

1. On August 3, 2001, the Inter-American Commission on Human Rights (the "Commission") received a petition from Mr. Derrick Tracey (the "Petitioner") against the Government of Jamaica (the "State" or "Jamaica"). The petition stated that on April 14, 2000, Mr. Tracey was convicted in the St. Ann Circuit Court in Jamaica of robbery with aggravation and illegal possession of a firearm and was subsequently sentenced to two 15-year sentences.

2. In his petition, Mr. Tracey has alleged that the State is responsible for violating his right to a fair trial under Article 8 of the American Convention on Human Rights (the "Convention") in connection with the criminal proceedings against him. In particular, the Petitioner claims that he was not brought to trial within a reasonable time, that he and his trial attorney did not have adequate time and means for the preparation of his defense, that he was denied the assistance of counsel altogether during his appeal, and that a coerced confession of guilt was used against him during his trial.

3. The State has argued that it is not responsible for violations of any of the Petitioner's rights under the American Convention, because the delay in his trial resulted from the State's efforts to secure trial counsel for him, he did not require an attorney to pursue his appeal to the Court of Appeal of Jamaica, and the trial judge made a finding of fact that Mr. Tracey gave his statement to the police voluntarily.

4. As set forth in this Report, having examined the contentions of the parties, the Commission concluded that Jamaica is responsible for violations of Articles 8.1, 8.2.c, d, e, f, h, and 25 of the Convention, together with violations of Article 1.1 and 2 of the Convention, in connection with the criminal proceedings against Mr. Tracey. Based upon these conclusions, the Commission has recommended that the State grant Mr. Tracey an effective remedy, which includes a re-trial in accordance with the fair trial protections under the American Convention.

II. PROCEEDINGS SUBSEQUENT TO REPORT 15/04

5. The Commission declared Mr. Tracey's petition admissible in Report 15/04 dated February 27, 2004 with respect to Article 1.1, 8 and 25 of the American Convention, subject to its decision to join the question of exhaustion of domestic remedies to the merits of the case. The Commission transmitted Report 15/04 to the Petitioners and the State by notes dated March 10, 2004 and requested any additional information from the Petitioners on the merits of the case within two months. In the same communications, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention, in accordance with Article 48.1.f of the Convention.

6. By note dated July 26, 2004, the Commission reiterated its March 10, 2004 request for information from the Petitioner. In a letter dated September 25, 2004 and received by the Commission on October 21, 2004, the Petitioner provided additional observations to the Commission.

7. The Commission transmitted the pertinent parts of the Petitioner's observations to the State by note dated October 26, 2004 with a request for any additional information on the merits of the petition within two months in accordance with Article 38.1 of the Commission's Rules of Procedure. In a

note dated December 6, 2004, the State requested a 30-day extension of time to provide a response to the Petitioner's observations, which the Commission granted in a communication dated December 8, 2004. Subsequently, by note dated February 22, 2005 and received by the Commission on February 24, 2005, the State provided a response to the Petitioner's observations, which the Commission transmitted to the Petitioner in a communication dated February 28, 2005. As of the date of the present report, the Commission had not received any additional observations from the parties.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

8. The Petitioner claims that he was arrested on a charge of robbery with aggravation and illegal possession of a firearm on July 10, 1998. He was subsequently tried in the St. Ann Circuit Court and, on April 14, 2000, was convicted of the charges against him and sentenced to two 15-year sentences, which he is presently serving at the St. Catherine Adult Correctional Centre in Jamaica.

9. With respect to the issue of exhaustion of domestic remedies, which has been joined to the merits of the case, as well as his right to a fair trial under Article 8 of the American Convention, the Petitioner contends that he was not afforded legal representation during the appeals from his conviction and was therefore denied the ability to properly and effectively present his case.

10. In particular, the Petitioner claims that following his April 14, 2000 conviction, he lodged an application for legal representation and for leave to appeal from the trial court to the Court of Appeal of Jamaica. On March 8, 2001, a single judge of the Court of Appeal of Jamaica dismissed the Petitioner's application. In its "Notification to Appellant of Result of Application", a copy of which the Petitioner provided to the Commission, the Court stated as follows:

Application for leave refused. All the legal issues have been properly dealt with by the Learned Trial Judge. Legal aid refused. Sentence to commence on 28/5/2000.

11. According to the Petitioner, he subsequently applied to a three-judge panel of the Court of Appeal of Jamaica for legal representation and for leave to appeal, and on June 11, 2001 the panel dismissed his application and request for leave.

12. The Petitioner also claims that he made other attempts to obtain legal representation to pursue an appeal before the Court of Appeal and the Judicial Committee of the Privy Council. In particular, Mr. Tracey indicates that in November 2002, he wrote to the President of the Court of Appeal of Jamaica concerning his circumstances and did not receive a reply. Mr. Tracey also claims that he requested assistance from the Independent Jamaican Council for Human Rights, a nongovernmental organization in Jamaica, and from the Public Defender of Jamaica, without success. In this connection, Mr. Tracey indicated that the Public Defender sent a representative to visit him, who only said that they "could not overrule the court," and that the Petitioner had to start his sentence and apply for parole after 5 years. The Petitioner also provided the Commission with a copy of a letter dated May 21, 2002 that he received from the Public Defender advising him that "unfortunately we are unable to assist you any further in this matter as was communicated to you by our Investigator, Mr. A.S. Sharpe, in July of last year." Finally, Mr. Tracey delivered to the Commission a copy of a letter dated April 27, 2004 from the Independent Jamaican Council for Human Rights indicating that it would not be possible for his case to go to the Judicial Committee of the Privy Council unless he was either on death row or he had the funds to finance the case himself as his matter involved robbery and not murder. The organization therefore indicated that the Court of Appeal in Jamaica was the last local court that was open to him.

13. Based upon these circumstances, the Petitioner contends that by denying his request for legal representation to pursue his appeal, the State effectively denied his right to pursue judicial remedies in respect of the criminal proceedings against him

14. The Petitioner also argues that the State is responsible for violating his right to a fair trial under Article 8 of the American Convention because of the delay in his proceedings and because he was not provided with due guarantees during the criminal proceedings against him. According to the Petitioner, following his arrest he represented himself during court proceedings for a period of over 21 months and was subsequently appointed a legal aid lawyer on the first day of his trial.¹ Mr. Tracey also alleges that the legal aid lawyer did not take a statement from him and did not have sufficient time to study the Petitioner's case.² Further, the Petitioner alleges that he was coerced through police mistreatment, which caused him to bleed from his head and ears, into making a confession of guilt in the absence of a Justice of the Peace or a lawyer and that the trial court nevertheless admitted the confession into evidence.³ In this regard, Mr. Tracey claims that despite a request made by him, the arresting officers did not attend court even though they could have made a difference in his case, but rather only a Superintendent testified at trial regarding his statement.⁴ Based upon these submissions, the Petitioner argues that he was not afforded his right to due process and a fair trial in the proceedings against him.

B. Position of the State

15. The State made several submissions concerning Mr. Tracey's allegations that his right to a fair trial was not respected in the criminal proceedings against him. First, with respect to Mr. Tracey's allegation that he was not represented on appeal, the State reiterates its previous argument that the Petitioner is not exempt from exhausting domestic remedies and has not been the victim of a fair trial violation, because it cannot be proved that the lack of legal counsel affected his right to a fair hearing. In particular, the State asserts that the application for leave to appeal to the Court of Appeal of Jamaica is a simple process, which requires only the completion of a single form. According to the State, the Petitioner instituted this process and his leave applications were considered and dismissed by a single judge of the Court of Appeal as well as a three-judge panel of the Court of Appeal. The State quotes the grounds put forward for Mr. Tracey's appeal form as follows:

"Lack of evidence – The main prosecution witness could not substantially verify that I was the person who committed the allege [sic] crime. There was not enough material evidence presented to link me to the allege [sic] crime.

Improper Police ID Parade – Procedure in that the police did not properly conduct the ID parade so as to ensure my innocence.

Unfair trial – the main fact of my trial was a caution statement which was presented in court. This statement was obtain [sic] by the police under force and duress, and should not be allowed to be tendered into evidence in court."⁵

16. Also in support of its position, the State cites the decision of the Inter-American Court of Human Rights in Advisory Opinion OC-11/90 of August 10, 1990, in the following terms:

¹ See Petitioner's communications of July 12, 2001, p. 3; May 6, 2002, p. 2; February 21, 2003, p. 2; October 2, 2003, p. 2; September 25, 2004, p. 2.

² See Petitioner's communications of July 12, 2001, p. 3; May 6, 2002, p. 2; February 21, 2003, p. 2; October 2, 2003, p. 2; September 25, 2004, p. 2.

³ See Petitioner's communications of July 12, 2001, pp. 1-2; May 6, 2002, p. 3; February 21, 2003, p. 2; October 2, 2003, p. 2; September 25, 2004, p. 2.

⁴ See Petitioner's communications of July 12, 2001, pp. 3; May 6, 2002, p. 2; February 21, 2003, p. 2; October 2, 2003, p. 2.

⁵ State's observations dated February 23, 2005, p. 3.

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing...

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing ... (emphasis added).⁶

17. The State argues that in the present complaint, the lack of counsel did not affect the Petitioner's right to a fair hearing because the application process was simple and Mr. Tracey was able to pursue the application for leave to appeal before the Single Judge and thereafter before the three-panel court and set out this grounds of appeal adequately. According to the State, the fact that leave to appeal was denied was based on the fact that all legal issues had been properly dealt with and there was therefore no point of law on which to appeal.⁷

18. With respect to the right to be tried within a reasonable time, the State argues that the 21-month delay before the Petitioner's trial was due to the delay in providing him with an attorney. More particularly, the State indicates that the regime in place at the time of Mr. Tracey's prosecution to provide legal assistance to poor persons was prescribed under the Poor Persons (Legal Proceedings) Act and the Supreme Court Rules and depended upon whether an attorney was willing or available to handle a matter, and as a consequence a trial could not be fairly scheduled until a willing counsel was found.⁸ The State also indicated that this system has now been replaced by the Legal Aid Act of 2000, which established a Legal Aid Council as well as a duty roster that contains a list of attorneys throughout the island who are available to represent persons who qualify for Legal Aid. According to the State, the Legal Aid Council is able to monitor those cases in which legal aid is granted in order to ensure that matters are dealt with as quickly as possible.⁹

19. Concerning the Petitioner's arguments as to the use of a coerced confession, the State claims that this issue was addressed at trial on examination-in-chief and on cross-examination of a police officer who witnessed the cautioned statement taken from the Petitioner. According to the State, the trial judge made the following findings regarding Mr. Tracey's statement:

The cautioned statement speaks to Mickey, Mickey being one of those persons who was engaged in the robbery.

Now the ex Deputy Supt. Vassell Bullock testified that on the 12th day of July, 1998, that is within a month after this, the accused man gave a statement and he was present, he saw the statement being given; that no threats, no beatings, no promise. He also testified that he had seeked [sic] the services of a JP, Justice of the Peace, to be there, to be present, but he did not get any as Constable James who was involved in the taking of the statement had already told him he had tried to get the JP and did not succeed.

This question of the Justice of the Peace, it is not absolutely necessary that a Justice of the Peace be present but usually the police do this. I accept the evidence of Mr. Bullock and find that at the time the accused gave his statement, he was not subjected to any beating, nor threats, nor any promises. I find, as a fact, that this statement was given voluntarily by the accused...the statement is almost a recitation of what Mr. Robinson told you in Court of his ordeal that night, what

⁶ State's observations dated February 23, 2005, p. 4.

⁷ State's observations dated February 23, 2005, p. 4.

⁸ State's observations dated February 23, 2005, p. 1.

⁹ State's observations dated February 23, 2005, p. 2.

happened, albeit in a shorter form...I find, as a fact, that the contents of this caution statement is indeed the truth as to what took place.¹⁰

20. The State therefore asserts that based on the evidence adduced at trial from the Petitioner and the witnesses, the trial judge found that the cautioned statement was given voluntarily, and that the burden of proof was therefore met by the prosecution.¹¹

IV. ANALYSIS

21. The Petitioner has argued that his right to a fair trial was violated at several stages of the criminal proceedings against him. First, he contends that neither legal counsel nor a Justice of the Peace were present when he gave a statement to the police, that he was coerced by the police into giving the statement through mistreatment that caused him to bleed from his head and ears, and that the statement was nevertheless admitted into evidence at trial. Mr. Tracey also claims in this connection that he had asked for his arresting police officers to attend and give evidence at his trial but only a Superintendent appeared to testify. Moreover, Mr. Tracey argues that as a result of the delay in the provision of an attorney for his trial, he had to represent himself during court proceedings for a period of over 21 months and was subsequently appointed a legal aid lawyer on the first day of his trial, who did not take a statement from him and did not have sufficient time to study the Petitioner's case. Finally, the Petitioner claims that his lack of effective representation extended to his appeal, where he claims that he was not provided with legal assistance in preparing and presenting his appeal to the Court of Appeal of Jamaica, and was not able to pursue an appeal to the Judicial Committee of the Privy Council despite his attempts to obtain legal assistance.

22. In response to the Petitioner's claims regarding his confession, the State does not dispute that Mr. Tracey lacked legal representation when his statement was taken, but rather acknowledges that he was not provided with an attorney until the beginning of his trial 21 months following his arrest. The State argues, however, that the trial judge heard evidence from one ex-Deputy Superintendent Vassell Bullock who claimed to have been present when Mr. Tracey's statement was taken and that, based upon the evidence presented, the trial judge made a finding of fact that Mr. Tracey had given the statement voluntarily. The State made no submissions concerning the alleged inability of Mr. Tracey's attorney to properly prepare for his trial. Finally, the State disputes Mr. Tracey's claims as to his efforts to appeal on the basis that Mr. Tracey was, in fact, able to pursue an appeal to a single judge of the Court of Appeal of Jamaica as well as three-member panel of the Court and that legal representation was therefore not necessary in order for Mr. Tracey to pursue domestic remedies. The State also argues that the absence of counsel did not amount to a violation of Mr. Tracey's right to a fair trial, because the Court of Appeal dismissed his appeal on the basis that it had no prospect of success and not because he was not represented by a lawyer.

23. In viewing the Petitioner's claims as a whole, the Commission considers that they relate, at base, to the question of whether Mr. Tracey was provided with effective and fair access to justice in relation to the criminal proceedings against him. In this respect, Article 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him [...]." The Inter-American Court has observed that in order to receive due process of law, a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants.¹²

¹⁰ State's observations dated February 23, 2005, p. 5.

¹¹ State's observations dated February 23, 2005, p. 5.

¹² I/A Court H.R., *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Ser. A No. 16, para. 117.

24. Articles 8.2 to 8.5 of the Convention in turn set out minimum fundamental guarantees that are necessary in order for due process to be afforded to a defendant in accordance with Article 8.1. Particularly pertinent to the issues raised on the merits of Mr. Tracey's petition are Articles 8.2.c, d, e, f and h and 8.3 of the American Convention, which include the following minimum guarantees:

- 8.2 Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
- c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. 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 period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - h. the right to appeal the judgment to a higher court.
- 8.3 A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

25. Article 25 of the Convention likewise recognizes the essential role that effective access to justice plays in protecting fundamental rights, by guaranteeing the right of recourse to judicial protection in respect of acts that violate a person's fundamental rights recognized by the constitution or laws of the state concerned or by the Convention. As the Inter-American Court has confirmed, this provision requires State Parties to the American Convention to provide effective judicial remedies to victims of human rights, which remedies must be substantiated in accordance with the rules of due process of law under Article 8 of the Convention.¹³

26. As reflected in the above provisions, effective access to counsel is recognized as one of the minimum guarantees necessary to ensure due process. In this connection, both the Commission and the Inter-American Court have observed that in criminal and other proceedings, an indigent has the right to legal counsel free of charge where such assistance is necessary for a fair hearing. Among the factors that bear on the determination of whether free legal representation is necessary for a fair hearing are the significance of a legal proceeding, its legal character, and its context in a particular legal system.¹⁴ In the same vein, the Inter-American Court, in its Advisory Opinion OC11/90, held that in those cases where an accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the

¹³ I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Ser. A No. 9, paras. 23-24.

¹⁴ See, e.g., I/A Court H.R., *Hilaire, Constantine and Benjamin et al. Case*. Judgment of 21 June 2002. Series C No. 94, para. 148; Advisory Opinion OC-11/90, *supra* note 545, paras. 25-29; Case 12.023, Report N° 41/00, Desmond McKenzie (Jamaica), Case 12.044, Report N° 41/00, Andrew Downer and Alphonso Tracey (Jamaica), Case 12.107, Report N° 41/00, Carl Baker (Jamaica), Case 12.126, Report N° 41/00, Dwight Fletcher (Jamaica), and Case 12.146, Report N° 41/00, Anthony Rose (Jamaica), Annual Report of the IACHR 2000, paras. 311-316; IACHR, Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.61, 5 October 1983, at 95.

Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.¹⁵

27. In addition, the fundamental fair trial protections under Article 8 of the Convention, including the right to counsel, apply to all stages of a criminal proceeding, including an appeal to a higher court. The Commission has long held in this regard that once an unfavorable decision is rendered at first instance, the right to appeal that judgment to a higher court must also be granted in compliance with fundamental fair trial protections.¹⁶ The Inter-American Court had similarly held that the right to appeal is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. Rather, the higher court must have the jurisdictional authority to take up the merits of the particular case in question and must satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law.¹⁷

28. The right to assistance of counsel is also intimately connected with the protection of defendants against coerced confessions.¹⁸ In particular, the Commission has held that the right to counsel under Article 8.2.d of the Convention, together with the right of a defendant under Article 8.3 not to make a confession of guilt under coercion of any kind, entail a defendant's prerogative to have a lawyer present for all important stages of the proceeding particularly when the defendant is held in detention, as well as the right of a defendant to have an attorney present when giving a statement or undergoing interrogation.¹⁹ This is necessary in order to ensure that any confession of guilt by an accused is given in an environment free from any form of pressure, intimidation or coercion and is therefore truly voluntary.

29. As set out below, after reviewing the contentions of the parties in light of the foregoing standards of protection, the Commission finds that Mr. Tracey was not provided with access to counsel from the outset of the criminal proceedings or in the course of processes significant to his prosecution and defense, including his subsequent efforts to appeal his judgment to a higher court. The Commission also finds that in the circumstances of the present case, the absence of counsel compromised the fairness of the various stages of the proceedings against him and denied him effective access to justice as guaranteed under Articles 8 and 25 of the Convention, in conjunction with the State's obligations under Article 1.1 and 2 of the Convention.

30. The Commission also concludes that in light of the deficiencies in Mr. Tracey's criminal proceedings, it has not been shown that a further appeal by Mr. Tracey to the Judicial Committee of the Privy Council would constitute an effective or available remedy for the issues raised before the Commission, and therefore that Mr. Tracey's claims are not inadmissible for failure to exhaust remedies under Article 46 of the Convention.

¹⁵ I/A Court H.R., Advisory Opinion OC-11/90, *Exceptions of the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights*, Ser. A No. 11, para. 27.

¹⁶ See, e.g., IACHR, Report on the Situation of Human Rights in Panama (1978), OEA/Ser.L/V/II.44, doc. 38, rev. 1, 22 June 1978, at 116; IACHR, Report on the Situation of Human Rights in Nicaragua (1981), 30 June 1981, OEA/Ser.L/V/II.53, doc. 25, p. 168.

¹⁷ I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999. Series C N° 52, para. 161.

¹⁸ See, e.g. IACHR, Report on the Situation of Human Rights in Panama (1978), OEA/Ser.L/V/II.44, doc. 38, rev. 1, 22 June 1978, Ch. IV, at 116.

¹⁹ See, e.g., IACHR, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116 doc. 5 rev. 1 corr. (October 22, 2002), para. 237; IACHR, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999, Ch. V, para. 97; Annual Report of the Inter-American Commission on Human Rights 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 Rev. 1, September 26, 1986, at 155. See *similarly* Eur. Court H.R., *John Murray v. United Kingdom*, 19 E.H.R.R. 193, para. 66 (finding that denying access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defense may well be irretrievably prejudiced, is incompatible with the fair trial rights of the accused).

31. In particular, the circumstances of the present case, the Petitioner has alleged, and the State has not denied, that a legal aid attorney was not appointed until the first day of his trial and that he did not have either counsel or a justice of the peace present when he gave his statement to the police. The Petitioner also alleges that he was coerced into making the statement through mistreatment. With respect to the admission of the statement into evidence at trial, Mr. Tracey claims that despite a request made by him, the arresting officers did not come to court even though they could have provided evidence relevant to the validity of his statement.

32. The Commission acknowledges, as contended by the State, that the issue of the voluntary nature of the Petitioner's statement was raised before the trial judge and that the trial judge found as a matter of fact that the statement was voluntary. This conclusion was based upon the testimony of ex-Deputy Superintendent Vassell Bullock, who claimed to have been present when the Petitioner was questioned. In past decisions concerning issues of this nature, the Commission has observed 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.²⁰

33. However, there are several aspects of the manner in which the Petitioner's statement was taken and subsequently relied upon by the trial court that concern the Commission. First, as noted above, the Petitioner did not have counsel present at the time that his statement was given, nor is it apparent that he was given an opportunity to have counsel present, notwithstanding the important role that legal representation plays in protecting against coerced confessions of guilt. Further, the Petitioner claims, and the State has not disputed, that he requested that the arresting officers present when his statement was taken be present at trial and that this did not occur. Indeed, this is corroborated by the statements of the trial judge provided by the State, which indicate that at least one other officer, a Constable James, was present and indeed was involved in taking the statement from Mr. Tracey but did not testify at the trial contrary to Mr. Tracey's right to defend his interests effectively and in full procedural equality. In addition, there is no indication from the judge's comments as to the admissibility of the statement that he took into account Mr. Tracey's allegation of abuse or, if he did, why these claims were discounted notwithstanding their serious nature. Finally, in light of the Commission's conclusions below concerning the need for counsel during Mr. Tracey's appeal to the Jamaica Court of Appeal, it cannot be said that the Petitioner was properly afforded his right to appeal this aspect of his case to a higher court.

34. Accordingly, applying the doctrine of the Inter-American Court in its Advisory Opinion OC-11/90 to the circumstances of Mr. Tracey's case, the Commission finds that counsel was required in order to ensure that the proceedings against Mr. Tracey were fair and that the Petitioner was denied both his right to counsel and his right to obtain the appearance of persons who may throw light on the facts contrary to Article 8.1 and 8.2.d, e and f of the Convention, in conjunction with Articles 1.1 and 2 of the Convention, in connection with the use of his statement against him at trial.

35. Further, the Petitioner has alleged that as a result of the delay in the provision of an attorney in his case, a lawyer was not provided until the first day of his trial, a statement was not taken from him, and his attorney did not have sufficient time to study the Petitioner's case. The State has not contested this allegation, but rather has acknowledged that the delay in the Petitioner's trial was attributable to the fact that a trial could not be scheduled until a lawyer willing to take Mr. Tracey's case was found.

²⁰ See, e.g., Report 41/04, Case 12.417, Whitley Myrie (Jamaica), Annual Report of the IACHR 2004, paras. 55-56. See also Report 41/00, Case 12.023, McKenzie *et al.* (Jamaica), Annual Report of the IACHR 1999, para. 298.

36. The Commission notes in this respect the provisions of Article 8.2.c of the American Convention, which protect the right of a defendant to “adequate time and means for the preparation of his defense.” The Inter-American Court has held that this provision, together with the right to counsel under Article 8.2.d, protect a defendant’s right to adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.²¹

37. In the circumstances of the present case, the Petitioner was facing a trial on serious charges for which a severe penalty could be imposed. Mr. Tracey’s counsel had not been involved in the pre-trial proceedings and had only met his client on the first day of the trial. Further, as the Commission noted previously, the trial involved potentially complicated issues of fact and law, including evidence from a police identification parade and a confession that the Petitioner alleged he had been coerced into giving. Notwithstanding these issues, Mr. Tracey’s trial counsel did not obtain a statement from him concerning his version of the events. Based upon the information available concerning the circumstances of Mr. Tracey’s criminal proceedings, and in the absence of contrasting submissions from the State on this issue, the Commission finds that Mr. Tracey’s attorney did not have sufficient time and means to prepare his defense. In addition, had Mr. Tracey been provided with access to counsel at an early stage in his proceedings, he may have been successful in reducing the 21-month period that lapsed between Mr. Tracey’s arrest and the beginning of his trial.

38. Consequently, the Commission finds that State responsible for a violation of Mr. Tracey’s right under Article 8.1 and 8.2.c of the Convention due to the inadequate time and means provide to Mr. Tracey and his attorney to prepare his defense.

39. Finally, the Petitioner alleges that his lack of access to counsel impacted upon his ability to effectively pursue an appeal from his conviction and sentence. In particular, the Petitioner argues that he was not provided with legal assistance in preparing and presenting his appeal to the Court of Appeal of Jamaica, and was not able to pursue an appeal to the Judicial Committee of the Privy Council despite his attempts to obtain legal assistance. He also claims that as a consequence, he was unable to effectively pursue and exhaust domestic remedies within the State’s legal system, and further, that his right to a fair trial under Article 8 of the Convention had been violated.

40. Applying the standards governing the right to counsel, as described above, to the circumstances of the present case, the State has acknowledged that the Petitioner represented himself on his appeal but argues that the assistance of counsel was not necessary in order to effectively prosecute Mr. Tracey’s appeal. Accordingly, the Commission must determine whether it was necessary for the State to provide Mr. Tracey with legal counsel in order to properly ensure his right under Article 8(2)(h) of the Convention to appeal his judgment to a higher court as well as his right to judicial protection under Article 25 of the Convention.

41. In undertaking this evaluation, the Commission must take into account the particular circumstances of Mr. Tracey’s case. The Commission notes in this regard that the legal proceedings against the Petitioner were of a serious nature, as he had been convicted of robbery with aggravation and illegal possession of a firearm and sentenced to two 15-year sentences. The Commission also notes that the issues of potential pertinence on appeal involved substantively and procedurally complex issues of fact and law, such as the admissibility of a confession and evidence from an identification parade.²²

²¹ See I/A Court H.R., *Castillo Petruzzi et al. Case, supra*, para. 139, citing UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990) [hereinafter UN Basic Principles on the Role of Lawyers], Principle 8.

²² See *similarly* Case 12.023 *et al.*, Report N° 41/00, Desmond McKenzie *et al.* (Jamaica), Annual Report of the IACHR 1999, para. 311.

Indeed, according to Mr. Tracey's appeal form, two issues pertinent to the fairness of Mr. Tracey's trial were not even raised before the Court of Appeal, namely the absence of legal representation during his pre-trial proceedings and the lack of adequate time and means for the proper preparation of his defense.

42. In these circumstances, the Commission considers that Mr. Tracey's lack of legal counsel during his appeal, as with the absence of counsel in the early stages of his criminal process, affected the fairness of the proceedings against him by hindering his ability to effectively raise and argue serious deficiencies in the proceedings against him and thereby contravened his right under Article 8.2.e of the Convention to be assisted by counsel provided by the state. As a further consequence, the Commission finds that Mr. Tracey was denied his right under Article 8.2.h of the Convention to effectively appeal his judgment to a higher court, as well as his right to judicial protection under Article 25 of the Convention, all in conjunction with the obligations under Article 1.1 and 2 of the Convention. In this regard, the Commission reiterates the observations of the Inter-American Court that the right to appeal is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. In the present case, the absence of counsel affected Mr. Tracey's right to a fair hearing before the Court of Appeal and therefore undermined his right to appeal his judgment to a higher court.

43. As noted above, in light of the deficiencies throughout Mr. Tracey's criminal proceedings, including those pertaining to his appeal to the Court of Appeal of Jamaica, the Commission concludes that it has not been shown by the State that a further appeal by Mr. Tracey to the Judicial Committee of the Privy Council would constitute an effective or available remedy for the issues raised before the Commission, and therefore that Mr. Tracey's claims are not inadmissible for failure to exhaust remedies under Article 46 of the Convention. Given this finding, the Commission does not consider it necessary to determine whether, absent these deficiencies, the State would have been obliged to provide Mr. Tracey with counsel to pursue an appeal to the Judicial Committee of the Privy Council.

V. PROCEEDINGS SUBSEQUENT TO REPORT 75/05

44. The Commission examined this case in the course of its 123rd regular session and on October 15, 2005 adopted Report N° 75/05 pursuant to Article 50 of the American Convention.

45. On November 3, 2005, the Commission transmitted Report N° 75/05 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.

46. As of the date of this report, the Commission had not received a response from the State to Report N° 75/05.

VI. CONCLUSIONS

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

48. Mr. Tracey was denied effective access to domestic remedies and therefore his claims are admissible as concerns the exhaustion of domestic remedies requirement, in accordance with Article 46 of the American Convention

49. The State is responsible for violations of Mr. Tracey's right to counsel and his right to obtain the appearance of persons who may throw light on the facts contrary to Article 8.2.d, e and f of the Convention, in conjunction with Articles 1.1 and 2 of the Convention, in connection with the use of his statement against him at trial.

50. The State is responsible for violating Mr. Tracey's right to a fair trial under Article 8.2.c of the Convention, in conjunction with a violation of Article 1.1 of the Convention, due to the inadequate time and means provide to Mr. Tracey and his attorney to prepare his defense.

51. The State is responsible for violations of Mr. Tracey's right to a fair trial and his right to judicial protection under Article 8.2.e and h and 25 of the Convention, in conjunction with a violation of Articles 1.1 and 2 of the Convention, due to the State's failure to provide Mr. Tracey with legal counsel to appeal his judgment to a higher court.

VII. RECOMMENDATIONS

52. 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 an effective remedy, which includes a re-trial of the charges against Mr. Tracey in accordance with the fair trial protections under the American Convention.

2. Adopt such legislative or other measures as may be necessary to ensure that indigent criminal defendants are afforded their right to legal counsel in accordance with Article 8.2.e of the American Convention, in circumstances in which legal representation is necessary to ensure the right to a fair trial and the right to appeal a judgment to a higher court.

3. Adopt such legislative or other measures as may be necessary to ensure that any confession of guilt by an accused is valid only if it is given in an environment free from coercion of any kind, in accordance with Article 8.3 of the Convention.

VIII. PUBLICATION

53. By communication dated March 21, 2006, the Commission transmitted the content of this report, adopted as Report N° 12/06 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.

54. By note dated May 31, 2006 and received by the Commission on the same date, the State delivered a response to the Commission's March 21, 2006 communication. In its response, the State indicated that it maintained that the petition should have been held inadmissible for failure to exhaust domestic remedies on the basis that the Petitioner could have appealed to the Judicial Committee of the Privy Council and/or could have sought constitutional relief from the courts through the services of the Public Defender. The State also informed the Commission of improvements that had been made to the legal aid system in Jamaica, such that the current Legal Aid Act provides for legal aid in criminal matters at all stages of criminal proceedings and each police station contains a roster of "duty counsel" which may be called upon to assist persons alleged to have committed a crime at the time that they are apprehended. Finally, the State indicated that in its view, it is within every individual's right to give a voluntary statement to the police with or without an attorney present and that a "cautioned statement" means that the police have advised an individual of his rights prior to taking a statement from him. The State therefore maintained that there are already measures in place to ensure that confessions are valid as evidence only when given voluntarily.

55. After considering the State's response to Report N° 12/06, 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 Guatemala, Guatemala, on the 20th day of the month of July, 2006.
(Signed): Evelio Fernández Arévalos, President; Florentín Meléndez, Second Vice-President; Clare K. Roberts, Freddy Gutiérrez, Paolo Carozza, Commissioners.