

of paragraphs 82(1) and (2) the United Nations Standard Minimum Rules cannot easily be ignored:

- “(1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
- (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.”

Such pronouncements fill certain gaps left in the ICCPR, and reflect the strong opinions of some countries in the international community; in practice, they may also help to embarrass negligent States into addressing treatment conditions that fall short of elementary considerations of humanity.

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CHAPTER 2

PARTICULAR HUMAN RIGHTS IN JAMAICA: THE RIGHT TO LIFE AND FREEDOM FROM CRUEL AND INHUMAN CONDITIONS

I. General

It is fair to suggest that Jamaica has committed itself to some of the main obligations that have come to be associated with human rights law. More particularly, by becoming a party to both the ICCPR and the ICESCR, Jamaica is bound by the two main international treaties that enshrine the rights to life, humane treatment, education, health and employment. Given that these treaties are limited in significant respects, however, it cannot be argued that participation in these treaty regimes is necessarily proof that substantial safeguards will be in place for the promotion and protection of human rights. And, in any event, there's many a slip between the cup of human rights treaty law and the lip of human rights enforcement in domestic jurisdictions. Generally, the factors that help to determine the extent to which international human rights standards are actually implemented in local circumstances include: cultural and social conditions within the domestic jurisdiction, the expectations of the populace concerning human rights, perceived tensions between respect for human rights and effective law enforcement, political commitment to human rights, economic constraints faced by the State and the level of vigour displayed by non-governmental groups in defence of human rights. The significance of some of these factors will be implicit in the discussion which follows.

The Jamaican Constitution contains some of the main provisions that help to safeguard human rights in the country. Unlike the situation in some States, where the constitution incorporates broad statements of vision and aspiration, the Jamaican Constitution falls squarely within the positivist tradition, so that its provisions are generally to be read as contemplating remedies enforceable in courts of law. The main provisions of the Jamaican Constitution relevant for the present purposes are to be found in Chapter III thereof, concerning

fundamental rights and freedoms;⁹⁷ this Chapter constitutes a Jamaican bill of rights, which traces its origins primarily to the language of civil and political rights in the Universal Declaration of Human Rights.⁹⁸

II. The Right to Life

(a) Certain Legislative Aspects

Section 14 of the Jamaican Constitution supports the right to life by stipulating in part that: "No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."⁹⁹ Section 14 also indicates that where a person dies as a result of the use of force reasonably justified in circumstances (i) for the defence of property or person, (ii) to effect a lawful arrest or to prevent escape from lawful detention, (iii) for the purpose of suppressing a riot, insurrection or mutiny, or (iv) to prevent the commission of a criminal offence by the

97 For comment on the distinction between fundamental and ordinary rights in the Caribbean context, see, e.g., Mohammed, "The Nature of Fundamental Rights and Freedoms in the Caribbean Community", in Ramcharan and Francis (eds.), *Caribbean Perspectives in International Law and Organizations* (1989), p. 336. Fundamental rights can only be altered following special procedures set out in the Constitution, in contrast to ordinary rights which are alterable in the manner of any other legal rule. On entrenchment of rights in Commonwealth Caribbean Constitutions, see especially the majority judgement of Lord Diplock in *Hinds and others v. The Queen* (1975) 13 JLR 262 at pp. 269-70.

98 In *Minister of Home Affairs v. Fisher*, the Privy Council noted that British postcolonial constitutions, including those of most Caribbean countries were "greatly influenced" by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), which in turn was influenced by the Universal Declaration of Human Rights (1948) AC 319, at p. 328. In practice the origins of the constitution in international instruments may allow greater latitude in the interpretation of particular constitutional provisions than would be the case for Acts of Parliament: *ibid.* p. 329. In *Minister of Home Affairs v. Fisher*, the Privy Council was also prepared to take into consideration the terms of the United Nations Declaration on the Rights of the Child and Article 24 of the ICCPR "as influences upon legislative policy" even though neither of these instruments had legal force at the time the relevant constitution was being drafted: p. 330. On the influence of the European Convention on Human Rights in interpreting Caribbean constitutional provisions, see also Lord Steyn's position in *Fisher v. Minister of Public Safety and Immigration*, (1998) AC 673, at pp. 688-9. The 1961 Committees of the Legislature which undertook much of the work on the drafting of Jamaica's Constitution expressly acknowledged that in preparing Chapter III they took as their models constitutions "among the new Nations in Africa" which were themselves "adapted from the European Convention on Human Rights": Report of the 1961 Committees of the Legislature, quoted in Parliament of Jamaica, *Final Report of the Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform*. 31st May 1995, at p. 8.

99 Section 14(1).

person, such deprivation of life shall not be treated as contrary to the Constitution. Deprivation of life as the result of an act of war is also not regarded as contrary to the Constitution.

The constitutional provision in Section 14 setting forth the contours of the right to life should also be read in conjunction with the common law and statutory provisions of Jamaican law concerning homicide.¹⁰⁰ As to statutory law, the main provisions with direct bearing on the right to life are to be found in the Offences against the Person Act, which contains, among other things, a listing of the circumstances in which charges of capital murder (giving rise to the death sentence upon conviction) and non-capital murder may be brought against the accused. In summary form, capital murder includes the murder of a member of the security forces, a correctional officer, a judicial officer, or a person vested with constabulary functions, acting in the course of his or her duties.¹⁰¹ Capital murder also occurs: upon the murder of a witness or party in a civil cause or criminal matter,¹⁰² or that of a juror or a Justice of the Peace acting in the execution of judicial functions;¹⁰³ in the case of a murder committed in the course or furtherance of robbery, burglary or housebreaking, arson in relation to a dwelling house or any sexual offence;¹⁰⁴ in the case of "murder for hire"¹⁰⁵ or in the case of murder in the course or furtherance of an act of terrorism.¹⁰⁶ All other cases of murder are classified as non-capital murder, and conviction for non-capital murder shall usually give rise to a sentence of life imprisonment.¹⁰⁷ Where a person has been convicted of more than one act of non-capital murder, the death penalty shall be imposed.¹⁰⁸ Also, where a woman convicted of an

100 There have been authoritative suggestions that the fundamental rights provisions in Chapter III of the Jamaican Constitution are declaratory of the common law: see, e.g., *Nasralla v. Director of Public Prosecutions* (1965) 9 WIR 15 (Jamaican Court of Appeal, especially per Lewis J., at p. 27); *Ex parte Nasralla* (1963) 6 WIR 305 (per Douglas J.) at p. 308; *Director of Public Prosecutions v. Nasralla* (1967) 2 AC 238 especially at p. 248 (per Lord Devlin).

101 Offences against the Person Act, Section 2(1)(a).

102 Section 2(1)(b)(i).

103 Section 2(1)(b)(ii).

104 Section 2(1)(d).

105 Section 2(1)(e).

106 Section 2(1)(f).

107 Generally, Sections 2 and 3A.

108 Section 3(1A).

offence punishable with death is found to be pregnant, the death sentence shall be replaced by life imprisonment.¹⁰⁹

(b) The Death Penalty in International Law

Under Jamaican law, therefore, each individual has the right to life, and the State imposes stringent punishment on persons who intentionally violate the right to life. The death penalty is retained for capital murder. While there are strong opinions to the contrary, the retention of the death penalty, in itself, seems compatible with the right to life.¹¹⁰ The ICCPR, the leading treaty instrument on the subject, contemplates that death sentences may be imposed by the State in some circumstances.¹¹¹ Specifically, Article 6 of the ICCPR states that the death penalty may be imposed if it is for the most serious crimes (though this category is undefined in the ICCPR),¹¹² implemented on a non-retroactive basis, in keeping with the terms of the ICCPR itself and the

109 Section 3(2). Daly notes that in Jamaica the death penalty is applicable to women, but that in practice it has always been commuted as an act of executive clemency: Daly, "The Right to Life and Human Dignity: Caribbean Experiences", in Byre and Byfield (eds.), *International Human Rights Law in the Commonwealth Caribbean* (1991), p. 141 at p. 143; see also Independent Jamaica Council for Human Rights, *The Death Penalty*, p. 3. This practice raises obvious questions of discrimination, but it is supported by some other States: see, e.g., the Commonwealth of Independent States, Convention on Human Rights and Fundamental Freedoms, 1995, Article 2(2): "As a rule, women may not be sentenced to the death penalty....", *Human Rights Law Journal*, Vol. 17, No. 3-6 (1996), p. 159.

110 Cf. for example, Amnesty International, *JAMAICA: A Summary of Concerns, A Briefing for the Human Rights Committee*, October 1997, AI Index: AMR 38/07/97, p. 5. For the view that the death penalty is "a crime", and a "crime against humanity", the perpetration of which undermines respect for life, and contributes to Jamaica's remarkably high homicide rate, see Headley, *The Jamaican Crime Scene: A Perspective* (1996), pp. 81-7. The contention that the maintenance of this form of punishment in Jamaica contributes to the homicide rate is vulnerable to the riposte that Jamaica has not carried out the death sentence since 1988, hardly a situation in which the death sentence plays a prominent role in encouraging disrespect for life. The characterization of the death penalty as a "crime" and as a "crime against humanity" is also problematic. Both terms usually make sense in a particular legal system of rules, so that, for instance, one may refer to a crime under Jamaican law, or a crime against humanity with reference to international law. Broadly to assert that the death penalty is a crime or a crime against humanity without identifying the legal system involved could suggest that what is being contemplated is that the death penalty is wrong within a particular moral order. Depending on the moral order in question, this may well be correct; however, that will not make the death penalty either a crime or a crime against humanity as these terms are normally understood.

111 Generally, see also Sapienza, "International Legal Standards on Capital Punishment", in Ramcharan (ed.), *The Right to Life in International Law* (1985), p. 284.

112 The United Nations Human Rights Committee has indicated that the limitation to most serious crimes implies that the death penalty should be "a quite exceptional measure": United Nations General Assembly, *Official Records*, 37th Session, Supp. No. 40 (1982), p. 94, quoted by Sapienza, *loc. cit.*, previous note, p. 286.

Genocide Convention, and if it is undertaken pursuant to final judgement rendered by a competent court.¹¹³ Article 6 also indicates that persons sentenced to death shall have the right to seek pardon or commutation of the sentence¹¹⁴ and that the death penalty shall not be applicable with respect to crimes committed by persons under 18 years, or to pregnant women.¹¹⁵ The Human Rights Committee, in its First General Comment on Article 6, has acknowledged that this provision does not require abolition of the death penalty, but notes that some aspects of Article 6 "strongly suggest that abolition is desirable."¹¹⁶

Moreover, even though there are philosophical or religious reasons for maintaining that the death penalty conflicts with the right to life, this debate remains inconclusive.¹¹⁷ In these circumstances, it is difficult to argue, without

113 Article 6(2).

114 Article 6(4).

115 Article 6(5). It is a matter of some concern that the provision on the right to life in the 1997 draft of the Charter of Civil Society for the Caribbean Community makes no express statement as to safeguards in death penalty cases along the lines of Article 6 of the ICCPR. Instead, the relevant draft Article IV of the proposed Charter simply reads: "(1) Every person shall have the right to life. No person shall be deprived of his or her life intentionally save in accordance with national law." If implemented in this form, the Charter would therefore add no normative standards in respect of death penalty matters.

116 First General Comment on Article 6, Human Rights Committee Report, United Nations General Assembly, *Official Records*, 37th Session, Supp. No. 40 (1982), p. 93. The Human Rights Committee expressly mentioned Articles 6(2) and 6(6) as provisions suggesting the desirability of abolition: *ibid.* Article 6(2) is addressed to "countries which have not abolished the death penalty" and then emphasizes certain constraints on the application of the penalty. It is not entirely clear that this amounts to a strong suggestion that Article 6 regards abolition as desirable; if it had been addressed to countries which have not yet abolished the death penalty, then the view in the First General Comment would have been more easily taken. Similarly, Article 6(6), which indicates that "(n)othing in Article 6 shall be invoked to delay or prevent the abolition of capital punishment by any State Party" to the ICCPR, is not necessarily a strong suggestion on the desirability of abolition. A plain reading of this provision might suggest simply that Article 6 itself, which allows capital punishment, should not be used to argue that international law requires the retention of this form of punishment.

117 Various Roman Catholic Archbishops and Bishops from the Caribbean are among those appealing for "the development of a consensus among the people of the world to abolish capital punishment": see Antilles Episcopal Conference, Pastoral Letter, *On Capital Punishment* (2000), p. 18. From the extensive literature on the death penalty, see, e.g., Schabas, *The Abolition of the Death Penalty in International Law* (2nd ed., 1997); Hood, *The Death Penalty: A World-wide Perspective* (2nd ed., 1998); Megivern, *The Death Penalty: An Historical and Theological Survey* (1997); Hanks, *Against the Death Penalty: Christian and Secular Arguments against Capital Punishment* (1997); Black, *Capital Punishment: The Inevitability of Caprice and Mistake* (1974); Glover, *Causing Death and Saving Lives* (1977, 1990 reprint), especially pp. 228-50; Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968, 1995 reprint), pp. 54-89; Nathanson, *An Eye for an Eye: The Morality of Punishing by Death* (1987), especially pp. 42-58; Bedau, "Abolishing the Death Penalty Even for the Worst Offenders", in Sarat (ed.), *The Killing State: Capital Punishment in Law,*

more, that the death penalty as contemplated under the Jamaican Constitution and the Offences against the Person Act should be subject to unqualified condemnation.¹¹⁸ This seems particularly true bearing in mind public perceptions on the need for the death penalty to remain as a part of Jamaican law.¹¹⁹ To be sure, since the entry into force of the ICCPR, several States Parties have sought to influence others towards the view that the death penalty should, in fact, be abolished, and such efforts could eventually have an impact on the customary international law pertaining to the death penalty. So, for instance, in recent years, the United Nations Commission on Human Rights has passed resolutions calling upon all States that have not yet abolished the death penalty to consider suspending executions, with a view to completely abolishing this form of punishment, a course of action expressly intended to influence State perceptions.¹²⁰ Also, as Amnesty International reports, by June 2001, 75 countries had abolished the death penalty for all crimes, 14 others had abolished it for "ordinary" crimes, and another 20 are abolitionist States in practice, leaving 86 retentionist States.¹²¹ The relatively high combined figure of 109 for

Politics, and Culture (1999), p. 40; van den Haag, "In Defense of the Death Penalty: A Practical and Moral Analysis", *Criminal Law Bulletin*, Vol. 14, No. 1 (1978), p. 51.

118 A different view is taken by some analysts. For instance, the 1992 compilation, *World Human Rights Guide*, proceeds on the assumption that capital punishment is contrary to international law (relying, it seems, on Article 6(6) of the ICCPR). On this basis, the retention of the death penalty by Jamaica lowers significantly the country's human rights record: Charles Humana, *World Human Rights Guide* (3rd ed., 1992), pp. xii, 168-9.

119 The Stone polling organization notes that about 85% of the Jamaican population has supported capital punishment over the past two decades, but this figure has recently declined to 65%: "Support for hanging declines", *The Observer*, August 7, 2000. This is not to suggest that the majority perspective is necessarily decisive on the question whether capital punishment should be retained; it is to suggest, however, that if strong public opinion is to be overcome, convincing arguments of principle need to be offered. For the position taken by the South African Constitutional Court on the role of public opinion in the death penalty debate in South Africa, see the comments of Chaskalson P. in *State v. Makwanyane and Another* (1995) (3) SA 391, at pp. 430-32, quoted in part in Independent Jamaica Council for Human Rights, *loc. cit.*, note 109, pp. 10-11.

120 United Nations Commission on Human Rights, Resolution 1997/12, operative paragraph 5, in Commission on Human Rights, Report on the Fifty-Third Session, Economic and Social Council, *Official Records*, 1997, Supp. No. 3, UN Doc. E/1997/23, p. 69; Resolution 1998/8, operative paragraph 4(b), in Commission on Human Rights, Report of the Fifty-Fourth Session, *ibid.*, 1998, UN Doc. E/1998/23, p. 56; Resolution 1999/61, operative paragraph 4(b), in Commission on Human Rights, Report of the Fifty-Fifth Session, *ibid.*, 1999, UN Doc. E/1999/23, p. 202.

121 Amnesty International, *Death Penalty News*, June 2001, AI Index: ACT 53/003/2001; see also Independent Jamaica Council for Human Rights, *loc. cit.*, note 109, p. 9.

abolitionist States, together with State actions such as the non-inclusion of the death penalty among the sentences to be made available pursuant to the Statute of the International Criminal Court, reinforces the view that there is now a substantial body of international opinion against the death penalty.

Significantly, however, State practice and *opinio juris* in this area are yet to have crystallized into a customary rule against the imposition of the death penalty. This is supported by a number of considerations. First, it may be noted that the aforementioned resolutions of the United Nations Commission on Human Rights on the question of the death penalty all presuppose that the *lex lata* permits capital punishment. Secondly, even these resolutions, which seek to influence the future development of the law, have met resistance in the form of dissenting votes,¹²² a point which further enhances the notion that the prevailing law does not prohibit the sentence of death if the preconditions set out in the ICCPR are satisfied. Thirdly, the fact that only 44 States have ratified the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty,¹²³ suggests that caution should be exercised in concluding that the death penalty is contrary to customary international law. And, fourthly, authoritative opinion, as expressed, for instance, in the American Law Institute's *Restatement of the Law Third*, advances the view that capital punishment has not been recognized as a violation of the customary international law of human rights where it conforms with the requirements of due process.¹²⁴ With these considerations in mind, it would be premature to conclude that there is a customary rule against the death penalty at this time.

Furthermore, even if such a customary rule were to become a part of international law in the imminent future, that rule would certainly be inapplicable to Jamaica, and other Commonwealth Caribbean countries, on the basis that these countries are, and have been, persistent objectors on the question of the death penalty.¹²⁵ As a matter of practice, there is usually some amount of political pressure on the persistent objector to conform to the general rule of

122 Resolution 1997/12 was adopted by 27 to 11, with 14 abstentions, Resolution 1998/8 by 26 to 13, with 12 abstentions, and Resolution 1999/61 by 30 to 11, with 12 abstentions.

123 *Multilateral Treaties Deposited with the Secretary-General*, *loc. cit.*, note 33, p. 303.

124 American Law Institute, *Restatement of the Law Third*, Vol. 2, *loc. cit.*, note 27, p. 164.

125 On persistent objection in international law, see especially the *Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), ICJ Reports, 1951, p. 116 at p. 131; separate opinion of Judge de Castro, *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (Merits), ICJ Reports, 1974, p. 3, at pp. 9 1-2; *North Sea Continental Shelf Cases* (Denmark; the Netherlands v. Federal Republic of Germany), ICJ Reports, 1969, p. 3 at pp. 26-7; separate opinion of Judge

customary law accepted by most States; and where the States that are persistently objecting also happen to have marked constraints as to their own political power and influence in international relations, there will be a tendency for the persistent objection to the development of a particular customary rule to evaporate with the passage of time.¹²⁶ In the case of capital punishment, however, certain factors will reduce the likelihood of this development. It would be an exaggeration to argue that Caribbean States are already persistent objectors on the question of capital punishment; for, as noted above, 86 countries are still classified as retentionist, a number which suggests that there is (as yet) no generally accepted customary rule against the death penalty in all circumstances. The number of abolitionist States is increasing, but it is not sufficiently large to support the view that all other States are now dissenting from an established rule against the death penalty. And, as a related point, although several European countries are now opposed to the death penalty, lending some degree of political influence to the abolitionist perspective, this is counterbalanced significantly by the United States of America, which has generally resisted the abolitionist perspective.¹²⁷ For the imminent future, therefore, it will be difficult to argue that Jamaica is barred from undertaking the death penalty as a matter of customary law; nor is it likely that international political factors will prompt Jamaica to abandon its position on the death penalty in the short-run.

Ammoun, at p. 131; dissenting opinion of Judge Lachs, at pp. 235, 238; Akehurst, "Custom as a Source of International Law", *British Year Book of International Law*, Vol. 47 (1974-5), p. 1 at pp. 23-7; Charney, "The Persistent Objector Rule and the Development of Customary International Law", *ibid.* (1986), Vol. 56 (1985), p. 1; Stein, "The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law", *Harvard International Law Journal*, Vol. 26 (1985), p. 457.

¹²⁶ Byers notes that the concept of reciprocity also tends to undermine the position of the persistent objector, and encourages the isolation of the persistent objector from the development of customary law in the area of the objection. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), pp. 102-5.

¹²⁷ There is a strong view, however, that States cannot claim to be persistent objectors with respect to the abolition of the death penalty for juveniles under 18. This is said to be so because the two States that are not party to treaty obligations prohibiting the application of the death penalty to persons under 18 have not persistently objected against the prohibition: see United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, *The Administration of Justice and Human Rights: Report of the Sessional Working Group on the Administration of Justice*, UN Doc. E/CN.4/Sub.2/2000/44, 15 August 2000, p. 6, paragraph 18 (view expressed by David Weissbrodt).

(c) Legal Representation in Capital Cases

But though the Jamaican Constitution and the Offences against the Person Act are broadly consistent with the requirements of the ICCPR and other instruments concerning the right to life, this does not necessarily mean that all aspects of Jamaican law in this area, as currently administered in the courts, satisfy international human rights standards. And here, one particular issue may be mentioned: namely, the way Jamaican law addresses the guarantee of a fair trial in murder cases, and especially whether the law should permit the possibility of the death penalty being imposed upon a defendant who has not had the benefit of legal representation. In Jamaican law, this issue arises mainly as a result of the approach taken by the Judicial Committee of the Privy Council (the Privy Council) in *Frank Robinson v. R.*¹²⁸ In *Robinson*, the appellant was convicted of murder and sentenced to death, when, faced with the prospect that the main prosecution witness would disappear, the trial judge had insisted upon proceeding with the case, even though the appellant was unrepresented. Prior to the commencement of the trial, the case had been adjourned on 19 previous occasions, owing to the absence of the main prosecution witness; but on the twentieth occasion, with the witness present, the trial judge started the case though counsel for the appellant were absent. On the following morning, counsel for the appellant both sought to withdraw from the case as they had not been fully paid, and did so withdraw against the trial judge's instructions; junior counsel refused to undertake the case as a legal aid assignment.

In the circumstances, the Privy Council found that Robinson's constitutional right to a fair trial had not been violated, and that his death penalty conviction should stand. The majority approach in the Privy Council turned in large part on the wording of Section 20(6) of the Jamaican Constitution, which provides:

"Every person who is charged with a criminal offence –

(c) shall be permitted to defend himself in person or by a legal representative of his own choice."

For the majority, the word "permitted" in Section 20(6)(c) indicated that the State could not prevent the appellant from having counsel of his own choice, but the provision as a whole did not "give rise to an absolute right to legal representation which if exercised to the full, could all too easily lead to manipu-

¹²⁸ (1985), 22 JLR 276.

lation and abuse."¹²⁹ In applying this interpretation of Section 20(6)(c) to the facts, the majority took the view that the trial judge did all that he could to secure the appellant's legal representation.¹³⁰ The majority also attached importance to the possibility that the main prosecution witness would disappear once again,¹³¹ to the conduct of the appellant's counsel,¹³² and to the fact that the grant of a legal aid certificate to other counsel would have necessitated another adjournment.¹³³

Bearing in mind, however, the significance of legal counsel to court proceedings generally, and the horrendous prospect of the accused having to defend himself personally against the capital charge, the majority position of the Privy Council in *Robinson* is not readily supportable. Admittedly, the judges in the majority took note of the fact that the trial judge was fair to appellant, and apparently formed their own view of Robinson's guilt on examination of the transcript of the trial.¹³⁴ But, even so, the majority approach is deficient: essentially, it elevated the State's interest in proceeding with the trial, and in securing the presence of the main prosecution witness, to the point where the appellant's constitutional right to a fair trial was negated. In their dissenting judgement Lords Scarman and Edmund-Davies found that, on the facts, the trial judge had not "permitted" the appellant to have legal representation of his choice when he (the judge) decided to proceed with the trial in the absence of counsel.¹³⁵ For the dissenting judges, in the circumstances of the case, the trial judge had, in fact, prevented the appellant from choosing to be defended by counsel, and had therefore not permitted the choice, as required by Section 20(6)(c).¹³⁶ But, in addition, the dissenting judges would also have adopted "a generous and purposive construction" upon Section 20(6)(c) as a means of safeguarding the right of the accused to legal representation.¹³⁷ As Lords Scarman and Edmund-Davies put the matter:

¹²⁹ *Ibid.* p. 282.

¹³⁰ *Ibid.*

¹³¹ *Ibid.* pp. 282, 283.

¹³² *Ibid.* p. 282.

¹³³ *Ibid.*

¹³⁴ *Ibid.* pp. 283-4.

¹³⁵ *Ibid.* p. 287.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* p. 288. In presenting this approach, Lords Scarman and Edmund-Davies placed reliance on dicta of Lord Diplock in *Thornhill v. Attorney-General of Trinidad and Tobago* (1981) AC 61, and *Attorney-General of the Gambia v. Momodou Jobe* (1984) 3 WLR 174.

"(T)here can, save in very special circumstances such as national emergency, be no greater public interest than that one who is accused of an offence conviction of which carries with it sentence of death has a proper opportunity of defending himself. This opportunity must include the option of defence by counsel.... In our view it must be clearly recognised that in the normal routine of the administration of justice in ordinary times (which was the setting of this trial) *it is a serious error of law to hold that a man accused of a capital offence can be denied the option of defence by a legal representative of his own choosing.* There can in ordinary times be no greater prejudice to the public interest in the administration of criminal justice than such a denial."¹³⁸

Despite the force of this dissenting opinion, the Privy Council has not questioned the validity of the *Robinson* decision in subsequent cases. In *Ricketts v. R.*¹³⁹ the appellant's counsel withdrew from the trial when the appellant refused to speak either to his counsel or to the court, and was found to be mute of malice by a jury. Placing express reliance on the majority decision in *Robinson*,¹⁴⁰ the Privy Council found that, in the circumstances, it was impossible to say the appellant had not been "permitted to defend himself in person or by a legal representative of his own choice" in keeping with his constitutional rights.¹⁴¹ The Privy Council also found that, as neither the appellant nor his counsel had sought an adjournment and as it was unlikely that an adjournment would have changed the situation, the trial judge had exercised his discretion properly.¹⁴² In contrast, in *Dunkley v. R.*¹⁴³ (where the appellant's counsel withdrew following a sharp disagreement with the trial judge) and *Mitchell v. R.*¹⁴⁴ (where the appellant and counsel both lost confidence in each other), the Privy Council allowed appeals from unrepresented defendants in capital cases. Even as it allowed these appeals, however, the Privy Council expressly applied *Robinson* in *Dunkley v. R.* and distinguished it in *Mitchell v. R.* a pattern which indicates that *Robinson* is not lacking vigour, and that

¹³⁸ 22 JLR 276, at p. 287 (emphasis added).

¹³⁹ (1998) 1 WLR 1016.

¹⁴⁰ *Ibid.* p. 1020.

¹⁴¹ *Ibid.* (emphasis in original).

¹⁴² *Ibid.* p. 1021.

¹⁴³ (1995) 1 AC 419.

¹⁴⁴ (1999) 1 WLR 1679.

the word "permitted," as used in the Jamaican Constitution continues to be narrowly construed.

The priority given by the dissenting opinion in *Robinson* to the rights of the individual in the present context is fully consistent with the language of the ICCPR. Specifically, Article 14(3)(d) of the ICCPR indicates that everyone "shall be entitled" to the minimum guarantee of defending himself in person, through legal assistance of his own choosing or by legal aid, and shall "have legal assistance assigned to him, if the interests of justice so require." In keeping with this more positive formulation (in contrast with the wording of Section 20(6)(c) of the Jamaican Constitution) the United Nations Human Rights Committee has treated the right to legal representation as an indispensable component of justice in murder cases. Thus, when the facts concerning Frank Robinson were submitted to the Human Rights Committee, in *Robinson v. Jamaica*,¹⁴⁵ the Committee appeared to have little difficulty in supporting the complainant's perspective. Applying Article 14(3)(d), the Human Rights Committee stressed that "it is axiomatic that legal assistance be available in capital cases,"¹⁴⁶ and held that this should be so even where the unavailability of private counsel "is to some degree attributable to the author himself" and even if an adjournment of the proceedings is necessary to secure legal assistance for the accused.¹⁴⁷ Accordingly, where legal counsel declines to appear in a capital murder case, for whatever reason,¹⁴⁸ the Human Rights Committee will treat as questionable any resulting trial in which the accused is convicted. As in the case of the dissenting opinion by Lords Scarman and Edmund-Davies in *Robinson*, the Human Rights Committee correctly places greater emphasis on the trauma and unfairness inherent in requiring the accused to defend himself personally in a capital case, than upon whatever risk the State may face if an adjournment is offered in particular instances.

The Human Rights Committee has also clarified related points of interpretation concerning the right to legal representation pursuant to Article 14(3)(d) of the ICCPR. So, for example, in *Wright and Harvey v. Jamaica*,¹⁴⁹ the

145 (1989) Human Rights Report, United Nations General Assembly, *Official Records*, 44th Session, Supp. No. 40 (1988), p. 241.

146 *Ibid.*, p. 245, paragraph 10.3 (emphasis added).

147 *Ibid.*

148 *Ibid.*

149 (1995) Human Rights Report, United Nations General Assembly, *Official Records*, 51st Session, Supp. No. 40 (1995) Vol. II, p. 35.

Human Rights Committee affirmed that the right of representation in capital cases must be respected in all stages of the proceedings (including preliminary hearings), and not just for the trial and related appeals.¹⁵⁰ In the same case, the Committee also indicated that where legal aid counsel for an appellant believes there is no merit in an appeal, counsel has the duty in capital cases so to inform the appellant. If the appellant has not been so informed, the court should ensure that this be done, and provide the appellant the opportunity to engage new counsel. Failure to follow this course of action amounts to inadequate representation by counsel, in breach of Article 14(3)(b)¹⁵¹ and 14(3)(d) of the ICCPR.¹⁵² This approach was also taken by the Human Rights Committee in *Graham and Morrison v. Jamaica*¹⁵³ and *Kelly v. Jamaica*,¹⁵⁴ in which cases the Human Rights Committee maintained that, for adequate representation, the domestic court must ensure that counsel's conduct "is not incompatible with the interests of justice."¹⁵⁵ Consistent with this approach, the Human Rights Committee has recommended release from imprisonment where a complainant was not allowed to see his private lawyer until five days after his arrest on a charge of murder, this being a violation of Article 14(3)(b) of the ICCPR.¹⁵⁶ Significantly, too, in an instance of purposive interpretation, the Human Rights Committee has now recommended that legal aid should be provided for constitutional motions concerning possible irregularities in criminal trials, a matter that has been of particular relevance in cases arising from Jamaica.¹⁵⁷

In sum, therefore, the present situation is less than satisfactory. The Human Rights Committee maintains that it is axiomatic that legal assistance should be provided for the accused, gives unambiguous support for the right of each accused to counsel of his own choosing, and strongly encourages trial courts

150 *Ibid.*, at p. 40, paragraph 10.2.

151 Article 14(3)(b) entitles each person to adequate time and facilities to prepare his defence and communicate with counsel of his choice.

152 *Ibid.*, p. 41, paragraph 10.5. See also *Reid v. Jamaica* (1990) *Human Rights Law Journal*, Vol. 11, No. 3-4 (1990), p. 319.

153 (1996), Human Rights Report, United Nations General Assembly, *Official Records*, loc. cit., note 149, p. 43.

154 *Ibid.*, p. 98.

155 *Ibid.*, p. 43 at p. 48, paragraph 10.5; p. 98 at p. 104, paragraph 9.2.

156 *Kelly v. Jamaica*, *ibid.*, p. 98 at p. 104.

157 See, e.g., *Currie v. Jamaica* (1994), *ibid.*, 49th Session, Supp. 40 (1993), Vol. II, p. 73 at pp. 76-7, paragraphs 13.2-13.4; *Kelly v. Jamaica*, loc. cit., note 149, pp. 105-6, paragraph 9.3.

to allow adjournments to facilitate the right to effective representation. But, the position of the Human Rights Committee is recommendatory only, and so, there can be no certainty that its perspective will be applied in Jamaican law. At the same time, although in most cases, the accused in Jamaica will have access to counsel, whether of his own choosing or by legal aid, the *Robinson Case* allows the possibility that, in some instances, the right to counsel may actually be illusory. This is an issue which requires reconsideration, and it is noteworthy that the Jamaican Charter of Rights Bill reformulates the right to representation now set forth in Section 20(6)(c) in more positive language; the relevant draft provision, set out in proposed Section 20(5)(c), reads as follows:

“(5) Every person charged with a criminal offence shall be entitled to the following rights –

(c) to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as shall be provided by any law in force for the time being.”¹⁵⁸

By clearly indicating that the accused shall have a right to representation, the new formulation should remove the possibility that the accused may go unrepresented, even in cases where the lack of representation may be partly attributed to the actions of the accused. This would bring Jamaican law more clearly into line with the requirements of the ICCPR, and the approach recommended by the Human Rights Committee.

(d) Aspects of Practice Concerning the Right to Life

From a purely legislative standpoint, the right to life may appear to be somewhat adequately safeguarded in Jamaica. This conclusion, however, would be a highly misleading representation of the overall picture concerning the right to life in the country at the present time. More specifically, when attention is focused on the murder rate and the level of police killings in recent years, the conclusion must be that, notwithstanding international instruments and domestic stipulations, the right to life is scarcely respected within the Jamaican social

order. As to the murder rate, the statistics for the last ten years are set out in Table 1 below.

Table 1
Murders Reported and Cleared Up, 1991-2000

Year	Murders Reported	Cases Cleared Up	% Reported Murders Cleared Up
2000	887	477	53.8%
1999	849	515	60.7%
1998	953	443	46.5%
1997	1038	393	37.9%
1996	925	328	35.5%
1995	780	322	41.3%
1994	690	300	43.5%
1993	653	306	46.9%
1992	629	240	38.2%
1991	561	324	57.7%

Sources: Planning Institute of Jamaica, *Economic and Social Survey* (1993-1999); Jamaica Constabulary Force, Police Statistics Unit, for information on 2000

The figures in Table 1 imply that the right to life has been severely compromised in recent years in Jamaica. Not only is the absolute figure for the numbers reported in each year extraordinarily high for a country with a population of less than 3 million,¹⁵⁹ the rate at which these murders are reported to be cleared up also reveals that, for most years, over one-half of all murders reported are left unanswered by the State. Almost inevitably, such an environment creates a self-generating vortex in which the sanctity of life, and the right to life, are shown scant respect, with individuals in some communities assuming the prerogatives of vigilantism and reprisal for reasons of survival, retribution and revenge.

In some communities underlying socio-economic conditions, as well as prevailing attitudes, also help to engender a climate in which the preservation of life is not necessarily accorded the highest priority. A description of these

¹⁵⁸ A Bill entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights and for connected matters, First Reading before the House of Representatives, 20th July 1999; *Order of Business of the Honourable Jamaican House of Representatives*, 27th July 1999.

¹⁵⁹ The population of Jamaica was estimated at 2,590,400 at the end of 1999; Planning Institute of Jamaica, *Economic and Social Survey* 1999, p. 19.1.

conditions and attitudes falls beyond the scope of this essay;¹⁶⁰ it may be noted, however, that the murders committed each year afflict a broad cross-section of Jamaican society, leaving little scope for arguing that any particular grouping is immune from the killings. In this context, Table 2 provides a selected listing of categories of persons killed between 1998 and 2000, while Table 3 indicates the main motives advanced for killings in the same period.

Table 2
Categories of Persons Killed, 1998-2000 (Selected)¹⁶¹

Category	1998	1999	2000
Females	103	82	100
Taxi Operators	15	9	9
Children	19	14	7
Police	14	8	11
Inmates	8	7	18
Tourists	0	0	2

Source: Jamaica Constabulary Force, Police Statistics Unit (2001)

Table 3
Killings by Motive, 1998-2000

Motive	1998	1999	2000
Drug/Gang Related	264	196	126
Domestic	260	226	294
Reprisal	238	243	287
Robbery	128	120	133
Mob Killing	16	9	8
Political	2	0	0
Police/Criminal Confrontation	6	6	7
Rape	7	5	5
Undetermined	32	43	27

Source: Jamaica Constabulary Force, Police Statistics Unit (2001)

160 For general assessments of some of the main causes of crime in Jamaica, see, e.g., Headley, *loc. cit.*, note 110; Levy *et al.* *They Cry Respect: Urban Violence and Poverty in Jamaica* (1996); Report of the National Committee on Political Tribalism, July 23, 1997. On issues concerning the right to life arising from Jamaica's high crime rate, see also Barnett, "Civil Society and Human Rights: The inter-relations between Societal Groups in Jamaica within a Human Rights framework" (UNDP Human Rights Day Roundtable, Kingston, 7 December 2001), pp. 12-19.

161 As the figures are from selected categories, they do not reflect the total number of persons killed in each year.

The foregoing suggests that, in significant respects, Jamaican society is under seige. This is further reinforced by the statistics on the number of police killings in Jamaica over the last decade. Relevant figures on police killings are set out in Table 4.

Table 4
Police Killings in Jamaica, 1991-2000

Year	No. of Police Killings	No. of Police Killed
2000	140	11
1999	151	8
1998	145	14
1997	149	13
1996	148	10
1995	132	4
1994	100	6
1993	123	10
1992	145	0
1991	156	13

Sources: Jamaica Constabulary Force, Police Statistics Unit (for 1997-2000); Harriot, *Police and Crime Control in Jamaica* (2000), p. 82 (for 1991-1996).¹⁶²

At very least, these figures prompt serious questions as to whether members of the police force have wilfully participated in the assassination of Jamaican citizens under the guise of State authority.¹⁶³ At one end of the spectrum, there is considerable scope for the view that police killings represent a fundamental breach of the right to life, with such killings being perpetrated as part of a deliberate scheme for the destruction of persons perceived by the State as criminal elements. In support of this viewpoint, the strikingly high level of police killings, the relative disproportion between police killings and the number of police killed by civilians, and the fact that the number of police killings has

162 Harriot relies on the Jamaica Constabulary Force, Police Statistics Unit, for statistics pertaining to the period 1978 to 1996: *Police and Crime Control in Jamaica* (2000), p. 82.

163 For a general discussion concerning these issues, see also Amnesty International, *Jamaica: Killings and Violence by Police: How Many More Victims?* (April 2001), AI Index: AMR 38/003/2001. The Government of Jamaica, and the Commissioner of Police have been publicly critical of some aspects of this report, while the Jamaican Leader of the Opposition has expressed support for it: see, e.g., the *Weekend Observer* (Jamaica), April 12, 2001 ("Amnesty Report Sparks Major Political Row"); the *Gleaner* (Jamaica), April 12, 2001 ("Amnesty Chided, Praised").

been at a high level for several years, all suggest that the present situation is neither coincidental nor accidental.¹⁶⁴ In addition, the notion that police killings are sometimes part of a deliberate approach to crime-fighting could find support from wider societal views that callous murderers should not be allowed to act with impunity, and that, in the present legal environment in which the death penalty has not recently been enforced, police vigilantism is necessary to ensure justice vis-à-vis known murderers.

At the other end of the spectrum, State authorities have never acknowledged the existence of a policy of official vigilantism, and, indeed, have consistently argued in support of the rule of law. Occasionally, it is true, some State officials make statements that, in a very broad sense, could be interpreted as supporting police brutality and murder, but some of these statements may also be read as affirmations of the right of self-defence for the police.¹⁶⁵ Also, although the level of police killings remains unduly high, the statistics do suggest a downward trend when the decade of the 1990s is compared generally with the previous decade: this, together with the fact that the vast majority of police killings are not ruled unjustifiable by the Director of Public Prosecutions, helps to counter the view that police killings in Jamaica are best understood as part of a scheme of State brutality, and deliberate disregard for the right to life.

On balance, though, it strains credulity to suggest that the high level of police killings may be explained entirely, or perhaps even substantially, as killings in self-defence.¹⁶⁶ Even though there is a low number of prosecutions for

¹⁶⁴ On this point, Americas Watch, in a study from the 1980s, noted that both statistical patterns and individual cases suggest that the Jamaican police "seek out" crime suspects and "summarily execute them": *Human Rights in Jamaica: An Americas Watch Report* (September 1986), p. 2.

¹⁶⁵ For a recent statement that could possibly be placed in either category, see, "Those gunmen belong in the morgue - Knight", the *Gleaner* (Jamaica), January 11, 2001. In this report, the then Jamaican Minister of National Security and Justice, speaking in the context of an attack by gunmen at the Kingston Public Hospital, is quoted as follows: "The police must be able, if challenged (by gunmen) to respond swiftly, efficiently and effectively, because when these gunmen come to the hospital, they are not coming with any slingshots, they are coming with big guns. I know I am going to be criticised for this, but gunmen who challenge the police in this manner, their place belong in the morgue and after that Dovecot or some family plot": p. A3. Dovecot is a well-known cemetery in Jamaica. On the law relating to self-defence in Jamaica, see, e.g., *Beckford v. R.* (1987) 3 All ER 425; *R. v. Clegg* (1995) 1 All ER 334.

¹⁶⁶ For skepticism from the decade of the 1980s, see, e.g., *Human Rights in Jamaica: An Americas Watch Report*, loc. cit., note 164 (September 1986): "This very high level of police homicides is sometimes attributed to the violent nature of Jamaican society. The police themselves claim that many of these killings take place in 'shoot-outs' with criminals. The Americas Watch rejects these explanations for the high rate of police homicides": pp. 1-2. See also Daly, loc. cit., note 109, especially at pp. 145-8; O'Connor, "The Jamaica Council for Human Rights: A Non-Governmental Organisation Case Study", in Byre and Byfield (eds.),

murder by the police, and even considering that the police are often called upon to perform their duties in difficult and, indeed, life-threatening circumstances, the overall figure for police killings still suggests that the use of firearms is not a matter of last resort for the police,¹⁶⁷ and that, generally, there is some degree of disregard for the right to life in practice. In addition, the fact that the figure for police killings has actually been reduced from a high of 355 persons in 1984 to 140 in 2000 implies that in some years, if not in all, certain policemen believe that the social climate is not averse to police killings.¹⁶⁸ To be sure, some allegations of police murder are open to suspicion, and may in fact reflect general and longstanding hostility between certain communities

loc. cit., note 109, p. 331 at pp. 340-43 Chevigny, "Police Deadly Force as Social Control: Jamaica, Argentina, and Brazil", *Criminal Law Forum*, Vol. 1, No. 3 (1990), p. 389.

¹⁶⁷ On this point, the Hirst Report noted that "the continuing level of deaths attributable to firearms operations involving the [Jamaica Constabulary Force] are undoubtedly produced by their use as an action of first resort...": Hirst Report, Sections 3.4.10; 3.4.11, at p. 28, quoted by Americas Watch, Vol. 5, No. 3, April 1993, *Human Rights in Jamaica: Death Penalty, Prison Conditions and Police Violence*, p. 6.

¹⁶⁸ The figure for 1984 is taken from Harriot, loc. cit., note 162, p. 82. It is not difficult to find support for the notion that policemen may sometimes need to kill perceived criminals - even if the killing is not technically a matter of self-defence: this is one of the points of contention inherent in the continuing debate in Jamaica concerning the police killing of seven young men in Braeton, Phase III, St. Catherine, on March 24, 2001. This episode, which raises several important questions pertinent to the right to life, is currently under investigation, but it has been subject to a considerable degree of public comment, as well agitation mainly on the part of Jamaicans for Justice, Families against State Terrorism and the Independent Jamaica Council for Human Rights. On the police version of this incident, a large contingent of police (over 50 persons) went to a house in Braeton in search of members of a criminal gang, some of whom were believed to be involved in the murder of a school principal. On approaching the house, the police encountered hostile gunfire, and in the ensuing exchange, all seven men inside the house were killed by the police. No member of the police force was hit by gunfire, and none reported serious injury of any type. The police version of events has been strongly questioned by persons claiming to be witnesses, some of whom maintain firmly that the police executed at least some of the young men in circumstances that cannot be characterised as self-defence. Assuming, *arguendo*, that the police version is correct, one implication is that residents in the environs of the house in question may well have lived in great fear, given their proximity to a gang of armed gunmen timorous enough to tackle over 50 members of the police force. Also, if the police version is correct, persons in the wider society should be relieved that vicious gunmen, keen to kill police members in open combat, have been removed from society. On the other hand, if we assume, again for the sake of argument, that the police actually executed the young men, then, the Braeton episode would have to be added to other putative instances of State murder; and, moreover, it would represent a signal - and for some people, clear confirmation - that very senior members of the police force are prepared to lie when faced with public accusations of murder. If confirmed by judicial processes, the idea that seven men could be killed by the police in cold blood, all on one occasion, by representatives of the State would also raise the possibility that there is an execution squad within the Jamaican police force. Amnesty International has sponsored the preparation of an unofficial pathology report concerning the victims of the Braeton killing: see Amnesty International, Danish Medical Group, *The Braeton Seven: Report on the Observation of Seven Autopsies in Jamaica*, 29 March 2001 (Report of Peter Mygind Leth, April 2001), AI Index: AMR 38/09/2001.

and the police, rather than the truth in particular cases.¹⁶⁹ In some instances, however, the evidence of wilful police killing is strong, and, occasionally, there is also the possibility of soldiers participating in murder under the cloak of State authority.

(e) The Example of Michael Gayle

In regard to the foregoing, the case concerning Michael Gayle should be expressly mentioned. Michael Gayle, a 26 year-old-man said to be of limited mental capacity, was beaten and kicked to death in August 1999 in circumstances that indicated that either soldiers from the Jamaica Defence Force or members of the Jamaica Constabulary Force, or both, were responsible for his death. To date, no formal charges have been brought by the Director of Public Prosecutions, though the Michael Gayle case has been a matter of grave concern to many Jamaicans, including the civil rights group, Jamaicans for Justice. The Michael Gayle case highlights at least two points of special relevance in the present context. First, no evidence has been proffered to the effect that the victim was participating in any unlawful activity at the time of his killing, a fact which supports the perception that some members of the security forces are not above taking the lives of citizens without just cause.¹⁷⁰ And, secondly, the circumstances concerning Michael Gayle's death, as well as the grave difficulties faced by the Director of Public Prosecutions in identifying the particular policemen or soldiers to be charged – in a situation where there were reportedly at least 13 members of the security forces in the vicinity of the scene of Michael Gayle's beating – indicate that in some instances there is a pronounced code of silence among the particular State officers involved in a murder under the cover of authority. These points are consistent with oft-stated opinions of denizens of Jamaica's inner cities and of human rights advocates. Finally, it should be noted that in this case, a coroner's jury returned a 10 to 1 verdict that Michael Gayle's killing was an act of manslaughter, a

¹⁶⁹ For this perspective, see, e.g., United States Department of State, *1999 Country Reports on Human Rights Practices: Jamaica* (Released by the Bureau of Democracy, Human Rights, and Labor, February 25, 2000), www.state.gov/www/global/human_rights/1999_hrp_report/jamaica.html, pp. 1-2.

¹⁷⁰ In some cases, acting without just cause may involve gross negligence or carelessness, rather than action prompted by malice. In June 1999, the police fired on a taxi transporting passengers in the Kitson Town area of St. Catherine, causing the death of the taxi driver. Following the incident, which prompted protest in the community, there were allegations that the police had mistakenly believed that the taxi was carrying a man wanted by the police: *ibid*

decision which borders on perversity, given that, on the evidence presented, Gayle was deliberately beaten and kicked to death.

(f) A Comment on Abortion

Another question which arises with reference to the right to life is whether the provision in Article 6(1) of the ICCPR, asserting the inherent right to life of "every human being," and prohibiting the arbitrary deprivation of life, may be interpreted as a legal barrier to abortion. Here, the argument would be that life begins at conception and that, therefore, the termination of pregnancy at any stage involves the deprivation of life, possibly in contravention of Article 6(1). Whatever merits this approach may carry in the realm of morality,¹⁷¹ it is difficult to sustain as a matter of treaty law under the ICCPR in the light of the *travaux préparatoires* concerning this instrument. More specifically, when Article 6(1) was being drafted, there was an attempt to introduce the issue of abortion, so that the provision on the right to life would read, in part, that: "From the moment of conception, this right shall be protected by law."¹⁷² This form of words was expressly opposed by some States, and a proposal containing this idea was rejected by a vote of 31 to 20, with 17 abstentions, in the Third Committee of the General Assembly in 1957.¹⁷³ Among the reasons advanced for opposition were the impossibility of identifying accurately the moment of conception, and the fact that different countries had already adopted divergent rules on the question of abortion.¹⁷⁴ These reasons may not be

¹⁷¹ For discussion on moral aspects of abortion, see, for instance, Glover, *loc. cit.*, note 117, pp. 119-149; Ross, "Abortion and the Death of the Fetus", *Philosophy and Public Affairs*, Vol. 11, No. 3 (1982), reprinted in Narveson (ed.), *Moral Issues* (1983), p. 239; Humber, "Abortion: The Avoidable Moral Dilemma", *The Journal of Value Inquiry*, Vol. 9 (1975), abridged version reprinted *ibid.* p. 250; Thomson, "A Defense of Abortion", *Philosophy and Public Affairs*, Vol. 1, No. 1 (1971), reprinted in Calm and Markie, *Ethics: History, Theory and Contemporary Issues* (1998), p. 737; Tooley, "Abortion and Infanticide on Demand", *Philosophy and Public Affairs*, Vol. 2, No. 1 (1972), reprinted *ibid.* p. 749. For political overview, see, e.g., Petchesky, "Reproductive Politics", in Krieger (ed.), *The Oxford Companion to Politics of the World* (1993), p. 782.

¹⁷² This was on the basis of a proposal by Belgium, Brazil, El Salvador, Mexico and Morocco: United Nations General Assembly, Report of the Third Committee, *Draft International Covenants on Human Rights*, UN Doc. A/3764 and Add. 1 (1957), paragraph 112; also reported in Hannum and Fischer (eds.), *United States Ratification of the International Covenants on Human Rights* (1993), pp. 92-3.

¹⁷³ United Nations General Assembly, Report of the Third Committee, *loc. cit.*, previous note, paragraph 119 (e).

¹⁷⁴ *Ibid.*, paragraph 112.

decisive in themselves,¹⁷⁵ but, for the present purposes, the point is that the reference to protecting life "from the moment of conception" was not accepted by the States which drafted Article 6(1) – a conclusion which supports the view that Article 6(1), in its final treaty form, was not intended to provide legal obligations for States on the controversial question of abortion.

The result is that Jamaica, like other States, is not constrained by the ICCPR in the formulation and implementation of the country's legal regime concerning abortion. On the other hand, the form of words rejected for the ICCPR is, broadly speaking, to be found in Article 4(1) of the American Convention on Human Rights, which reads as follows:

"Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

On its face, Article 4(1) would seem to protect life from the moment of conception, and thereby act as a restrictive provision on abortion. If, therefore, Jamaica were to contemplate a permissive regime for abortion, it would be necessary to reconcile that approach with the country's treaty obligations under the American Convention. However, any assessment of the impact of the American Convention on abortion in Jamaica would also need to take into account the *Baby Boy* Case in which a majority of the Inter-American Commission rejected the idea that Article 4(1) prohibited abortion in all circumstances.¹⁷⁶ Specifically, the majority in this case noted that Article 4(1) represented a compromise between States which wanted the right to life protected from conception and those which had laws permitting abortion for a

175 For instance, it has been suggested that difficulties concerning the determination of the beginning of life should prompt the State to consider protecting foetal life without reference to time periods within pregnancy: see Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992), pp. 127-8 (referring to Carnegie, "Minority Report" in the *Report of the National Commission on the Status of Women in Barbados* (1978), p. 413). Also, the fact that different States have divergent rules on particular matters has not in itself prevented States from accepting broad rules in the ICCPR (as in the case of the right to life and the death penalty, for example).

176 *Human Rights Law Journal*, Vol. 2, No. 1-2 (1981), p. 110, at pp. 118-9. In the *Baby Boy* Case, the Inter-American Commission also found that the *travaux préparatoires* of the American Declaration of the Rights and Duties of Man did not indicate support for the idea that the right to life is to be protected "from the moment of conception": pp. 116-8; cf dissenting opinions of Marco Gerardo Monroy Cobra and Luis Demetrio Tinoco Castro: pp. 122 and 124, respectively. For criticism of the majority approach on this point, see also Shelton, "Abortion and the Right to Life in the Inter-American System: the Case of 'Baby Boy'", *ibid.*, Vol. 2, No. 3-4 (1981), p. 309 at pp. 312-6. For the text of the American Declaration, see Whiteman, *Digest*, Vol. 5, pp. 231-4.

number of reasons, and emphasized that the use of the phrase "in general" in Article 4(1) could possibly allow abortion in cases of rape or to save the mother's life, among other possibilities.¹⁷⁷ Hence, although Article 4(1), as interpreted in the *Baby Boy* Case, indicates some level of restriction on the right to an abortion, the precise extent of that restriction awaits further judicial determination.¹⁷⁸

Within Jamaica, the right to life as enshrined in the Constitution has not been invoked in domestic courts in opposition to abortion activities in practice.¹⁷⁹ Rather, the question of abortion has been assessed mainly by reference to the Offences against the Person Act. Section 72 of that Act stipulates that:

"Every woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent ... shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for life, with or without hard labour."

Section 72 also imposes life imprisonment upon persons who "unlawfully" procure a miscarriage, while Section 73 indicates that it shall be a misdemeanour "unlawfully" to supply or procure any implement "knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman."

The particular language relied upon in both Sections 72 and 73 has prompted the view that there is a broad prohibition on abortion, especially as the Offences against the Person Act contains no express exception that would, for instance, allow abortions to protect the life or privacy rights of the prospective mother. This interpretation is, however, open to question, mainly because Sections 72 and 73 repeatedly prohibit abortion-related activities that are

177 *Human Rights Law Journal*, Vol. 2, No. 3-4 (1981), p. 119. The words "in general" were incorporated into the draft provision on the right to life in Article 4(1) of the American Convention on the recommendation of the Inter-American Commission on Human Rights in 1966; see Colon-Collazo, "The Drafting History of Treaty Provisions on the Right to Life: A Legislative History of the Right to Life in the Inter-American Legal System", in Ramcharan (ed.), *loc. cit.*, note 111, p. 33 at p. 39.

178 Strictly speaking, the comments by the Inter-American Commission in *Baby Boy* on the right to life in Article 4(1) are *obiter*, for the United States of America was not a party to the American Convention at the time of the case: *Human Rights Law Journal*, Vol. 2, No. 1-2 (1981), p. 110 at p. 120. In a concurring opinion, Anreas Aguilar M. agreed with the majority approach on the points of legal obligation, though he expressed the view that, *de lege ferenda*, protection for life should begin at "the very moment of conception": *ibid.*, p. 121.

179 See Demerieux, *loc. cit.*, note 175, p. 126.

undertaken "unlawfully" by the prospective mother or third parties: *prima facie*, the context and use of the term "unlawfully" prompt the suggestion that there is a range of lawful activities that could give rise to abortion, and that such activities are not prohibited by Sections 72 and 73.

This line of reasoning was appealing to Macnaghten J. in *R v. Bourne*.¹⁸⁰ The case concerned a prosecution under Section 58 of the English Offences against the Person Act, 1861, which, in relevant part contained the same form of words set out in Section 72 of the current Jamaican legislation. In interpreting this formulation, Macnaghten J. noted that "the word 'unlawfully' is not a meaningless word";¹⁸¹ and, on the basis, therefore, that there were unlawful and lawful forms of abortion, he concluded that abortions were lawfully undertaken when they are done "in good faith for the purpose only of preserving the life of the mother."¹⁸² Though Macnaghten J.'s approach correctly gives deference to the use of the word "unlawfully" in the relevant provision, it is still somewhat problematic. In keeping with his view that Section 58 distinguished lawful and unlawful abortions, Macnaghten J. maintained further that the language in the Infant Life (Preservation) Act, 1929 – which created a defence in favour of preserving the life of the mother – was applicable.¹⁸³ This approach is clearly subject to the criticism that Macnaghten J. was prepared to read non-existent words into Section 58 of the Offences against the Person Act, a criticism which strongly undermines this perspective.¹⁸⁴ In subsequent cases, though, Macnaghten J.'s approach in *Bourne* has been followed at first instance.¹⁸⁵ For example, in *R. v. Newton and Stungo*,¹⁸⁶ Ashworth J., in his direction to the jury, noted that the use of an instrument to procure a miscarriage "is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman."¹⁸⁷ *R v. Newton and Stungo* may

180 (1939) 1 KB 687.

181 *Ibid.*, p. 691.

182 *Ibid.*, pp. 691-2. Macnaghten J. also noted, *obiter* and without reference to supporting case law, that in his view, this approach "is in accordance with what has always been the common law of England with regard to the killing of an unborn child": *ibid.*, p. 691.

183 *Ibid.*, pp. 690-91.

184 See also Havard, "Therapeutic Abortion", (1958) *Criminal Law Review*, p. 600 at p. 602-3.

185 See also Havard's reference to the judgment of Morris J. in the unreported case of *Bergmann and Ferguson*: *loc. cit.*, previous note, p. 605.

186 (1958) *Criminal Law Review*, p. 469.

187 *Ibid.*

have expanded on *Bourne* in the sense that Ashworth J. expressly mentioned that preserving the health of the mother, as distinct from her life, may justify an abortion in particular cases; but, if anything, this emphasizes that subsequent courts have been prepared to read words into the language of Section 58 of the English Offences against the Person Act in a manner similar to Macnaghten J.'s approach.

By extension, it seems likely that Jamaican courts would be prepared to do the same, and that, as a result, Sections 72 and 73 of the Jamaican Offences against the Person Act should be read as prohibiting abortion, and the procuring of implements with a view to committing abortion, save in the circumstances where the abortion is done in good faith for the purpose of preserving the life or health of the prospective mother. However, this statement of the law is necessarily tentative, for *Bourne* is a decision at first instance, it relies on a tenuous reading of the relevant statutory provision, and it was made at a time when technological advances in the field of therapeutic abortion were relatively underdeveloped. Moreover, even if *Bourne* is correct in the common law,¹⁸⁸ it provides only limited guidance in practice, for the concepts of "good faith" and "actions necessary to preserve the life (or health) of the mother" are broadly subjective. It is also noteworthy that, in Jamaica, the medical profession as a group appears to have doubts about the legal rules concerning the circumstances in which abortions may be legitimately performed.¹⁸⁹ These considerations point to the need for more precise, modern

188 In *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* (1981) 1 All E.R. 545, Lord Diplock noted, *obiter*, that *R v. Bourne* was "a sagaciously selected test case" submitted by Aleck Bourne, and that because Macnaghten J.'s summation resulted in an acquittal, its correctness in law was not examined by the higher courts: p. 567. Still with respect to *Bourne*, Lord Diplock added: "No disrespect is intended to that eminent judge... if I say that his reputation is founded more on his sturdy commonsense than on his lucidity of legal exposition. Certainly his summing up, directed as it was to the highly exceptional facts of the particular case, left plenty of loose ends and ample scope for clarification": *ibid.* This hardly amounts to a ringing endorsement of Macnaghten J.'s approach.

189 For example, a proposed Statement of Policy on Abortion of the Medical Association of Jamaica (MAJ), issued in 2000, indicates, *inter alia*, that "The MAJ wishes to have the law on abortion clarified. (The law as it stands on the books is over 100 years old and its relevance must be questioned. The adoption of British Common Law which may allow a lawful abortion makes the legal position on this subject ambiguous...)": reprinted in the *Sunday Observer* (Jamaica), December 3, 2000. The proposed Statement of Policy on Abortion of the MAJ may have been prompted in part by the arrest of a medical doctor in January 2000 on charges pursuant to Section 72 of the Offences against the Person Act. As of May 2001, the case had not been brought to trial. See also "Doctors Want Clarity on Abortion Law", *ibid.*

legislation on the subject. In formulating new statutory provisions, the State may opt to take into account approaches to abortion from other jurisdictions,¹⁹⁰ and it will need to reconcile any new provisions with the terms of the American Convention on Human Rights. It will not, however, be seriously constrained by the right to life language set out in Article 6 of the ICCPR.

III. Freedom from Cruel and Inhuman Treatment and Conditions

Section 17(1) of the Jamaican Constitution is generally consistent with international strictures against cruelty and inhumanity in State activities. It stipulates that: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." As Barnett has noted, the language of this provision is broad enough to cover punishment or treatment meted out not only by the State, but also by private persons; it also pertains to treatment or punishment for persons in detention, as well as to actions undertaken outside penal institutions.¹⁹¹

(a) Significance of Savings Clauses

Notwithstanding its broad scope, however, the basic provision safeguarding civilized standards of treatment in Jamaica seems deficient in at least two particular respects. In the first place, Section 17(1) needs to be read in conjunction with Section 17(2). The latter provides that:

¹⁹⁰ For the prevailing position in the United Kingdom, see the Abortion Act 1967, as amended by Section 37 of the Human Fertilisation and Embryology Act 1990; *Paton v. United Kingdom* (1981) 3 EHRR 408, E Comm HR; *Paton v. British Pregnancy Advisory Service Trustees* (1979) QB 276; for commentary on the United Kingdom position from a human rights perspective, see, e.g., Feldman, *Civil Liberties and Human Rights in England and Wales* (1993), pp. 104-16; Clayton and Tomlinson, *The Law of Human Rights*, Vol. 1 (2000), pp. 345-7, 357-8, 363 and 367. The extensive sources on abortion in the United States of America include *Roe v. Wade*, 410 US 113 (1973); *Planned Parenthood v. Danforth*, 428 US 52 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 US 416 (1983); *Thornburgh v. American College of Obstetricians*, 476 US 747 (1986); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992). For a slightly dated but useful international review, see, e.g., Tribe, *Abortion: The Clash of Absolutes* (1990), pp. 52-76; for a perspective from the Caribbean, see Demerieux, *loc. cit.*, note 175, pp. 126-130.

¹⁹¹ See Barnett, *The Constitutional Law of Jamaica* (1977), p. 391. For a summary of English cases on the meaning of the phrase "inhuman or degrading punishment or other treatment" decided before the Human Rights Act became effective in the United Kingdom, see Clayton and Tomlinson, *loc. cit.*, previous note, p. 385.

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before [August 6, 1962]."

In effect, Section 17(2) ensures that forms of punishment (but not of torture or treatment) which were valid before independence cannot be regarded as unconstitutional even in the post-independence period. The difficulty that arises from this is not merely academic: one important feature of human rights law is that the rules giving substance to particular principles are not always immutable. Thus, with the passage of time, forms of punishment once regarded as culturally acceptable may become objectionable to large segments of a country's populace and to wider international opinion. Section 17(2), by limiting the power of the judiciary to find some forms of punishment constitutionally unacceptable as cruel, inhuman or degrading, seems to place an undue restriction on the development of human rights perceptions in this area. In practice, Section 17(2) could mean, for instance, that legislative provisions imposing the death sentence for minor offences (in contravention of the ICCPR) would not be unconstitutional in Jamaica, essentially because the death sentence is a form of punishment that predates independence.¹⁹²

The tendency to show a high degree of deference to the past with respect to human rights norms such as those pertaining to cruel and inhuman treatment, is also evident in the language of Section 26(8) of the Jamaican Constitution. Section 26(8) reads as follows:

"Nothing contained in any law in force immediately before [August 6, 1962] shall be held to be inconsistent with any of the provisions of this Chapter;¹⁹³ and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.

¹⁹² *Ibid.*, p. 392. The savings clause in Section 17(2) would also undermine the possibility of following the approach taken by the South African Constitutional Court to the question of the death penalty. In *State v. Makwanyane and Another* (1995) (3) SA 391, the South African Constitutional Court held that capital punishment for murder, aggravated robbery, child-stealing and rape was contrary to that country's constitution primarily because it violated the prohibition on cruel, inhuman or degrading treatment or punishment. Because hanging predates independence in Jamaica, the reasoning of the South African Constitution Court would not be available to Jamaican courts; for brief discussion, see also *Report of the Joint Select Committee of Parliament on the Charter of Rights (Constitutional Amendment) Bill* (Jamaica), pp. 49-50.

¹⁹³ *Viz.*, Chapter III of the Constitution, on fundamental rights and freedoms.

As in the case of Section 17(2), this provision preserves the pre-independence *status quo* and thus may be said to lend stability to the law; it tends, on the other hand, to undermine judicial capacity to adjust the application of human rights norms to reflect changing social values and expectations.

In practice, Sections 17(2) and 26(8) mean that the Jamaican judiciary would be hard-pressed to find that, as a matter of constitutional law, practices such as flogging or whipping are contrary to the injunction against "inhuman and degrading punishment or other treatment" set out in Section 17(1), once it is established that such forms of punishment effectively predated independence.

In *R v. Errol Pryce*,¹⁹⁴ for instance, the Jamaican Court of Appeal upheld a sentence of whipping, with Carey P. (Ag.) writing for the court, noting, among other things, that because the Crime (Prevention of) Act sanctioning whipping was in force before independence, it was preserved by Section 26(8) of the Constitution. Carey P. (Ag.) expressly indicated that the Court of Appeal was not concerned with the "constitutionality or legality of the sentence of whipping,"¹⁹⁵ though the decision of the court, upholding the sentence in question, could be read as implying a judgement in favour of the constitutionality and legality of whipping. In a more recent case, *R v. Noel Samuda*,¹⁹⁶ the Jamaican Court of Appeal refused (Harrison, J.A. dissenting) to uphold a sentence of whipping primarily on the basis that the statutory provisions used to sanction whipping in the instant case (the Crime (Emergency Provisions) Act of 1943, and subsequent provisions passed by reference thereto) were not in effect in Jamaica at the time the sentence was imposed. Again, the Jamaican Court of Appeal did not decide whether flogging or whipping violated the constitutional injunction against inhuman or degrading punishment or other treatment; however, Bingham, J.A., and Harrison, J.A., expressed views that suggesting that the savings clauses in Sections 17(2) and 26(8) of the Jamaican Constitution could be used to uphold flogging and whipping if these sentences were validly in existence prior to independence. In this context, Bingham, J.A., also mentioned the possibility of relying on Section 4(1) of the Jamaica (Constitution) Order in Council, 1962, as a savings clause to preserve pre-independence legislation.

Generally, therefore, one point of criticism is that in instances where the standard of freedom from inhuman and degrading punishment or treatment

194 (1994) 47WIR 336.

195 *Ibid.*, p. 337.

196 *Jamaica*, SCCA No. 134/96 (1996).

may possibly be violated, the Jamaican Constitution prevents judges from assessing this question once the punishment or treatment was sanctioned by the legislature prior to independence. Not only can this lead to the infliction of treatment or punishment that may well appear to be contrary to modern perceptions of human dignity, it also tends to stifle the development of domestic jurisprudence and legal reasoning concerning human rights standards such as freedom from cruel and inhuman treatment.¹⁹⁷

In addition, the savings provisions, when applied, for instance, to justify the persistence of whipping as a punishment, lead to a situation in which Jamaica appears to be in breach of its obligations under Article 7 of the ICCPR. In *Osbourne v. Jamaica*,¹⁹⁸ a case concerning the legality of whipping under the ICCPR, the Human Rights Committee stated:

"Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant."¹⁹⁹

In this case, Jamaica had argued that whipping was constitutionally sanctioned by the savings clause, but, in response, the Human Rights Committee noted that the constitutionality of the sentence was not sufficient to meet the terms of Article 7.²⁰⁰ It may be that Jamaica could also have argued that whipping is justified as a regional variation under the ICCPR, given the view expressed by some countries in favour of acknowledging regional differences on some matters of human rights implementation;²⁰¹ however, the firmness inherent in the opinion of the Human Rights Committee quoted above suggests that this argument, too, would have been rejected.

197 For general criticism of savings provisions in Caribbean Constitutions, see Alexis, "Human Rights Adjudication in the Caribbean Community", in Ramcharan and Francis, *loc. cit.*, note 97, p. 343 at pp. 350-9. The Jamaican Constitutional Commission has recognized the force of this criticism, and has recommended rescission of the savings clause in Section 26(8) of the Constitution. For the proposition that corporal punishment for disciplinary offences in prison may be prohibited under general international law (as distinct from treaty law), see Rodley, *loc. cit.*, note 55, pp. 316-24; see also the decision of the Supreme Court of Zimbabwe in *The State v. Ncube and Others* (1987) (2) ZLR 246 at p. 267B-C. This proposition needs, however, to overcome particular obstacles if it is to be fully accepted, including the argument that States which have retained flogging may be regarded as persistent objectors with respect to the prohibition on corporal punishment.

198 (2000) Human Rights Committee Report, United Nations General Assembly, *Official Records*, 55th Session, Supp. No. 40 (2000), Vol. II, p. 133.

199 *Ibid.*, p. 138, paragraph 9.1.

200 *Ibid.*

201 *Supra*, note 54 and accompanying text.

(b) Aspects of Practice Concerning Cruel and Inhuman Conditions

The second weakness of Section 17(1) is concerned not with the actual formulation of the constitutional provision, but rather with the failure of the State to safeguard its requirements in practice. Generally, it is fair to say that, in the post-independence period, the Jamaican State has not accorded high priority to the construction and maintenance of prisons, other correctional facilities, and detention centres. This low level of priority has, over the medium-term, manifested itself in living conditions in some correctional facilities and detention centres that fall considerably short of elementary conditions for humanity. From a statistical point of view, one index of the problems concerning lack of facilities is the fact that the overall prison population has consistently exceeded the rated capacity of the prison system. For the decade of the 1990s, the situation is summarized in Table 5, and graphically illustrated in Figure I.

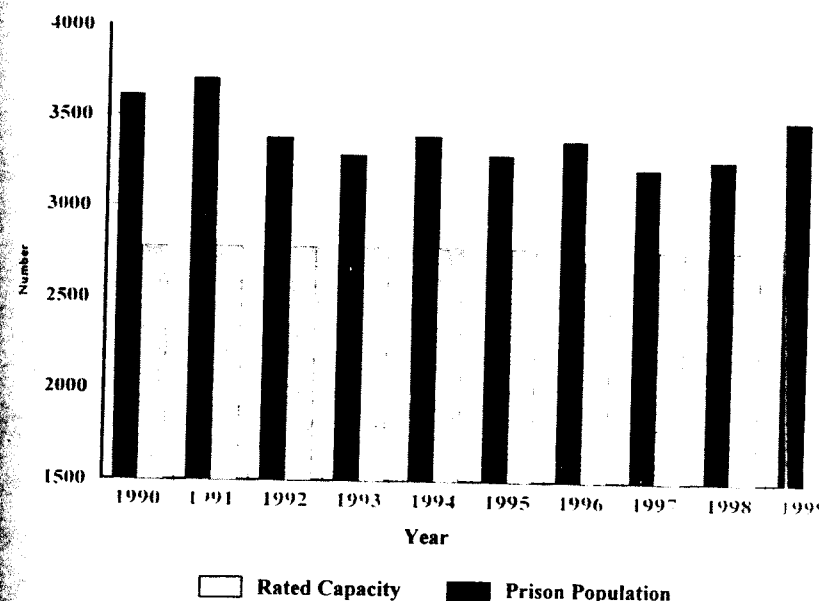
Table 5
Prison Population Compared with Rated Capacity, 1990-1999

Year	Prison Population	Rated Capacity	Ratio of Population to Rated Capacity
1999	3489	2771	1.26:1
1998	3268	2771	1.18:1
1997	3216	2771	1.16:1
1996	3371	2720	1.23:1
1995	3289	2781	1.18:1
1994	3392	2781	1.22:1
1993	3284	2781	1.19:1
1992	3379	2781	1.22:1
1991	3705	2781	1.33:1
1990	3610	2781	1.30:1

Source: Planning Institute of Jamaica, *Economic and Social Survey* (1993-1999)

Although the figures in Table 5 indicate that some degree of overcrowding has characterised the prison system for at least a decade, they do not fully capture the nature of the problem. Further assistance in that regard may be derived by examining additional statistics for particular prisons. These statistics, set out in Table 6 (and illustrated Figures II and III), indicate that, for the period 1995 to 1999, some prisons were significantly more crowded than others, and provide some insight into why certain prisons are more prone to demonstrations and general unrest than others.

Figure I: Prison Population Compared with Rated Capacity, 1990-1999



Overcrowding at the St. Catherine and Tower Street Adult Correctional Facilities is both extreme in magnitude and enduring in character. In a "good" year at St. Catherine, for example, the correctional authorities will be called upon to place twice the prison's capacity within the walls of the institution. And, to the problem of limited capacity must, of course, be added the related difficulties of inadequate sewerage systems, delapidated buildings and generally deplorable conditions. Indeed, although more than seven years have elapsed since the *Report of the National Task Force on Crime* (the Wolfe Report) was published, and although certain measures of improvement have been attempted since the publication of the report, its language concerning prison conditions remains appropriate:

"It is indeed a very serious indictment on a civilized society to have some of its citizens housed in such inhuman conditions. We warn that

Table 6
Population and Ideal Capacity of Selected Adult
Correctional Centres, 1995-1999

Institution	1995	1996
	Capacity/Population	Capacity/Population
St. Catherine	650/1160	650/1294
Tower Street	850/1705	850/1309
Fort Augusta	300/144	280/146
Tamarind Farm	300/208	300/210
Institution	1997	1998
	Capacity/Population	Capacity/Population
St. Catherine	671/1191	671/1253
Tower Street	895/1234	895/1232
Fort Augusta	300/157	300/158
Tamarind Farm	280/174	280/185
Institution	1999	
	Capacity/Population	
St. Catherine	671/1344	
Tower Street	895/1309	
Fort Augusta	300/181	
Tamarind Farm	280/192	

Source: Planning Institute of Jamaica, *Economic and Social Survey* (1995-1999)

the conditions which exist in our prisons make them a seething cauldron, the explosion of which is imminent."²⁰²

Nor have these conditions been kept from public scrutiny. In some instances, information about the state of the St. Catherine and Tower Street facilities has been made public as a result of discrete episodes of unrest at,²⁰³

²⁰² *Report of the National Task Force on Crime* (April 1993), p. 55.

²⁰³ Unrest at the Tower Street Adult Correctional Centre and the St. Catherine Adult Correctional Centre between August 20 and 23, 1997, prompted the establishment of a Board of Enquiry chaired by Justice W.D. Marsh, with Flo O'Connor and Herman Ricketts as members. The Board of Enquiry noted that "(p)ractically every published report on our two (2) major prisons begins and ends with the same litany; namely, that the root of the problem is OVERCROWDING". *Report of the Board of Enquiry into Disturbances at the Tower Street Adult Correctional Centre and the St. Catherine Adult Correctional Centre between 20th-23rd August 1997*, p. 12 (emphasis in original).

Figure II: Population and Ideal Capacity
St. Catherine District Prison 1995-1999

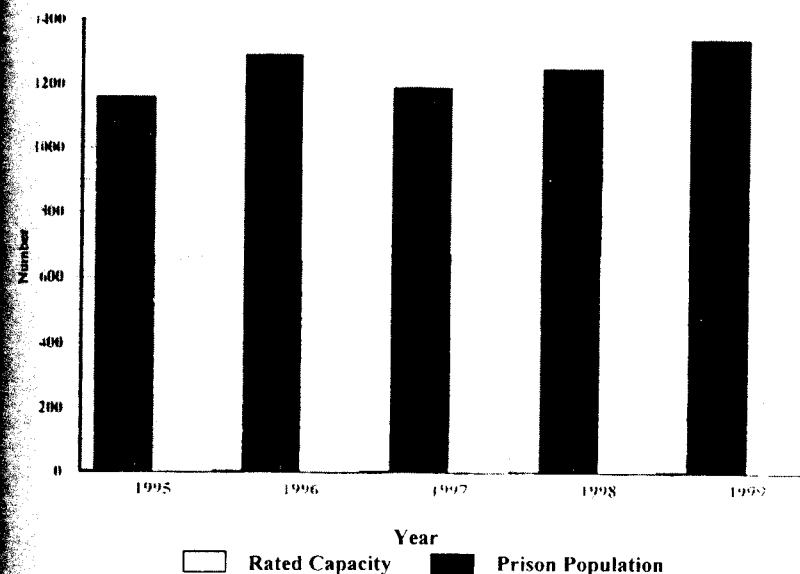
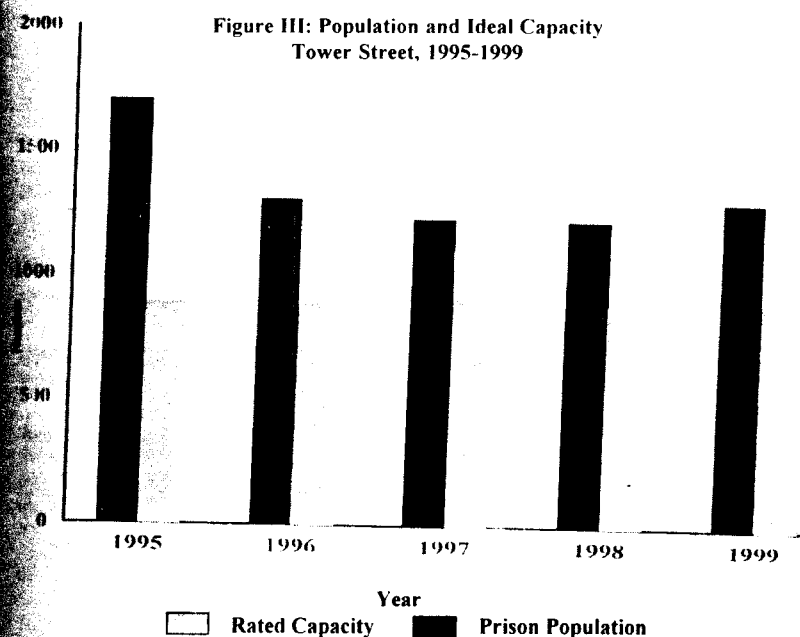


Figure III: Population and Ideal Capacity
Tower Street, 1995-1999



or escape from,²⁰⁴ these institutions. At other times, persons visiting these institutions have felt obliged to raise their voices in protest. So, for instance, in May 2000, there were reports of beating and other abuses by soldiers and/or prison warders at the St. Catherine prison, giving rise to scores of serious injuries, and prompting a public inquiry. Similarly, Jamaica, as a party to the ICCPR, cannot regard with pride statements from experienced, impartial observers to the effect, for example, that "death row (in Jamaica) is one of the most abominable places that I have visited in my life,"²⁰⁵ or that the St. Catherine facility "is the worst prison I have ever seen."²⁰⁶

Given the conditions at the St. Catherine and Tower Street correctional facilities, in particular, there is scope for the view that all inmates at these institutions are, by definition, experiencing inhuman and degrading conditions in breach of the ICCPR, the American Convention on Human Rights, and the Jamaican Constitution.²⁰⁷ But, inhumane conditions are surely not limited to the two largest correctional institutions in Jamaica: in some of the other correctional facilities, such as Tamarind Farm and Richmond Farm, conditions are not unrelentingly inhumane but leave scope for improvement, while in some police lock-ups, the stark realities of the Tower Street detention block are replicated from time to time. Of course, it is to be expected that, in such

204 Between October 21 and November 16, 1999, Justice Karl Harrison chaired a Commission of Enquiry to examine the escape of 22 prisoners from the Tower Street Adult Correctional Centre on October 8, 1999. Though the report of the Commission of Enquiry concerned itself primarily with matters that had facilitated the flight of inmates, the Chairman was constrained to report that, at the Tower Street prison, "there is no proper waste and sewerage facility", and that "(i)t is a miracle that there is no epidemic in the Institution": *Findings of the Commission of Enquiry into the escape of 22 prisoners from Tower Street Adult Correctional Centre on October 8, 1999* (The Harrison Report), Chapter 4, paragraph 32.

205 Gerald Kaufman, United Kingdom Member of Parliament, in a Statement to the British Parliament in October 1995, www.parliament.the-stationery-office.co.uk/pa/cm/199495/cmhansrd/1995-10-18/Debate-S.html, Column 318.

206 1992 Report by Christopher Gibbard, then Governor of Shepton Mallet Prison in the United Kingdom, quoted by Gerald Kaufman, *loc. cit.*, previous note, Column 319; cf. "Prison System Not the Worst in the World - Knight", *The Gleaner*, June 16, 2000, p. B8.

207 There is no originality in this point. In 1986, Americas Watch quoted with approval the view of the then Jamaican Ombudsman, E.G. Green that it was "virtually impossible for any inmate of any adult penal institution ... to avoid being subjected to a general rule of cruel and inhuman treatment": *Human Rights in Jamaica (America's Watch Report)*, *loc. cit.*, note 164, p. 46 (quotation from the Ombudsman's Special Report on Prisons and Lock-ups to Parliament (1984)). If there is a sameness in the analysis contained in the various reports concerning conditions at places of detention, this reflects the reality that conditions have not improved significantly with the passage of time.

circumstances, individuals may also have special grievances concerning ill-treatment. In some cases, the Human Rights Committee has shown sensitivity to particular difficulties faced by inmates, and has recommended, among other remedies, compensation as a means of addressing specific problems.²⁰⁸

In matters concerning prison conditions and related issues, international law has sometimes concerned itself with the choice between the international minimum standard of treatment and the national standard.²⁰⁹ The former approach – which has traditionally received support from developed countries – requires States to afford foreign inmates a standard of treatment that is at least equivalent to a certain basic level, and failing that, State responsibility will arise for the maltreatment of foreigners.²¹⁰ The latter indicates that, in order to avoid State responsibility, the local authorities need to ensure not a specified minimum level, but that the level of treatment accorded to foreign inmates is equivalent to that available for nationals.²¹¹ That debate, however, is only of limited relevance in the present context for two reasons. First, the vast majority of inmates in the Jamaican prison system are nationals, who would therefore not be able to invoke traditional rules of State responsibility to support the need for reform in the prison system. And, secondly, the development of particular rules in human rights law has helped to establish that there is indeed a minimum standard of treatment on human rights matters, namely, that all

208 See, e.g., *Lewis v. Jamaica* (1995), Human Rights Committee, United Nations General Assembly, *Official Records*, 51st Session, Supp. No. 40 (1995), Vol. II, p. 89 at p. 95, paragraph 10.4 (denial of medical treatment for inmate initially on death row); *Burrell v. Jamaica* (1995), *ibid.*, p. 121 at p. 130, paragraph 9.5 (failure to protect the life of a death row inmate); *Chaplin v. Jamaica* (1995), *ibid.*, p. 197 at p. 202, paragraph 8.2 (conditions at St. Catherine District Prison, including the uncontested allegation that the complainant was beaten by a warder); *Freemantle v. Jamaica* (2000), *ibid.*, 55th Session, Supp. No. 40 (2000), Vol. II, p. 11 at pp. 18-19 (beatings by warders in breach of Articles 7 and 10; deplorable conditions of detention, including confinement to a two-metre square cell for 22 hours each day, isolation from others, enforced darkness in cell and little by way of occupation, found to be in breach of Article 10). Claims in this area must be specific to be considered by the Human Rights Committee: see, e.g., *Hylton v. Jamaica* (1996) *ibid.*, p. 224 at p. 225 (general reference to report "prepared by a non-governmental organization" deemed insufficient to found a claim within the meaning of Article 2 of the First Optional Protocol to the ICCPR).

209 Generally, see, e.g., Harris, *loc. cit.*, note 8, pp. 522-5; Brownlie, *System of the Law of Nations: State Responsibility* (Part I) (1983), p. 74.

210 *The Neer Claim (US v. Mexico)* (1926), RIAA, Vol. 4, p. 60; *Faulkner Claim (US v. Mexico)* (1926), *ibid.*, p. 67.

211 *Preparatory Study Concerning a Draft Declaration on Rights and Duties of States, Memorandum Submitted by the UN Secretary-General*, UN Doc. A/CN.4/2 (1949), p. 71 (Panamanian draft and United Kingdom response), quoted in Harris, *loc. cit.*, note 8, pp. 523-4.

persons should be free from cruel and inhuman conditions, irrespective of nationality: this, indeed, is the main point made by Article 7 of the ICCPR. Jamaica therefore cannot avoid legal responsibility for the conditions which prevail at some of its penal institutions.

(c) The Case of Agana Barrett, Ian Forbes and Vassell Brown

The general nature of the foregoing discussion may be given more specific form by reference to the case of Agana Barrett, Ian Forbes and Vassell Brown. Although conditions in some lock-ups may have improved marginally since the unlawful deaths of these men at the Constant Spring Police Station in 1992, the situation still prompts concern whenever groups of individuals are detained in groups by the police for general questioning. Harrison J.'s summary of the evidence given by Shawn Coleman in the civil case brought by Doris Fuller in connection with the death of Agana Barrett continues to merit attention, and serves as a reminder of the extent to which the Jamaican State has failed to demonstrate due deference to Section 17(1) of the Constitution.²¹²

With respect to the conditions at the Constant Spring Lock-up at the time of detention of Agana Barrett and others, Coleman's evidence was summarized as follows:

"Shawn Coleman, one of the survivors, testified that several men including the deceased and himself were taken from Grant's Pen Road to Constant Spring Police Station by the police on Thursday the 22nd day of October 1992. After being finger-printed and processed they were placed in different cells at Constant Spring Station. Coleman stated that the deceased, himself and sixteen others were placed in cell number 3. By Friday, one more man was added to their numbers.

Coleman gave a graphic description of conditions which existed in this cell. The cell which was about 8ft x 7ft in size was extremely hot due to the congestion. There was very little air available and this was only accessible through small holes in a metal door for the cell. The cell had no windows and they were surrounded by concrete walls. Water dampened the floor and in order to quench thirst, perspiration and water dripping from walls had to be used as no drinking water was made available for them. He also testified that one man had to drink his own urine in order to quench his thirst. After being released from the cell for lunch at 1:00 p.m. on Friday, they were never fed again

²¹² See *Fuller (Doris) v. Attorney-General of Jamaica*, 56 WIR 337.

and were locked up thereafter without further release until Saturday morning."²¹³

It is often argued that prison conditions in Jamaica fall short of elementary standards concerning humane treatment because of general economic constraints faced by the State; as the foregoing summary of evidence implies, however, Jamaica also fails to meet the relevant human rights standards because those entrusted with the authority of the State wilfully disregard even minimal considerations of human decency. The cultural context which engenders behaviour of the type noted in the case which led to the deaths of Agana Barrett, Ian Forbes and Vassell Brown cannot be attributed primarily, or even mainly, to financial constraints.

Finally it should not be believed that the approach of the Jamaican State to conditions in prisons and remand centres reflects the conflict in principles of penology, as between humanitarian treatment, on the one hand, and the notion of "less eligibility," on the other.²¹⁴ Within the Jamaican correctional services system, basic principles of humanitarianism are often ignored, but this is not because the State wittingly seeks to ensure that inmates are kept at a lower standard of living while incarcerated than they would enjoy beyond the cell walls. On the contrary, the standard of treatment for inmates tends to be so low that, even bearing in mind the difficult living conditions faced by a substantial proportion of the Jamaican populace, there is no helpful comparison to be made between conditions in Jamaica's harshest prisons and life in the rest of the country. In practice, prison conditions and conditions in remand centres seem largely determined by social attitudes that encourage complete disregard for the dignity of prisoners and detainees,²¹⁵ and by the willingness of the State to assume that these social attitudes reflect majority sentiments.

(d) Impact of the Time Limit in the *Pratt and Morgan Case*

Another issue concerning the standard of inhuman and degrading treatment may be considered in the present context. Arising from the decision of

²¹³ *Ibid.*, p. 343.

²¹⁴ The principle of less eligibility suggests that inmates should be granted no living conditions or benefits that are superior to those offered, or available to, the most disadvantaged class of citizens in the society: Carlie and Minor (eds.), *Prisons Around the World: Studies in International Penology* (1992), p. 261.

²¹⁵ See also Daly, for the comment that many people in Jamaican society believe that prisoners are simply "getting what they deserve": *loc. cit.*, note 109, p. 151.

the Privy Council in *Earl Pratt and Ivan Morgan v. Attorney-General and the Superintendent of Prison, St. Catherine, Jamaica*.²¹⁶ It is now established that, in capital cases, if the time elapsed between the sentence of death and execution exceeds five years, "there will be strong grounds for believing that the delay was such as to constitute inhumane or degrading punishment or other treatment."²¹⁷ And, in such cases, it is highly likely – if not inevitable – that persons on death row will have their capital sentences commuted to life imprisonment. Although the decision in *Pratt and Morgan* has not been without its critics,²¹⁸ it has helped to highlight the need for the State to offer humane standards of treatment even to persons who have committed serious crimes. Somewhat paradoxically, however, the decision has also generated a series of State responses that may undermine human rights protection in Jamaica.

Specifically, the Government of Jamaica has argued that in the five-year period contemplated by *Pratt and Morgan* for capital cases, the State is hard-pressed to complete, in good time, the process of judicial appeals in the domestic system as well as procedures for appeals to the United Nations Human Rights Committee and the Inter-American Commission on Human Rights. Consequently, in 1997, the Government withdrew Jamaica from the First Optional Protocol to the ICCPR, maintaining that this move would reduce the time taken for capital appeals without seriously compromising the human rights of persons making appeals in capital cases.²¹⁹ By denying persons convicted of capital offences access to the United Nations Human Rights Committee, the Government has, in fact, made it easier for the State to meet the five-year rule. But, on the other hand, this approach has had a negative

216 (1993) 30 JLR 473.

217 *Ibid.*, at p. 490.

218 See, e.g., McIntosh, "Cruel, Inhuman and Degrading Punishment: A Re-Reading of *Pratt and Morgan*", *Caribbean Law Review*, Vol. 8, No. 1 (1998), p. 1; Simmons, "Judicial Legislation for the Commonwealth Caribbean: The Death Penalty, Delay and the Judicial Committee of the Privy Council", *Caribbean Law Bulletin*, Vol. 3, Nos. 1 and 2 (1998), p. 1. An implied criticism of the *Pratt and Morgan* decision may also be discerned from the 1997 draft of the Charter of Civil Society for the Caribbean Community; for, bearing in mind that most Caribbean Community Constitutions incorporate a provision against cruel and inhuman treatment, it is noteworthy that the draft Charter omits reference to this human right.

219 See generally, Ministry of Foreign Affairs and Foreign Trade, Jamaica, Ministry Paper No. 34/97, Jamaica's Withdrawal from the Optional Protocol to the International Covenant on Civil and Political Rights, October 28, 1997; News Release, dated November 12, 1997, from the Office of the Prime Minister ("Prime Minister Patterson Responds to Caribbean Human Rights Network").

effect on human rights generally in Jamaica because withdrawal from the First Optional Protocol has also meant that appeals in non-capital cases are now blocked from the purview of the United Nations Human Rights Committee.

Clearly, withdrawal from the First Optional Protocol has tainted Jamaica's general record with respect to civil and political rights, and has foreclosed an important avenue for the development of human rights jurisprudence for the country.²²⁰ Given that the withdrawal was prompted essentially by the need to satisfy the time constraint under *Pratt and Morgan*, one question is whether Jamaica could have withdrawn from the First Optional Protocol only with respect to death penalty matters, thus leaving the procedures under the Protocol available for persons with civil and political rights complaints in other areas. Faced with a *Pratt and Morgan* dilemma similar to that of Jamaica, Trinidad and Tobago withdrew from the First Optional Protocol, and then sought to re-accede to that treaty for all purposes but those pertaining to the death penalty.²²¹ However, this approach has been challenged by a majority in the United Nations Human Rights Committee; it has also been formally opposed by a number of Western European States primarily on the ground that issues concerning the right to life constitute part of the fundamental object and purpose of the ICCPR scheme, and that, therefore, reservations pertaining to the right to life under the First Optional Protocol to the ICCPR are impermissible.²²² In

220 See also Belle Antoine, *loc. cit.*, note 79, pp. 160-1; Arts, *loc. cit.*, note 54, p. 77.

221 Ministry of Foreign Affairs, Republic of Trinidad and Tobago, Notice to Denounce the Optional Protocol to the International Covenant on Civil and Political Rights, 27 March 2000; see also Ministry of Foreign Affairs, Republic of Trinidad and Tobago, Notice to Denounce the Optional Protocol to the International Covenant on Civil and Political Rights, 26 May 1998, and Instrument of Re-accession to the Optional Protocol to the International Covenant on Civil and Political Rights with a reservation excluding the Competence of the Human Rights Committee to Receive and Consider Communications relating to the Imposition of the Death Penalty, 26 May 1998, reprinted in *Human Rights Law Journal*, Vol. 20, No. 4-6, pp. 280-281.

222 The approach taken by the majority in the Human Rights Committee against the reservation made by Trinidad and Tobago is set out in *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999, 31 December 1999, especially at paragraphs 6.1-6.8. In the view of the majority, the reservation is invalid because it singles out one particular group of persons, namely, prisoners under sentence of death, to lesser procedural protection than that which is enjoyed by the rest of the population; for the majority, this kind of discrimination is contrary to basic principles enshrined in the First Optional Protocol, and therefore incompatible with the object and purpose of the First Optional Protocol, paragraph 6.7. The minority view in *Kennedy v. Trinidad and Tobago* makes the point that the form of discrimination in the reservation of Trinidad and Tobago results from constitutional considerations in Trinidad and Tobago, and may actually be justified in the circumstances: see Individual, dissenting opinion of Committee members Ando, Bhagwati, Klein and Kretzmer, paragraphs 6-12. Western European States opposing Trinidad and Tobago's approach include:

the circumstances, the Jamaican Government will be understandably reluctant to attempt re-accession to the First Optional Protocol with respect to non-death penalty matters only.

At the time of the country's withdrawal from the First Optional Protocol, the Government also suggested that this would not lead to a substantial diminution in human rights protection because Jamaicans would still have access to the Inter-American Commission on Human Rights.²²³ This perspective is open to debate. The United Nations Human Rights Committee and the Inter-American Commission may have different perspectives on particular human rights problems, and in any event, the former institution is part of a more internationalised system of rights protection than the Inter-American system. Moreover, now that the precedent of withdrawal from a treaty-based system for human rights protection has been set, the Government may also be inclined to withdraw Jamaica from the Inter-American Commission if that body does not comply with the Government's perspectives on certain human rights questions. Indeed, the Government has argued that the Inter-American Commission is insufficiently sensitive to the need for the Jamaican appellate pro-

the Netherlands, Germany, Sweden, Ireland, Spain, France and Italy: *Multilateral Treaties Deposited with the Secretary-General*, loc. cit., note 33, pp. 19-20. Guyana's approach, which is similar to that of Trinidad and Tobago, has also been met with objections from various European States: *ibid.*, p. 19. From a human rights perspective, the Western European approach may, paradoxically, be open to criticism. Given that the Caribbean States in question believe themselves compelled to withdraw from the First Optional Protocol because of the workings of the five-year rule, the choice in the perception of Caribbean States is between having no human rights matters heard pursuant to the First Optional Protocol and having non-death penalty matters remaining subject to the regime of the First Optional Protocol. The latter option is implicitly barred by the Western European approach, so that, in sum, fewer Caribbean human rights issues will be taken to the Human Rights Committee. Some of the countries opposing the approach taken by Trinidad and Tobago have been consistent in the view that reservations concerning the right to life are incompatible with the ICCPR, and this may have influenced their perspective on the question of reservations to the First Optional Protocol. See, e.g., responses to the United States reservation on Article 6, ICCPR, discussed briefly by Schmidt, "Reservations to United Nations Human Rights Treaties — The Case of the Two Covenants", in Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out* (1997), p. 20 at p. 25. For the position of the United States, and comment, see, e.g., International Covenant on Civil and Political Rights, Text of U.S. Reservations, Understandings and Declarations, *Human Rights Law Journal*, Vol. 14, No. 3-4 (1993), p. 123; Lawyers Committee for Human Rights, New York, Statements on Ratification of the CCPR, *ibid.*, p. 125 at p. 126; Stewart, "U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations", *ibid.*, p. 77.

223 Jamaica, Ministry Paper No. 34/97, loc. cit., note 219, p. 4.

cess for capital cases to be completed in five years, and has adopted certain measures to counter perceived delay in the operations of the Commission;²²⁴ as these measures have not been accepted by the Commission, the possibility that Jamaica may withdraw from the Inter-American system for human rights protection is not particularly remote.²²⁵ Withdrawal here would mean that, as an indirect result of the *Pratt and Morgan* decision, persons with human rights problems not pertaining to capital murder may be without recourse to either the United Nations Human Rights Committee or the Inter-American Commission.

(e) The Approach of the United Nations Human Rights Committee to Prolonged Delay

Bearing in mind the difficulties that have arisen as a result of the Privy Council's approach in *Pratt and Morgan*, it is noteworthy that the United Nations Human Rights Committee does not believe that detention for a long period, in itself, amounts to a violation of the prohibition on cruel and inhuman treatment in Article 7 of the ICCPR. So, for instance, in respect of the petition made to the Human Rights Committee in *Pratt and Morgan v. Jamaica*,²²⁶ the Committee found that although ten years had elapsed between the imposition of the death penalty and the adoption of views of the Committee, the claim of cruel and inhuman treatment on the basis of prolonged delay was not substan-

224 *Ibid.*, pp. 3-4. Generally, see also Statement by the Honourable A.J. Nicholson, Attorney General of Jamaica to the Permanent Council of the OAS on Death Penalty Cases Before the Inter-American Commission on Human Rights, December 11, 1998.

225 On this point, see especially Jamaica, Statement to the House by the Deputy Prime Minister and Minister of Foreign Affairs and Foreign Trade, the Honourable Scymour Mullings, July 27, 1999 ("If this state of affairs should continue [viz., delay on the part of the Inter-American Commission] we will have no other choice but to contemplate withdrawal from the [American Convention on Human Rights since its operations lead to undermining our legal system and cause delays which obstruct the process for due enforcement of law]"). Statement to Parliament by Rt. Hon. P.J. Patterson, Q.C., M.P., Prime Minister, on Tuesday, July 13, 1999. Trinidad and Tobago has taken this course of action. Ministry of Foreign Affairs, Republic of Trinidad and Tobago, Notice to Denounce the American Convention on Human Rights, 26 May 1998, reprinted in *Human Rights Law Journal*, Vol. 20, No. 4-6, p. 281; for criticism of Trinidad and Tobago's withdrawal, see, e.g., Amnesty International, "Trinidad Repudiates American Convention on Human Rights", AI Index: AMR 49/04/99, 21 May 1999.

226 (1989) Human Rights Committee Report, United Nations General Assembly, *Official Records*, 44th Session, Supp. No. 40 (1989), p. 222.

tiated.²²⁷ In *Pratt and Morgan v. Jamaica*, the Human Rights Committee acknowledged that in some cases prolonged delay could be "a source of mental strain for the convicted prisoners," but it was equally mindful that "the situation could be otherwise in cases involving capital punishment." And, with these countervailing considerations in mind, the Human Rights Committee suggested that where there is prolonged delay, "an assessment of the circumstances of each case would be necessary."²²⁸

The approach taken by the Human Rights Committee in *Pratt and Morgan v. Jamaica* has been reinforced by the jurisprudence of the Human Rights Committee, especially in *Barrett and Sutcliffe v. Jamaica*²²⁹ and *Johnson v. Jamaica*.²³⁰ In the former, where over thirteen years elapsed between the conviction of Barrett and Sutcliffe and their proposed execution, the Human Rights Committee reiterated its own *Pratt and Morgan* perspective in the following terms:

"In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies."²³¹

227 *Ibid.*, p. 230, paragraph 13.6. Other cases in which the Human Rights Committee has taken this approach include, for instance, *Stephens v. Jamaica* (1995), *ibid.*, 51st Session, Supp. No. 40 (1995), p. 1; *Graham and Morrison v. Jamaica* (1996), *ibid.*, p. 43 at p. 48, paragraph 10.3; *Chaplin v. Jamaica* (1995), *ibid.*, p. 197 at p. 207, paragraph 8.1; *Sterling v. Jamaica* (1996), *ibid.*, p. 214 at p. 217, paragraph 8.1; *Spence v. Jamaica* (1996), *ibid.*, p. 219 at p. 221, paragraph 7.1. The situation concerning prolonged delay between sentence of death and execution is to be distinguished, however, from circumstances in which the trial is subject to undue delay, in which case the Human Rights Committee may find a violation of Article 14(3)(c) of the ICCPR and recommend release of the convicted or commutation of the death sentence: see, e.g., *Wright and Harvey v. Jamaica* (1995) *ibid.*, p. 35 at p. 41, paragraph 10.3 (almost six years between end of original trial with a hung jury and retrial was one of the factors prompting a recommendation in favour of the complainants).

228 *Ibid.*, 44th Session, Supp. No. 40 (1989), p. 230, paragraph 13.6.

229 (1992), *ibid.*, 47th Session, Supp. No. 40 (1992), p. 246 at p. 250, paragraph 8.4.

230 (1996), *ibid.*, 56th Session, p. 174 at pp. 180-1. The Human Rights Committee has recently reiterated, without elaboration, its position on prolonged delay, in *Michael Robinson v. Jamaica* (2000) Human Rights Committee Report, General Assembly, *Official Records*, 55th Session, Supp. No. 40 (2000), Vol. II, p. 116 at p. 127, paragraph 9.3.

231 *Barrett and Sutcliffe v. Jamaica*, *loc. cit.*, note 229, p. 250, paragraph 8.4.

Thus, for the Human Rights Committee, delay is inherent in the appellate process, and it is not necessarily objectionable, because it may facilitate the interests of the appellant.

In *Johnson v. Jamaica*, the Human Rights Committee sought further to clarify its position on prolonged delay, setting out additional reasons for its position in a case which was considered after the decision of the Privy Council in *Pratt and Morgan*. For the Human Rights Committee, where prolonged delay is exacerbated by "some further compelling circumstance," this could result in a violation of Article 7, and Article 10(1), of the ICCPR.²³² On the other hand, prolonged delay *per se* does not amount to cruel and inhuman treatment. To support this position, the Human Rights Committee noted initially that:

- (a) "as detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel degrading and inhuman it may appear to be, it cannot, of itself, be regarded as a violation of articles 7 and 10 of the Covenant,"²³³
- (b) the Committee believes that "reducing recourse to the death penalty may be seen as one of the objects and purposes of the Covenant,"²³⁴ and
- (c) "an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided."²³⁵

On this foundation, the Human Rights Committee then considered two implications of holding that prolonged delay on death row could, *per se*, be regarded as cruel and inhuman treatment. The Committee noted that:

"The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's object and purpose."²³⁶

232 *Johnson v. Jamaica*, *loc. cit.*, note 230, p. 178, paragraph 8.1

233 *Ibid.*, p. 179, paragraph 8.2.

234 *Ibid.*

235 *Ibid.*

236 *Ibid.*, at p. 179, paragraph 8.3.

The reasoning of the Human Rights Committee on this particular point is difficult to sustain. In point (b) above, the Committee establishes that reducing recourse to the death penalty is one of the objects and purposes of the ICCPR. It then indicates that one implication of regarding prolonged delay as cruel and inhuman would be that if a person is executed this will be acceptable, whereas if it refrains from executing him this will be unacceptable. And, finally, it concludes that this approach would be inconsistent with the object and purpose of the ICCPR.

Three problems with this line of argumentation may be mentioned. In the first place, the Committee's reasoning is based ultimately on the proposition in point (b), that reducing recourse to the death penalty is one of the objects and purposes of ICCPR. This proposition is open to debate: in supporting its position, the Human Rights Committee indicated that Article 6 of the ICCPR "refers generally to abolition in terms which strongly suggest that abolition is desirable," and noted that the Second Optional Protocol reflects this viewpoint.²³⁷ In truth, however, Article 6 actually says little or nothing on the desirability of abolition, and there is no basis in principle to transfer the approach inherent in the Second Optional Protocol into the terms of the ICCPR, because the two treaties are distinct instruments. Thus, the underlying premise of the Committee's argument is doubtful. Secondly, even if reducing recourse to the death penalty is one of the objects and purposes of the ICCPR, this does not necessarily mean that, in all circumstances, when faced with a choice of executing the death penalty and not executing it, the Committee must support the latter course of action. The Committee's approach, quoted above, uncritically accepts that any decision leading to a reduction in executions in death penalty cases will naturally be correct. This is tantamount to conflating the desirability of reducing recourse to the death penalty with the abolition of the death penalty, for, the Committee's approach, which does not examine individual cases of delay on their merits, seems based on the notion that the death penalty is always to be avoided, irrespective of the circumstances of the particular case. Thirdly, and on a related point, the Committee's perspective attaches no significance to the problems inherent in prolonged delay. True, there are references in the jurisprudence to the agony and mental strain involved, and critical remarks about the length of time that some convicted persons have had to

²³⁷ *Ibid.*, at p. 179, paragraph 8.2.

await final decision;²³⁸ but the underlying perception of the Human Rights Committee is captured in point (a) above, namely, that because detention is a "necessary consequence" of the death penalty, it cannot violate the prohibition against cruel and inhuman treatment, no matter how cruel, degrading and inhuman it may appear. This implies a certain insensitivity to the suffering that may be occasioned by prolonged delay, and it appears to foreclose the issue at hand; point (a) suggests that, from the outset, the Committee has determined that prolonged delay is not cruel and inhuman, and its reasoning is designed to reinforce this *a priori* assumption.

In *Johnson v. Jamaica*, the Human Rights Committee advanced, as a second reason for its position, the idea that time limits may prompt death penalty States to carry out each sentence "as expeditiously as possible after it was imposed."²³⁹ For the Human Rights Committee, this possibility is not to be encouraged:

"Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed."²⁴⁰

The position taken by the Committee on this point is logical inasmuch as some States may well be disinclined to introduce moratoria and so on if they face a specified time limit. It is also prudent, because, in some States, the desire to beat a time limit could also mean that the need for expedition is given as much priority as meticulous care in the completion of death penalty cases.

At the same time, however, it is again questionable whether the implications raised by the Human Rights Committee necessarily justify a blanket

²³⁸ *Ibid.*, at p. 179, paragraph 8.4.

²³⁹ *Ibid.* This approach has been criticised on the ground that it is "a subjective analysis in that the Committee is anticipating a supposed reaction by the State": *Johnson v. Jamaica*, Individual opinion of Committee member Christine Chanet, *ibid.*, p. 183 at pp. 1834; Individual opinion of Committee member Francisco Jose Aguilar Urbina, *ibid.*, p. 187 at p. 189.

²⁴⁰ *Ibid.*, p. 174, at p. 179, paragraph 8.4.

prohibition on regarding prolonged delay as cruel and inhuman treatment. For one thing, although life on death row is, indeed, preferable to death, that is not the issue at hand.²⁴¹ The issue is whether, in some circumstances prolonged delay attributable to the State is so unjustifiable that it would be cruel and inhuman to execute the convicted person after the agony of prolonged delay. If the argument is premised simply on the fact that life is always preferable to death, this could allow the State to keep death row inmates incarcerated for indefinitely long periods before actually executing them, in effect giving them both a life sentence followed by a death sentence. This gives the State the right to act with impunity, even though the Human Rights Committee would no doubt wish the matter to be otherwise.²⁴²

For another, the concerns about moratoria and so on, validly raised by the Human Rights Committee, do not necessarily lead to the imposition of the blanket rule concerning prolonged delay. Specifically, the Human Rights Committee could fashion its jurisprudence to take into account factors that may be relevant from case to case.²⁴³ So, for instance, if delay is in fact occasioned by a moratorium, and moratoria are to be encouraged, then the Human Rights Committee could take that into account when it issues a recommendation on prolonged delay following from this fact situation. Conversely, if the delay is prompted mainly by dilatory tactics or lack of due concern for the welfare of convicted persons, it would be open to the Committee to recommend commu-

241 For the view, however, that the Human Rights Committee is being "excessively subjective" on this point, see *Johnson v. Jamaica*, Individual opinion of Committee member Christine Chanet, *ibid.*, p. 183 at p. 184; see also Individual opinion of Committee member Francisco Jose Aguilar Urbina, *ibid.*, p. 187 at p. 188.

242 When *Pratt and Morgan v. Attorney-General of Jamaica* was before the Privy Council, there were 23 persons on death row who had been awaiting execution for more than ten years, and 82 who had been awaiting the same fate for more than five years: *Pratt and Morgan v. Attorney-General of Jamaica* (1993) 30 JLR 475 at p. 476.

243 This case-by-case approach was recommended by individual members of the Human Rights Committee in *Johnson v. Jamaica*; see Individual opinion of Committee member Christine Chanet, (1996) Human Rights Committee Report, United Nations General Assembly, *Official Records*, 56th Session, p. 183 at p. 184; Individual opinion of Committee members Prafullachandra Natwarlal Bhagwati, Marco Tulio Bruni Celli, Fausto Pocar and Julio Prado Vallejo, *ibid.*, p. 186; Individual opinion of Committee member Francisco Jose Aguilar Urbina, *ibid.*, p. 187. See also, for instance, Individual opinion of Committee member Francisco Jose Aguilar Urbina in *Spence v. Jamaica*, Human Rights Committee Report, General Assembly, *Official Records*, 51st Session, Supp. No. 40 (1995), p. 223, and in *Hyllton v. Jamaica*, *ibid.*, p. 230.

tation as a sanction against the State.²⁴⁴ Admittedly, this approach would not have the certainty of the blanket prohibition now carried in the Committee's jurisprudence. It would, however, show sensitivity to the divergent circumstances in which prolonged delay may arise, and, more importantly, it would lend force to the view that arbitrary delay in death penalty cases is not acceptable from a humanitarian point of view.²⁴⁵

(f) The Death Penalty and Cruel and Inhuman Treatment: Abolition of Capital Punishment by Judicial Means?

The public discourse on strategic responses that would enable the State to meet the five-year restriction in *Pratt and Morgan* has tended to concentrate on the significance of external human rights agencies in extending the time period between sentencing and possible execution. As part of this discussion, there has been the suggestion that the Privy Council, the United Nations Human Rights Committee and the Inter-American Human Rights Commission have approached Jamaican death penalty cases with a negative predisposition towards capital punishment in all circumstances.²⁴⁶ This, of course, is difficult to prove; but, those presenting this perspective are in a position to argue that, owing largely to the decision of the Privy Council in *Pratt and Morgan* and related developments, there have been no hangings in Jamaica since 1988, though the Government has repeatedly reiterated its intention to proceed with this form of punishment. In addition, the perception that the Privy Council is inclined to use devices such as the constitutional prohibition on cruel and inhuman

244 In *Barrett and Sutcliffe v. Jamaica*, the Human Rights Committee, having reiterated its broad rule concerning prolonged delay, noted that the delay in petitioning the Privy Council in this case was largely attributable to the appellants. In a scheme which is sensitive to case-by-case analysis, delay on the part of appellants could arguably be one of the factors to be considered in determining the reasonableness of the overall delay in the circumstances. It is, however, a matter of controversy whether the human inclination to delay the imminence of death can ever fairly be held against an appellant: see, Individual opinion of Committee member Christine Chanet in *Barrett and Sutcliffe v. Jamaica*, *loc. cit.*, note 229, at p. 252.

245 In *Pratt and Morgan v. Attorney-General of Jamaica*, the Privy Council showed concern for such factors in assessing whether time limits should be used: see especially *loc. cit.*, note 216, pp. 485-9.

246 With respect to the Privy Council, this perception pre-dated the *Neville Lewis* decision, and has been called into evidence in some instances to support the replacement of appeals to the Privy Council with appeals to the proposed Caribbean Court of Justice; for comment, see, e.g., Jamaican Bar Association, Report of the Special Committee of the Jamaican Bar Association Appointed to Consider the Proposed Caribbean Supreme Court, especially at pp. 12-13; Vasciannie, "The Caribbean Court of Justice: Further Reflections on the Debate", *West Indian Law Journal*, Vol. 23, Nos. 1 & 2, May & October 1998, p. 37, at pp. 54-7.

treatment to prevent the implementation of the death penalty was given some force by aspects of the decision of the Privy Council in *Neville Lewis et al v. The Attorney General of Jamaica and the Superintendent of St. Catherine District Prison*.²⁴⁷

In the *Neville Lewis Case*, by a four to one majority, the Privy Council commuted death sentences against six appellants to life imprisonment, on constitutional grounds. The majority judgement of Lord Slynn attached particular significance to two questions, namely: (a) what rights do convicted murderers have when they petition the Jamaican Privy Council for mercy (following the failure of all their judicial appeals); and (b) whether such convicts have a right not to be executed before an external human rights agency, the Inter-American Commission on Human Rights or the United Nations Human Rights Committee, has finally responded to their petitions. On both questions, the majority found, as a matter of law, for the appellants, with the result that, in a somewhat charged political environment in Jamaica, the appellants appeared to have escaped capital punishment on the basis of technicalities.²⁴⁸

Not only that, critics of the majority judgement have called into question even whether these technicalities were appropriately invoked in the case.²⁴⁹ As to the rights of convicted murderers *vis-à-vis* the Jamaican Privy Council, a skeptical reading of the majority position could allow the conclusion that their Lordships were disposed to avoid the imposition of the death penalty in the case. By virtue of Section 91(1) of the Jamaican Constitution:

247 (2000) 3 WLR 1785.

248 For the Jamaican Government's strong negative reaction to the majority judgement, see e.g., "PM hits at Privy Council", the *Gleaner* (Jamaica), September 16, 2000; "Cabinet to review Privy Council decision: Patterson says death penalty ruling strong reason to support regional court", the *Weekend Observer* (Jamaica), September 16, 2000; "Privy Council ruling will frustrate hangings - AG", the *Sunday Gleaner* (Jamaica), September 17, 2000; "PM blames Privy Council: Prime Minister says judicial body bending the law to prevent application of the death penalty", the *Observer* (Jamaica), September 18, 2000; "Regional meeting on Privy Council: Jamaica threatens to withdraw from human rights body", *ibid.*, September 19, 2000.

249 Critics of the majority ruling on technical grounds include the Jamaican Attorney-General, the Governor-General's Secretary, the Deputy Attorney-General, and a legal advisor to the Minister of National Security and Justice: see A.J. Nicholson, Attorney-General, "The Privy Council: Frustrating the will of our people", the *Sunday Herald* (Jamaica), October 8-14, 2000; Letter from Geoff Madden, Jamaican Governor-General's Secretary, to the Editor of *The Sunday Gleaner*, October 8, 2000 ("Privy Council ruling 'devoid of juridical integrity'"); Letter from Geoff Madden to the Editor of the *Sunday Gleaner*, October 21, 2000 ("'Erudite' judgement of the Judicial Committee"); Douglas Leys, Deputy Attorney-General, "Judgement flawed: conclusions suspect", the *Sunday Herald*, September 24-30, 2000; Keste Miller (Legal Advisor to the Minister of National Security and Justice), "Execute the Death Penalty: *Neville Lewis et al v The AG of Jamaica - (Part 1)*", the *Sunday Herald*, September 17-23, 2000.

"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 (Jamaican) Privy Council so that the (Jamaica) Privy Council may advise him in accordance with the provisions of section 90 of this Constitution."

Thus, a written report from the trial judge and other information that the Governor-General *may* require are to be considered by the Jamaican Privy Council. But, in the *Neville Lewis* decision, the Privy Council concluded, notwithstanding the apparently clear wording in Section 91(1), that in death penalty cases there are compelling reasons why the Jamaican Privy Council should be required to give notice to each condemned man as to the date when his case will be considered and that it should receive representations from the condemned man concerning his plea for mercy. The condemned man should also have the opportunity to see the material presented to the Jamaican Privy Council, and to comment thereon. The Privy Council supported its position mainly by reference to developments in principles of fairness and natural justice, and by noting that this approach was consistent with human rights norms set out in treaties to which Jamaica is a party, irrespective of whether those norms are independently enforceable in Jamaican law.

Two main criticisms of the majority's reasoning on this point are readily apparent. The first is already implicit in the language of Section 91(1) of the Jamaican Constitution, noted above: the scheme for consideration of mercy pleas is clearly set out in the Jamaican Constitution, and it does not provide for the procedural safeguards that have now been established by the Privy Council. The Privy Council therefore appears to be proceeding in the direction of judicial legislation when it insists upon reading these safeguards into the law on the basis of fairness and natural justice. Secondly, the issues concerning natural justice and procedural fairness in the *Neville Lewis Case* were not matters of first impression. In reaching its conclusions concerning rights of condemned men seeking mercy, the majority judgement expressly overruled two earlier decisions of the Privy Council in *de Freitas v. Benny* and *Reckley v. Minister of Public Safety and Immigration (No. 2)*.²⁵⁰ Especially bearing in mind that the decision in *Reckley (No. 2)* was made as recently as 1996, the *Neville*

de Freitas v. Benny (1976) AC 239; *Reckley v. Minister of Public Safety and Immigration (No. 2)* (1996) AC 527. Cf. the dissenting judgement of Lord Hoffman, which notes that the majority approach departed from recent cases not only with respect to petitioner's rights before the local Privy Council, but also on points concerning the Inter-American Commission and prisoner's rights: (2000) 3 WLR 1785 at pp. 1814-5.

Lewis decision is open at least to the perception that it has undermined certainty and predictability in death penalty cases. This is not to suggest that the passage of only a short period of time necessarily bars the Privy Council from departing from an earlier decision;²⁵¹ however, if value is attached to finality in decision-making by the Privy Council, there is a case for arguing that the majority approach in *Neville Lewis* should have identified more clearly the changed circumstances, or the new principles,²⁵² that justified overruling the precedent in *Reckley (No. 2)*.²⁵³

Another criticism of the *Neville Lewis* decision arises from the Privy Council's approach to the question whether the Jamaican authorities need to await the final recommendations of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee before deciding whether the prerogative of mercy should be exercised. With reference to the time constraint for hanging arising from *Pratt and Morgan*, the Jamaican

251 Pursuant to the Practice Statement (Judicial Precedent) (1966), the House of Lords overruled its decision in *Anderson v. Ryan* ((1985) AC 560) after only one year, by its judgement in *R v. Shivpuri* (1987) AC 1. Also, in *R v. Secretary of State for the Home Department, ex parte Khawaya*, Lord Bridge placed no value on the age of the precedent under consideration: (1984) AC 74, at p. 125. For discussion, see Harris, "Towards Principles of Overruling - When Should a Final Court of Appeal Second Guess", *Oxford Journal of Legal Studies*, Vol. 10, No.2, 1990, p. 135.

252 The Jamaican Governor-General's Secretary has expressed strong disappointment about the majority judgement's level of analysis concerning the overruled cases. In his view, the majority did not offer a thorough examination of those cases: "Instead we were given shallow waffling about fairness and offensive hypothetical suggestions about possible grounds for complaints concerning impropriety by the Governor-General and the Privy Council". Letter from Geoff Madden to the Editor of the *Sunday Gleaner*, October 8, 2000. But, for the reminder that the Judicial Committee in the *Neville Lewis* Case invited Attorneys-General from Jamaica, Trinidad and Tobago, the Bahamas, and five petitioners from Belize to present their views on the possible overruling of previous decisions concerning petitions to local mercy committees, see Chuck, "Ensuring Procedural Fairness", the *Gleaner*, October 11, 2000.

253 See also Lord Hoffman's dissent, *supra*, note 250. In the Jamaican Court of Appeal case of *Heron v. Director of Public Prosecutions and the Attorney General for Jamaica* (Supreme Court Civil Appeal No 13/2000), Downer J.A. noted, *obiter*, that the majority in *Neville Lewis* had ignored Sections 32(4) and 33 of the Jamaican Constitution which effectively proscribe judicial inquiry into certain acts of the Governor-General: pp. 17-20. This point, together with the presence of earlier precedents such as *de Freitas v. Benny, Reckley No. 2* and others, prompted Downer J.A. to conclude that "it is open to lower courts to follow the precedents which are in conformity with the Constitution in a future case": p. 20. This extraordinary judicial suggestion - that Jamaican lower courts could disregard the decision of the Privy Council in *Neville Lewis* - indicates that some degree of uncertainty now prevails with respect to petitions for clemency in Jamaica.

authorities had introduced a six-month limit for responses from the Inter-American Commission and the United Nations Human Rights Committee in death penalty cases. In practice, however, this limit is insufficient for either external human rights body; consequently, in the *Neville Lewis Case*, the validity of the six-month time period was called into question. But, on what basis could the Jamaican authorities be required, by law, to await recommendations from external human rights bodies when the terms of the treaties establishing access for petitioners to those bodies have not been incorporated into Jamaican law? The controversial response offered by the *Neville Lewis* majority in the Privy Council is that the guarantee of "protection of law" provided for in Section 13 of the Jamaican Constitution connotes that condemned men are entitled to have access to the external human rights processes (even though the result of such processes is merely recommendatory).²⁵⁴ As part of its reasoning, the Privy Council also found that the six-month time limit implemented by the Jamaican authorities for the hearing of cases by external rights bodies was contrary to rules of natural justice and unlawful. Again, the result reached by the majority is open to criticism: in particular, it is difficult to identify the line of authority, or the compelling logic, which requires the recognition of rules from unincorporated treaties as part of Jamaican law.

Generally, therefore, the majority judgement in the *Neville Lewis Case* is susceptible to a number of criticisms, and, the final decision to commute the death sentences of the six appellants is not impeccably reasoned. This has prompted the question whether the judgement was not in some senses influenced by the view that the imposition of the death penalty, though formally permitted by Jamaican law, is now anachronistic.²⁵⁵ To support this view, it may also be noted that, when taken together, the new approach to petitions for mercy²⁵⁶ and the need to await responses from the Inter-American Commission, could place pressure considerable strain on the ability of the Jamaican State to conduct

254 In reaching this conclusion the majority in the Judicial Committee appear to have disregarded two recent precedents in *Higgs v. Minister of National Security and Others* ((2000) 2 WLR 1368), and *Thomas v. Baptiste* ((1993) 3 WLR 249). For criticism, see, e.g., Leys, *loc. cit.*, note 249.

255 But cf. Chuck, who correctly notes that on the issue of petitions to local mercy committees, the majority judgement in *Neville Lewis* showed no small degree of reliance on positions taken by judges in lower courts in the Caribbean, including the Jamaican Court of Appeal. This tends to suggest that if the Privy Council is influenced by anti-death penalty sentiments, the inherent bias is not confined to members of Jamaica's final court: Chuck, *loc. cit.*, note 252.

256 There may now be the need, for instance, to allow appeals to the Privy Council on the natural justice aspects of petitions for mercy.

all necessary appellate procedures in death penalty cases within five years.²⁵⁷ Such considerations, together with the relatively slow pace evinced by external human rights bodies in addressing death penalty petitions, suggest that the time factor may undermine the application of the death penalty in a number of Jamaican cases.

But, in addition, the view that the Privy Council may be predisposed to undermine the death penalty by the use of constitutional safeguards extraneous to the right to life has received some force from *obiter dicta* by Lord Hoffman in the *Neville Lewis Case* itself.²⁵⁸ Specifically, in the introductory paragraph of his stinging dissent in this case, Lord Hoffman wrote as follows:

"The Board sits as a supreme court of appeal to enforce (Caribbean) laws and constitutions. It is of course obvious to the members of the Board that they must discharge that duty without regard to whether they personally favour the death penalty or not. But the wider public may need to be reminded."²⁵⁹

Naturally, one important question which arises from the foregoing comment concerns why Lord Hoffman found himself obliged to make it. At no point in the majority judgment in the *Neville Lewis Case* was there a reference to personal views on the death penalty, and, indeed, even Lord Hoffman himself avoided giving any personal views on the subject. Why then did Lord Hoffman believe that the "wider public" has to be reminded that the Privy Council was applying Jamaican law (which allows the death penalty), and not the personal opinion of the judges?

At least two plausible responses may be proffered. The first is that Lord Hoffman himself believed that the Privy Council has, in fact, been influenced by personal revulsion to the death penalty: he was therefore sending a subtle message to the "wider public" to the effect that the Privy Council may actually be against the death penalty in principle. This interpretation could be supported by Lord Hoffman's sarcastic remark concerning the majority judgment's reliance on the term "due process of law," and its analogue "protection of

257 See also comments by the then Jamaican Solicitor-General, Dr Kenneth Rattray, reported in "Privy Council Ruling Effectively Abolishes Death Penalty - Rattray", the *Gleaner*, October 2, 2000. Jamaica's withdrawal from the First Optional Protocol to the ICCPR has, however, reduced the waiting time for procedures before international human rights agencies, for complaints may no longer be brought before the Human Rights Committee: *supra*, note 219.

258 (2000) 3 WLR 1785, at pp. 1814-5.

259 *Ibid.*, p. 1814.

law" in reaching its decision concerning the applicability of recommendations of human rights bodies in domestic law. For Lord Hoffman, the concept of due process of law in this context is "a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive action into the gold of legislative power"; he maintained that the majority simply did not explain "how this trick is done." In short, therefore, Lord Hoffman could well be implying that the majority judgment in the *Neville Lewis Case* has created new law as a means of preventing the application of the death penalty in particular instances.

The second interpretation of Lord Hoffman's introductory comment is less severe on the majority perspective. On this interpretation, Lord Hoffman was not convinced that the majority judgment had reached the correct decision; but, independently of this, he also recognized the distinct possibility that some persons in the Caribbean would regard the majority judgment as being influenced by personal views. So, to emphasize the invalidity of this public perception, he went out of his way to point out that "it is of course obvious" to the Privy Council members that their decisions must not be influenced by personal views on the death penalty. On the second interpretation, Lord Hoffman's pronouncement was not an accusation of judicial bias. It was, rather, an attempt to dismiss precisely that accusation from the debate among the "wider public." In support of this reading, one could note the obvious: if Lord Hoffman wished to accuse the majority of being influenced by personal predilection, he could have addressed the issue in more direct terms. So, Lord Hoffman's comment on the matter is indecisive, and it remains open to conjecture whether the Privy Council, in particular, is prepared wilfully to disregard Jamaican law on the death penalty by reliance on concepts such as cruel and inhuman treatment.

But, even assuming *arguendo* that the Privy Council and external human rights agencies are opposed in principle to the death penalty, they would still need to act on the pretext of cruel and inhuman treatment or by reference to other devices. And, in this regard, the Privy Council, in particular, could easily point to inordinate delays in the justice system as the basis for denying capital punishment in specific instances. Given that the *Pratt and Morgan* ruling represents the law in Jamaica, the Executive (which wishes to have hanging reintroduced) should further expedite the process of appeals in death penalty cases within the local system. The Wolfe Report, in its review of aspects of the criminal justice system noted five primary causes of delay in the local system, namely: (1) the degree to which courts were overburdened, (2) unavailability of witnesses, (3) unavailability of counsel to represent persons

under the Poor Prisoners' Defence Act, (4) lack of support services, and (5) the difficulty of obtaining transcripts of evidence for the hearing of appeals.²⁶⁰ In varying degrees, these factors are within the control of the Executive; and even though some improvements have been noted arising from the Wolfe Report, delays still remain inherent in the system. It may be somewhat disingenuous for the Executive to argue that the Privy Council is using delays in appellate proceedings as a pretext for abolishing the death penalty, when, in fact, the same Executive has the power further to expedite the local segment of those proceedings.²⁶¹

(g) Consequences of Violating the Cruel and Inhuman Treatment Standard

There is also room for conjecture on the practical consequences of a finding that a person has been subject to inhuman or degrading treatment, contrary to the Jamaican Constitution. In non-capital cases, the courts have power to prohibit the offending punishment or treatment, or to prevent its continuation.²⁶² However, for capital cases, the question is whether a finding that a convicted murderer has been subject to inhuman or degrading punishment or treatment should prompt commutation of that convict's death sentence to life imprisonment. Already, the *Pratt and Morgan* decision indicates this result if the inhuman or degrading punishment takes the form of undue delay in the execution of the death sentence. But if treatment in prison and prison conditions are inhuman and degrading, should this make it inappropriate to execute convicted murderers? This question was raised in the *Neville Lewis Case*,²⁶³ when the six appellants argued, *inter alia*, that their death sentences should be commuted to life imprisonment because of inhuman and degrading treatment in prison. In the instant case, the Privy Council expressed disappointment

that the prisoners' claims were decided on affidavit evidence only, and found that it was not necessary to reach a conclusion on the treatment actually meted out to each prisoner. However, the Privy Council also pointed out that:

"Had it been necessary to do so ... they would have required these allegations to be investigated to see whether (a) they were made out and (b) whether they were such as to aggravate the punishment of the death sentence so as to amount to inhuman and degrading treatment in the light of the Board's judgment in *Higgs v. Minister of National Security* and *Thomas v. Baptiste*."²⁶⁴

This approach suggests that, in principle, the Privy Council is not averse to holding that prison conditions could aggravate a death sentence to the point where that sentence will have to be commuted to life imprisonment. The matter has not been definitively settled, but, if anything, prison authorities have been put on guard that failure to apply the standard of humane treatment to death penalty inmates may have important consequences in practice.

It would be appropriate to have death sentences commuted to life imprisonment in cases where prison conditions are so egregious that they amount to cruelty and inhuman treatment. This result would not be designed as a piece of good fortune for death penalty inmates; on the contrary, it would be based on the need to respect both the rule of law and human dignity in the administration of justice, and to give practical effect to sanctions for breach of the Jamaican Constitution in this area.²⁶⁵ At the same time, however, a decision to this effect would need to overcome certain *dicta* in the majority judgment of Lord Millet in the Privy Council decision in *Thomas v. Baptiste*, and specifically, the idea that "even if the prison conditions in themselves amount to cruel and inhuman treatment and so constituted an independent breach of the applicants' constitutional rights, commutation of the sentence would not be the appropriate remedy."²⁶⁶ Even this majority judgment, however, accepts in principle that some episodes of cruel and inhuman punishment may be so shocking that the appropriate remedy for constitutional breach in this area is commutation:

260 *Report of the National Task Force on Crime*, *loc. cit.*, note 202, pp. 77-8.

261 For a different view, see especially Jamaican Attorney-General A.J. Nicholson, Q.C., "The Death Row Phenomenon", *The Sunday Gleaner*, August 22, 1999. In *Thomas v. Baptiste*, the majority judgment of the Privy Council suggested that, with hindsight, the 18-month time period for access to external human rights agencies assumed in *Pratt and Morgan* may have been unduly optimistic. *loc. cit.*, note 254, at p. 264. This seems beyond argument, but it does not undermine the need for local authorities to expedite the domestic component of death penalty cases if capital punishment is to be resumed in practice in Jamaica.

262 See, e.g., Section 25 of the Jamaican Constitution.

263 *Loc. cit.*, note 247.

264 *Ibid.*, p. 1813.

265 See, e.g., *dicta* by Lord Steyn in *Higgs v. Minister of National Security* (2000) 2 W.L.R. 1368, at pp. 1385-92, and in *Thomas v. Baptiste* (1999) 3 W.L.R. 249 at pp. 272-5.

266 *Thomas v. Baptiste*, *loc. cit.*, note 254, at p. 265. See also Lord Hoffman, *Neville Lewis Case*, *loc. cit.*, note 250, at pp. 1815.

specifically, the majority in *Thomas v. Baptiste* would consider commuting death sentences to life imprisonment in extreme cases where condemned men are "placed in solitary confinement, or shackled or flogged or tortured."²⁶⁷ The possibilities raised by the majority judgment may not constitute a closed list however; for, in practice, it may be difficult to distinguish, for instance, between cases of torture deliberately inflicted by State representatives, and cases where prison conditions are so horrendous (owing to neglect on the part of the State) that they fall well below all standards of civilized treatment.

CHAPTER 3

PARTICULAR HUMAN RIGHTS IN JAMAICA: THE RIGHTS TO HEALTH, EDUCATION AND WORK

I. General

Chapter III of the Jamaican Constitution, on fundamental rights and freedoms, is modeled ultimately on the Universal Declaration of Human Rights, but, more specifically on the civil and political rights incorporated in that United Nations General Assembly resolution.²⁶⁸ Accordingly, it is not surprising that the rights to health, education and work – economic and social rights – have not been included among the fundamental rights and freedoms contemplated by the Jamaican Constitution. This position is also broadly in line with the economic realities faced by Jamaica, for constitutional recognition of individual rights to health, education or work would imply that the State has the means fully to provide such rights, or at least, that the courts would have the power to guarantee such rights. The silence of the Constitution on these putative rights is not, therefore, a matter for negative comment in Jamaica's present economic circumstances.

This approach is also consistent with practice under most liberal constitutions: States are frequently inclined to refer to the indivisibility of human rights, and are not averse to accepting the programmatic approach in the ICESCR; but, at the same time, the pronounced trend is to omit the enforcement of economic and social rights from the realm of constitutional protection.²⁶⁹ In

²⁶⁸ *Supra*, note 98.

²⁶⁹ Darrow and Alston, "Bills of Rights in Comparative Perspective", in Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999), p. 465 at pp. 502-3. One of the exceptions to this approach noted by Darrow and Alston is that of the South African Constitution, which incorporates rights with respect to health care, education and

²⁶⁷ *Thomas v. Baptiste*, *loc. cit.*, note 254, p. 265.

discussions concerning possible amendments to the Jamaican Constitution under the auspices of the Constitutional Commission, some sensitivity was shown to the possibility of incorporating economic and social rights in a future listing of fundamental rights and freedoms. Eventually, the Commission appears to have adopted a compromise position, noting that "there should be a reference in the Constitution to certain social and economic aspirations, but not as enforceable rights."²⁷⁰ In that form, the reference to social and economic "aspirations" will have no legal import in terms of rights and duties, and therefore, one wonders whether there is any real point having it included in a constitution which is generally positivist in orientation. It could possibly serve the symbolic purpose of emphasizing the importance which the State attaches to social and economic advancement, but if, as is now the case, the Constitution is perceived as a document creating legal rights and duties, the reference to economic and social aspirations would be mere verbiage. The *Report of the Constitutional Commission* offers no explanation for this proposal. At one stage, however, it notes that the Commission had received a request to bring "fundamental rights and freedoms in line with the United Nations,"²⁷¹ a request which prompts conjecture on whether the Commission was being encouraged expressly to include economic, social and cultural rights in the Constitution along the lines of the ICESCR.²⁷²

labour relations, *inter alia*: *ibid.*, p. 503. For reference to the inclusion of social and economic entitlements in Commonwealth Caribbean constitutions, see Demerieux, *loc. cit.*, note 175, pp. 48-52. Although the ICESCR does not specify the form in which its obligations should be incorporated into domestic legal systems, General Comment No. 9 of the Committee on Economic, Social and Cultural Rights indicates that the form taken should be similar to that taken with respect to other human rights, unless compelling reasons prompt a different approach. General Comment No. 9 also recommends an approach that would ensure justiciability of social, economic and cultural in the domestic legal system, and encourages the direct incorporation of the ICESCR provisions into domestic law: General Comment No. 9, Committee on Economic, Social and Cultural Rights, Report of the Eighteenth and Nineteenth Sessions, *loc. cit.*, note 58, p. 117 at pp. 118-9.

270 *Report of the Constitutional Commission, Jamaica*, submitted to the Speaker of the Jamaican House of Representatives, September 1993, p. 20, paragraph 12.1(2).

271 *Ibid.*, p. 20, paragraph 12.1(1).

272 A draft form Bill of Rights prepared by Dr. Lloyd Barnett, Chairman of the Legal Subcommittee of the Jamaican Constitutional Commission avoided express reference to the "economic and social aspirations" of the people; from among economic and social rights, the Barnett draft included the view that no person should be denied the right to primary education, *ibid.*, p. 89 at p. 94. Barnett's perspective has also found favour with the Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform; see *infra*, p. 104 on the proposed right to primary education. The 1997 draft of the Charter of Civil Society for the Caribbean Community also contemplates a right to quality primary education, as well as other legal provisions for access to secondary and post-secondary education (draft Article XV).

Although the Jamaican Constitution does not guarantee economic and social rights in the area of health, education and work, it does contain one safeguard of direct relevance to the exercise of these rights, namely, protection from discrimination as set out in Section 24.²⁷³ Under this provision, no law shall be discriminatory (with specified exceptions),²⁷⁴ and no person shall be treated in a discriminatory manner by any person acting under law or in the performance of public duties (again, with specified exceptions).²⁷⁵ For the present purposes, the significance of Section 24, then, is that persons seeking to gain access to health care facilities or educational services offered by the State, or persons seeking employment in the public sector shall not be subject to discriminatory treatment on the grounds of race, place of origin, political opinions, colour or creed.²⁷⁶ At the level of rule-making, the constitutional safeguard in Section 24 broadly reflects the approach recommended in Article 2(2) of the ICESCR, by virtue of which each State Party guarantees that economic, cultural and social rights will be exercised without distinction of any kind as to "race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status."²⁷⁷

Particularly with reference to questions concerning political opinion, however, it is sometimes difficult to safeguard in practice the approach to discrimination recommended by both the Jamaican Constitution and the ICESCR. For one thing, persons who allege discrimination on partisan political grounds may have serious problems proving their allegations in litigation: the alleged perpetrator of discrimination, aware of the constitutional prohibition on this point, is hardly likely to publicise the notion that his or her actions are discriminatory. And, in practice, the Jamaican courts have not been prepared to presume the

273 For the view that even if non-discrimination was not enforceable in a court of law before its entrenchment, it was protected to some extent by "the force of public opinion", see Parnell J. in *Banton and Others v. Alcoa Minerals* (1971), 17 WIR 275, at p. 304.

274 Jamaican Constitution, Section 24(1).

275 Section 24(2).

276 Section 24(3).

277 In contrast to rights that may be achieved progressively pursuant to the ICESCR, the prohibition on discrimination set out in Article 2(2) is a State obligation that applies with immediate effect under the ICESCR: for comment, see Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant), in Economic and Social Council, *Official Records*, 1991, Supp. No. 3, UN Doc. E/1991/23, p. 83, paragraph 1.

existence of discrimination when alternative factors may explain the plaintiff's exclusion from access to employment, for example.²⁷⁸

Similarly, certain features of the prevailing political culture in Jamaica contradict the spirit of non-discrimination. In the *Report of the National Committee on Political Tribalism*, the manifestations of tribalism are listed as including the allocation of housing on the basis of partisan affiliation, the allocation of State resources with reference to known political loyalties, political violence, and "area branding."²⁷⁹ None of these characteristics can prevail in communities unless there is a prior decision to apply discriminatory practices on the basis of "political or other opinion." But, in addition, the listed manifestations of tribalism also have consequences with respect to certain economic and social rights relevant to this essay. So, for example, the right to education is sometimes significantly fettered by political violence in specific communities. Also, to the extent that life chances in such communities are a function of the partisan allocation of resources, parents and guardians of children at the primary and secondary levels especially may find that the financial means to support the acquisition of education vary according to political fortunes in particular communities.²⁸⁰ In like manner, opportunities to gain employment are not im-

278 In *Byfield v. Allen* (1970) 12 J.L.R. 9, for instance, the appellant submitted that he was barred from becoming headmaster of the Trench Town Senior School because he was an active member of the People's National Party, and that the respondent Minister of Education was motivated by political considerations against him. The Jamaican Court of Appeal decided, 2-1, that on the evidence presented the real reason for the decision not to appoint the appellant to the post of headmaster was: (a) "a reasonable belief" that the appellant was seeking to be appointed headmaster of the school solely to further his political ambition of being the elected representative of the constituency in which the school was located (*per* Waddington, J.A.), and (b) the view that the appellant would "improperly" use his position as headmaster to further his political aspirations in the constituency (*per* Luckhoo, J.A.). On the evidence, Graham-Perkins, J.A., reached the opposite conclusion, noting that the reasons for not appointing the appellant were "attributable wholly" to his political opinions. One difficulty faced by the appellant in this case concerned the methods by which he could demonstrate precisely what motivated the Minister's decision not to appoint him. The majority position, which placed emphasis on what the respondent Minister expected the appellant to do in the future, seems to have required an unreasonable degree of prophesying on the part of the judges and the respondent Minister.

279 *Report of the National Committee on Political Tribalism*, *loc. cit.*, note 160, pp. 11-15. See also Levy *et al.*, *loc. cit.*, note 60, pp. 13-14.

280 On the basis of a survey of constituency offices throughout Jamaica, the Stone Committee reported in 1991 that 52% of the persons visiting these offices sought employment, 44% wanted help to get access to government project benefits, and 32% wanted help with school expenses for children. *Report of the Stone Committee Appointed to Advise the Jamaican Government on the Performance, Accountability and Responsibilities of Elected Parliamentarians* (1991), pp. 10-12 and 59.

mune from the effects of tribalism. One feature of area branding, as identified by the National Committee on Tribalism is "political and economic victimization" in areas whose political representatives do not form part of the Government: projects providing employment may be closed down for political reasons, and with consequential effects on the employment prospects of denizens of such communities.²⁸¹ Against this background, the provisions in Section 24 of the Jamaican Constitution and in Section 2(2) of the ICESCR may provide a yardstick for assessing when the State has deviated from the principles of fairness in areas such as employment allocation and the provision of educational services; in practice, however, they do not guarantee the consistent application of non-discrimination principles with respect to substantial groups of Jamaicans.

Notably, too, the Jamaican Constitution does not prohibit employment discrimination on grounds of sex. This situation needs to be rectified both because such discrimination is morally unjustifiable in contemporary Jamaica, and because it seems contrary to the spirit of obligations accepted by Jamaica pursuant to the Convention on the Elimination of all Forms of Discrimination against Women. Admittedly, domestic legislation, and especially the Employment (Equal Pay for Men and Women) Act, now serves to prohibit specific forms of gender discrimination in practice;²⁸² but a constitutional safeguard would ensure a wider degree of protection, and emphasize the importance of the principle of non-discrimination in this area. The approach taken by Jamaica on this subject may not conflict with the letter of the Convention on Elimination of all Forms of Discrimination against Women: this treaty requires States Parties "to embody the principle of equality of men and women in their

281 *Loc. cit.*, note 160, p. 16.

282 Section 3(1) of the Employment (Equal Pay for Men and Women) Act reads: "From and after the first day of January 1976, no employer shall, by failing to pay equal pay for equal work, discriminate between male and female employees employed by him in the same establishment in Jamaica." Though this provision serves to protect the interests of female employees to some extent, it does not provide for "equal pay for work of equal value", arguably a more equitable, but less precise, criterion than "equal pay for equal work". From as early as 1979, in the context of the United Kingdom, Davies and Freedland could write confidently that the limited approach of equalising pay for the same work was generally agreed to be "an insufficiently rigorous attack upon the problem of discrimination in pay": Davies and Freedland, *Labour Law: Text and Materials* (1979), pp. 298-9. The essential difficulty with the formulation in the Jamaican legislation is that the legal standard applies usefully only in unusual situations where two jobs can be characterised as "equal work" with no points of differentiation.

national constitutions or other appropriate legislation,²⁸³ with the reference to "appropriate legislation" arguably being broad enough to allow the Employment (Equal Pay for Men and Women) Act to pass muster. In 1993, the Jamaican Constitutional Commission "unanimously and unhesitatingly" recommended that the word "sex" should be expressly included in the non-discrimination in Section 24 of the Constitution, but this is yet to be done.²⁸⁴

Still at the general level, given that Jamaican law has not traditionally treated access to education, health and employment as justiciable rights, there are few judicial decisions that lend illumination in this area. However, by means of broad statistical analysis, certain conclusions may be reached about the extent to which the Jamaican Government is ensuring that its commitments under the ICESCR with respect to education, health and employment are being fulfilled in practice.²⁸⁵ These statistical indicators may serve as guidelines for future action, but, as they largely reflect activities at the national level, they are of limited value as an index of the situation concerning economic and social rights at the level of the individual.

II. Evidence Concerning the Right to Health

(a) Legislative and Statistical Indicators

As to the provision of health services in particular, in the post-independence period the Jamaican authorities have consistently sought to increase public access to health care facilities, and to improve the general indices of health among the populace. There is, of course, no shortage of legislation in this area, with discrete Acts of Parliament covering matters such as registration and conduct of medical doctors,²⁸⁶ treatment of mental health patients,²⁸⁷ the functioning of specific hospitals,²⁸⁸ and preservation of public health,²⁸⁹

²⁸³ Article 2(a).

²⁸⁴ *Report of the Constitutional Commission, Jamaica, loc. cit.*, note 270, p. 26. This position is also supported by the Joint Select Committee of Parliament which presented its report to Parliament in December 2001: see *Report of the Joint Select Committee of Parliament on the Charter of Rights (Constitutional Amendment) Bill*, pp. 28-9.

²⁸⁵ For a discussion concerning the use of indicators and benchmarks with respect to ICESCR commitments, see Alston, "International Governance in the Normative Areas", in United Nations Development Programme, Background Papers: *Human Development Report* (1999), pp. 15-18, partially reproduced in Steiner and Alston (eds.), *loc. cit.*, note 7, pp. 317-8.

²⁸⁶ See especially the Medical Act.

²⁸⁷ The Mental Health Act.

²⁸⁸ See, e.g., the University Hospital of the West Indies Act.

²⁸⁹ The Public Health Act.

among other things.²⁹⁰ However, as legislative provisions are sometimes little more than symbols of aspiration, reliance should also be placed on statistical evidence in assessing the degree of progress made in the health sector for different time periods.

Table 7
Survival Rates

	Life expectancy at birth (years)		Infant mortality rate (per 1,000 live births)	
	1970-75	1995-2000	1970	1998
Jamaica	69.0	74.8	47	10
LACs ²⁹¹	61.1	69.9	86	32
All Developing ²⁹²	55.6	64.4	110	64
High Human Dev. ²⁹³	71.2	76.9	25	7

	Under-five Mortality Rate (per 1,000 live births)		People not expected to survive to age 60 (%) ²⁹⁴
	1970	1998	1995-2000
Jamaica	62	11	13.3
LACs	123	39	22.4
All Developing	168	93	28.0
High Human Dev.	32	8	11.6

Source: UNDP, *Human Development Report 2000*, pp. 186-9.

²⁹⁰ For a dated, but nonetheless useful, review see Cumper, *Survey of Social Legislation in Jamaica* (1972, 1987 reprint), pp. 101-106.

²⁹¹ "LACs" denotes Latin American and Caribbean countries taken as a group.

²⁹² "All Developing" denotes all developing countries taken as a group.

²⁹³ "High Human Dev." denotes countries ranked from first to forty-sixth in the Human Development Index of the UNDP, as set out in UNDP, *Human Development Report 2000*.

²⁹⁴ This figure is obtained by multiplying the probability at birth of not living to age 60 by 100.

Table 8

Health Profiles: Selected Indices

	One-year-olds fully immunized against tuberculosis (%) 1995-98	One-year-olds fully immunized against measles (%) 1995-98	Tuberculosis cases (per 100,000) 1997
Jamaica	90	88	4.7
LACs	92	89	47.8
All Developing	82	72	68.6
High Human Dev.	n.a.	90	18.4
	People living with HIV/AIDS (% age 15-49)	Doctors (per 100,000)	Nurses (per 100,000)
Jamaica	0.99	57	69
LACs	0.61	132	100
All Developing	1.18	78	98
High Human Dev.	0.34	246	n.a.

Source: UNDP, *Human Development Report 2000*, pp. 190-193

Table 9

Comparison of Selected National Health Indicators (1999)
With Regional/International Targets for Year 2000

Health Indicators	Jamaica (Current Status)	Regional/International Target
Fertility Rate	2.8	2.2
Access to Safe Water(%)	80.0	85.0
Access to Toilet Facilities (%)	99.0	80.0
Immunization Coverage (%)	87.0	100.0
Life Expectancy (Years)	72.0	72.0
Maternal Mortality (per 100,000 live births)	111	65
Infant Mortality Rate (per 1,000 live births)	24.5	18

Source: Planning Institute of Jamaica, *Economic and Social Survey* (1999)

These figures denote that in some respects, notably including life expectancy, mortality rates and survival prospects to age 60, Jamaica compares favourably with Latin American and Caribbean countries as a group, and generally much more favourably than developing countries taken together; indeed, with respect to survival rates generally, Jamaica is not far behind expectations for the group of countries with high human development indices (see Table 7). Immunization rates with respect to tuberculosis and measles for the period 1995 to 1998 are also broadly comparable with rates for the Latin American and Caribbean region, and significantly higher than the figures for developing countries as a group (Table 8). In addition, Table 9 suggests certain grounds for optimism in health care matters, for the indices concerning access to safe water (80% of the population), immunization coverage (87%) and infant mortality rate (24.5 per 1,000 live births) are not far removed from the target rates for individual countries set out by the World Health Organization, the Pan-American Health Organization and related institutions. Generally, therefore, in terms of current results, Jamaica has demonstrated meaningful commitment to the goals concerning infant mortality and survival rates implicit in Article 12 of the ICESCR.

On the other hand, some of the indices pertaining to the health sector still give cause for concern. To begin with, the crude death rate for Jamaica²⁹⁵ showed a significant increase from 5.9 to 7.1 between 1997 and 1998, and declined only slightly to 6.7 between 1998 and 1999.²⁹⁶ Naturally, the figures for the crude death rate are no more than a broad indicator of what may, or may not, become a trend: as the crude death rate encompasses a multifaceted array of considerations, including lifestyle factors, and socio-economic variables of both short- and long-term importance, caution should be exercised in reaching definitive conclusions from this figure. At the same time, however, certain health-related statistics of the more specific type also prompt concern. For example, as indicated in Table 8 above, the ratio of doctors and nurses per 100,000 people (57 and 69, respectively, for 1992-1995) is relatively low as compared with both Latin American and Caribbean countries as a group (132 and 100, respectively) and all developing countries as a group (78 and 98, respectively). As at 1999, as well, it is possible to identify particular deficiencies

²⁹⁵ That is, the total deaths for a given year as a fraction of the mean population for that year, converted to a result per 1,000 population.

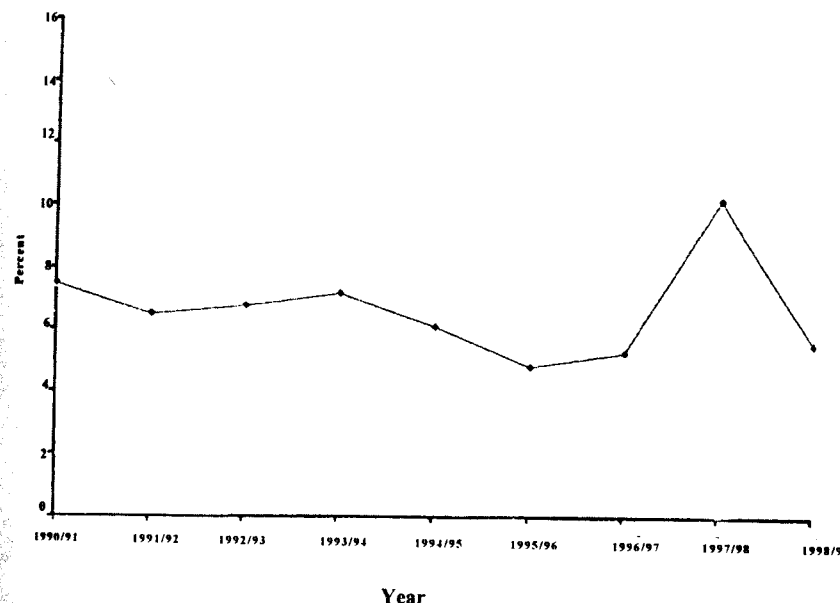
²⁹⁶ PIOJ, *Economic and Social Survey* (1999), Table 19.1, at p. 19.1.

cies in health care delivery based on vacancies in the public health sector: hence, a 61.8% vacancy rate in the posts for mental health officers, and vacancy rates of 48.2%, 46.2% and 42.2%, in posts for pharmacists, enrolled assistant nurses and midwives, respectively,²⁹⁷ suggest that in some areas ready access to health care facilities – if not the quality of care – is being compromised.

In some respects too, the positive outlook to be derived from the statistics in Tables 7 to 9 may flatter to deceive. This possibility arises in at least two ways. The first is that comparative figures with other countries or with institutional targets, even while complimentary in a relative sense, do not fully capture the reality faced by numerous individuals in the quest for health care or for social conditions conducive to good health. Thus, for instance, an infant mortality rate reported as 10 per 1,000 live births for 1998 may be comforting when compared to the figure of 32 per 1,000 live births for Latin America and the Caribbean for the same period, but it tells us little about the conditions of birth with respect to either category (see Table 7). Similarly, although 80% of the Jamaican population is reported to have access to safe water, this figure may not fully capture the fact that some persons within the 80% need to travel for some distance to obtain water, or that in some cases entire communities receive water on a sporadic basis only. Secondly, some of the statistics offered here may be deficient because they are estimates: in Table 7, the infant mortality rate for Jamaica for 1998 is quoted as 10 per 1,000 live births, relying on UNDP statistics, but the infant mortality rate for 1999 is quoted in Table 9 as 24.5 per 1,000 live births, relying on the Planning Institute of Jamaica. The discrepancy here cannot be explained as a difference between 1998 and 1999, for the Planning Institute of Jamaica also notes that the infant mortality rate “has officially remained at 24.5” since 1993.²⁹⁸

The quality of health care available to Jamaicans, as partly reflected in the foregoing statistics, is in large part a function of State expenditure on health in the budgetary process. As indicated in Figure IV, for the decade of the 1990s expenditure in most years, as a percentage of the national budget, hovered in

Figure IV: Expenditure on Health as a Percentage of Total Government Expenditure, 1990/91–1998/99



the range of 4.5% to 7.5%, with a significant difference noted for 1997/98.²⁹⁹ In 1997/98, expenditure rose outside this range to 10.22% of the national budget, but, in the following year, it declined to 5.56%, within the usual range. The relatively low percentage allocated to health in 1998/99 was reduced by 12.1% (of the 1998/99 figure) to \$7.4 billion in 1999/2000.³⁰⁰ Generally, one implication of these statistics is that a substantial proportion of persons seeking specific health care services place reliance on the private sector.³⁰¹ This, together with the fact that there have been increases in user fees for patients at public health care facilities, indicates that, particularly for those least able to afford it, health care access is still decidedly limited. In such circumstances, the State may

²⁹⁷ *Ibid.*, Table 22.3, at p. 22.5.

²⁹⁸ *Ibid.*, p. 22.4. The figures on this point appear even more difficult to reconcile when it is noted that, according to Jamaica's report to the United Nations Human Rights Committee in 1997, “(i)nfant mortality (per 1000)” for 1993 was 15.0: United Nations, International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: Jamaica*, UN Doc. HRI/CORE/1/Add.82, 23 June 1997, p. 4.

²⁹⁹ The source for the figures used here, and for the graph in Figure IV, is the Planning Institute of Jamaica, *Jamaica: Human Development Report 2000*, Table 1.6, at p. 9.

³⁰⁰ Planning Institute of Jamaica, *loc. cit.*, note 296, p. 22.1.

³⁰¹ According to the *Jamaica Survey of Living Conditions 1999*, 12.3% of the population was covered by health insurance in 1999: noted *loc. cit.*, note 296, at p. 22.3.

aspire to provide full access to health care facilities with the passage of time, but no immediate right to health care can be guaranteed.³⁰²

(b) Health and Right to Life Issues

But although no right to health is safeguarded either in Jamaican law or practice, the relationship between health issues and the more established right to life should be noted. According to the First General Comment on Article 6 issued by the United Nations Human Rights Committee,³⁰³ the right to life has been interpreted too restrictively in State practice, and it should, in fact, be taken to embrace positive measures to assist in the preservation of life.³⁰⁴ Thus, the First General Comment recommends that, in giving effect to the right to life, "it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."³⁰⁵ At first sight, this could give rise to the view that, as a part of the legally enforceable right to life, States are under a duty to reduce infant mortality and increase life expectancy.³⁰⁶ And, as both infant mortality reduction and increased life expectancy are significant aspects of the putative right to health, the approach advanced in the First General Comment on Article 6 would suggest that some elements of the right to health may now have legal force in domestic jurisdictions. Ramcharan supports this perspective, when he argues that:

"(I)n its modern sense, the right to life encompasses not merely protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are

302 The 1997 draft of the Charter of Civil Society for the Caribbean Community is sensitive to some of the economic realities that undermine the validity of references to a "right to health". Accordingly, the draft Charter does not use the term in its draft provision on health; instead, it stipulates that States shall use their best endeavours to provide a comprehensive, well-administered, adequately equipped and accessible health care system (draft Article XX). On the notion that there is no legal right to receive treatment under either English or Scottish law, see Feldman, *loc. cit.*, note 190, p. 903.

303 *Loc. cit.*, note 116.

304 Paragraph 5.

305 *Ibid.*

306 Joseph notes that, pursuant to this general approach, some members of the United Nations Human Rights Committee have made inquiries concerning public health, environmental matters, nutritional policies, efforts to combat epidemics and so on, under the heading of the right to life pursuant to Article 6 of the ICCPR: Joseph, "The Right to Life", in Harris and Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995), p. 155 at pp. 156 and 174-7.

designed to ensure access to the means of survival for every individual within its country. If, after its best efforts, in good faith, a government is unable to meet the survival requirements of its own people, then a residual duty vests upon the international community to assist through appropriate forms of international co-operation."³⁰⁷

This line of analysis is unconvincing mainly because it conflates the *lex ferenda* and the *lex lata*: the First General Comment on Article 6 mentions that "it would be desirable" for certain health measures to be taken and thus indicates that this is the direction the law could take in the future; but, on the other hand, it does not posit that these measures must now be implemented, as a part of the positive law, in order to satisfy the right to life. Furthermore, it would be counterproductive to interpret the First General Comment on Article 6 in a manner that does not conform with economic realities facing Jamaica and other developing countries. As the figures in Table 7 indicate, Jamaica views reduced infant mortality and increased life expectancy as important goals of health policy. In practice, however, budgetary constraints limit the extent to which these objectives may be satisfied in any given year. Against this background, it is important to acknowledge the desirability of further improvement in health matters, but this is not equivalent to the suggestion that individuals have an enforceable right to health.

Ramcharan's perspective, which seeks to build on the First General Comment, accepts that in some cases developing countries may not be able to enforce the survival of all its nationals, and for these cases, he would apply "a residual duty" to the international community. Surely, as a matter of morality, this perspective upholds the strongest traditions of humanitarianism in international relations, but it seems to be a rather unusual legal concept. The international lawyer is obliged to ask wherein lies the legal source of this residual duty,³⁰⁸ and to point out that, even within Ramcharan's analysis, the requirement that the Government of the country in need should demonstrate its "best efforts" and act "in good faith" introduces vagaries that would undermine the

307 Ramcharan, "The Concept and Dimensions of the Right to Life", in Ramcharan (ed.), *loc. cit.*, note 111, p. 1 at p. 6.

308 Ramcharan starts from the philosophical position that the international human rights lawyer should be in the forefront of international law, charting new courses, and leading the march in the development of the law: *ibid.*, p. 1. Presumably, advocacy of a legal right of survival on the basis of the right to life is part of this overall position. One problem, however, is that this position does not adhere to a common legal standard for the identification of duties, and so, it is really a subjective moral system.

value of Ramcharan's recommendation. To be sure, this is not an argument concerning the significance of international aid for impoverished countries. Rather, the point is that if we extend the meaning of the right to life to a degree that is unrecognizable from what States actually accept in practice, this could work to undermine the right to life, in its generally accepted, but more restricted, sense.

III. Evidence Concerning the Right to Education

(a) Legislative Aspects

Historically, the Jamaican educational system has evolved from an elitist foundation, through the opening of avenues for middle class opportunities, to an era of mass participation, at least at the primary level.³⁰⁹ The current arrangements for education depend on a combination of State, church and private initiatives, in which both denominational and non-denominational institutions exist within an integrated scheme. This overall scheme has legislative underpinnings in the Education Act of 1965 and regulations introduced thereunder. The Act makes provision for matters such as the establishment of a Teachers Services Commission,³¹⁰ management of public³¹¹ and independent³¹² institutions, registration and discipline of teachers,³¹³ and general organization of the educational system.

The Education Act expressly indicates that public education shall be organized on a tripartite basis, with the following components:

- (a) primary education, which is full-time education appropriate for junior pupils;
- (b) secondary education, which is full-time education appropriate for senior pupils under the age of 19; and

309 For historical overview, see, e.g., Figueroa, *Society, Schools and Progress in the West Indies* (1971), pp. 1-29, 68-73; Turner, "The Socialisation Intent in Colonial Jamaican Education 1867-1911", in King (ed.), *Education in the Caribbean: Historical Perspectives* (1987), p. 54; King, "The Jamaica Schools Commission and the Development of Secondary Schooling", *ibid.*, p. 88; Miller, "Church, State and Secondary Education in Jamaica, 1912-1943", *ibid.*, p. 109; Lowenthal, *West Indian Societies* (1972), pp. 118-122.

310 Section 5.

311 Part III.

312 Part IV.

313 Part V.

- (c) further education, which includes full-time education other than secondary education, part-time education, and organized leisure time occupation.³¹⁴

This structure is recognized in practice, and it therefore provides a framework for the provision of education at different levels. Within the current scheme, also, the Minister of Education is empowered to promote the education of the Jamaican people and the "progressive development" of institutions for that purpose,³¹⁵ as well as to ensure that efficient education "shall be available to meet the needs of the Island."³¹⁶ The Minister, however, is placed under no legislative responsibility to ensure that the right to education, even at the primary level, is guaranteed to all. In fairness, the Minister is authorized to declare any area within a radius of three miles from a specified school "a compulsory education area" and require attendance of all students in a particular age range.³¹⁷ In such instances, parents or guardians are placed under a duty to ensure attendance under penalty of law.³¹⁸ Notice, then, that it is legally possible for the Minister to place a duty of school attendance on parents and guardians, but parents do not have the corollary legal right to have their children educated in the public school system. In practice, the policy of successive governments since independence has been to broaden access at all levels within the constraints of limited economic resources, but this is not synonymous with the recognition of a right to education.³¹⁹

314 Section 7.

315 Section 3(a).

316 Section 3(e).

317 Sections 20 and 21. The current perspective of the Government of Jamaica is that "school attendance at the primary level is to be made compulsory". Ministry of Education, *Education: The Way Upward*, Ministry Paper No. 6/01, February 16, 2001, p. 8. No date is offered as the starting-point for the implementation of this approach.

318 There is some evidence, with respect to the parish of Clarendon, that compulsory education does not necessarily lead to an improvement in attendance patterns at primary level: Coomarsingh, "A study of four schools in Southern Clarendon just prior to, and immediately after the implementation of Compulsory Education", unpublished (1984), reported by Hamilton, "A Review of Educational Research in Jamaica", in Barrow and Reddock (eds.), *Caribbean Sociology: Introductory Readings* (2001), p. 685 at p. 691. Hamilton also notes unpublished studies by Jones (1985) and Roberts (1985), that suggest a similar result with respect to Trelawny and St. Thomas, respectively: Hamilton, *ibid.*

319 Occasionally, there are indications that the State is prepared to accept the existence of a right to education, but pronouncements to this effect are usually made in a manner that suggests that the word "right" is not being used with legal implications in mind. For instance, Ministry Paper No. 6/01, *loc. cit.*, note 317, indicates that the State, with the support of the family and the community, has a responsibility to ensure that every Jamaican child has "a right to education to the level and extent possible within the resources of the family, the community and the

Significantly, however, this position may be subject to constitutional modification in the near future. For, as a result of deliberations in the Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform,³²⁰ the current draft of the Charter of Rights in Jamaica contemplates that a new provision on the right to education should be added to Chapter III of the Jamaican Constitution on the right to education.³²¹ In relevant part, the proposal reads as follows:

“(2) Save only for laws that are required for the governance of the State in periods of public emergency, or as may be demonstrably justified in a free and democratic society, Parliament shall pass no law and no public authority or any essential entity shall take any action which abrogates, abridges or infringes –

... (m) the right of every child –

(ii) who is a citizen between the ages of six and fifteen years to free tuition in a public educational institution, at the primary level:

....”³²²

This proposal, if accepted as a constitutional amendment, would incorporate the right to education into Jamaican law in a manner broadly consistent with expectations set out in the ICESCR concerning primary education. It would also break the general disinclination of the Jamaican State to give constitutional support to economic and social rights. At the same time, however,

state”: p. 10. The simultaneous emphasis on the family, the community and the State would make it difficult to identify the bearer of the legal duty that would correspond to the right to education, while the implied reference to resource constraints would also weaken the possibility of enforcing the right contemplated. For the view, expressed with reference to the United Kingdom, that the right of a child to education can be derived from the statutory duty on parents to cause that child to receive full-time, efficient education appropriate for his or her level and needs, see Clayton and Tomlinson, *loc. cit.*, note 190, p. 1348. Section 8 of the Education Act in the United Kingdom places an obligation on public authorities to ensure that adequate primary and secondary schools are available in particular areas, an approach which helps to give effect to the right to education. For discussion on access to education under English law, see, e.g., Feldman, *loc. cit.*, note 190, pp. 889-98.

320 Final Report of the Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform, *loc. cit.*, note 98, pp. 9 and 16.

321 A Bill entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights and for connected matters, *supra*, note 158.

322 Draft Section 13(2)(m)(ii). The Joint Select Committee of the Jamaican Parliament examining the Charter of Rights (Constitutional Amendment) Bill has recommended that the proposed Section 13(2)(m)(ii) should be extended to cover the right of every child who is a citizen to free tuition in a public educational institution at the pre-primary level, with the right being given essentially to children between 3 and 6 years: *Report of the Joint Select Committee of Parliament on the Charter of Rights (Constitutional Amendment) Bill*, pp. 37-43.

this new approach would raise important questions concerning the implementation of the right to primary education. For instance, would the right to a primary education be applicable only to schools within the vicinity of the residence of a particular beneficiary? In an environment where some primary schools are clearly more reputable than others, would an individual have the right to be educated at a specific primary school? And, at a time when students in secondary school (from age 11) are called upon to make school payments as part of a cost-sharing scheme, is it discriminatory to stipulate, as a constitutional matter, that free primary tuition will be available up to age 15? These questions arise largely because the proposed constitutional provision expressly safeguards only “free tuition” at primary school, whereas the right to primary education could be perceived as broad enough to raise issues concerning the effectiveness of the education provided, among other things.³²³

(b) Statistical Indicators

Some of the statistical evidence concerning Jamaican education is complimentary when compared with countries for the Latin American and the Caribbean as a group, and with developing countries as a group. Table 10 sets out elements of the country's education profile.

In respect of both adult and youth literacy rates (86.0% and 93.5%, respectively), Jamaica's position is roughly similar to that of Latin American and Caribbean countries as a group, while it is markedly superior to the category of developing countries as a group. Likewise, Jamaica's enrolment ratios for primary and secondary education (95.6% and 69.8%, respectively) also show rough equality with Latin American and Caribbean counterparts taken together, and a considerable margin of superiority over developing countries on the whole. Having regard to the expectations contemplated in Article 13(2)(a) of the ICESCR – compulsory primary education available free for all – Jamaica's 95.6% enrolment at the primary level is also a positive feature of the educa-

323 In *R (Holub and another) v. Secretary of State for the Home Department* (2001) 1 W.L.R. 1359, the English Court of Appeal referred, with approval, to a definition of the right to education set out in Lester & Pannick, *Human Rights Law and Practice* (1999). Among the components of the general right to education included in this definition are: (a) a right of access to existing educational institutions, (b) a right to an effective education, and (c) a right to official recognition of academic qualifications.

324 Ministry Paper No. 6/01, which is current as of February 2001, indicates that the figure for enrolment of students in the 6-11 age group is 99 percent: *loc. cit.*, note 317, p. 23.

Table 10
Elements of an Education Profile

	Adult literacy rate (% age 15 and above 1998)	Youth literacy rate (% age 15-24) 1998	Age group enrolment ratios (adjusted)	
			Primary age group (% of relevant age group) 1997	Secondary age group (% of relevant age group) 1997
Jamaica	86.0	93.5	95.6	69.8
LACs	87.7	93.7	93.3	65.3
All Developing	72.7	84.1	85.7	60.4
High Human Dev.	n.a.	n.a.	99.3	94.3

Source: UNDP, *Human Development Report 2000*, pp. 194-197.

tional system.³²⁴ The figure is also impressive when one considers that in developing countries as a group approximately 130 million children of school age have recently been reported as being without access to primary education.³²⁵ But, the apparent success in enrolment at the primary level is in marked contrast to the 69.8% enrolment for secondary school. Specifically, for secondary schools, it cannot reasonably be said that the mandate in Article 13(2)(b) of the ICESCR – of general availability, accessibility, and progressive moves towards free education³²⁶ – is close to fulfilment at this time. Ministry Paper Number 6/01 of the Ministry of Education tends to support at least one aspect of this conclusion, when it indicates that 81 % of the high school age population (19% short of the ideal) has access to five years of high schooling.³²⁷

325 General Comment No. 11, Plans of Action for Primary Education (Article 14 of the Covenant) (1999), in Committee on Economic, Social and Cultural Rights, Report of the Twentieth and Twenty-first Sessions, Economic and Social Council, *Official Records*, 2000, Supp. No. 2, p. 99.

326 The terms "availability", "accessibility" and the "progressive introduction of free education" as used in Article 13 of the ICESCR have been the subject of elaboration at the United Nations; see General Comment No. 13 (1999), Report on the Twentieth and Twenty-first Sessions, Economic and Social Council, *Official Records*, 2000, Supp. No. 2, E/2000/22, p. 111.

327 Ministry Paper No. 6/01, *loc. cit.*, note 317, p. 24.

Moreover, the statistics as to adult literacy and enrolment, though useful in themselves, fail to provide a fair index as to the quality of the education being made available to those exposed to formal schooling. Save in exceptional cases, exposure to formal schooling is a necessary condition for educational attainment in Jamaica; but, clearly, such exposure is sometimes not sufficient. Quite apart from anecdotal evidence, this point is borne out, for instance, by the results of the first sitting of the Grade Four Literacy Test of the National Assessment Programme administered by the Ministry of Education. This test, designed in keeping with the Government's policy declaration of 1998 that no child should be promoted beyond Grade Four without proficiency in reading and comprehension, placed student performance in one of three categories, namely, "Questionable Status," "At Risk," and "Enrichment" (not at risk). Overall, 41,128 students from 793 primary schools took the test and, on an analysis of the data from 84% of the schools, it was found that 18.5 % of the students were in the category "Questionable Status," 30.8% "At Risk," and 50.7% in the "Enrichment" category.³²⁸ In effect, 49.3 % of the Grade Four students who took the test did not fully satisfy the examiners as to their facility with the rudiments of literacy. This emphasizes that enrolment is not synonymous with attainment, and removes some of the lustre from the high enrolment figures at the primary level.

Some of the difficulties as to quality assurance inherent in the results for the Grade Four Literacy Test are arguably not surmounted at the secondary level. True, since 1998, the Government's Grade Four policy has required literacy skills for promotion to secondary school; but, some students currently in the system were promoted to secondary school prior to the entry into effect of the 1998 policy at secondary level,³²⁹ and it is not yet entirely clear that the Grade Four Literacy Test has solved the problem of students being promoted without proper literacy skills. In any event, quality assurance at the secondary level is also placed under severe strain owing to infrastructural and other problems at this level. As demonstrated in Table 11, for instance, in the period from 1997 to 1999, enrolment in a number of different types of secondary schools was notably higher than the capacity of such schools.

328 Planning Institute of Jamaica, *loc. cit.*, note 296, p. 21.6.

329 In 1999, following the Grade Six Achievement Test, for the assessment of students in the transition from primary to secondary school "all 40,000 students were placed at the secondary tier of the system": *ibid.*, p. 21.1.

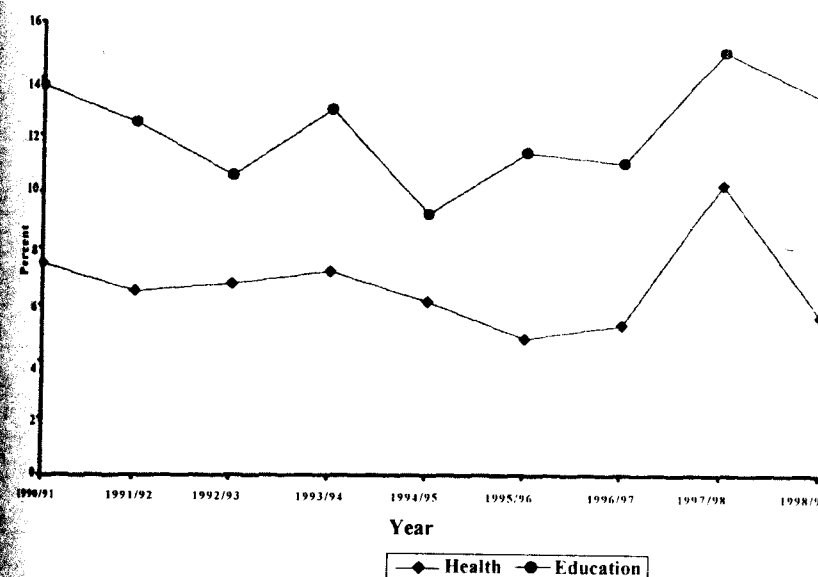
Table 11
Enrolment and Capacity in Secondary Institutions
By School and Types, 1997/98-1998/99

1997/8				
	No.	Capacity	Enrolment	Ratio of Enrolment to Capacity
Primary & Junior High (7-9) ³³⁰	54	15,024	9,178	0.61
Junior High	1	300	528	1.76
New Secondary	18	19,745	13,930	0.70
Secondary High	56	40,525	75,071	1.85
Comprehensive High	52	42,250	67,559	1.60
Technical High	14	9,330	16,323	1.75
Agricultural/Vocational	5	1,350	1,246	0.92
1998/99				
	No.	Capacity	Enrolment	Ratio of Enrolment to Capacity
Primary & Junior High (7-9)	90	15,025	24,728	1.65
Junior High	1	300	517	1.72
New Secondary	0	0	0	-
Secondary High	59	40,525	75,568	1.83
Comprehensive High	75	42,250	86,098	2.04
Technical High	14	9,330	16,657	1.78
Agricultural/Vocational	3	1,350	677	0.50

Source: Planning Institute of Jamaica, *Economic and Social Survey* (1999), Table 21.6.

For 1997/98 and 1998/99, therefore, Secondary High, Comprehensive High and Technical High Schools, all had ratios of enrolment to capacity over 1.5 and in the case of Comprehensive High Schools in 1998/99, enrolled students exceeded school capacity by a factor of 2. In these circumstances, it is difficult to expect that basic skills of literacy and numeracy are being transmitted efficiently in Jamaica's educational system. Other factors will certainly be relevant in assessing the educational quality at particular institutions, but

Figure V: Expenditure on Education as a Percentage of Total Government Expenditure, 1990/91-1998/99



the national statistics noted above point to general weaknesses within the system.³³¹

To some extent, this situation may be explained by resource constraints faced by the Jamaican State. As noted in Chapter 1, one problem with the rules concerning the human right to education is that although they set out desirable objectives, they do not, in their terms, demonstrate sufficient sensitivity to the budgetary trade-offs that each State may have to make in safeguarding quality education. For the case of Jamaica, the expenditure on education as a percentage of total government expenditure is illustrated in Figure V: throughout the decade of the 1990s, the lowest percentage is noted in 1994/95 at 9.19%, while in 1997/98, the highest percentage was achieved

³³¹ For instance, one issue not fully highlighted by Table 11 concerns the presence of university graduates at particular schools. In 1999/2000, 41.9% of the teachers in secondary high schools were university graduates, as against 20% at the comprehensive high schools: Ministry Paper No. 6/01, *loc. cit.*, note 317, p. 24. Thus, the schools with the least satisfactory teacher/student ratios also tend to have a lower percentage of university graduates on staff.

³³⁰ One school continues to Grade 11. Ratios were calculated by the present writer.

at 14.90% of the national budget.³³² This means that, following debt servicing, expenditure on education exceeds expenditure in all, or most, other sectors, a point which may be broadly consistent with the spirit of Jamaica's obligations under the ICESCR.³³³ Nevertheless, even if the percentage of national expenditure is relatively high compared to other sectors, it is not particularly high by regional standards.³³⁴ And, more importantly, the problems of capacity noted above, together with claims that teachers' salaries are generally insufficient, infrastructural difficulties, and problems in ensuring quality control, all point to the need for increased support for the educational sector. Significantly, however, when this recommendation is made in the abstract, it does not pay due regard to competing claims on the country's resources.

Although the foregoing statistics capture, in summary form, the State's contribution to the educational process, they do not indicate the extent to which parents or guardians also help to ensure academic attainment. At the primary level, the public school system encompassed 95.0% of total enrolment in 1999,³³⁵ and at these schools, there are generally no costs for tuition within the formal system. At the secondary level, however, the cost-sharing scheme now places direct financial responsibility on parents/guardians for some school expenses, so that in 1999, for instance, approximately \$295 million was collected from 66

332 Ministry Paper No. 6/01 indicates that the Government of Jamaica is committed to maintain the annual allocation to education at between 15 % and 20% of the national budget: *ibid.*, note 317, p. 6.

333 Bearing in mind, however, the rather vague character of obligations under the ICESCR, even this mild conclusion is open to challenge. As already noted, Resolution 1994/11 of the United Nations Commission on Human Rights indicates that the international debt problem should not be allowed to undermine the protection of basic economic and social rights. If one accepts this line of reasoning, then arguably Jamaica is in breach of its ICESCR obligations where, as in the present situation, it gives priority to debt servicing over education. The reasoning implied in Resolution 1994/11 is also consistent with arguments presented by Trubek, *loc. cit.*, note 59, at p. 214-215. In particular, Trubek argues that the obligation, in Article 2(1) of the ICESCR, for the State to take steps "to the maximum of its available resources" to achieve economic, social and cultural rights progressively means that each State must give priority to such rights. Though Trubek does not fully identify the order of priority to be followed, one could argue that educational needs, as a matter of social welfare, should be met before debt repayments. It may be enough to point out that this line of reasoning does not generally conform with international practice, and that if debt repayments are overridden by expenditure on education, this could affect the economic potential of developing countries in the long run.

334 For the period 1995-97, Jamaica's expenditure on education is noted as 12.9% of total government expenditure by the UNDP. The comparative percentages for Barbados, Belize and Mexico are listed as 19.0%, 19.5% and 23.0%, respectively: UNDP, *Human Development Report 2000*, pp. 194-195. Some of the countries from the Latin American and Caribbean region with lower percentages allocated to education as part of national expenditure include St. Kitts-Nevis (8.8%), Grenada (10.6%) and Cuba (12.6%): *ibid.*

335 Planning Institute of Jamaica, *loc. cit.*, note 296, p. 21.6.

secondary schools.³³⁶ At the tertiary level, students are required to pay a fixed portion of their tuition costs, and in 1999, approximately 4,646 students availed themselves of assistance from the Students' Loan Bureau to the overall sum of \$263.9 million. One measure of the broad impact of educational expense on households, with respect to children under 17 years, is set out in Table 12.

Table 12
Proportion of Households with Difficulty
Meeting Educational Expenses in Relation to
Number of Children in Household and Poverty Level, 1999

Number of Children under 17	Percentage which Report Difficulty in Meeting Educational Expenses (Households with Children under 17 years)	
	All Households	Households below the Poverty Line Households above the Poverty Line
1-2	38.2	32.4
3-4	56.5	60.9
5 or more	78.4	81.0
		39.1
		55.2
		76.7

Source: Planning Institute of Jamaica/Statistical Institute of Jamaica, *Jamaica Survey of Living Conditions 1999*, Table 10, at p. 92.

Table 12 indicates that among all Jamaican households with 1 to 2 children under 17 years, 38.2% report difficulty in meeting educational expenses, while among Jamaican households with 3 to 4 children, and with 5 or more children, 56.5% and 78.4%, respectively, report difficulty in this area. For all households with children, there was a direct relationship between the number of children in the household and the probability that the household would report difficulty in meeting educational expenses.³³⁷ There is also survey evidence to the effect that in periods of financial difficulty, 56.0% of all households will reduce the level of expenditure on education as a means of coping.³³⁸

336 *Ibid.*, p. 21.3.

337 Planning Institute of Jamaica/Statistical Institute of Jamaica, *Jamaica Survey of Living Conditions 1999*, p. 92 (Section on "Coping Strategies and Social Assistance Among the Poor and Needy in Jamaica" by Dr. Pat Anderson).

338 *Ibid.*, p. 95.

(c) The ICESCR and Fees for Tertiary Education

At the tertiary level, a particular question arises concerning the significance of Article 13(2)(c) of the ICESCR in circumstances where, as in the case of Jamaica, university fees for students have been re-introduced after a period in which they were not required. As noted in Chapter 1 above, Article 13(2)(c) places a responsibility on the State to make higher education "equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education."³³⁹ The question, then, is whether Article 13(2)(c) prohibits the reintroduction of university fees after a period of free higher education.³⁴⁰ Two considerations point to an affirmative response to this question. First, the reintroduction of fees would almost certainly reduce the prospect of equal accessibility on the basis of capacity, for there is reason to believe that some students will have difficulties paying fees even where a loan system assists in covering some financial costs. Secondly, the reference in Article 13(2)(c) to the progressive introduction of free education seems to imply that States should proceed towards that situation; the reintroduction of a fee-paying scheme would be a move in the opposite direction.

On this interpretation, the Jamaican authorities were presumably in breach of the ICESCR when fees were re-introduced for tertiary level students in the decade of the 1980s. But, though this interpretation appears to follow the strict letter of Article 13(2)(c), the virtue of this result is open to debate. The mandate in Article 13(2)(c) is unduly whiggish in orientation: it proceeds, somewhat over-optimistically, on the assumption that as time passes, governmental authorities will always have an increasing resource base to fund the progressive extension of free higher education to greater numbers of students. In some cases, however, this will not necessarily conform with reality; and, indeed, even where the country's growth rate leads to a regular increase in the national resource base, governmental authorities may decide to use such increases in areas other than the higher education sector. In any given year, there may be a series of trade-offs both within the education sector (among

primary, secondary and tertiary sectors),³⁴¹ and between the education sector and other areas of the national economy. And, in making decisions concerning such trade-offs, it is distinctly possible that in some years tertiary level students may be required to assume financial responsibility for fees, even though earlier governmental policy had sought to assure free higher education. In this context, it seems unrealistic to suggest that the right to education at the tertiary level has been violated simply because the State, in allocating budgetary resources, does not always facilitate the progressive development of free education at the tertiary level.

This conclusion raises the question whether the State can, in some circumstances, raise a defence of economic necessity if it apparently fails to meet the ICESCR's expectation of inexorable progress towards free education at the tertiary level.³⁴² And, if that question may reasonably be proffered for tertiary education, there is no conceptual reason why it should not also be considered with respect to secondary education, which is required to be generally available, accessible to all, and progressively introduced as a free service.³⁴³ These questions demonstrate another practical difficulty with the idea of the right to education as set out in the ICESCR. On the one hand, if the right is to be understood in a legal sense, then States parties to the Covenant will have accepted that the ICESCR has imposed significant constraints on the budgetary process, an approach which most States have not expressly accepted. On the other, if States may virtually ignore the language of the ICESCR, using the defense of economic necessity or otherwise, this will bring into question the integrity of the provisions on education, and undermine the general significance of the Covenant.

(d) The Question of Discrimination in Tertiary Education

A further aspect of the right to education at the tertiary level should be briefly considered. It has been suggested that, in recent years, girls have generally outperformed boys in academic matters within the Jamaican school system, and that the difference in performance manifests itself at the tertiary

339 *Supra*, p. 23.

340 This issue has been given some consideration by the United Nations Committee on Economic, Social and Cultural Rights: see "Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (Analytical Paper adopted by the Committee on Economic, Social and Cultural Rights at its seventh session, 11 December 1992), Committee on Economic Social and Cultural Rights, Report on the Seventh Session, in ECOSOC, *Official Records*, 1993, Supp. No. 2, UN Doc. E/1993/22, p. 87 at pp. 91-3.

341 For example, in 1996/97 in Jamaica, the percentage allocation to the primary, secondary and tertiary educational sectors was 34.3%, 31.3% and 20.2%, respectively. By 2000/2001, this had changed to 36.9%, 32.9% and 18.3% for the respective categories: Ministry Paper No. 6/01, *loc cit.*, note 317, p. 20.

342 *Loc cit.*, note 340, at p. 92.

343 ICESCR, Article 13(2)(b).

level where women matriculate in significantly greater numbers into various institutions of higher learning.³⁴⁴ Evidence of this is to be found, for instance, in the fact that between 1995 and 1999, the percentage of enrolled males at the University of the West Indies, Mona, declined from 35% to 28.8% of the total campus population.³⁴⁵ Naturally, if this trend continues, it could have an important impact on socio-economic relations in Jamaica. For the present purposes, however, the question is whether the different levels of matriculation in tertiary institutions provide evidence that men are less entitled, in practice, to a university education, or that, in other words, that the right to education at the tertiary level is being applied in a discriminatory manner. If this is so, Jamaica would *prima facie* be in breach not only of standards concerning non-discrimination in international law;³⁴⁶ possibly, it would also be acting contrary to the terms of Article 13(1) of the ICESCR, which ensures the right of everyone to education, and to the requirement of accessibility for all persons to higher education in Article 13(2)(c) of the same convention.

Perhaps, however, the question of discrimination against males with respect to tertiary education may be raised to be dismissed. Access to education at the primary and secondary levels is open to both sexes and, in the main, access to tertiary education is determined in accordance with academic criteria. There is clearly no stated policy of discrimination against males in respect of entry into any of the country's three universities, and no evidence has emerged to call into question the stated admissions policies. The difference that exists between the sexes at this level seems best explained by sociological and economic considerations. There is, for instance, reason to believe that the socialization process at home, as well as gender-related assumptions made by

344 Recent studies include Evans, *Gender and Achievement in Secondary Education in Jamaica* (Planning Institute of Jamaica, Policy Development Unit, Working Paper No. 2, March 1999); Evans, *Inside Jamaican Schools* (2001), pp. 136-42. For earlier work on the issue of gender in Jamaican schools, see, e.g., Miller, *Marginalization of the Black Male* (1986); Hamilton and Leo-Rhynie, "Sex Roles and Secondary Education in Jamaica", *World Yearbook of Education, 1984: Women and Education* (1984), p. 123; Leo-Rhynie, "Educational Opportunities for Jamaican Female Students: A Contemporary Perspective", paper prepared for First Interdisciplinary Seminar on Women and Development Studies, June 1987, briefly quoted in Hamilton, *loc. cit.*, note 318, at p. 691.

345 Planning Institute of Jamaica, *loc. cit.*, note 296, p. 21.20. The gender imbalance is particularly pronounced in certain academic areas; for instance, at the University of the West Indies, Mona, in 1999, males amounted to 17% of the enrollment in the Faculty of Law, versus 4% in the Faculty of Pure and Applied Sciences: *ibid.*

346 For discussion, see also McKean, *Equality and Discrimination under International Law* (1985 reprint), pp. 128-135.

some teachers at school, tend to contribute ultimately to the attitudes and goals of both boys and girls from an early stage, and that this helps to determine the degree of imbalance at the tertiary level.³⁴⁷ Also, inasmuch as some Jamaicans accept traditional perceptions as to different roles for men and women, another factor that helps to explain the gender discrepancy in higher education could be the notion that higher education does not necessarily lead to positions in society that generate quick money-earning capabilities. The point, though, is that the range of possible explanations does not reasonably include either deliberate intervention by the State in favour of females, or discriminatory neglect of males on the part of the State.

But, even if the State has not wittingly created the circumstances which give rise to the unbalanced result at the tertiary level, is it in breach of international law for allowing the gender imbalance to exist? Under the Convention and Recommendation on Discrimination in Education, 1960,³⁴⁸ States are required to take measures to eliminate and prevent discrimination,³⁴⁹ which the Convention and Recommendation define as:

"any distinction, exclusion, limitation or preference, which being based on ... sex... has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of access to education of any type or any level; ..."³⁵⁰

With reference to this definition, the Jamaican State could plausibly maintain that the gender imbalance at the tertiary level does not amount to discrimination because there is no clearly identifiable distinction, exclusion, limitation or preference based on sex that deprives males of tertiary education. Similarly, with reference to Article 13(1) of the ICESCR, the State could argue that its policies do not distinguish between the sexes, and that it is already in compliance with Article 13(2)(c) because higher education is "accessible to all, on the basis of capacity."

347 See, e.g., Evans, *Gender and Achievement in Secondary Education*, *loc. cit.* note 344, especially pp. 52-64, 78-81.

348 For the text of the Convention against Discrimination in Education, see United Nations, *Treaty Series*, Vol. 429, p. 93. The Recommendation on Discrimination in Education uses the same language as the Convention, and is intended as a guide for State practice among countries, such as Jamaica, that have not ratified the Convention. For text of the Recommendation, see www.unesco.org/human_rights/hrcc.htm.

349 Article 3.

350 Article 2.

Therefore, Jamaica does not appear to be in breach of any international obligations in respect of sexual discrimination in higher education. However, the general discrepancy between the performance of females and males has prompted official attention. So, for instance, Ministry Paper Number 6/01 notes, under the heading of "Key Considerations," that:

"The issue of gender imbalance in the education system is a source of concern as boys appear to be disadvantaged. To regain some balance a special effort will be made in curriculum development and delivery to engage both boys and girls in the learning process."³⁵¹

The Ministry Paper does not elaborate on the specific nature of curriculum development to be pursued, but the thrust of the proposed approach will presumably be undertaken at the primary and secondary levels. Noticeably, too, the Ministry Paper does not canvass an affirmative action programme at the tertiary level along the lines contemplated and pursued within the United States of America.³⁵² The American model, which essentially allows the application of differential standards of entry to universities for the benefit of historically disadvantaged groups, is not easily reconciled with the terms of the Convention against Discrimination in Education because, at the individual level, it appears to impair equality of treatment in education.³⁵³ Also, within Jamaica, affirmative action to support boys and men would be fundamentally ahistorical, as girls and women have traditionally been placed at a disadvantage in the context of Jamaican education;³⁵⁴ this factor, in particular, would work strongly

351 *Loc. cit.*, note 317, pp. 8-9.

352 From the extensive sources on this issue, see, e.g., *Regents of the University of California v. Bakke*, 438 US 265 (1978); *Hopwood v. State of Texas*, 78 F 3d 932 (5th Circuit), Bowen and Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998); Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (1991); Cox, *The Court and the Constitution* (1987), pp. 269-287; Riley, "The 'Diversity' Defense", *Commentary* (April 2001), p. 24.

353 McKean notes that in the decade of the 1950s the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities accepted that protection and compensatory measures designed to help "backward groups" achieve equality of opportunity did not amount to discrimination. The Sub-Commission, however, opposed quota systems on the basis that this would ignore the principle of equal treatment: McKean, *loc. cit.*, note 346, pp. 130-131.

354 At the University of the West Indies, for instance, women constituted 30%, 37%, 37% and 47% of the overall enrolment for the decades beginning 1948/49, 1958/59, 1968/69 and 1978/79, respectively: Hamilton, *Women and Higher Education in the Commonwealth Caribbean: UWI: A Progressive Institution for Women?*, Centre for Gender and Development Studies, University of the West Indies, Working Paper Series (Cave Hill), Working Paper No. 2, February 1999, p. 7. Women began outnumbering men at the University of the West Indies in 1982/83: *ibid.*

against the possible application of the American model to the Jamaican context.

IV. Evidence Concerning the Right to Work

It has already been suggested that the provisions on the right to work in Article 6 of the ICESCR cannot realistically guarantee an individual in a country with market-based decision-making processes a right to employment at all times.³⁵⁵ In addition, it should be recalled that in countries with high rates of unemployment, the concept of a right to work – if the word "right" is to be understood in its juristic sense – is misleading, for there is no significant possibility that an unemployed individual may bring a claim to the courts to obtain employment, assuming there are no special issues of discrimination or unfair dismissal.³⁵⁶ Also, if one posits the existence of a right to work, in the sense of the right to obtain employment, this raises questions about the worker's perception of what is appropriate employment as against the prospective employer's assessment of the worker's level of qualification and expertise for the job in question. And, if the worker does not accept a particular job offered, would the right to work still represent a claim held by that worker at the location where the job has been offered?³⁵⁷

Against this background, it is difficult to assess the extent to which the right to work as, as a legal right, is being fulfilled in Jamaica at this time. In view of the conceptual difficulties in this area, the Jamaican Constitutional Commission has emphasized that the right to work should not be given constitutional recognition.³⁵⁸ But, at the same time, the promotion of increased levels of employment remains an important objective of the State even in the context of a liberalised, free market economy, an approach consistent with the programmatic orientation of the ICESCR on the right to work. Even so, however, this objective is not readily met by the Jamaican authorities. Thus, the level of unemployment in the country remains substantial, and when compared with

355 *Supra*, p. 21.

356 See also Francis, "International Law and Human Rights: A Caribbean Context", in Griffith and Sedoc-Dahlberg, *Democracy and Human Rights in the Caribbean* (1997), p. 15 at p. 17.

357 For similar concerns, see, e.g., Summers (as revised by Grodin), "The International Covenant on Economic, Social and Cultural Rights, Article 6 – Right to Work", in Hannun and Fischer, *loc. cit.*, note 172, p. 172 at p. 173.

358 *Report of the Constitutional Commission, loc. cit.*, note 270, p. 31.

the labour force generally, it represents a serious drain on the country's resources. Table 13 incorporates certain labour market statistics for the period 1992 to 1999, while Figure VI indicates the employment rate for the same period, both according to sexes and in the aggregate.

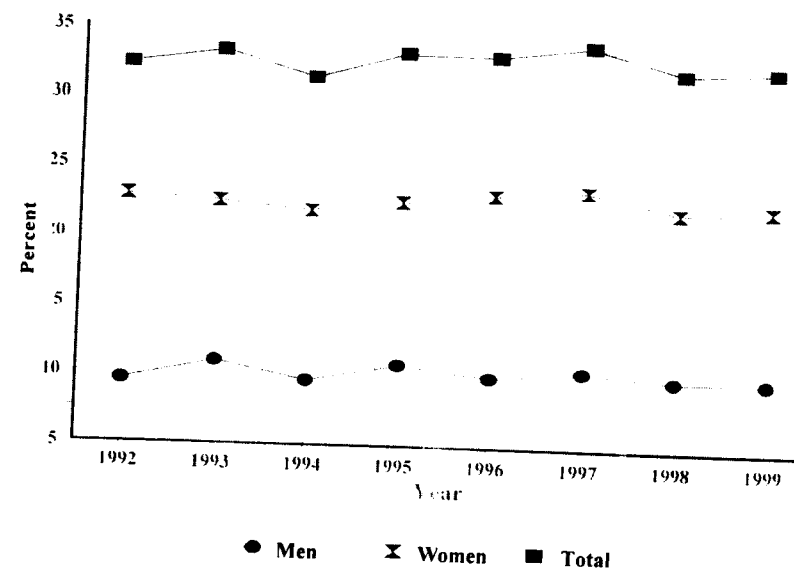
Table 13
Main Labour Force Indicators, 1990-1999
(^{'000})

	1992	1993	1994	1995
Labour Force	1,074.0	1,083.0	1,090.5	1,150.0
Employed Labour Force	905.7	906.3	923.1	963.3
Unemployed Labour Force	169.2	176.7	167.4	186.7
Unemployment Rate (%)	15.7	16.3	15.4	16.2
Job-Seeking Rate (%)	6.1	7.1	7.3	6.2
Unemployment Rate (Men) (%)	9.5	10.9	9.6	10.8
Unemployment Rate (Women) (%)	22.8	22.4	21.8	22.5
	1996	1997	1998	1999
Labour Force	1,142.7	1,133.8	1,128.6	1,119.1
Employed Labour Force	959.8	946.8	953.6	943.8
Unemployed Labour Force	183.0	186.9	174.9	175.2
Unemployment Rate (%)	16.0	16.5	15.5	15.7
Job-Seeking Rate (%)	6.7	7.1	7.3	7.1
Unemployment Rate (Men) (%)	10.0	10.5	10.0	10.0
Unemployment Rate (Women) (%)	23.1	23.5	22.1	22.4

Source: Planning Institute of Jamaica, *Economic and Social Survey* (1993-1999).

In the period from 1992 to 1999, the Jamaican unemployment rate has ranged within the narrow band of 15.4% to 16.5% of the labour force. The fairly constant, and high, level of unemployment is an important index of the underdevelopment of human potential in Jamaica; for, with roughly one adult in every six unemployed, and with an observable degree of underemployment, a substantial part of the populace has failed to develop the requisite attitudes and aptitudes for economic success and fulfillment in a competitive environment. The intractable character of the unemployment problem also implies

Figure VI: Unemployment Rate, 1992-1999



that the policies of successive governments have, unhappily, not overcome the historically-rooted structural difficulties that lie at the foundation of the Jamaican economy. As also evident in Figure VI, the fairly constant level of unemployment applies across the sexes, but with the unemployment rate for women being at least twice that for men, in each year from 1992 to 1999.

If one assumes – however unrealistically – that the State owes individuals a right to work, then surely the Jamaican State has failed to satisfy its obligations in this area. But, international human rights instruments, and in particular, the ICESCR, also mention other rights for workers: Article 6(2) of the ICESCR indicates, for instance, that, as a means of realizing the right to work States should introduce, *inter alia*, “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development.” This formulation is too abstract to encourage definitive assessment: if a State is wilfully violating the civil and political rights of its workers, or if it has deliberately refrained from introducing technical and vocational training programme, it will be in breach of Article 6(2). But, what if, as in the case of Jamaica, there is an effort towards implementing such programmes, but the achievement of steady economic, social and cultural development proves elusive? Article 6(2) provides no clear index for measuring

success, and appears to presuppose, without justification, that the introduction of technical and vocational guidance and training programmes, and related efforts, will necessarily result in development.

With respect to employment matters, Jamaica is a party to six of the core conventions of the International Labour Organization that help to promote human development through the protection of workers' rights. These treaties are:

- The Freedom of Association and Protection of the Right to Organize Convention (1948) (Convention 87);
- The Right to Organize and Collective Bargaining Convention (1949) (Convention 98);
- The Forced Labour Convention (1930) (Convention 29);
- The Abolition of Forced Labour Convention (1957) (Convention 105);
- The Equal Remuneration Convention (1951) (Convention 100); and
- The Discrimination (Employment and Occupation) Convention (1958) (Convention 111).³⁵⁹

Generally, the obligations arising from these treaties, and especially those owed by the State, have the force of law in Jamaica – either through constitutional safeguards on matters such as freedom of association,³⁶⁰ and protection from discrimination,³⁶¹ or through domestic legislation, such as the Labour Relations and Industrial Disputes Act. Within the Jamaican context, the domestic legal provisions are a strong reflection of the role played by the trade union movement in the years preceding independence, and of the link between some trade unions and political parties that still features prominently in the socio-economic environment. The result is that Jamaica is largely compliant of its obligations concerning union rights arising under the various International Labour Organization Conventions, but this position is arguably as much a result of local trade union influence and strategy, as it is the result of a desire to satisfy international treaty obligations.

In Jamaica, there are also certain statutory provisions which modify or clarify aspects of the common law applicable to industrial relations. Among

³⁵⁹ UNDP, *loc cit.*, note 334, pp. 52-55.

³⁶⁰ Jamaican Constitution, Section 23.

³⁶¹ Section 24.

the statutes in this area are the Minimum Wage Act, the Employment (Termination and Redundancy Payments) Act, the Holidays with Pay Act, and the Maternity Leave Act.³⁶² Each of these specifies particular rules for the relationship between employers and employees, and, in effect, sets minimum safeguards designed primarily for the benefit of the latter. In the context of the right to work contemplated in Article 6 of the ICESCR, one point for emphasis is that these domestic provisions do not necessarily reinforce the impact of Article 6 in Jamaica. Rather, the relevant legislation in each case presupposes that the beneficiary identified already has employment, and seeks to give substance to certain rights and duties concerning the pre-existing employment relationship. To reinforce this point, it may be noted that in some instances, the terms of the domestic legislation could actually work to reduce employment, and thus undermine the notion of a right to work. So, for instance, in the event that the minimum wage level is bureaucratically established at a rate which is greater than the market can bear, there is the possibility that some workers may be displaced as employers address the prospect of increased labour costs. Therefore, the protection for employees set out in Jamaican legislation does not necessarily enhance the concept of the right to work. In practice, however, the legislation safeguards workers' rights, and in that sense, the Acts in question tend to reinforce the provisions of Article 7 of the ICESCR, which is concerned mainly with the need to ensure appropriate remuneration, working conditions, opportunities for promotion and limitations on working hours – matters which, generally speaking, have benefitted from trade union vigilance in Jamaica.

³⁶² For review, see Kirkcaldy, *Industrial Relations Law and Practice in Jamaica* (1998), pp. 205-231.