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The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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THE DEATH PENALTY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: FROM RESTRICTIONS TO ABOLITION

I. INTRODUCTION

1. The Inter-American Commission on Human Rights ("Inter-American Commission", "Commission" or "IACHR") has dealt with the death penalty as a crucial human rights challenge. While a majority of the member states of the Organization of American States ("OAS") has abolished capital punishment, a substantial minority retains it.

2. The American Convention on Human Rights ("American Convention" or "Convention") does not prohibit the imposition of the death penalty, but does impose specific restrictions and prohibitions. As the Inter-American Court of Human Rights ("Inter-American Court", "Court", or "I/A Court H.R.") indicated almost 30 years ago:

> Without going so far as to abolish the death penalty, the [American] Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.[1]

3. The Commission has dedicated special attention to the death penalty, particularly over the last 15 years. During this period, first the Commission and then the Court dealt with the practice of the obligatory imposition of the penalty of death upon conviction for murder in a number of countries in the Commonwealth Caribbean. The standards developed as a result, and the interaction between the inter-American human rights bodies and the judicial bodies of the Commonwealth Caribbean have given rise to unprecedented changes in law and policy. At present only two of those countries retain the mandatory death penalty, and one of those is in the process of reforming it in compliance with decisions of the Inter-American Court. During this period, the Commission has examined a series of issues concerning the death penalty in the United States, Cuba, Guatemala and other countries, and established standards focusing on the right to strict due process.

4. While capital punishment remains a pressing challenge, there have been significant changes in the region, which, as explained below, include reforms to restrict the types of crimes and circumstances with respect to which the penalty may apply, as well as express or *de facto* moratoriums. The death penalty is increasingly being called into question in the countries that retain it. The concerns most often cited by state and civil society representatives relate to the risk of putting innocent persons to death; arbitrariness and unfairness in the application of the penalty; and the costs to judicial systems of years of appeals prior to implementing an irrevocable penalty. New technologies and initiatives such as the Innocence Project in the United States have led to the exoneration of persons previously condemned to death. The American Civil Liberties Union reports that 139

[1] I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 57.

persons sentenced to death in the United States have later been found innocent and released.[2] A growing number of countries worldwide are doing away with the death penalty,[3] although changes remain tenuous.

5. The Inter-American Commission on Human Rights has prepared the present report to make the standards it has developed regarding the death penalty and the restrictions and prohibitions that apply to it more easily accessible to the users of the regional system.

6. In reviewing these standards and developments in the region, and in light of the objective of gradually eliminating the death penalty in the inter-American system, the Commission takes this opportunity to call upon OAS Member States that still have the death penalty to abolish it or, at least, to impose a moratorium to its application.

A. The human rights framework applicable to the death penalty

Inter-American Norms

7. As indicated, the American Convention on Human Rights does not prohibit the application of the death penalty by states that retain it, but subjects its use to a series of express restrictions and prohibitions. Article 4 of the Convention provides:

> 1. 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.
>
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
>
> 3. The death penalty shall not be reestablished in states that have abolished it.
>
> 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

[2] ACLU, American Civil Liberties Union, death penalty, at http://www.aclu.org/human-rights/death-penalty.

[3] In a recent press release, European Union leaders compared the figure of 55 countries that had eliminated the penalty as of 1993 to 97 that had done so as of 2009. Joint declaration by the European Union High Representative for Foreign Affairs and Security Policy and the Secretary General of the Council of Europe, on the European and World Day against the Death Penalty, 10 October 2011. Amnesty International reports that as of 2010, 96 countries had abolished the death penalty for all offenses, 9 for ordinary crimes only, and 34 countries were abolitionist in practice. Amnesty International, Death Penalty Statistics 2010, at: http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-statistics-2010.

> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
>
> 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

8. Both the Inter-American Commission and the Court have interpreted these terms in the context of specific cases. The present report reviews the primary standards established by the Commission. The Court, for its part, has summarized the prescribed restrictions as follows:

> Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.[4]

9. In addition to the limitations set forth, Article 4 provides for the gradual restriction of the penalty by indicating that in countries that have not abolished the death penalty, it may not be extended to new or additional crimes, and in countries that have abolished it, it may not be reinstated.

10. The American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration") protects the right to life in Article I, and does not expressly refer to the death penalty. The Commission has indicated that the terms of Article I neither prohibit capital punishment *per se* nor exempt it from the Declaration's standards and protections:

> Rather, in part by reference to the drafting history of the American Declaration as well as the terms of Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.[5]

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[4] I/A Court H.R., *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 55.

[5] See *e.g.* IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996 cited in IACHR, Report No. 62/02, Case 12.285, Michael Domingues, United States, October 22, 2002, para. 52. All Commission sources cited in the present report are available at www.cidh.org.

11. As indicated in the present compilation of standards, the kinds of deficiencies that have been identified by the Commission as rendering an execution arbitrary and contrary to Article I of the American Declaration include failing to limit the penalty to crimes of exceptional gravity set forth in pre-existing law, the failure to provide strict due process guarantees, and the existence of demonstrably diverse practices that result in the inconsistent application of the penalty for the same crimes.

12. On the basis of the recognition of the right to life, and the restrictions on the death penalty set forth in Article 4 of the American Convention, and considering the "tendency among the American States […] to be in favor of abolition of the death penalty," in 1990 the OAS General Assembly adopted the Protocol to the American Convention to Abolish the Death Penalty.[6] Parties to this Protocol undertake that they will not apply the death penalty, although a reservation is possible to allow for its application in times of war. As of the close of 2011, Argentina, Brazil, Chile, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela have ratified this Protocol.[7]

13. As the Commission has faced different challenges with respect to the death penalty, it has interpreted and applied the American Convention and the American Declaration on the basis that the right to life holds a special primacy, and any deprivation of that right must be subject to the highest possible level of scrutiny. The decisions referred to in the present compilation consequently take as their point of departure this standard of strict, heightened scrutiny.

B. Overview of approaches to the death penalty in other human rights systems

The United Nations Human Rights System

14. The approach to the death penalty in the inter-American system is, in its principal aspects, consistent with that of other human rights systems that impose strict limitations on the penalty aimed at its gradual restriction and eventual elimination.

15. At the international level, the International Covenant on Civil and Political Rights ("ICCPR") does not prohibit the death penalty, but establishes strict restrictions on its imposition. Article 6 of the ICCPR provides that:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in

[6] Preamble, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on June 8, 1990, at the 20th Regular Session of the General Assembly, Asunción, Paraguay.

[7] Two parties, Brazil and Chile, have invoked the reservation to retain the application of the death penalty to the most serious crimes during times of war.

accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

16. In line with the trend toward the elimination of the death penalty, in 1989 the General Assembly adopted the Second Optional Protocol to this ICCPR aimed at the abolition of capital punishment.[8] As of the end of 2011, 73 countries were party to that Protocol.[9] When the United Nations was founded in 1945, only a small minority of seven countries had abolished the death penalty in law or practice; as of November 2008, this number had increased to a total of 141 throughout the world.[10]

17. More recently, the United Nations General Assembly adopted resolutions in 2007, 2008 and 2010, calling upon States that maintain the death penalty to establish a moratorium on executions with a view to abolishing it.[11] These resolutions also called upon States to progressively restrict the use of the death penalty and to reduce the number of offences for which it may be imposed, as well as to refrain from reintroducing the death

[8] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by the UN General Assembly Resolution 44/128 of 15 December 1989.

[9] United Nations Treaty Collection database, at http://treaties.un.org/.

[10] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/10/44, 14 January 2009, Human Rights Council, 7th Session, Agenda Item 3, para. 31. See also UN GA, Report of the Secretary-General on the moratorium on the use of death penalty, A/63/293, August 15, 2008, para. 12.

[11] See UN GA Res. 62/149 Moratorium on the Use of the Death Penalty, December 18, 2007; UN GA Res. 63/168 Moratorium on the Use of the Death Penalty, December 18, 2008and UN GA Res. 65/206, Moratorium on the Use of the Death Penalty, December 21, 2010.

penalty once abolished. In its resolutions, the General Assembly indicated that it was mindful that "any miscarriage or failure of justice in the implementation of the death penalty is irreversible and irreparable" and that it was convinced that "a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights," and is consistent with the fact that "there is no conclusive evidence of the deterrent value of the death penalty."[12]

The African Human Rights System

18. In the African system, Article 4 of the African Charter on Human and Peoples' Rights ("African Charter") recognizes the right to life and does not refer expressly to the death penalty.[13] Article 5(3) of the African Charter on the Rights and the Welfare of the Child, however, guarantees the non-application of death penalty for crimes committed by children; and Article 4(2)(g) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa establishes that it shall not be applied to pregnant or nursing women.

19. The issue has such relevance in the African regional system that the African Commission on Human and Peoples' Rights ("African Commission") established a Working Group on the Death Penalty. The African Commission has issued resolutions in 1999 and 2008 calling on States to observe a moratorium on the execution of death sentences with a view to abolishing the death penalty.[14] Most recently, in November of 2010, the Working Group recommended that the African Commission proceed to draft a protocol to the African Charter concerning the abolition of the death penalty in Africa.[15]

The European Human Rights System

20. The approach to the death penalty in Europe has evolved from a system that viewed the death penalty as a permissible form of punishment in certain circumstances, to one in which it is prohibited in all circumstances. Some 60 years ago when the European Convention on Human Rights was drafted, the death penalty was not considered to violate international standards, and Article 2 accordingly indicates that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

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[12] See *e.g.* UN GA Res. 65/206, Moratorium on the Use of the Death Penalty, December 21, 2010.

[13] Article 4 of the African Charter provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

[14] ACHPR/Res 42 (XXVI) calling on States to consider observing a moratorium on the death penalty, adopted at the 26 the Ordinary Session of the African Commission on Human and Peoples' Rights held from 1st to 15th November 1999 in Kigali, Rwanda; ACHPR/Res.136(XXXXIIII).08: Resolution calling on State Parties to OBSERVE THE moratorium on the death penalty, 44th Ordinary Session held from 10th to 24th November 2008 in Abuja, Federal Republic of Nigeria, November 24th, 2008.

[15] Progress Report of the African Commission on Human and Peoples' Rights Working Group on the Death Penalty in Africa, presented by the Chairperson of the Working Group on the Death Penalty, Commissioner Zainabo Sylvie Kayitesi, 48th Ordinary Session of the African Commission, November 10-25, 2010, Banjul, The Gambia.

21. Within this process of evolution, in 1983 the Council of Europe adopted Protocol 6 to the European Convention on Human Rights establishing the abolition of the death penalty, with an exception in times of war or imminent threat of war.[16] Two decades later, in 2002, the Council of Europe adopted Protocol No. 13 concerning the abolition of the death penalty in all circumstances.[17] No execution has taken place on the territory of the Council of Europe member states since 1997. "As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment."[18] All Council of Europe Member States have either abolished the death penalty or instituted a moratorium on executions. The Council has made abolition of the death penalty a prerequisite for membership.[19] As such, issues concerning the death penalty rarely arise now, and when they do:

> The [European] Court takes as its starting point the nature of the right not to be subjected to the death penalty. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the Member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as 'convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings'.[20]

International Criminal Courts

22. The evolution of attitudes and approaches to the death penalty is also reflected in the establishment of international criminal tribunals and the penalties they may impose. Whereas the Nuremberg and Tokyo tribunals installed to judge crimes committed during World War II applied the death penalty,[21] the International Criminal

[16] Council of Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No. 11, Strasbourg, 28.IV.1983.

[17] Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Vilnius, 3.V.2002.

[18] ECHR, Ocalan v. Turkey (2005) 41 E.H.R.R. 45, para. 163.

[19] Following the opening for signature of Protocol No. 6, the Parliamentary Assembly of the Council of Europe established a practice whereby it required States wishing to join the Council of Europe to undertake to apply an immediate moratorium on executions, to delete the death penalty from their national legislation and to sign and ratify Protocol No. 6. All the member States of the Council of Europe have now signed Protocol No. 6 and all save Russia have ratified it. See ECHR, Al-Saadoon and Mufdhi v. UK, Application No. 61498/08, March 2, 2010, para. 116.

[20] ECHR, Al-Saadoon and Mufdhi v. UK, Application No. 61498/08, March 2, 2010, para. 115.

[21] See Article 27 of the Charter of the Nuremberg International Military Tribunal, annexed to the 1945 London Agreement for the Establishment of an International Military Tribunal, 8 August 1945, 82 UNTS 279; and

Continues…

Court established by the Rome Statute, which entered into force in 2002, excludes capital punishment as a possible penalty. Life imprisonment is the maximum penalty provided.[22] This is also the case for the range of special criminal tribunals established during the last two decades to judge war crimes in Yugoslavia, Rwanda, Sierra Leone and Camboya. The Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY, 1993), the International Criminal Tribunal for Rwanda (ICTR, 1994), the Special Court of Sierra Leone (SCSL, 2002) and the Extraordinary Chambers in the Courts of Cambodia (ECCC, 2004) all exclude the application of capital punishment as penalties.[23]

C. Some significant developments in the region

23. Over the last 15 years, in particular, the Commission and Court have dealt with a series of cases concerning the mandatory application of the death penalty in countries of the Caribbean, under which all persons convicted of murder were sentenced to death. Under that legal regime, judges had no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender. The sentence of death was imposed automatically, based on the nature of the charge, as opposed to the intrinsic gravity of the crime committed. In the late 1990's the Commission began receiving a significant number of petitions addressing this and other aspects of the death penalty, including 97 such petitions between 1996 and 2001, with the largest number filed against Trinidad and Tobago and Jamaica.[24]

24. The cases of Hilaire, Constantine and Benjamin (Trinidad and Tobago), Boyce and others (Barbados) and Dacosta Cadogan (Barbados) are examples of mandatory death penalty cases dealt with first by the Commission and then the Court. The laws at issue in these cases did not distinguish between different classifications of murder, or consider whether the perpetrator had the intent to kill. Under these laws the death penalty could be issued for crimes of differing degrees of seriousness, and sentencing could be inconsistent. In the Boyce case, four defendants were accused under identical facts. Two accepted plea bargains and were sentenced to 12 years in prison, while Mr. Boyce and Mr. Joseph opted to stand trial and were sentenced to death.

25. Through these and other cases, the Commission and Court established that the automatic imposition of the death penalty without consideration of the individual circumstances of the offence or the offender is incompatible with the rights to life, humane treatment and due process.

…continuation
Article 27 of the Charter of the Tokyo Military Tribunal for the trial of the major war criminals in the Far East, 19 January 1946, 1589 TIAS 3.

[22] Article 77 "Applicable Penalties", ICC Statute, entry into force 1 July 2002 (2187 UNTS 3).

[23] Article 24 of the ICTY Statute, Article 23 of the ICTR Statute, Article 19 of the SCSL Statute, and Article 3 of the ECCC Law, as amended in 2004.

[24] For a detailed analysis of the system's handling of these issues, see Brian Tittemore, "The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections," 13 Wm. & Mary Bill of Rts. J. 445 (2004).

26. The Commission's decision in the Hilaire case was the first by an international human rights body to evaluate the human rights implications of the mandatory death penalty.[25] The Commission, and later the Court, drew on standards that had been developed by certain national courts in interpreting international standards. The work of the Commission and Court in turn had an important influence on the development of further standards at the national level, and then by other international instances. At the national level, the Eastern Caribbean Court of Appeal was the first, in 2001, to make explicit reference to the Inter-American Commission's jurisprudence (McKenzie v. Jamaica and Baptiste v. Grenada) in concluding that the mandatory death penalty in St. Lucia and St. Vincent violated the prohibition of inhuman treatment. In conjunction with these developments, the Judicial Committee of the Privy Council helped give legal effect to the mechanisms of the regional system by prohibiting certain States from executing the death sentences of persons whose petitions were pending before the Commission or Court.

27. Within this context, courts of national jurisdiction have found the mandatory death penalty to be unconstitutional in countries including Saint Lucia (The Queen v. Hughes), Dominica (Balson v. The State), Belize (Reyes v. The Queen), The Bahamas (Bowe v. The Queen) and Grenada (Coard et al. v. Grenada), among other examples. Following this period of reexamination of the mandatory death penalty, a number of countries have abolished that aspect of the death penalty. The judges of Belize, Jamaica, the Bahamas, Saint Lucia, Grenada and Guyana, among others, now have the discretion to impose lesser sentences. Trinidad and Tobago and Barbados presently remain the only two countries in the region that retain the mandatory death penalty, and Barbados reports that it is in the process of adopting reforms to abolish it in light of the sentence issued by the Inter-American Court in the Boyce case.

28. It should be noted that developments in the inter-American system have also helped support advances in countries and systems outside the region. For example, in deciding a 2005 case (Kafantayeni v. The Attorney General), the High Court of Malawi cited a report of the Inter-American Commission in finding the mandatory death penalty unconstitutional.

29. These developments have taken place in a context marked by complexity and in some instances controversy. After the Judicial Committee of the Privy Council issued its decision in Pratt and Morgan -- indicating that execution following post-conviction delay in excess of 5 years could amount to cruel and inhuman treatment and that commutation should be the remedy -- certain countries began to express concern about the time required to process petitions before international instances. In May of 1998 the Republic of Trinidad and Tobago denounced the American Convention, the first State to do so. It indicated as the reason the failure of the Inter-American Commission to adhere to time frames proposed by the Government to avoid post-conviction delay and the so-called "death row phenomenon." In 1997 Jamaica withdrew from the First Optional Protocol to the ICCPR in relation to similar concerns about delay in the processing of individual petitions.

[25] Brian Tittemore, "The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections," 13 Wm. & Mary Bill of Rts. J. 445 (2004), p. 22.

30. During this same period, the Commission addressed the amplification of the death penalty in Guatemala to crimes to which it had not previously applied. Through Decrees issued between 1994 and 1996 (38-94, 14-95 and 81-96) the Congress of Guatemala adopted reforms to the Criminal Code that expanded the application of the death penalty to include not only kidnapping followed by murder, already classified as a capital crime, but also kidnapping not followed by murder, which was not. As indicated above, Article 4(2) of the American Convention expressly prohibits any amplification of the death penalty to new or different crimes. While it had been argued that the crimes of simple or aggravated kidnapping fell under the same legal heading, the Commission in its Fifth Report on Guatemala, and the Inter-American Court in its decision on the case of Raxcacó Reyes established that the decisive factor is not the title attributed to a given provision but rather the content and specifically the legal interests and factual assumptions at issue. The approach of the organs of the system to any possible amplification of the death penalty has been to apply a strict standard of review.

31. The organs of the system have also dealt with a series of cases concerning the absence of an appropriate procedure in Guatemala for persons sentenced to death to seek pardon or clemency. As noted above, Article 4(6) of the American Convention stipulates that any person sentenced to death has the right to apply for amnesty, pardon, or commutation of sentence, and may not be executed while such a petition is pending. As the Inter-American Court established in the case of Fermín Ramírez, the right to seek pardon or commutation "forms part of the international *corpus juris*, specifically of the American Convention and the International Pact of Civil and Political Rights."[26] "Therefore, since the internal legislation does not establish any attribution so that a State body has the power to [analyze] and decide upon the measures of grace and being this the explanation for the denial of the measure of grace presented by Mr. Fermín Ramírez, the State failed to comply with the obligations derived from Article 4(6)…"[27].

32. Against this backdrop, it is important to emphasize that Guatemala has not carried out any executions in recent years. In 2000, the Constitutional Court suspended the execution of death sentences because of the absence of a proper procedure to decide upon requests for commutation. President Alvaro Colom twice vetoed legislation that proposed to establish such a procedure and thereby reinstate the possibility for executions to go forward.[28] President Colom indicated that the draft legislation was unconstitutional and incompatible with the country's obligations under Article 4 of the American Convention, and that resumption of executions would violate the country's international obligations. Further, in recent years a series of decisions have been handed down by the Guatemalan courts commuting sentences of death.

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[26] IACourtHR, Fermín Ramírez v. Guatemala. Merits, Reparations and Costs. Judgment of June 20, 2005, Ser C No. 126, para. 109, citing in the same sense Inter-American Commission on Human Rights, *Fifth Report on the Situation of Human Rights in Guatemala*, April 6, 2001, Chapter V; and MINUGUA, *Eleventh Report on Human Rights,* September 2000, para. 26.

[27] I/A Court H. R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 110.

[28] "Colom vetó pena de muerte," BBC Mundo, 15 March, 2008, at http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7297000/7297884.stm (in Spanish).

33. The Commission has examined a range of other issues including, for example, the execution of juvenile offenders, racial discrimination in capital trials and sentencing, and due process issues concerning the failure to comply with the notification requirement of the Vienna Convention on Consular Relations in the execution of foreign nationals in the United States. Information on each of these issues is provided in the extracts that follow, but the Commission considers it important to briefly refer to the cases that have arisen concerning the imposition of death sentences in the case of foreign nationals who were not notified of their right to make contact with a consular official, in violation of the terms of the Vienna Convention on Consular Relations. This question was brought before the Inter-American Commission in a series of individual petitions and precautionary measures concerning the United States; before the Inter-American Court in the request for Advisory Opinion OC-16 (a process in which the United States presented observations and participated in the public hearing); before the International Court of Justice ("ICJ") in the Case concerning Avena and Other Mexican Nationals (Mex. v. US); and before national courts.

34. Through their analysis of this issue, the Inter-American Commission and Court have clarified that the right to notification, and to contact a consular official, form part of the due process guarantees that apply in the prosecution of a foreign national. For example, the Leal case was decided by the Commission applying this standard and requiring that the State refrain from executing his sentence until there had been full judicial review and reconsideration. Mr. Leal was executed in 2011 without that requirement having been met.

35. The State's position in this regard reflects a grave underlying challenge related to the federal and state jurisdictions in the United States. The State maintains that it is committed to improving its compliance with its obligations under the Vienna Convention on Consular Relations, and recognizes that the decision of the ICJ in the Avena *et al.* case imposed an international obligation on it to ensure that Mr. Leal was not executed prior to the judicial reconsideration of his conviction and sentence. The US reports that the State Department took measures to urge authorities in Texas to refrain from executing him, and with that intervention obtained a deferral of execution until July of 2011. At that time, the draft "Consular Notification Compliance Act of 2011" ("CNCA") had been brought before Congress, legislation that would provide for the judicial review and reconsideration of claims of foreign nationals sentenced to capital crimes without having received consular notification and access. The United States Government transmitted the communications of the Inter-American Commission to Texas state authorities, and filed an amicus brief before the US Supreme Court supporting an application for a stay of execution in order for Congress to consider the draft legislation that could have opened the way for reconsideration of Mr. Leal's claims. However, the application was denied, and notwithstanding the position of the State Department, Texas proceeded immediately with the execution.

36. Developments in the region demonstrate that, over the last 15 years or so, most if not all of the countries of the region that retain the death penalty have engaged in a serious re-examination of relevant laws and practices. However, crucial challenges remain.

37. Even in countries that maintain a firm retentionist position, practices and opinions have changed. A study issued by the Death Penalty Information Center at the close of 2011 concerning capital punishment in the United States indicates that the number of executions, death sentences and states with the death penalty all dropped from previous years.[29] The same report indicates that, for the first time since the death penalty was reintroduced in 1976, the number of new death sentences was less than 100, with approximately 78 such sentences reported.[30] In 2011, Illinois abolished the death penalty, joining three other states that have done so in the last several years: New Mexico, New Jersey and New York. Also, in 2011 the governor of Oregon imposed a moratorium on executions during his term.

38. It is also relevant to analyze public opinion and the factors upon which it is formed. While some countries maintain a strongly retentionist position in general, opinions about the death penalty are not necessarily general. For example, a recent study analyzing public opinion on the mandatory death penalty in Trinidad found that while the death penalty continues to find popular support, that support "was contingent on it being enforced with no possibility that an innocent person could be executed" and those surveyed largely favored that the penalty should be discretionary, imposed by a judge on the basis of an individualized consideration of the circumstances of the offence and the offender.[31]

D. Key issues regarding the death penalty in the inter-American system

39. The compilation of standards in this report provides information on a broad range of issues that the Commission has dealt with concerning the death penalty. There are three crosscutting issues to which the Commission wishes to draw particular attention.

1. The standard of review in death penalty cases: strict scrutiny

40. Over the last 15 years, the Commission has developed a well established approach to matters involving the death penalty based on a standard of heightened, strict scrutiny. The Commission has indicated that a heightened standard of scrutiny is required in capital punishment cases because:

> The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the

[29] The Death Penalty in 2011: Year End Report, report summary quoting the report's author, at http://www.deathpenaltyinfo.org/.

[30] Death Penalty Information Center.

[31] Roger Hood and Florence Seemungal, "Public Opinion on the Mandatory Death Penalty in Trinidad," A Report to the Death Penalty Project and the Rights Advocacy Project of the University of West Indies Faculty of Law, 2011, p. viii.

> application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty….[32]

41. As the Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees:

> due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.[33]

42. The Inter-American Court has similarly confirmed that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."[34]

43. The Commission has accordingly concluded that the execution of a death sentence pursuant to summary proceedings that failed to offer an adequate right to defense would constitute an arbitrary deprivation of life. The Commission's 2006 report on the case of Lorenzo Enrique Copello Castillo *et al.* serves as a clear example:

> On the basis of the foregoing, the Commission considers that Messrs. Copello, Sevilla, and Martínez were tried and condemned to death by a court that did not meet the requisite standards of impartiality and independence, by means of an expedited summary procedure that did not allow them to exercise their right to an adequate defense, and the conduct for which they were accused was subjected to a criminal definition that was inappropriate.[35]

2. Conditions on death row

44. The Inter-American Commission has dedicated sustained attention to the situation of persons deprived of liberty in the Americas. In 2004, the Commission established a Rapporteurship on the Rights of Persons Deprived of Liberty, and deals with

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[32] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 122.

[33] IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, paras. 34.

[34] I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 136.

[35] IACHR, Report No. 68/06, Case 12.477, Merits, Cuba, October 21, 2006, para. 114.

the rights of such persons through working visits, thematic reports, precautionary measures and individual cases. The Commission has observed consistently, across these different mechanisms, and in countries throughout the region, that the conditions afforded to death row prisoners are most often inhumane.

45. In many instances this inhumane treatment is due to conditions of physical deprivation, which include insufficient food, water and sanitation. In other instances, it is due to prolonged solitary confinement, which can extend over many years, and the absence of opportunities to leave their cells for exercise. In the Boyce case, the Commission presented evidence before the Inter-American Court that death row prisoners had been held in cages for approximately two and a half years.

46. In some of the cases that have been decided by the Commission and Court, death row prisoners have been read warrants of execution one or more times, even while they had a petition pending before the inter-American system, and notwithstanding that some of those sentences were eventually commuted to life imprisonment. In the Hilaire, Constantine and Benjamin case, the showers used by the death row prisoners were located in close proximity to the gallows. The Commission and Court evaluate the treatment of prisoners starting from the point that the State is the guarantor of the rights of persons in its custody, and is therefore obliged to ensure that the rights of such persons are only restricted to the extent this corresponds to the penalty and no further.[36]

3. Execution of the death penalty in violation of precautionary and provisional measures

47. The Commission has consistently and emphatically condemned the practice by certain States of executing persons sentenced to death in violation of precautionary measures issued by it, including in instances where the Commission had before it a pending petition presenting allegation of due process or other violations in the prosecution that produced the sentence.

48. Both the Commission and the Inter-American Court have indicated that the execution of a person under precautionary or provisional measures respectively, constitutes an aggravated violation of the right to life. The execution of a person who has presented a petition pending before the Inter-American system constitutes interference with the right to petition, a right of all inhabitants of the region. An execution under those circumstances obstructs the Commission's or Court's ability to effectively investigate and issue determinations on capital cases.

49. As explained in more detail below, this has been a profound concern with respect to death penalty cases against the United States. In dozens of instances the IACHR has issued precautionary measures requesting that the execution of death row inmates in the United States be stayed until the Commission had issued a determination on their petitions, and in dozens of instances the State has executed the prisoners in violation of

[36] See generally, IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II. Doc. 64. December 31, 2011.

those measures. The Commission considers this incompliance with the principles of the system to be of the utmost gravity.

50. The Commission concludes the present report with a series of recommendations to the Member States. These recommendations are based on the Commission's standards concerning the death penalty developed through its work with individual petitions, precautionary measures, country visits and reports, and thematic approaches, and seek to assist the Member States in meeting their international human rights obligations. With this objective, the Commission recommends that the Member States:

- Impose a moratorium on executions as a step toward the gradual disappearance of this penalty;
- Ratify the Protocol to the American Convention on Human Rights to Abolish the Death Penalty;
- Refrain from any measure that would expand the application of the death penalty or reintroduce it;
- Take any measures necessary to ensure compliance with the strictest standards of due process in capital cases;
- Adopt any steps required to ensure that domestic legal standards conform to the heightened level of review applicable in death penalty cases; and
- Ensure full compliance with decisions of the Inter-American Commission and Court, and specifically with decisions concerning individual death penalty cases and precautionary and provisional measures.

II. METHODOLOGY

51. This report is composed of excerpts from the most important decisions issued by the Inter-American Commission on Human Rights in the last fifteen years regarding the death penalty, with references to decisions of the Inter-American Court of Human Rights where pertinent. The rationale behind this timeframe is that during this period the Commission received a large number of petitions concerning the death penalty, which provided the basis for it to articulate and consolidate its approach of applying a strict, heightened standard of review in such cases. Excerpts of decisions, reports, judgments, requests for precautionary measures or orders for provisional measures cited refer to the application of the death penalty as has been examined by the organs of the inter-American System in nine OAS Member States: Barbados, Cuba, Guatemala, Guyana, Grenada, Jamaica, The Bahamas, Trinidad and Tobago, and the United States. With this report, the Commission aims at compiling the standards as developed in the inter-American human rights system regarding the restrictions on the application of the death penalty, thereby reiterating States' obligations under the inter-American human rights system, under either the American Declaration or the American Convention.

52. With respect to the sources used, the vast majority are reports issued on the merits by the Commission, under the individual petition system. The report also includes citations from IACHR country reports or chapters in annual reports, applications to the Inter-American Court of Human Rights, judgments and advisory opinions from this tribunal, when applicable. Reference is also made to admissibility decisions, only to note emerging issues or questions that have not been extensively addressed by the Commission in merits decisions yet. Press communiqués, when applicable are also included, inasmuch as they highlight execution of prisoners in contempt of decisions or requests for precautionary measures by the IACHR.

53. Regarding the structure, the report is divided into several chapters. Chapter III refers to execution by OAS State Members in defiance of decisions from the inter-American human rights system, including precautionary measures and decisions on the merits adopted by the Commission, and provisional measures issued by the Court. Chapter IV compiles excerpts on some of the general principles derived from the Convention and the Declaration, as they have been developed in the jurisprudence of the organs of the system. Chapter V reviews the most important standards established by the Commission and Court regarding due process guarantees in death penalty cases, based on the issues that have emerged from the examination of human rights violations in the region. Chapter VI compiles excerpts regarding the obligation of non discrimination and equal protection; while Chapter VII reviews the standards related to the right to humane treatment and punishment of persons sentenced to death.

54. The subsections in the chapters are introduced with a text box highlighting the most important standard developed by the jurisprudence or doctrine. Each section includes excerpts of the most recent decisions that make reference to previous decisions on the same issue[37]. Extracts from previous reports are included inasmuch as they reveal standards not found thereafter in the jurisprudence or present specific issues particular to a Member State's domestic law. For example, the section referring to the application of the mandatory death penalty includes various quotes on the same issue regarding different States, as has been dealt by the Commission or Court, reflecting different domestic laws and the specific analysis of their compatibility with the American Declaration and the American Convention. The rest of the decisions dealing with a specific issue, as they reiterate standards that have been previously cited, are referred to in the footnotes.

55. The compilation presented in this report is intended to be descriptive and to organize precedents according to common themes. The IACHR anticipates that this systematization will serve as reference on the standards developed in the inter-American human rights system, useful for petitioners and States within the region and abroad. The Commission hopes that this report will further promote an understanding and dissemination of its standards on the strict limitations to the application of the death penalty. Finally, the Commission wishes to reiterate through the compilation of these

[37] It is highly recommended that the original sources from the IACHR or the Court are consulted for citation purposes. The excerpts of decisions or the textboxes that are included in this repot are included solely for the purposes of consultation or reference.

standards, the OAS Member States' international obligations on human rights to comply with the decisions, precautionary measures, judgments and provisional measures adopted by the Commission and Court.

III. EXECUTION IN CONTEMPT OF DECISIONS BY BODIES OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

56. Full compliance with the decisions of the bodies of the inter-American Human Rights System is essential for ensuring that human rights have full force in the OAS Member States, and for strengthening the Inter-American system's role in protecting human rights in the region. In this regard, the Commission wishes to reiterate:

> the OAS General Assembly, in its resolution AG/RES. 2522 (XXXIX-O/09), "Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights," urged the member states to follow up on the recommendations of the Inter-American Commission on Human Rights (operative paragraph 3.b) and to continue to take appropriate action in connection with the annual reports of the Commission, in the context of the Permanent Council and the General Assembly of the Organization (operative paragraph 3.c). Likewise, in its resolution AG/RES. 2521 (XXXIX-O/09), "Strengthening of Human Rights Systems pursuant to the mandates arising from the Summits of the Americas," it reaffirmed the intent of the OAS to continue taking concrete measures aimed at implementing the mandates of the Third Summit of the Americas, including follow-up of the recommendations of the Inter-American Commission on Human Rights (operative paragraph 1.b), and instructed the Permanent Council to continue to consider ways to promote the follow-up of the recommendations of the Inter-American Commission on Human Rights by member states of the Organization (operative paragraph 3.e).[38]

57. Although there is an increasing tendency by OAS Member States to comply with the decisions from the Commission and the Court; this has not always been the case concerning decisions, precautionary measures or provisional measures related to the application of the death penalty.

58. Execution of detainees has been carried out by OAS Member States in defiance of the Inter-American Commission's decisions on the merits, signaling a grave violation of international obligations.[39] For example, the United States executed Medellín and Leal García on August 5, 2008 and July 7, 2011, respectively, after Report 45/08 was

[38] See IACHR, Annual Report 2010, Chapter III.D, para. 78.

[39] See, for example, the following cases in the U.S.: Jeffrey Timothy Landrigan, José Ernesto Medellín, Humberto Leal García, and Juan Raul Garza. See also the case of Anthony Briggs in Trinidad and Tobago..

adopted on July 24, 2008.[40] With respect to the execution of Medellín, the Commission held:[41]

[40] In its report on the admissibility and the merits (Report No. 45/08), the Commission concluded:

157. The Commission hereby concludes that the State is responsible for violations of Articles I, XVIII and XXVI of the American Declaration against Messrs. Medellín, Ramírez Cardenas and Leal García in respect of the criminal proceedings leading to the imposition of the death penalty against them. The Commission also concludes that, should the State execute them pursuant to the criminal proceedings at issue in this case, it would commit an irreparable violation of the fundamental right to life under Article I of the American Declaration.

158. According to the information presently available, the 339th District Court of Harris County, Texas, has scheduled Mr. Medellín's execution for August 5, 2008. In this connection, the Commission recalls its jurisprudence concerning the legal effect of its precautionary measures in the context of capital punishment cases. As the Commission has emphasized on numerous occasions, it is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending the completion of the proceedings before the IACHR, including implementation of the Commission's final recommendations, undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances. (footnote omitted).

159. In light of these fundamental principles, and in light of the Commission's findings in the present report, the Commission hereby reiterates its requests of December 6, 2006 and January 30, 2007, pursuant to Article 25 of its Rules of Procedure that the United States take the necessary measures to preserve Messrs. Medellín's, Ramírez Cardenas' and Leal García's lives and physical integrity pending the implementation of the Commission's recommendations in the matter.

160. In accordance with the analysis and the conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE UNITED STATES:

1. Vacate the death sentences imposed and provide the victims with an effective remedy, which includes a new trial in accordance with the equality, due process and fair trial protections, prescribed under Articles I, XVIII and XXVI of the American Declaration, including the right to competent legal representation.

2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.

3. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and, if convicted, sentenced in accordance with the rights established in the American Declaration, including Articles I, XVIII and XXVI of the Declaration, and in particular by prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.

4. Review its laws, procedures and practices to ensure that persons who are accused of capital crimes can apply for amnesty, pardon or commutation of sentence with minimal fairness guarantees, including the right to an impartial hearing.

Continues…

> (…) the execution of the death sentence against Mr. Medellin represents a failure on the part of the State to implement both the precautionary measures and the recommendations issued on the merits of the claims on July 24, 2008 and notified to the State on that same date.
>
> By permitting Mr. Medellin's execution to proceed in these circumstances, the IACHR considers that the United States failed to act in accordance with its fundamental human rights obligations as a member of the Organization of American States. This is not the first time the United States has executed a person who has been the beneficiary of precautionary measures granted by the IACHR. The Inter-American Commission views the State's omissions in this regard as extremely grave and calls upon the United States to take all steps necessary to comply in any future matter with the IACHR's requests for precautionary measures.

59. Precautionary measures have proven an effective tool through which the Commission has protected and safeguarded the life and personal integrity of persons in the region. In capital punishment cases that have reached the Commission in the last fifteen years, the mechanism of precautionary measures enables the IACHR to request the State to stay the execution, until it has had an opportunity to examine the merits of the complaint.[42]

60. Specifically regarding the importance of complying with precautionary measures in capital punishment cases, the Commission has affirmed:[43]

> In its decision in the case of Juan Raul Garza v. United States, the Commission held that in capital cases, the failure of an OAS member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state's human rights obligations.[44] The Commission premised

…continuation

IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 157-160.

[41] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 167-168.

[42] See *e.g.* IACHR, PM 301-11, Manuel Valle, United States, available at: http://www.oas.org/en/iachr/decisions/precautionary.asp.

[43] IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, paras. 90-92. See also, *e.g.*, IACHR, Report No. 101/03, Case 12.412, Napoleon Beazley, United States, December 29, 2003, paras. 51-53.

[44] Case 12.243, Report 52/01, Juan Raul Garza v. United States, Annual Report of the IACHR 2000, para. 117. See similarly IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Doc. OEA/Ser.L/V/II.111 doc.21 rev. (6 April 2001) [IACHR, Fifth Report on the Situation of Human Rights in Guatemala, 2001], paras. 71, 72.

these obligations on a finding that OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission's Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission's mandate.[45] The Commission found support for this determination in its own jurisprudence as well as the findings of other regional and international adjudicative bodies, including the UN Human Rights Committee, the European Court of Human Rights and the International Court of Justice.[46]

Upon carefully considering the observations of the parties in this case, the Commission finds no grounds for varying its previous findings on this issue. The State has emphasized differences in the nature of the governing instruments for the various international bodies under consideration. However, in the Commission' view, the fundamental precepts upon which states' obligations are based, namely preserving the essential effectiveness of the supervisory bodies and preventing irreparable harm to the rights of their constituents, apply equally to all of the bodies concerned, regardless of the particular modality through which states choose to create those bodies or define their mandates.

Accordingly, in the present case, the Commission considers that the State abrogated its international obligations under the OAS Charter and the American Declaration by failing to implement the Commission's request to preserve Mr. Suarez Medina's life and integrity until the Commission decided upon his petition. In addition, by scheduling Mr. Suarez Medina's execution on fourteen occasions based upon death sentence that was imposed in contravention of Mr. Suarez Medina's rights to due process and to a fair trial under Articles XVIII and XXVI of the American Declaration and was therefore arbitrary, and by ultimately executing Mr. Suarez Medina on August 14, 2002, the Commission considers that the State is responsible for serious violations of Mr. Suarez Medina's right to life, his right to petition for a remedy, and his right not to receive cruel, infamous or unusual punishment, contrary to Articles I, XXIV and XXVI of the American Declaration.

61. In the view of the Commission, the jurisprudence of the system "articulates a principle common to the functioning of international adjudicative systems that requires the systems' member states to implement interim or precautionary measures

[45] *Id.*

[46] *Id*., citing International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, Nº 104, paras. 22-28; United Nations Human Rights Committee, Dante Piandiong and others v. The Philippines, Communication Nº 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), paras. 5.1-5.4; Eur. Court H.R., Affaire Mamatkulov et Abdurasulovic c. Turkey, Reqs. Nos. 46827/99, 46951/99 (6 February 2003), paras. 104-107.

when doing so is necessary to preserve the very purposes for which the systems were created and to prevent irreparable harm to the parties whose interests are determined through those systems."[47]

62. In this connection, the Commission wishes to recognize the decision of the Texas judicial system, adopted in the case of Moreno Ramos, in which the presiding judge agreed to postpone setting an execution date in light of the petition before the IACHR. The Commission then indicated:[48]

> The Commission wishes to note that, according to the most recent information available, an execution date has not yet been scheduled for Mr. Moreno Ramos. According to the Petitioners' submissions during the March 5, 2004 hearing before the Commission, this state of affairs resulted from a November 12, 2002 hearing before the 93rd District Court of Hidalgo, Texas, where the presiding judge, with the concurrence of Mr. Moreno Ramos' attorneys and the assistant criminal district attorney, agreed to postpone setting an execution date in light of the petition before the Commission and its March 7, 2002 request for precautionary measures. The Commission observes that this arrangement has given practical effect to the Commission's precautionary measures by preserving Mr. Moreno Ramos' life and physical integrity pending the Commission's consideration of his complaint, and the Commission commends the efforts taken within the Texas judicial system to preserve Mr. Moreno Ramos' right of effective access to the inter-American human rights system. Consistent with this precedent, the Commission also calls upon the State to implement the Commission's final recommendations in this case and thereby ensure Mr. Moreno Ramos' right to benefit from the results of the Commission's deliberations.

63. Notwithstanding the cited precedents, the Commission has witnessed how in the last fifteen years, various OAS Member States have executed beneficiaries of precautionary measures issued by the Commission, in disregard of their international human rights obligations.

64. In the last fifteen years several OAS Member States have executed persons sentenced to the death penalty in contempt of precautionary measures granted by the Commission, including in cases or petitions presenting serious allegations of violations

[47] IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, para. 90.

[48] IACHR, Report No. 1/05, Case 12.430, Roberto Moreno Ramos, United States, January 28, 2005, para. 89.

of due process. Some examples include executions by Guatemala,[49] The Bahamas,[50] and the United States.[51]

[49] **Roberto Girón** and **Pedro Castillo Mendoza (executed in 1996)**. See IACHR, Precautionary Measures granted by the IACHR in 1996; **Manuel Martínez Coronado (executed in 1998)**. See IACHR, Fifth Report on the Situation of Human Rights in Guatemala, 2001, para. 72. In this regard, the Commission indicated in its 2001 *Fifth Report on the Human Rights Situation in Guatemala* (Chapter V, paras 71-72):

> On three occasions in 1997 and 1998, the Commission addressed the State of Guatemala in relation to the case of Manuel Martínez Coronado (case 11.834) for the purpose of requesting precautionary measures to stay his pending execution. The Commission had opened case 11.834 in October of 1997, and requested the measures so as to be able to examine the claims raised according to its procedures. In contrast to the positive action taken recently by President Portillo in the case of Pedro Rax, the previous administration rejected the request for precautionary measures, indicating that domestic remedies had been exhausted and the judicial system did not contemplate the legal faculties to adopt such measures to stay an execution at that stage of the process. Manuel Martínez was executed by lethal injection on February 10, 1998.
>
> Requests for special measures are framed in terms of the competence of the Commission to act on petitions under Article 41(f) of the Convention, and to request precautionary measures when necessary to avoid irreparable harm to persons under Article 29 of its Regulations. Such measures enable the Commission to maintain the efficacy of its Convention-mandated responsibility of examining and pronouncing upon individual cases. It is, moreover, a general principle of international law that states are required to comply with their international obligations in good faith, and that internal law (including deficiencies therein) may not be invoked to evade such compliance. Every member state of the inter-American human rights system is obliged to give effect to its norms; accordingly, the Commission found the response of the State in the Martínez case to be in breach of that duty. (Guatemala," *Annual Report of the IACHR 1997*, OEA/Ser.L/V/II.95, Doc. 7 rev., Mar. 14, 1997).

[50] **David Mitchell (executed in 2000)**, IACHR, Precautionary Measures granted by the IACHR, 1999.

[51] **Manuel Valle (executed in 2011)**, IACHR, Press Release No. 106/11 "IACHR Condemns Execution of Manuel Valle in the United States", October 6, 2011; **Mark Anthony Stroman (executed in 2011)**, IACHR, Press Release No. 74/11, "IACHR Condemns Execution of Mark Anthony Stroman in the United States", July 22, 2011; **Humberto Leal García (executed in 2011)**, IACHR, Press Release No. 67/11 "IACHR Condemns Execution of Humberto Leal García in the United States", July 8, 2011 (see related IACHR, Press Release No. 65/11 "IACHR Urges United States to Suspend Execution of Leal García", July 1, 2011); **Jeffrey Timothy Landrigan (executed in 2010)**, IACHR, Press Release No. 109/10, "IACHR Concludes its 140th Period of Sessions", November 5, 2010, para. 9, (see related IACHR, Press Release No. 107/10 "IACHR Concludes that the United States Violated Landrigan's Basic Rights and Asks that his Execution be Suspended", October 22, 2010, and IACHR, Press Release No. 105/10 "IACHR Urges United States to Suspend Execution of Jeffrey Timothy Landrigan", October 21, 2010); **David Powell (executed in 2010)** and **Ronnie Lee Gardner (executed in 2010)**, IACHR, Press Release No. 63/10 "IACHR Condemns Execution of Two People in the United States in Contempt of Precautionary Measures" (David Powell and Ronnie Lee Gardner), June 21, 2010; **Heliberto Chi Aceituno (executed in 2008)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19, 131; see also IACHR, Press Release No. 35/08 "IACHR Condemns Execution of Heliberto Chi Aceituno", August 8, 2008; **José Ernesto Medellín (executed in 2008)**, IACHR, Press Release No. 33/08 "IACHR Condemns Execution of José Ernesto Medellín", August 6, 2008; **Philip Ray Workman (executed in 2007)**, IACHR, Report No. 33/06, Petition 12.261, Admissibility, Philip Workman, United States, March 14, 2006, para. 10; see also "Philip Ray Workman. Executed on May 9, 2007" http://www.clarkprosecutor.org/html/death/US/workman1075.htm; **Jaime Elizalde, Jr. (executed in 2006)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19; **Angel Maturino Resendiz (executed in 2006)**, IACHR, Press Release No. 22/06 "IACHR Condemns Execution of Angel Maturino Resendiz by the United States", June 28, 2006; **Marlin Gray (executed in 2005)**, IACHR, Press Release No. 35/05, "IACHR Reports on Human Rights Situation at the Conclusion of its Session", October 28, 2005; **Troy Albert Kunkle (executed in 2005)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19; **Stephen Anthony Mobley (executed in 2005)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey

Continues…

65. Trinidad and Tobago has also failed to comply with provisional measures issued by the Inter-American Court in cases of death penalty, carrying out executions.[52]

…continuation

et al., Admissibility, United States, March 24, 2011, paras. 1, 19; see also IACHR, Precautionary Measures granted by the IACHR in 2005, para. 42; **Robert Karl Hicks (executed in 2004)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19, 113; see also IACHR, Precautionary Measures granted by the IACHR in 2004, para. 48; **James Brown (executed in 2003)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19, 107; **Larry Eugene Moon (executed in 2003)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19; see also IACHR, Precautionary Measures granted by the IACHR in 2003, para. 62; **Edward Hartman (executed in 2003)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19; see IACHR, Precautionary Measures granted by the IACHR in 2003, para. 64; **John Elliot (executed in 2003)**, IACHR, Report No. 68/04, Petition 28-03, John Elliot, Admissibility, United States, October 14, 2004, paras. 1, 41; see also IACHR, Precautionary Measures granted by the IACHR in 2003, para. 63; **Anthony Green (executed in 2002)**, IACHR, Precautionary Measures granted by the IACHR in 2002, para. 84; **Tracey Lee Housel (executed in 2002)**, IACHR, Report No. 16/04, Petition 129-02, Tracy Lee Housel, Admissibility, United States, February 27, 2004, para. 42; see also IACHR, Precautionary Measures granted by the IACHR in 2002, para. 78; **James Rexford Powell (executed in 2002)**, IACHR, Precautionary Measures granted by the IACHR in 2002, para. 86; **Walter Mickens (executed in 2002)**, IACHR, Precautionary Measures granted by the IACHR in 2002, para. 82; **Toronto Markkey Patterson (executed in 2002)**, IACHR, Report No. 25/05, Case 12.439, Merits, Toronto Markkey Patterson, United States, March 7, 2005, paras. 1, 46; see also IACHR, Precautionary Measures granted by the IACHR in 2002, para. 83; **Javier Suárez Medina (executed in 2002)**, IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, para 1; see also IACHR, Precautionary Measures granted by the IACHR in 2002, para. 85; **Napoleon Beazley (executed in 2002)**, IACHR, Report No. 101/03, Case 12.412, Napoleon Beazley, United States, December 29, 2003, para. 49; **Juan Raul Garza (executed in 2001)**, IACHR, Annual Report 2009, Chapter III. D "Status of compliance with the recommendations of the IACHR", OEA/Ser.L/V/II. Doc. 51, corr. 1, 30 December 2009, reference to Case 12.243, Report N° 52/01, Juan Raul Garza (United States), para. 795 ("By note dated March 6, 2007, the State informed the Commission that Mr. Garza had been executed in June of 2001"); **Shaka Sankofa (executed in 2000)**, IACHR, Press Release 9/00, "Execution of Shaka Sankofa, formerly known as Gary Graham, in the State of Texas on June 22, 2000", June 28, 2000; **Miguel Ángel Flores (executed in 2000)**, IACHR, Report No. 116/11, Petition 12.333, Admisibility, Miguel Ángel Flores, United States, July 22, 2011, paras. 2, 7, 8; see also, IACHR, Press Release No. 17/00, "Execution in the United States of Miguel Angel Flores", November 13, 2000; **Douglas Christopher Thomas (executed in 2000)**, IACHR, Precautionary Measures granted by the IACHR in 2000, para. 47; **James Wilson Chambers (executed in 2000)**, IACHR, Report No. 117/11, Petition P-12.341, Admissibility, James Wilson Chambers, United States, July 22, 2011, paras. 2, 5; see also IACHR, Precautionary Measures granted by the IACHR in 2000, para. 54; **David Leisure (executed in 1999)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19, 105; see also IACHR, Precautionary Measures granted by the IACHR in 1999, para. 68; **Joseph Stanley Faulder (executed in 1999)**, see IACHR, Precautionary Measures granted by the IACHR in 1999, para. 66; **Sean Sellers (executed in 1999)**, IACHR, Precautionary Measures granted by the IACHR in 1998, para. 23; **Allan Jeffrey Bannister (executed in 1997)**, IACHR, Precautionary Measures granted by the IACHR in 1997; **Clarence Allen Lackey (executed in 1997)**, IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, paras. 1, 19; and **Richard Steven Zeitvogel (executed in 1996),** IACHR, Precautionary Measures granted by the IACHR in 1996; see also Missouri Death Row, Capital Punishment Missouri, State of Missouri v. Richard Steven Zeitvogel, December 11, 2008, available at: http://missourideathrow.com/2008/12/zeitvogel_richard/.

[52] **Joey Ramiah (executed in 1999)**, I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002. Series C No. 94, para. 84 (r); and **Anthony Briggs (executed in 1999)**, see I/A Court H.R., *James et al. Provisional Measures*. Order of August 16, 2000, Trinidad and Tobago, operative paragraphs 4, 12.

Regarding Trinidad and Tobago's execution in contempt of provisional measures the Court has affirmed:[53]

> In an Order dated May 25, 1999, the Court directed Trinidad and Tobago to take all necessary measures to preserve the life of Joey Ramiah, among others (*supra* para. 29), so that his case could continue being processed before the inter-American system, specifically before the Commission.[54] This request was reiterated by the Court and its President in later Orders.[55]
>
> Despite the Provisional Measures expressly ordered by the Court, the State executed Joey Ramiah on June 4, 1999. On June 7, 1999, the Commission advised the Court of this execution.[56] Despite having been duly notified by the Court, the State claimed that it had not received any order related to the adoption of protective measures in favour of Joey Ramiah.[57]
>
> The Court finds that the execution of Joey Ramiah by Trinidad and Tobago constitutes an arbitrary deprivation of the right to life. This situation is aggravated because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed pending the resolution of the case by the inter-American human rights system.
>
> The State of Trinidad and Tobago has caused irreparable harm to the detriment of Joey Ramiah, by reason of its disregard of a direct order of the Court and its deliberate decision to order the execution of this victim.
>
> The Court reiterates that the State of Trinidad and Tobago arbitrarily deprived Joey Ramiah of the right to life (*supra* paras. 197 and 198). This Tribunal emphasizes the seriousness of the State's non-compliance in virtue of the execution of the victim despite the existence of Provisional Measures in his favour, and as such finds the State responsible for violating Article 4 of the American Convention.

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[53] I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case*. Judgment of June 21, 2002. Series C No. 94, paras. 196-200.

[54] *Cf.* I/A Court H.R., *James et al. Provisional Measures.* Order of May 25, 1999. Series E No. 2, Operative Paragraph 2(b).

[55] *Cf.* I/A Court H.R., *James et al. Provisional Measures.* Order of June 14, 1998, August 29, 1998 and May 25, 1999. Series E No. 2.

[56] *Cf.* I/A Court H.R., *James et al. Provisional Measures.* Order of August 16, 2000. Series E No. 3, having seen 1 and 4.

[57] Statement from the State of September 4, 2000, in which it presented information about the circumstances that led to the execution of Joey Ramiah, *Cf.* I/A Court H.R., *James et al. Provisional Measures.* Order of November 24, 2000. Series E No. 3, having seen 3.

66. In light of the above cited precedents, and in the context of the standards that are cited in this report, the Commission wishes to reiterate Member States' obligations to comply with decisions and orders from both the Commission and the Court, in particular in capital punishment cases. In this regard, the Commission maintains a number of precautionary measures, which OAS Member States are required to respect.

IV. GENERAL PRINCIPLES GOVERNING THE IMPOSITION OF THE DEATH PENALTY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

A. Standard of Review and "Heightened Scrutiny"

The IACHR applies a "heightened level of scrutiny" in deciding capital punishment cases. This approach requires in particular strict adherence to the rules and principles of due process and fair trial in the context of capital cases.

67. In this regard, the Commission stated in a 2009 report: [58]

> (…) the Commission wishes to reaffirm and reiterate its well-established doctrine that it will apply a heightened level of scrutiny in deciding capital punishment cases. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty[59] and has been articulated and applied by the Commission in previous capital cases before it.[60]

[58] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 122-123.

[59] *See e.g.* I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); U.N.H.R.C., Baboheram-Adhin et al. v. Suriname, Communication Nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, U.N. Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life).

[60] IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, paras. 170-171; IACHR, Report Nº 38/00, Case 11.743, Rudolph Baptiste, Grenada, April 13, 2000, paras. 64-66; IACHR, Report Nº 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 169-171.

> The Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

68. On the implications of applying heightened scrutiny to examining parties' allegations, the Commission has further indicated: [61]

> This approach requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases. The Commission has previously emphasized that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.
>
> The Commission will therefore review the Petitioners' allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial as prescribed under the American Declaration have been properly respected by the State.

69. The IACHR has further affirmed that it has competence to apply the heightened scrutiny test and is not precluded by the "fourth instance formula" by stating:[62]

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[61] IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, paras. 34-35.

[62] IACHR, Report No. 47/01, Case No. 12.028, Donnason Knights, Grenada, April 4, 2001, paras. 58-59. For more information on the heightened scrutiny test applied by the IACHR in other capital punishment cases, see *e.g.*: IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, para. 29; IACHR, Report No.81/07, Case 12.504, Merits (Publication), Daniel and Kornel Vaux, Guyana, October 15, 2007, paras. 39-42; IACHR, Report No. 68/06, Case 12.477, Merits, Lorenzo Enrique Copello Castillo and Others, Cuba, October 21, 2006, paras. 77-78; IACHR, Report No. 1/05, Case 12.430, Roberto Moreno Ramos, United States, January 28, 2005, paras. 43-44; IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, paras. 72-73; IACHR, Application to the I/A Court in the Case of Fermín Ramírez v. Guatemala, Case 12.403, September 9, 2004, para. 4; IACHR, Report No. 97/03, Case 11.193, Gary Graham/Shaka Sankofa, United States, December 29, 2003, paras. 26-29; IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, 78-79; IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 90-91; IACHR, Report No.. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, para. 54; IACHR, Report No. 62/02, Case 12.285, Michael Domingues, United States, October 22, 2002, paras. 38-39; IACHR, Report No. 52/02, Case 11.753, Ramón Martinez Villareal, United States, October 10, 2002, paras. 51-54; IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, para. 103; IACHR, Report No. 127/01, Case 12.183, Joseph Thomas, Jamaica, December 3, 2001, para. 90; IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 107-113; IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, paras. 70-72; IACHR, Application to the I/A Court in the Case of Fermín Ramírez v. Guatemala, Case 12.403, September 9, 2004, para. 4. The heightened scrutiny test has also been increasingly referred to by the Commission in admissibility reports, see *e.g.*: IACHR, Report No. 132/11, Petition 194-04, Admissibility, Gregory Thompson, United States, October 19, 2011, para. 44; and IACHR, Report No. 60/11, Petitions P-11.575 and others, Admissibility, Clarence Allen Lackey, United States, March 24, 2011, para. 158.

The Commission also notes that the heightened scrutiny test is not precluded by the fourth instance formula adopted by the Commission. Pursuant to the "fourth instance formula," the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees.[63] The fourth instance formula does not, however, preclude the Commission from considering a case where the petitioner's allegations entail a possible violation of any of the rights set forth in the American Convention. In the case of Clifton Wright, for example, a Jamaican citizen who alleged that a judicial error resulted in a death sentence against him, the Commission concluded that the conviction and sentence were undermined by the record in the case, but that the appeals process in Jamaica did not permit for a correction of the situation. Consequently, the Commission found that Jamaica had violated the petitioner's right to judicial protection under Article 25 of the Convention, and recommended that the Government of Jamaica order an investigation of the matter and afford Mr. Wright a judicial remedy to have the inconsistency corrected. Because Mr. Wright had been denied effective domestic judicial protection, and was the victim of a discrete human rights violation under the American Convention, the fourth instance formula did not apply in his case.[64]

The Commission will therefore review Mr. Knights' allegations pertaining to the imposition of capital punishment with a heightened level of scrutiny, to ensure that the right to life as prescribed under the American Convention is properly respected. In addition, the fourth instance formula will not preclude the Commission from adjudicating Mr. Knights' rights insofar as those claims disclose possible violations of the Convention.

B. Arbitrary deprivation of life and the mandatory imposition of the death penalty

The mandatory death penalty, that is, the imposition of death penalty upon conviction for a crime without an opportunity for presenting and considering mitigating circumstances in the sentencing process, contravenes the American Convention and the American Declaration.

70. In general terms, the Commission has affirmed that:[65]

The mandatory death penalty cannot be reconciled with Article 4 of the Convention (…), the Inter-American Court has emphasized several

[63] IACHR, Report Nº 39/96, Case Nº 11.673 (Argentina), Santiago Marzioni, 15 October 1996, Annual Report 1996, p. 76.

[64] IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996.

[65] IACHR, Application to the I/A Court H. R. in the Case of Dacosta Cadogan v. Barbados, Case 12.645, October 31, 2008, paras. 63-64.

restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention. These include considerations relating to the nature of a particular offense as well as to factors concerning the circumstances of an individual offender. In this manner, Article 4 of the Convention itself presumes that before capital punishment may be lawfully imposed, there must be an opportunity to consider certain of the individual circumstances of an offender or an offense. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death.

Accepted principles of treaty interpretation indicate that sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article 4(1) of the Convention.[66] For its part, the Court has previously found that a lawfully sanctioned mandatory sentence of death may be arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime. On this point, the Court has specifically held that to consider all persons responsible for murder as deserving of the death penalty, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."[67]

71. In a case regarding **The Bahamas**, the Commission held:[68]

Further, the Commission has identified several deficiencies that may render an execution arbitrary contrary to Article I of the Declaration. These include a failure on the part of a state to limit the death penalty to crimes of exceptional gravity prescribed by pre-existing law,[69] denying an

[66] IACHR, *McKenzie et al., Jamaica,* para. 197.

[67] I/A Court H.R., *Case of Boyce et al v. Barbados*, paras. 57, 58; *Cf. Case of Hilaire, Constantine and Benjamin et al.,* para. 105, citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Supreme Court of the United States of America held that the mandatory death penalty constituted a violation of the due process guarantees of the Fourteenth Amendment and the right to not be subjected to cruel and unusual punishment of the Eighth Amendment of the Constitution of the United States of America. The Court also indicated that the imposition of the death penalty generally necessitates a consideration of the relevant facets of the character and record of the individual offender and the circumstances of the particular offence.

[68] IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 135, 137, 138, 142, 143, 145-154. See similarly, IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, paras. 46-54.

[69] See *William* Andrews v. USA, *supra*, para. 177.

accused strict and rigorous judicial guarantees of a fair trial,[70] and notorious and demonstrable diversity of practice within a Member State that results in inconsistent application of the death penalty for the same crimes.[71] It is in light of the foregoing interpretive rules and principles that the Commission must determine whether the practice of imposing the death penalty through mandatory sentencing is compatible with the terms of Articles I, XVIII, XXIV, XXV, XXVI, of the Declaration and the principles underlying those provisions.

(…)

Mandatory sentencing by its very nature precludes consideration by a court of whether the death penalty is an appropriate, or indeed permissible, form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated. In the Commission's view, these aspects of mandatory death sentences cannot be reconciled with Article I of the Declaration, in several respects. As noted above, the mandatory death penalty in The Bahamas imposes the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability. Not only does this practice fail to reflect the exceptional nature of the death penalty as a form of punishment, but, in the view of the Commission, it results in the arbitrary deprivation of life, contrary to Article I of the Declaration.

More particularly, imposing a mandatory penalty of death for all crimes of murder prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances, despite the fact that murder can be committed under widely-differing circumstances. By its nature, then, this process eliminates any reasoned basis, for sentencing a particular individual to death and fails to allow for a rational and proportionate connection between individual offenders, their offenses, and the punishment imposed on them. Implementing the death penalty in this manner therefore results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article I of the Declaration.

(…)

[70] *See* Andrews v. USA, *supra*, para. 172 (finding that in capital punishment cases, states have an "obligation to observe rigorously all the guarantees for an impartial trial.")

[71] *See e.g*. Roach and Pinkerton v. US, *supra*, para. 61.

The mandatory death penalty cannot be reconciled with Article I of the Declaration in another significant respect. As noted previously, the Inter-American Court has emphasized several restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention, restrictions which, in the Commission's view, also provide guidance in defining limitations under Article I of the Declaration on the imposition of capital punishment. These include considerations relating to the nature of a particular offense, for example whether it can be considered a political or related common offense, as well as factors relating to the circumstances of an individual offender, for example whether the offender was pregnant at the time he or she committed the crime for which the death penalty may be imposed. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death.

Similarly, by reason of its compulsory nature, the imposition of a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As indicated previously, once a mandatory death sentence is imposed, all that remains for a higher court to review is whether the defendant was properly found guilty of a crime for which the sentence of death was mandated. There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration, that govern the imposition of the death penalty.

(…)

The absence of effective review further illustrates the arbitrary nature of implementing the death penalty through mandatory sentencing, and leads the Commission to conclude that this practice cannot be reconciled with the terms of Article 1 of the Declaration and its inherent principles. In this regard, the Commission is also of the view that the imposition of a mandatory death sentence in all cases of murder in The Bahamas is not consistent with Articles XXVI, and XXV of the Declaration and its underlying principles. XXVI of the Declaration provides as follows: (…)

> Among the fundamental principles upon which the American Declaration and the American Convention are grounded is the recognition that the rights and freedoms protected thereunder are derived from the

> attributes of their human personality.[72] From this principle flows the basic requirement underlying the Declaration and the Convention as a whole, that individuals be treated with dignity and respect. Article XXV of the Declaration which guarantees the right of protection from arbitrary arrest, provides that every individual "has the right to humane treatment during the time he is in custody. In addition, Article XXVI, of the Declaration which guarantees the right to due process of law, provides that every person accused of an offense, "has the right not to receive cruel, infamous or unusual punishment. The Commission believes that these guarantees presuppose that persons protected under the Declaration will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of his or her life.

The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to life based solely upon the category of crime for which an offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offense. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Articles XXV and XXVI of the Declaration, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.

Finally, the Commission considers that the imposition of mandatory death sentences cannot be reconciled with an offender's right to due process, as contemplated in and as provided for in Articles XVIII, XXV, and XXVI of the Declaration. It is well established that proceedings leading to the imposition of capital punishment must conform to the highest standards of due process. The due process standards governing accusations of a criminal nature against an individual prescribed in Articles XVIII, XXV, and XXVI, of the Declaration, include namely, the right to judicial protection which is the right to resort to the courts to ensure respect for his legal rights, and for violation of any fundamental constitutional rights (Article XVIII); the right not to be deprived of his

[72] The Preamble to the Declaration and Convention recognizes that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon the attributes of the human personality."

liberty and to be tried without undue delay or to be released, and the right to humane treatment during the time he is in custody (Article XXV); the right to be presumed innocent until proven guilty and to be given an impartial and public hearing, with all due process guarantees; (Article XXVI); and the right to petition to any competent authority and to obtain a prompt decision thereon (Article XXIV).

In the Commission's view, therefore, the due process guarantees under Articles XVIII, XXIV, XXV, and XXVI, of the Declaration, when read in conjunction with the requirements of Article I of the Declaration, presuppose as part of an individual's defense to a capital charge an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. The due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.

The mandatory imposition of the death sentence is inherently antithetical to these prerequisites. By its nature, it precludes any opportunity on the part of the offender to make, or for the Court to consider, representations or evidence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the considerations underlying Article I of the Declaration or otherwise. Also, as noted previously, it precludes any effective review by a higher court of a decision to sentence an individual to death.

Contrary to the current practice in The Bahamas, the Commission considers that imposing the death penalty in a manner which conforms with Articles I, XVIII, XXIV, XXV, and XXVI, of the Declaration requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or an appropriate form of punishment in the circumstances of their case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the provisions of Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration may prohibit the imposition of the death penalty.

In this regard, as the following discussion of international and domestic jurisdictions will indicate, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to himself and his or her offense, and the court imposing sentence is afforded discretion to

> consider these factors in determining whether the death penalty is a permissible or appropriate punishment.[73]
>
> Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and humane treatment under Articles XVIII, XXIV, XXV, and XXVI of the Declaration should be interpreted to require individualized sentencing in death penalty cases.
>
> In light of the foregoing analysis, the Commission considers that the imposition of a mandatory death sentence by the State for the crime of murder, is not consistent with the terms of Articles I, XXIV, XXV, and XXVI of the Declaration, and the principles underlying those Articles.

72. In a case regarding the mandatory imposition of the death penalty in **Jamaica**, the Commission held:[74]

> The record in the present case indicates that Mr. Sewell was convicted of capital murder in Jamaica and sentenced to death. It also indicates that the death sentence was imposed pursuant to legislation in Jamaica that prescribes the death penalty as the only punishment available when a defendant is found guilty of capital murder.
>
> Mr. Sewell was convicted of the crime of capital murder under Jamaica's *Offences Against the Person Act*, as amended by the *Offences Against the Person (Amendment) Act, 1992*.[75] Section 2(1)(d)(i) of this *Act* defines capital murder as including the following:
>
> > 2.(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say-

[73] The Commission refers in this regard to the interpretative approach advocated by the European Court of Human Rights, that its governing Convention is "a living instrument which must be interpreted in light of present-day conditions." See Eur. Court H.R., Tyrer v. United Kingdom (1978) 3 E.H.R.R. 1 at para. 31.

[74] IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, paras. 80-84, 87, 90-102; See similarly, IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 96, 99, 103-114; IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, paras. 104-143; IACHR, Report No. 127/01, Case 12.183, Joseph Thomas, Jamaica, December 3, 2001, paras. 91-112; IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 172-211.

[75] Offences Against the Person Act, as amended by the Offences Against the Person (Amendment) Act, 1992 (13 October 1992), Nº 14.

> [. . .]
>
> (d) any murder committed by a person in the course or furtherance of-
>
> (i) robbery;
>
> Section 3(1) of the *Act* in turn prescribes the death penalty as the mandatory punishment for any person convicted of a capital offence as defined under Section 2 the *Act*:
>
> 2(1) Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A), shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this section a person is sentenced to death, the form of the sentence shall be to the effect only that he is to "suffer death in the manner authorized by law."

The *Act* therefore prescribes death as the mandatory punishment for all individuals convicted of capital murder. Capital murder in turn includes murder committed in the course or furtherance of certain other offences, including robbery, burglary, housebreaking, and arson in relation to a dwelling house. Accordingly, once the jury found Mr. Sewell guilty of capital murder, the death penalty was the only available punishment. The Commission notes that the State has not denied the mandatory nature of Mr. Sewell's punishment, but rather argues that the exercise of the Prerogative of Mercy is sufficient to take into account the individual circumstances of Mr. Sewell's case.

Therefore, as the Commission has determined in previous cases,[76] the crimes of capital murder in Jamaica can be regarded as being subject to a "mandatory death penalty," namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death

[76] See McKenzie et al. Case, supra, para. 178.

once a conviction for capital murder has been rendered. The Commission notes, however, that there is one exception to this rule under Jamaican law. Section 3(2) of the *Act* specifically exempts from the death penalty female offenders who are convicted of offenses punishable with death, but who are found by a jury to be pregnant.[77]

(…)

b. Mr. Sewell's Mandatory Death Sentence under Articles 4, 5 and 8 of the Convention

In previous cases involving the application of capital punishment under the *Offenses Against the Person Act* in Jamaica, the Commission has evaluated the mandatory nature of the death penalty under that legislation in light of Article 4 (right to life), Article 5 (right to humane treatment) and Article 8 (right to a fair trial) of the Convention and the principles underlying those provisions. It has also considered the mandatory death penalty in light of pertinent authorities in other international and domestic jurisdictions, to the extent that those authorities may inform the appropriate standards to be applied under the American Convention. Based upon these considerations and analysis, the Commission has reached the following conclusions.

(…)

Finally, the Commission has noted and relied upon the determination by the Inter-American Court of Human Rights in its Advisory Opinion OC-3/83 that under the terms of Article 4 of the Convention, "certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account" by States Parties that have not abolished the death penalty.[78]

In the context of these interpretive rules and principles, the Commission has evaluated mandatory death penalty legislation under Articles 4, 5 and 8 of the Convention and has concluded that imposing the death penalty through mandatory sentencing, as Jamaica has done in respect of crime of capital murder, is not consistent with the terms of Articles 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those

[77] *See* Offenses Against the Person Act, sections 3(1) to 3(6).

[78] Mckenzie et al. para. 189, citing Advisory Opinion OC-3/83, *supra*, para. 55 (observing with regard to Article 4 of the Convention that "three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.").

provisions.[79] The Commission observes in this regard that since its determination in the case of *Haniff Hilaire v. Trinidad and Tobago*[80] in 1999 that the mandatory death penalty was inconsistent with the rights protected in the inter-American system, other international and regional tribunals have reached similar conclusions. A majority in the UN Human Rights Committee, for example, has found the implementation of a death sentenced based upon a mandatory sentencing law to violate the right not to be arbitrarily deprived of one's life under Article 6(1) of the International Covenant on Civil and Political Rights.[81] In addition, a majority of the Eastern Caribbean Court of Appeal determined in April of 2001 that the mandatory death penalty in Saint Vincent and Saint Lucia constitutes inhuman or degrading punishment or other treatment contrary to the constitutions of those states.[82]

In light of these inherent deficiencies in the mandatory death penalty, the Commission has determined that imposing the death penalty in a manner that conforms with Articles 4, 5 and 8 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or appropriate form of punishment in the circumstances of his case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty.[83]

In reaching this conclusion, the Commission has identified a principle common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing.[84] Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment. Mitigating factors may relate to the gravity of the particular offense or the degree of

[79] *Mckenzie et al.* paras. 193-207. *See similarly* Baptiste Case, *supra*, paras. 80-94.

[80] Haniff Hilaire v. Trinidad and Tobago, Report Nº 66/99, Case Nº 11.816 (April 1999).

[81] UNHRC, Eversley Thompson v. St. Vincent and the Grenadines, Communication Nº 806/1998 (October 18, 2000).

[82] Eastern Caribbean Court of Appeal, Newton Spence v. The Queen, Peter Hughes v. The Queen, Criminal Appeal Nos. 20 of 1998 and 14 of 1997, Judgment, 2 April 2001.

[83] McKenzie *et al.* Case, *supra*, para. 207.

[84] McKenzie *et al*. Case, *supra*, paras. 208, 212-219, citing Woodson v. North Carolina 49 L Ed 2d 944 (U.S.S.C.); The State v. Makwanyane and McHunu, Judgment, Case Nº CCT/3/94 (6 June 1995) (Constitutional Court of the Republic of South Africa); Bachan Singh v. State of Punjab (1980) 2 S.C.C. 475 (Supreme Court of India). *See also* Baptiste Case, *supra*.

culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

The Commission has also previously observed that Jamaica has already considered it appropriate to prescribe in its legislation a mechanism by which a jury may determine whether an individual female offender should be spared the death penalty because she is pregnant.[85] The Commission has therefore considered that the foundation already exists under Jamaican law to extend this mechanism, or to develop a comparable mechanism, to permit a jury to consider other potentially mitigating factors pertaining to an offender in determining whether the death penalty should be imposed in the circumstances of the offender's case.[86]

Applying these findings in the context of the case presently before it, the Commission has confirmed that Mr. Sewell was convicted of the offense

[85] As noted above, sections 3(2) to 3(6) of the Act prescribe a specific procedure by which a jury is to determine whether a defendant is pregnant for the purposes of section 3(1) of the Act:

3(2) Where a woman convicted of an offence punishable with death is found in accordance with the provisions of this section to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment with or without hard labour for life instead of sentence of death.

(3) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before whom a woman is so convicted thinks fit to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be determined by a jury.

(4) Subject to the provisions of this subsection, the said jury shall be the trial jury, that is to say the jury to whom she was given in charge to be tried for the offence, and the members of the jury need not be re-sworn:

Provided that-

(a) if any member of the trial jury, after the conviction, dies or is discharged by the court as being through illness incapable of continuing to act for any other cause, the inquiry as to whether or not the woman is pregnant shall proceed without him; and

(b) where there is no trial jury, or where a jury have disagreed as to whether the women is or is not pregnant, or have been discharged by the court without giving a verdict on that question, the jury shall be constituted as if to try whether or not she was fit to plead, and shall be sworn in such manner as the court may direct.

(5) The question whether the woman is pregnant or not shall be determined by the jury on such evidence as may be laid before them either on the part of the woman or on the part of the Crown, and the jury shall find that the woman is not pregnant unless it is proved affirmatively to their satisfaction that she is pregnant.

(6) Where in proceedings under this section the jury finds that the woman in question is not pregnant the woman may appeal under the Judicature (Appellate Jurisdiction) Act, to the Court of Appeal and that Court, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed on her and instead thereof pass on her a sentence of imprisonment with or without hard labour for life:

Provided that the operation of the provisions of this subsection shall be deemed to be coincident with the operation of the Judicature (Appellate Jurisdiction) Act.

[86] McKenzie et al. Case, *supra*, para. 210.

of capital murder under Jamaica's *Offences Against the Person Act*. Once an offender is found guilty of capital murder under that *Act*, section 3(1) of the *Act* requires a court to impose the death penalty. With the exception of the provisions in sections 3(2) to 3(6) of the *Act* governing pregnant offenders, no provisions in the *Act* have been identified that permit a judge or jury to consider the personal circumstances of an offender or his or her offense, such as the offender's record or character, in determining whether the death penalty is an appropriate penalty for a particular offender in the circumstances of his or her case. Upon satisfying the elements of section 3(1) of the *Act*, death is the automatic penalty.

Consequently, the Commission concludes that once Mr. Sewell was found guilty of his crimes, the law in Jamaica did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty. There was no opportunity for the trial judge or the jury to consider such factors as Mr. Sewell's character or record, the nature or gravity of Mr. Sewell's, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate punishment. Mr. Sewell was likewise precluded from making representations on these matters, as a consequence of which there is no information on the record as to potential mitigating factors that might have been presented to the trial court in Mr. Sewell's circumstances. The court sentenced Mr. Sewell based solely upon the category of crime for which he had been found responsible.

In this context, and in light of the Commission's prior analysis of mandatory death penalties under the Convention, the Commission concludes that the State violated Mr. Sewell's rights under Articles 4(1), 5(1), 5(2), and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.

With respect to Article 4(1) of the Convention, the Commission concludes that the trial court was compelled under the State's legislation to impose a death sentence upon Mr. Sewell, with no discretion to consider Mr. Sewell's personal characteristics and the particular circumstances of his offenses to determine whether death was an appropriate punishment. Likewise, Mr. Sewell was not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of his case. Rather, the death penalty was imposed upon Mr. Sewell automatically and without principled distinction or rationalization as to whether it was an appropriate form of punishment in the particular circumstances of his case. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and Mr. Sewell's execution and death at the hands of the State are imminent, his conviction having been upheld on appeal to the highest court in Jamaica.

The Commission therefore concludes that the State has by this conduct violated Mr. Sewell's right under Article 4(1) of the Convention to have his life respected and not to be arbitrarily deprived of his life.[87]

The Commission further concludes that the State, by sentencing Mr. Sewell to a mandatory penalty of death absent consideration of his individual circumstances, has failed to respect Mr. Sewell's physical, mental and moral integrity contrary to Article 5(1) of the Convention, and has subjected him to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced Mr. Sewell to death solely because he was convicted of a predetermined category of crime. Accordingly, the process to which Mr. Sewell has been subjected would deprive him of his most fundamental right, his right to life, without considering his personal circumstances and the particular circumstances of his offense. Not only does this treatment fail to recognize and respect Mr. Sewell's integrity as an individual human being, but in all of the circumstances has subjected him to treatment of an inhuman or degrading nature. Consequently, the State has violated Article 5(1) and 5(2) of the Convention in respect of Mr. Sewell.[88]

Finally, the Commission concludes that the State has violated Article 8(1) of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, by subjecting him to a mandatory death sentence. By denying Mr. Sewell an opportunity to make representations and present evidence to the trial judge as to whether his crime permitted or warranted the ultimate penalty of death, under the terms of Article 4 of the Convention or otherwise, the State also denied Mr. Sewell the right to fully answer and defend the criminal accusations against him, contrary to Article 8(1) of the Convention.[89]

Also consistent with its previous findings, and contrary to the State's submissions, the Commission considers that the exercise of the Prerogative of Mercy by the Jamaican Privy Council is not consistent with, and therefore cannot serve as a substitute for, the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences. As explained above, these requirements include legislative or judicially-prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in Jamaica, even as informed by the minimal requirements of fairness prescribed in the Judicial Committee of the Privy Council's *Neville Lewis*

[87] *See similarly* McKenzie et al. Case, *supra*, para. 234; Baptiste Case, *supra*, para. 127.

[88] *See similarly* McKenzie et al. Case, *supra*, para. 235; Baptiste Case, *supra*, para. 128.

[89] *See similarly* McKenzie *et al*. Case, *supra*, para. 237; Baptiste Case, *supra*, para. 130.

et al. judgment,[90] does not satisfy these standards and therefore cannot serve as an alternative for individualized sentencing in death penalty prosecutions.

It follows from the Commission's findings that, should the State execute Mr. Sewell pursuant to his death sentence, this would constitute further egregious and irreparable violations of his rights under Article 4 of the Convention.

73. In a case regarding **Grenada**, the Commission found:[91]

Mr. Lallion was convicted of murder pursuant to Section 234 of the Criminal Code of Grenada, which provides that "[w]hoever commits murder shall be liable to suffer death and sentenced to death."[92] The crime of murder in Grenada can therefore be regarded as subject to a "mandatory death penalty," namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in imposing the death sentence and therefore once the jury found Mr. Lallion guilty of capital murder, the death penalty was the only available punishment. The State has not denied the mandatory nature of Mr. Lallion's death sentence.

(…)

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[90] On September 12, 2000, the Judicial Committee of the Privy Council issued its judgment in the case *Neville Lewis et al. v. The Attorney General of Jamaica*, in which it found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review. The Judicial Committee of the Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision. Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.), at p. 23.

[91] IACHR, Report No. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 56-57, 66-73; See similarly IACHR, Report No. 47/01, Case No. 12.028, Donnason Knights, Grenada, April 4, 2001, paras. 62-89; IACHR, Report No. 56/02, Merits, Case 12.158, Benedict Jacob, Grenada, October 21, 2002, paras. 60-64; IACHR, Report No. 38/00, Case 11.743, Rudolph Baptiste, Grenada, April 13, 2000, paras. 69-97.

[92] Section 234 of the Criminal Code, Title XVIII, Cap. 76 , p. 790, contains a proviso to the death penalty for a crime of murder. The proviso states:

> Provided that the sentence of death shall not be pronounced or recorded against a person convicted of murder if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years; but, in lieu of such punishment, the Court shall sentence the juvenile offender to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of any other Law or Ordinance, be liable to be detained in such place and under such conditions as the Governor may direct, and whilst so detained shall be deemed to be in legal custody.

(…) as the Commission has determined in previous cases,[93] that the crimes of capital murder in Grenada can be regarded as being subject to a "mandatory death penalty" namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death once a conviction for capital murder has been rendered.

(…)

Applying these findings in the context of the cases presently before it, the Commission has confirmed that Mr. Lallion was convicted of capital murder pursuant to Section 234 of the Criminal Code of Grenada and that no provisions in the Code have been identified that permit a judge or jury to consider the personal circumstances of an offender or his or her offense, such as the offender's record or character, the subjective factors that may have motivated his or her conduct, or the offender's likelihood of reform or social readaptation, in determining whether the death penalty is an appropriate penalty for a particular offender in the circumstances of the offender's case.

In Mr. Lallion's case, the Court could not consider the mitigating factors of his case nor the nature of the offense, upon his conviction for murder and prior to sentencing him to death. The Trial Court could not take into account the fact that he was questioned in excess of the 48 hours and not brought promptly before the Court as provided by the law of Grenada. Mr. Lallion was detained from 4:15 p.m. on September 29, 1993 to 1:15 p.m. on October 2, 1993, in excess of the 48 hours established by the domestic law of Grenada, and during that illegal detention Mr. Joseph, the former Assistant Superintendent of Police held him by his shirt and the other policeman, "Mason" gave him a "small punch" in his belly, and he was forced to sign a confession.[94] In addition, the police officers ordered Mr. Lallion to remove the plastic covering from the deceased's body, where he was laying in the morgue. At the conclusion of his trial, and upon satisfying the elements of Section 234 of the Code, Mr. Lallion was convicted of murder. The Trial Court had no discretion in passing sentence on him because death is the automatic penalty under the law of Grenada.

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[93] Donnason Knights, (Grenada) Report Nº 47/01, Annual Report of the Inter-American Commission on Human Rights 2000, Volume II, at 841. OEA/Ser.L/V/II. 111, Doc. 20 rev., 16 April 2001; and the following cases can be found in Annual Report of the Inter-American Commission on Human Rights 2000, Volume I, OEA/Ser.L/VII.111, Doc. 3 rev., April 16, 2000 - Rudolph Baptiste, Report Nº 38/00, Case 11.743 (Grenada) Annual Report Of The Iachr 1999, p. 721, at p. 738; Report Nº 48/01, Michael Edwards, Case 12.067 (The Bahamas) at 620, Omar Hall, Case 12.068, at 620 (The Bahamas), Brian Schroeter and Jeronimo Bowleg, at 620 (The Bahamas). McKenzie et al. (Jamaica), Report Nº 41/00, Annual Report of The IACHR 1999, P. 918, At P. 967, para 178.

[94] Trial transcript pages 89-90.

Consequently, the Commission concludes that once Mr. Lallion was found guilty of capital murder, the law in Grenada did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty. There was no opportunity for the trial judge or the jury to consider such factors as Mr. Lallion's character or record, the nature or gravity of his crime, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate punishment. Mr. Lallion was likewise precluded from making representations on these matters, as a consequence of which there is no information on the record as to potential mitigating factors that might have been presented to the trial court. The court sentenced Mr. Lallion to a mandatory death sentence based solely upon the category of crime for which he had been found responsible.

In this context, and in light of the Commission's prior analysis of the mandatory death penalty under the Convention, the Commission concludes that the State violated Mr. Lallion's rights under Articles 4(1), 5(1), 5(2), and 8(1) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by sentencing him to a mandatory death penalty.

With respect to Article 4(1) of the Convention, the Commission concludes that the trial court was compelled under the State's legislation to impose a death sentence on Mr. Lallion, without any discretion to consider his personal characteristics and the particular circumstances of his offense to determine whether death was an appropriate punishment. Mr. Lallion was likewise not provided with an opportunity to present representations and evidence as to whether the death penalty was an appropriate punishment in the circumstances of his case. Rather, the death penalty was imposed upon Mr. Lallion automatically and without principled distinction or rationalization as to whether it was an appropriate form of punishment in the particular circumstances of his case. Moreover, the propriety of the sentence imposed was not susceptible to any effective form of judicial review, and Mr. Lallion's execution and death at the hands of the State is imminent, his conviction having been upheld on appeal to the highest court in Grenada. The Commission therefore concludes that the State has by this conduct violated Mr. Lallion's right under Article 4(1) of the Convention not to be arbitrarily deprived of his life, and therefore, Mr. Lallion's death sentence is unlawful.[95]

The Commission further concludes that the State, by sentencing Mr. Lallion to a mandatory death penalty absent consideration of his individual circumstances, has failed to respect Mr. Lallion's right to his physical, mental and moral integrity contrary to Article 5(1) of the

[95] See similarly McKenzie et al. Case, *supr*a, para. 234; Baptiste Case, *supra*, para. 127.

Convention, and has subjected him to cruel, inhuman, or degrading punishment or treatment in violation of Article 5(2). The State sentenced Mr. Lallion solely because he was convicted of a predetermined category of crime. Accordingly, the process to which Mr. Lallion has been subjected would deprive him of his most fundamental rights, his right to life, without considering the personal circumstances and the particular circumstances of his offenses. Not only does this treatment fail to recognize and respect Mr. Lallion's integrity as an individual human being, but in all of the circumstances has subjected him to treatment of an inhuman or degrading nature. Consequently, the State has violated Article 5(1) and 5(2) of the Convention in respect of Mr. Lallion.[96]

Finally, the Commission concludes that the State has violated Article 8(1) of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, by subjecting Mr. Lallion to a mandatory death sentence. By denying Mr. Lallion an opportunity to make representations and present evidence to the trial judge as to whether his conviction warranted the ultimate penalty of death, under the terms of Article 4 of the Convention or otherwise, the State also denied Mr. Lallion his right to fully answer and defend the criminal accusations against him, contrary to Article 8(1) of the Convention.[97]

It follows from the Commission's findings that, should the State execute Mr. Lallion pursuant to his death sentence, this would constitute further egregious and irreparable violations of Articles 4 and 5 of the Convention.

74. Regarding **Barbados**, the Commission has held:[98]

While the strict observation of certain due process rights and procedures are essential in evaluating whether the death penalty has been imposed arbitrarily,[99] the Court has held that a distinction should be made between the sentencing stage and the availability and observance of such procedures during the whole proceedings of a capital case, including the appeals process. In accordance with the law in Barbados, the availability of statutory and common law defenses and exceptions for defendants in death penalty cases are relevant only for the determination of the guilt or

[96] See similarly McKenzie et al. Case, *supra*, para. 235; Baptiste Case, *supra*, para. 128.

[97] See similarly McKenzie et al. Case, *supra,* para. 237; Baptiste Case, *supra*, para. 130.

[98] IACHR, Application to the I/A Court H. R. in the Case of Tyrone Dacosta Cadogan v. Barbados, Case 12.645, October 31, 2008, paras. 65-70, 72-73.

[99] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 59; In Advisory Opinion OC-16/99, the Court made it clear that when due process guarantees are affected the "imposition of the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties (e.g. The American Convention on Human Rights, Article 4 […]) with the juridical consequences inherent in a violation of this nature i.e., those pertaining to the international responsibility of the State and the duty to make reparations." Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 80, para. 137.

innocence of the accused, not for the determination of the appropriate punishment that should be imposed once a person has been convicted. That is, a defendant in a capital punishment case may attempt to escape a guilty verdict by claiming certain common law defenses to a charge of murder.[100] These defenses seek to escape a conviction for murder and replace it with one for manslaughter, for example, which carries a sentence of life imprisonment, or even to totally exclude criminal liability for murder.[101] Nevertheless, if and when a defendant is found guilty of the crime of murder, the law does not allow the judge any latitude to consider the degree of culpability of the defendant or other forms of punishment that may be better suited for that particular person in light of all circumstances. That is, courts have no authority to individualize the sentence in conformity with information of the offence and the offender.[102]

Contrary to the current practice in Barbados, the Commission considers that imposing the death penalty in a manner which conforms with Article 4 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or appropriate form of punishment in the circumstances of their case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty.

In this regard, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing.[103] Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.[104]

Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that

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[100] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 59; *Cf. Offenses Against the Person Act*, (defining, for example, diminished responsibility and provocation), Appendix A.4, ss. 4 and 5.

[101] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 59; *Cf. Offenses Against the Person Act,* Appendix A.4, s. 6.

[102] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para. 59.

[103] IACHR, *McKenzie et al., Jamaica, supra* note 84*,* para 208.

[104] Id.

might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.

In the instant case, the victim was sentenced to death pursuant to section 2 of the Act, which prescribes the mandatory application of the death penalty for all those convicted of murder in Barbados. The Commission concludes that once Mr. Cadogan was found guilty, the law in Barbados did not permit a hearing by the courts as to whether the death penalty was a permissible or appropriate penalty in his case. There was no opportunity for the trial judge or the jury to consider such factors as the individual's character or record, the nature or gravity of the offense, or the subjective factors that may have motivated his conduct, in determining whether the death penalty was an appropriate form of punishment. Mr. Cadogan was likewise precluded from making representations on these matters. The courts sentenced the victim based solely upon the category of crime for which he had been found responsible.

The Commission recognizes that, had the courts been presented with evidence of mitigating factors and had they been permitted to consider this evidence in determining an appropriate sentence, they may well have still imposed the death penalty. The Commission cannot, and indeed should not, speculate as to what the outcome may have been. This determination properly falls to the domestic courts. What is crucial to the Commission's determination that Mr. Cadogan's sentence violates the Convention, however, is the fact that he was not given an opportunity to present evidence of mitigating factors, nor did the courts have discretion to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of each case.[105]

(…)

The Court recently endorsed this finding in *Boyce et al v. Barbados* (2007) concluding that the Offences Against the Person Act of Barbados violates the prohibition against the arbitrary deprivation of life and fails to limit the application of the death penalty to the most serious crimes, in contravention of Article 4(1) and 4(2).[106]

In sum, the mandatory application of the death penalty as prescribed in section 2 of the Act and as applied against Mr. Cadogan cannot be reconciled with Article 4(1) or 4(2) of the Convention in the following respects. Section 2 of the Offences Against the Person Act in Barbados

[105] Id., paras. 221-223.

[106] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, paras. 54 and 55; 62 and 63.

lawfully sanctions the death penalty as the one and only possible sentence for the crime of murder[107] and the law does not allow the imposition of a lesser sentence in consideration of the particular characteristics of the crime or the participation and degree of culpability of the defendant.[108] In line with the Court's reasoning on this matter in *Boyce et al. v. Barbados* and previous cases, the Commission considers that 'in the determination of punishment, [the Offences Against the Person Act] mechanically and generically imposes the death penalty for all persons found guilty of murder' in contravention of the prohibition of the arbitrary deprivation of the right to life recognized in Article 4(1) of the Convention, as it fails to individualize the sentence in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused.[109] By its nature, then, this process eliminates a reasoned basis for sentencing a particular individual to death, and fails to allow for rational and proportionate connections between individual offenders, their offenses, and the punishment imposed on them in this manner.[110] The Commission concludes that because the Offences Against the Person Act submits all persons charged with murder to a judicial process in which the participation and degree of culpability of the accused and the individual circumstances of the crime are not considered, the aforementioned Act violates the prohibition against the arbitrary deprivation of life and fails to limit the application of the death penalty to the most serious crimes, in contravention of Article 4(1) and 4(2) of the Convention.[111]

75. In a case against **Guatemala** the Commission affirmed:[112]

Mandatory capital punishment makes no rational distinctions between persons who may have committed the same crime -- in this case, kidnapping -- under very diverse personal circumstances and,

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[107] As explained by the I/A Court H.R. in the *Case of Boyce et al v. Barbados*, *supra* note 69:

The definition of murder is not provided in any written law, as it remains a common law offence, and it is understood that "[m]urder is committed where a person of sound mind and the age of discretion unlawfully kills any reasonable creature in being under the Queen's peace with malice aforethought either expressed by that person or implied by law, so that the party wounded or hurt dies of that wound or hurt within a year and a day of same." Moreover, a person who "aids, abets, counsels, procures or incites another to commit [murder] is guilty of [such] offence and may be proceeded against and punished as a principal offender."

[108] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 57; IACHR, *McKenzie et al., Jamaica, supra* note 84*,* para 196.

[109] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 61.

[110] IACHR, *McKenzie et al., Jamaica, supra* note 84*,* para 196.

[111] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 62.

[112] IACHR, Application in the Case of Raxcacó v. Guatemala, Case 12.402, September 18, 2004, paras. 45 – 58, 73.

consequently, takes the perpetrator's life without recognizing that, as a unique individual, he merits individual consideration.

Article 201 of the Guatemalan Criminal Code now in force, under which a mandatory death sentence was imposed on Mr. Raxcacó Reyes, provides that the perpetrator of the crime of kidnapping, irrespective of the outcome of the crime, must be put to death, and only by exception, when the death penalty cannot be imposed, he is to be sentenced to a prison term of 25 to 50 years. The exceptions referred to in this provision are set out in Article 43 of the Criminal Code, which provides:

> (...) the death penalty may not be imposed: 1. For political crimes; 2. When the conviction is based on presumptions; 3. To women; 4. To males older than 70 years of age; 5. To persons whose extradition has been agreed to on that condition.

In turn, Article 65 of the Guatemalan Criminal Code requires the judge to examine a series of factors in addition to the crime itself when sentencing the perpetrators:

> the judge or the court shall determine in the decision the penalty to be imposed, within the maximum and minimum provided by law for each offense, taking into account the greater or lesser danger posed by the perpetrator, his personal background and that of the victim, the motive for the crime, the extent and intensity of the injury caused and the extenuating and aggravating circumstances that may be present and should be assessed in terms of both their number and their significance or importance. The judge or the court shall specifically mention the factors referred to in the preceding paragraph that were considered decisive in adjusting the penalty. (emphasis added)

Application of this provision to the crime of kidnapping is rendered absolutely impossible because of the present wording of the article that prescribes one particular penalty.

The above means that, under Guatemalan law, once a person has been found guilty of kidnapping, the court may not weigh any extenuating circumstance whatever to adjust the penalty. The law in its present wording forces the judge, in this case the sentencing court, to impose a penalty solely on the basis of the category of crime the defendant has committed.

In the particular case of Mr. Raxcacó, the exceptional circumstances that would have made it possible to impose a penalty other than death, do

not operate, and the particular circumstances of the event and the accused were never considered. Once the sentencing court found him guilty of the crime of kidnapping, it imposed the death penalty directly, as prescribed by domestic law.

The wording used by the sentencing court shows the automatic nature of the application of the penalty in cases of abduction or kidnapping. Indeed, operative clause VII of the decision of May 14, 1999, dealing with Messrs. Raxcacó Reyes, Mr. Ruiz Fuentes and Mr. Murga Rodríguez, held unanimously that, as a consequence of violating the criminal provision, they should be given the death penalty.

The prohibition against arbitrarily taking any person's life, which is established in Article 4 (1) of the Convention, must be interpreted to allow for the imposition of the death penalty only through individual court decisions in which the sentencing authority has the discretion to consider possible extenuating circumstances relating to the perpetrator and the crime, in order to determine whether the death penalty is adequate punishment. These factors must include the character and background of the perpetrator, the subjective factors that may have led to the crime, the way in which the particular crime was committed, and the possibility of reform and rehabilitation of the perpetrator, as established by legislative and judicial principles and rules. In addition, the exercise of discretion must be subject to effective judicial review. This is consistent with the interpretation principles that must be followed in interpreting Article 4 of the Convention, as well as the restrictive construction that international bodies have placed on contract provisions on capital punishment. This includes, in particular, the opinion of the Court that Article 4 of the Convention must be interpreted as "imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance."[113]

The Commission has considered the mandatory nature of the death penalty established in various laws in the region[114] in light of Article 4 (right to life), Article 5 (right to physical integrity), Article 8 (judicial guarantees) and Article 25 (judicial protection) of the Convention and the principles underlying those provisions. It has also considered the mandatory death penalty in light of the criteria established by other international and domestic jurisdictions to the extent that such criteria

[113] Inter-American Court, Advisory Opinion OC-3/83 of September 8, 1983, *Restrictions on the Death Penalty (Arts. 4 (2) and 4 (4) of the American Convention on Human Rights*), Series A No. 3, para. 57.

[114] IACHR, *Rudolph Baptiste*, Report No. 38/00, Case 11,743, Grenada, 1999, IACHR Annual Report, p. 721; *Desmond McKenzie and others*, Jamaica, Case 12,023, Report No. 41/00, para. 220; *Michael Edwards and others*, Bahamas, Case 12,067, Report No. 48/01, paragraphs 117-165.

are capable of shedding light on the conventional rules applicable, as may be seen below.[115]

The Commission believes that the bodies supervising international human rights instruments have placed on death penalty provisions a restrictive interpretation in order to ensure that the law will strictly control and limit the circumstances in which government officials may take away a person's life. This includes strict compliance with due process rules.[116]

The European Court of Human Rights has found categorically that even though the death penalty is in principle permissible under Article 2 of the European Convention (equivalent to Article 4 of the American Convention), the arbitrary taking of life by capital punishment is prohibited, inasmuch as this is the principle that springs from the very wording of the Convention when it provides that every person's right to life must be protected by law.[117]

The same court has established that in all cases where the death penalty is imposed, the personal circumstances of the convicted perpetrator, the conditions of detention while he awaits execution and the duration of detention prior to execution are examples of factors capable of requiring an examination of the penalty under Article 3 of the European Convention (equivalent to Article 5 of the American Convention).[118]

Several decisions within the universal system serve to illustrate, such as *Lubuto v. Zambia,*[119] in which the plaintiff had been given a mandatory death sentence for committing armed robbery. The UN Human Rights Commission, while not concluding that mandatory death sentences were in themselves a violation of the International Pact on Civil and Political Rights (hereinafter the "IPCPR"), recognized that absence of discretion on

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[115] In this connection Article 29 of the Convention establishes that no provision in the treaty may be interpreted in such a way as to limit the enjoyment and exercise of any right or liberty that may be recognized under the laws of any of the States Parties or under any other international instrument to which one of those States is a party, or to exclude or limit the effects of the American Declaration of the Rights and Duties of Man and other international instruments of the same kind.

[116] See IACHR, *McKenzie and others*, supra, para. 186-187; *Edwards*, supra, para. 109; IACHR; and similarly, *Martínez Villareal*, supra, para. 52, and *Baptiste*, supra, paragraphs 74 and 75. See also, HRC, *Anthony McLeood v. Jamaica*, Communication No. 734/1997, U.N. Doc. CCPR/C/62/734/1997; and Inter-American Court, Advisory Opinion OC-3/83 of September 8, 1983, *Restrictions on the Death Penalty (Arts. 4 (2) and 4 (4) of the American Convention on Human Rights*), Series A No. 3, paragraphs 52 and 54.

[117] See ECHR, *Ocalan v. Turkey*, Judgment of 12 March 2003, found in www.echr.coe.int as at September 16, 2004, para. 202.

[118] See ECHR, *G.B. v. Bulgaria*, Judgment of 11 march 2004, found in www.echr.coe.int as at September 16, 2004, para. 73.

[119] HRC, *Lubuto v. Zambia* (Communication No. 390/1990), UN Doc. CCPR/C/55/D/390/1990/Rev.1, (October 1995), para. 7.2.

the part of the sentencing authority to consider the particular circumstances of the offense when determining whether the death penalty was the appropriate punishment, could violate the conditions laid down internationally for application of the death penalty -- in this case the requirement of Article 6 (2) of the IPCPR that the death penalty be imposed only for the gravest crimes. The Commission concluded that

> considering that in this case the use of firearms did not lead to the death or injury of any person and that the Court could not legally take this into account when imposing a sentence, the Commission believes that imposing a mandatory death sentence under these circumstances violates paragraph 2 of Article 6 of the Pact.

On the other hand, in *Thompson v. St. Vincent and the Grenadines,*[120] the Human Rights Commission specifically stated that:

> mandatory imposition of the death penalty under the law of the State Party is based solely on the type of offense of which the perpetrator has been found guilty, without taking into account the personal circumstances of the accused or those in which he committed the crime (...) the Commission believes that this system of mandatory capital punishment would deprive the individual of the most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of the case.

This view was later confirmed in *Kennedy v. Trinidad and Tobago*, in which the Commission pointed out that mandatory capital punishment would take the life of the perpetrator without considering whether, in the particular circumstances of the case, that exceptional form of punishment is consistent with the provisions of the Pact.[121]

(…)

Automatic and generic application of the death penalty may present various degrees of seriousness. In this connection, the Court held in one case that a law preventing the judge from considering basic circumstances to determine the degree of guilt and specify the penalty,

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[120] HRC, Thompson v. St. Vincent and the Grenadines (Communication No. 806/1998), UN Doc. CCPR/C/70/D/806/1998, December 15, 2000), para. 8.2.

[121] HRC, Kennedy v. Trinidad and Tobago (Communication No. 845/1999), UN Doc. CCPR/C/74/D/845/1999, (March 28, 2002), para. 7.3.

led to indiscriminate application of the same penalty to actions the may vary widely. In the view of the Court, when human life is at stake this indiscriminate application of the penalty is arbitrary under the terms of Article 4 (1) of the Convention.[122]

76. Also regarding **Guatemala**, the Inter-American Court found:[123]

The Court finds that the regulation in force for the crime of kidnapping or abduction in the Guatemalan Penal Code orders the automatic and generic application of the death penalty to the perpetrators of this illegal act ("the death penalty shall be applied to them") and, in this regard, considers it pertinent to recall that the United Nations Human Rights Committee considered that the mandatory nature of capital punishment which deprives the subject of his right to life, prevents consideration of whether, in the specific circumstances of the case, this exceptional form of punishment is compatible with the provisions of the International Covenant on Civil and Political Rights.[124]

Likewise, in a previous case, the Court found that the application of the mandatory death penalty treated the accused "not as individual, unique human beings, but as undifferentiated and faceless members of a mass who will be subjected to the blind application of the death penalty."[125]

Article 201 of the Penal Code, as it is written, has the effect of subjecting those accused of the crime of kidnapping or abduction to criminal proceedings in which the specific circumstances of the crime and of the accused are never considered, such as the criminal record of the accused and of the victim, the motive, the extent and severity of the harm caused, and the possible attenuating or aggravating circumstances, among other considerations concerning the perpetrator and the crime.

In view of the above, the Court concludes that Article 201 of the Guatemalan Penal Code, on which the sentence of Mr. Raxcacó Reyes was based, violated the prohibition to arbitrarily deprive a person of their life established in Article 4(1) and 4(2) of the Convention.

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[122] Inter-American Court, *Hilaire, Constantine and Benjamin and others*, Judgment of June 21, 2002, Series C No. 94, para. 103.

[123] I/A Court H.R., Case of Raxcacó-Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, paras. 79-82.

[124] *Cf.* UN, Human Rights Committee, *Kennedy v. Trinidad and Tobago* (Communication No. 845/1999), UN Doc. CCPR/C/74/D/845/1999 of March 28, 2002, para. 7(3); UN, Human Rights Committee, *Thompson v. Saint Vincent and the Grenadines* (Communication No. 806/1998), UN Doc. CCPR/C/70/D/806/1998 of December 5, 2000, para. 8(2); UN, Human Rights Committee, *Pagdayawon v. the Philippines*, Communication 1110/2002, para. 5(2).

[125] Cf. Case of Hilaire, Constantine and Benjamin et al., supra note 39, para. 105.

77. With respect to **Trinidad and Tobago** the Inter-American Court has indicated: [126]

> The Commission contended that the State is responsible for violating the American Convention through the arrest, detention, trial, conviction and sentencing to death by hanging of the thirty-two victims included in the present Case (*supra* para. 2), pursuant to the *Offences Against the Person Act* of Trinidad and Tobago, enacted in 1925.
>
> It added that, in accordance with Section 4 of the *Offences Against the Person Act*, once the offender is found guilty of murder, the death penalty is "mandatorily imposed" because that section provides that "every person found guilty of murder shall suffer death."[127]
>
> In addition, the Commission pointed out that the law of Trinidad and Tobago does not allow the courts to consider the personal circumstances of the offender or his crime in murder cases. Among the circumstances mentioned were the prior criminal record of the offender, the subjective factors that could have motivated his conduct, the degree of his participation in the criminal act and the probability that the offender could be reformed and socially readapted. The courts also cannot assess whether the death penalty is the appropriate punishment or not for the specific case in light of the particular circumstances of the offender's conduct.
>
> The Commission added that the use of the "mandatory death penalty" by Trinidad and Tobago results in its imposition on all persons convicted of murder, without taking into account the mitigating and aggravating circumstances of the case or the varying degrees of culpability. In the Commission's opinion, the foregoing contravenes the inherent dignity of the human being and the right to humane treatment protected in Article 5(1) and 5(2) of the American Convention.
>
> The Commission added that the "mandatory imposition of the death penalty," that is, where the death penalty is the only imposable punishment for murder cases, eliminates the possibility of determining individualised sentences and prevents a rational and proportional relation between the offender, the crime and the punishment imposed

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[126] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002. Series C No. 94, paras. 85-92, 101- 108.

[127] Section 3 of the *Offences Against the Person Act* adopts a definition of murder provided by English law, which states that the offender may be convicted of murder if it is proven that he intended to cause death or serious bodily harm, or when the offender has acted with one or more persons with a common design to cause death or serious bodily harm of another and has committed the act according to this common design, regardless of whether he was the principle author of the murder. *Cf. Offences Against the Person Act* of Trinidad and Tobago (April 3, 1925). Laws of Trinidad and Tobago, Section 3, *supra* note 31.

and does not allow judicial review of the judgment, according to the terms of the American Convention.

In light of this, the Inter-American Commission pointed out in its final allegations that the imposition of the "mandatory death penalty" for all persons convicted of murder, without analysing the individual characteristics of the offender and the crime and without considering whether the death penalty was the appropriate punishment for that case, renders it an inhuman and unjust punishment, constituting a violation of Articles 4(1), 4(2), 5(1), 5(2), and 8(1) in relation to Article 1(1) of the American Convention.

The Commission maintained that Articles 4, 5 and 8 of the Convention should be interpreted as obligating courts to dictate "individualised sentences," or rather, to exercise certain discretion, even if it is a limited discretion, for the purpose of taking into account the mitigating and aggravating circumstances in play for each particular case.

Finally, the Commission indicated that the "mandatory death penalty" is incompatible with the safeguards of the most fundamental human rights. This finding is consistent with the conclusions reached by supervisory domestic and international bodies that have considered the matter, including the Inter-American Court and the Judicial Committee of the Privy Council, who recently addressed the issue in *Reyes v. The Queen*. The Commission stated that, according to this jurisprudence, the death penalty is subject to rigorous application of judicial guarantees and procedural requirements, whose observance should be strictly respected and scrutinized by the highest domestic judicial bodies.

(…)

(…) The Court also considers that the State's struggle against murder should be carried out with the utmost respect for the human rights of the persons under their jurisdiction and in compliance with the applicable human rights treaties.[128]

The intentional and illicit deprivation of another's life (intentional or premeditated murder, in the broad sense) can and must be recognised and addressed in criminal law under various categories (criminal classes) that correspond with the wide range of gravity of the surrounding facts, taking into account the different facets that can come into play: a special relationship between the offender and the victim, motives for the behaviour, the circumstances under which the crime is committed, the means employed by the offender, etc. This approach allows for a

[128] *Cf.* I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, para. 174; I/A Court H.R., *Durand and Ugarte Case*. Judgment of August 16, 2000. Series C No. 68, para. 69; and I/A Court H.R., *Castillo Petruzzi et al. Case*, *supra* note 66, paras. 89 and 204.

graduated assessment of the gravity of the offence, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment.

The Court finds that the *Offences Against the Person Act* of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness. Consequently, this Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different. In light of Article 4 of the American Convention, this is exceptionally grave, as it puts at risk the most cherished possession, namely, human life, and is arbitrary according to the terms of Article 4(1) of the Convention.[129]

The Court finds that the *Offences Against the Person Act* has two principal aspects: a) in the determination of criminal responsibility, it only authorizes the competent judicial authority to find a person guilty of murder solely based on the categorization of the crime, without taking into account the personal conditions of the defendant or the individual circumstances of the crime; and b) in the determination of punishment, it mechanically and generically imposes the death penalty for all persons found guilty of murder and prevents the modification of the punishment through a process of judicial review.

The Court concurs with the view that to consider all persons responsible for murder as deserving of the death penalty, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."[130]

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[129] *Cf. Lubuto v. Zambia*, United Nations Human Rights Committee (No. 390/1990) U.N. Doc. CCPR/C/55/D/390/1990/Rev. 1 (Oct. 1995), para. 7.2 (recognising the importance of enabling the competent sentencing authority to exercise discretion in the imposition of sentences and indicating that, according to Article 6(2) of the International Covenant on Civil and Political Rights, the death penalty may only be applied for the "most serious crimes"); *Ndiaye Report*, 1994/82, para. 377, U.N. Doc. E/CN.4/1995/61 (14 December 1994) (holding that due process requires the consideration of all mitigating factors in proceedings that result in the imposition of the death penalty); *Bachan Singh v. State of Punjab* (1980) 2 S.C.C. 475, 534 (the Supreme Court of India held that the "scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large... "); *The State v. Makwanyane and McHunu*. Judgment, Case No. CCT/3/94 (June 6, 1995) (the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act No. 51 as inconsistent with South Africa's 1993 Constitution and declared in part that "[M]itigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond a reasonable doubt the existence of aggravating factors [...] Due regard must be paid to personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objects of punishment [...]."

[130] The Supreme Court of the United States of America held that the mandatory death penalty constituted a violation of the due process guarantees of the Fourteenth Amendment and the right to not be subjected to cruel and unusual punishment of the Eighth Amendment of the Constitution of the United States of America. The Court also indicated that the imposition of the death penalty generally necessitates a consideration

Continues…

In countries where the death penalty still exists, one of the ways in which the deprivation of life can be arbitrary under Article 4(1) of the Convention is when it is used, as is the case in Trinidad and Tobago due to the *Offences Against the Person Act*, to punish crimes that do not exhibit characteristics of utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention.

It is the view of this Court that although a violation of Article 4(2) of the Convention was not specifically alleged by the Commission in its Applications (*supra* para. 3), but rather only in its final arguments (*supra* para. 90), the Tribunal is not prevented from examining that issue, by virtue of the general principle of law *iura novit curia*, "on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them."[131]

In light of these facts, the Court concludes that because the *Offences Against the Person Act* submits all persons charged with murder to a judicial process in which the individual circumstances of the accused and the crime are not considered, the aforementioned Act violates the prohibition against the arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention.

C. Imposition of the death penalty only for the most serious crimes and no imposition for political offenses or related common crimes

The fact that the Convention limits the imposition of the death penalty to the most serious crimes not related to political offenses indicates that it was designed to be applied in truly exceptional circumstances only.

A distinction must be made between the different degrees of seriousness of the facts that permits distinguishing serious crimes from the "most serious crimes"; namely, those that affect most severely the most important individual and social rights and therefore merit the most vigorous censure and the most severe punishment.

78. Article 4(2) of the American Convention reads "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes (…)".

…continuation
of the relevant facets of the character and record of the individual offender and the circumstances of the particular offence. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

[131] I/A Court H.R., *Godínez Cruz Case*, *supra* note 68, para. 172. *Cf.* I/A Court H.R., *Durand and Ugarte Case*., *supra* note 109, para. 76; and I/A Court H.R., *Castillo Petruzzi et al. Case*. Judgment of May 30, 1999, *supra* note 66, para. 166.

Article 4(4) of the American Convention establishes: "[i]n no case shall capital punishment be inflicted for political offenses or related common crimes".

79. In interpreting these provisions, the Inter-American Court has indicated:[132]

> The Convention imposes another set of restrictions that apply to the different types of crimes punishable by the death penalty. Thus, while the death penalty may be imposed only for the most serious crimes [Art. 4(2)], its application to political offenses or related common crimes is prohibited in absolute terms. [Art. 4(4)] The fact that the Convention limits the imposition of the death penalty to the most serious of common crimes not related to political offenses indicates that it was designed to be applied in truly exceptional circumstances only.

80. In interpreting a reservation to Article 4(4) of the American Convention, the Inter-American Court stated:[133]

> Keeping the preceding considerations in mind and in view of the fact that a clear answer to the first question submitted by the Commission is provided by the text of Article 4(2) of the Convention, the Court can now proceed to an examination of the second question. It reads as follows: "2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?" In other words, may a State that has made a reservation to Article 4(4) of the Convention, which article prohibits the application of the death penalty to common crimes related to political offenses, validly assert that the reservation extends by implication to Article 4(2) and invoke the reservation for the purpose of applying the death penalty to crimes to which that penalty did not previously apply notwithstanding the prohibition contained in Article 4(2)? The difficulties that might have arisen if one sought to answer this question in the abstract disappeared once the Commission called the Court's attention to the text of Guatemala's reservation. The Court will therefore analyze the question by reference to that reservation, which it will have to examine in some detail.
>
> In relating Article 4(4) to Article 4(2), the Court finds that each provision, in its context, is perfectly clear and that each has a different meaning. Thus, while Article 4(2) imposes a definite prohibition on the death

[132] I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) No. 3 (1983), para. 54.

[133] I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) No. 3 (1983), paras. 67-75.

penalty for all categories of offenses as far as the future is concerned, Article 4(4) bans it for political offenses and related common crimes. The latter provision obviously refers to those offenses which prior thereto were subject to capital punishment, since for the future the prohibition set forth in paragraph 2 would have been sufficient. The Court is here therefore dealing with two rules having clearly different purposes: while Article 4(4) is designed to abolish the penalty for certain offenses, Article 4 (2) seeks to bar any extension of its use in the future. In other words, above and beyond the prohibition contained in Article 4(2), which deals with the extension of the application of capital punishment, Article 4(4) adds a further prohibition that bars the application of the death penalty to political offenses related to common crimes even if such offenses were previously punished by that penalty.

Accordingly, given the context of the Commission's request, what is the effect of a reservation to Article 4(4) of the Convention? In answering this question, it must be remembered above all, that a State reserves no more than what is contained in the text of the reservation itself. Since the reservation may go no further than to exempt the reserving State from the prohibition of applying the death penalty to political offenses or related crimes, it is apparent that all other provisions of the article remain applicable and in full force for the reserving State.

Furthermore, if Article 4, whose second paragraph clearly establishes an absolute prohibition on the extension of the death penalty in the future, is examined as a whole, it becomes clear that the only subject reserved is the right to continue the application of the death penalty to political offenses or related common crimes to which that penalty applied previously. It follows that a State which has not made a reservation to paragraph 2 is bound by the prohibition not to apply the death penalty to new offenses, be they political offenses, related common crimes or mere common crimes. On the other hand, a reservation made to paragraph 2, but not to paragraph 4, would permit the reserving State to punish new offenses with the death penalty in the future provided, however, that the offenses in question are mere common crimes not related to political offenses. This is so because the prohibition contained in paragraph 4, with regard to which no reservation was made, would continue to apply to political offenses and related common crimes.

The Court does not believe, moreover, that it can be reasonably argued that a reservation to Article 4(4) can be extended to encompass Article 4(2) on the grounds that the reservation relating to the prohibition of the death penalty for political offenses and related common crimes would make no sense if it were inapplicable to new offenses not previously punished with that penalty. Such a reservation does in fact have a purpose and meaning standing alone; it permits the reserving State to avoid violating the Convention if it desires to continue to apply the death penalty to common crimes related to political offenses, which penalty

existed at the time the Convention entered into force for that State. The Court having established, moreover, that the aforementioned provisions of Article 4 apply to different issues (see para. 68, **supra**) there is no reason for assuming either as a matter of logic or law that a State which when ratifying the Convention, made a reservation to one provision, was in reality attaching a reservation to both provisions.

The foregoing conclusions apply, in general, to the reservations made by Guatemala when it ratified the Convention. The reservation is based solely on the fact that "the Constitution of the Republic of Guatemala, in its Article 54, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." This explanation merely refers to a reality of domestic law. The reservation does not suggest that the Constitution of Guatemala requires the application of the death penalty to common crimes related to political offenses, but rather that it does not prohibit the application of the death penalty to such crimes. Guatemala was, therefore, not debarred from making a more extensive commitment on the international plane.

Since the reservation modifies or excludes the legal effects of the provision to which it is made, the best way to demonstrate the effect of the modification is to read the provision as it has been modified. The substantive part of the reservation "only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." It is clear and neither ambiguous nor obscure, and it does not lead to a result that is absurd or unreasonable, applying the ordinary meaning to the terms, to read the article as modified by the reservation as follows: "4(4). In no case shall capital punishment be inflicted for political offenses," thus excluding the related common crimes from the political offenses that were reserved. No other modification of the Convention can be derived from this reservation, nor can a State claim that the reservation permits it to extend the death penalty to new crimes or that it is a reservation also to Article 4(2).

It follows that if the Guatemalan reservation is interpreted in accordance with the ordinary meaning to be given to its terms, within the general context of the Convention and taking into account its object and purpose, one has to conclude that in making the reservation, what Guatemala did was to indicate that it was unwilling to assume any commitment other than the one already provided for by its Constitution. The Court finds that in its reservation Guatemala failed to manifest its unequivocal rejection of the provision to which it attached a reservation. Although this fact does not transform the reservation into one that is unique in character, it does at the very least reinforce the view that the reservation should be narrowly interpreted.

The instant opinion of the Court refers of course not only to the reservation of Guatemala but also to any other reservation of a like nature.

81. The Inter-American Court has further affirmed: [134]

The Commission and the representatives argued that the death penalty applied in Guatemala as a punishment for the crime of simple kidnapping "is disproportionate and excessive."

In this regard, the Court has stated that the American Convention reduces the scope of application of the death penalty to the most serious common crimes;[135] in other words, "it was designed to be applied in truly exceptional circumstances only."[136] Indeed, Article 4(2) of the American Convention stipulates that "[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes."

The United Nations Human Rights Committee[137] has stated that "crimes that do not result in loss of life" may not be punished by the death penalty.

A distinction must be made between the different degrees of seriousness of the facts that permits distinguishing serious crimes from the "most serious crimes"; namely, those that affect most severely the most important individual and social rights and therefore merit the most vigorous censure and the most severe punishment.

The crime of kidnapping or abduction may include different nuances of seriousness, ranging from simple kidnapping, which does not fall within the category of the "most serious crimes," to kidnapping following by the death of the victim. Even in the latter case, which would constitute an extremely serious act, it would be necessary to consider the conditions or circumstances of the case *sub judice.* All of this must be examined by the court and, to this end, the law must grant it a margin of subjective appraisal.

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[134] I/A Court H.R., Case of Raxcacó-Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, paras. 67-72.

[135] *Cf. Case of Hilaire, Constantine and Benjamin et al.*, *supra* note 39, para. 106.

[136] *Cf. Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), *supra* note 40, para. 54.

[137] *Cf.* UN, Human Rights Committee. Concluding observations on Iran (Islamic Republic of) issued on August 3, 1993. CCPR/C/79/Add.25, para. 8; and UN, Human Rights Committee. Concluding observations on Iraq issued on November 19, 1997. CCPR/C/79/Add.84, paras. 10 and 11.

> In the case that concerns us, Article 201 of the Penal Code, applied to Mr. Raxcacó Reyes, punished both simple kidnapping and any other form of kidnapping or abduction with the death penalty, thus disregarding the restriction imposed by Article 4(2) of the American Convention regarding the application of the death penalty only for the "most serious crimes."

82. In an application before the Inter-American Court, the Commission held:[138]

> The Convention reserves the most severe form of punishment for the most severe illicit acts.[139] Nevertheless, Section 2 of the Offences Against the Person Act simply states that where a person is found guilty of murder, that person shall be sentenced to death. Accordingly, the penalty for all crimes of murder in Barbados is the same, regardless of the individual circumstances of each case, the manner in which the murder is committed or the means employed.[140] That is, the Offences Against the Persons Act of Barbados fails to differentiate between intentional killings punishable by death, and intentional killings (not merely manslaughter or other lesser form of homicide)[141] that would not be punishable by death. Rather, the Offences Against the Person Act "compels the indiscriminate imposition of the same punishment for conduct that can be vastly different."[142]
>
> On this issue, the Court in *Boyce et al. v. Barbados* considered that Section 2 of the Offences Against the Person Act of Barbados does not confine the application of the death penalty to the most serious crimes, in contravention with Article 4(2) of the Convention.[143]

[138] IACHR, Application to the I/A Court H. R. in the Case of Tyrone Dacosta Cadogan v. Barbados, Case 12.645, October 31, 2008, paras. 61-62. See also I/A Court H.R., *Case of Dacosta-Cadogan v. Barbados*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 24, 2009. Series C No. 204, paras. 50-52.

[139] Article 4(2), American Convention on Human Rights.

[140] I/A Court H.R., *Case of Boyce et al v. Barbados*, para 54.

[141] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 54; Killings which otherwise would constitute murder in Barbados are subject to lesser punishments in the following areas: attempted murder, threatening murder through letters, conspiracy to murder, aiding suicide, acting in pursuance of a suicide pact and infanticide. *Cf. Offenses Against the Person Act,* Appendix A.4, ss. 2 and 9-14

[142] I/A Court H.R., *Case of Boyce et al v. Barbados*, *supra* note 69, para 54; *Cf. Case of Hilaire, Constantine and Benjamin et al.*, *supra* note 78, para. 103.

[143] I/A Court H.R., *Case of Boyce et al v. Barbados* , para 54, 55.

D. Imposition according to a law establishing such punishment enacted prior to the commission of the crime, no expansion to other crimes and no reestablishment of the death penalty

Any expansion of the list of offenses subject to the death penalty is prohibited under the American Convention.

The reestablishment of the death penalty for any type of offense is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes a final and irrevocable decision.

The promulgation of a law that manifestly violates the obligations assumed by a State upon ratifying or acceding to the Convention constitutes a violation thereof and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility of the State.

83. Article 4(2) of the American Convention reads "[i]n countries that have not abolished the death penalty, it may be imposed (…) pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply".

84. Article 4(3) of the American Convention establishes: "[t]he death penalty shall not be reestablished in states that have abolished it."

85. In interpreting these provisions, the Inter-American Court has established: [144]

> The tendency to restrict the application of the death penalty, which is reflected in Article 4 of the Convention, is even clearer and more apparent when viewed in yet another light. Thus, under Article 4(2), **in fine**, "the application of such punishment shall not be extended to crimes to which it does not presently apply." Article 4(3) declares, moreover, that "the death penalty shall not be reestablished in states that have abolished it." Here it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so. Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented. In the second case, the

[144] I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) No. 3 (1983), paras. 56, 59.

reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, **ipso jure**, a final and irrevocable decision.

(…)

(…) in interpreting the last sentence of Article 4(2) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" [Vienna Convention, Art. 31(1)], there cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), **in fine.** The only way to achieve a different result would be by means of a timely reservation designed to exclude in some fashion the application of the aforementioned provision in relation to the State making the reservation. Such a reservation, of course, would have to be compatible with the object and purpose of the treaty.

86. In an Advisory Opinion issued later, the Court held:[145]

In the instant case, although the considerations giving rise to the interpretation requested by the Commission regarding Article 4, paragraphs 2 *(in fine)* and 3, of the American Convention relate to the amendment of the Constitution of Peru, which expanded the number of cases for which the death penalty can be applied, it is evident that the Commission is not here requesting a statement as to the compatibility of that provision of Peru's domestic law with the abovementioned provision of the Convention. On the contrary, the questions posed by the Commission make no reference to that provision. They are general in nature and concern the obligations and responsibilities of the states or individuals who promulgate or enforce a law manifestly in violation of the Convention. Consequently, the Court's response would apply not only to Article 4 but also to all other provisions that proclaim rights and freedoms.

(...)

In view of the above, the Court believes that, on this occasion, it must limit its response to the questions posed in the request for advisory opinion, without addressing the interpretation of Article 4, paragraphs 2 *(in fine)* and 3 of the Convention which are cited in the cover note and in

[145] I/A Court H.R., *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, paras. 24, 29, 43, 44, 50.

> the considerations that gave rise to the request. The Court also should not concern itself with the interpretation of Article 140 of the new Constitution of Peru mentioned by the Commission and cited as the reason for its advisory opinion request. In the oral arguments before the Court, the Commission itself only referred to these provisions tangentially and restricted its comments to developing or defending the two specific questions posed in its advisory opinion request.
>
> (…)
>
> In the case of self-executing laws, as defined above, the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights —for example, because of race— automatically injures all the members of that race.
>
> When dealing with norms that violate human rights only upon their application and to prevent such violations from occurring, the Convention provides for provisional measures [Art. 63(2) of the Convention, Art. 29 of the Regulations of the Commission].
>
> (…)
>
> The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.

87. In its 2001 Report on the human rights situation in **Guatemala**, the Commission affirmed:[146]

> During the period covered by this report, there have been a number of significant developments related to the imposition and application of this penalty. When President Portillo took office in January of 2000, he indicated that he did not wish to make decisions on petitions for clemency in death penalty cases, and that he supported initiatives in Congress to revoke Decree 159, which provided for such petitions. The Congress derogated Decree 159 several months later. The President nonetheless agreed to consider several appeals for clemency that had been pending when he assumed office.
>
> Pursuant to that consideration, at the end of May of 2000, President Portillo commuted the sentence of death imposed on Pedro Rax Cucul for

[146] IACHR, Fifth Report on the Situation of Human Rights in Guatemala, Chapter V: the Right to Life, April 6, 2001, OEA/Ser.L/V/II.111, doc. 21 rev., paras. 60 – 70.

the crime of homicide, on the basis of serious due process concerns. The Commission had been following developments in this case for some months, and had opened case 12.244 in February of 2000 to investigate a petition claiming that Rax was mentally ill, that the judiciary had failed to properly evaluate this and take it into account in the criminal process, and that the application of the sentence of death imposed on him would consequently constitute cruel and unusual punishment. The Commission values this action on the part of President Portillo, which favors the role of due process in a state of law. The Commission continues to process case 12.244 and several other cases involving the application of the death penalty in accordance with its Statute and Regulations.[147]

At that time, President Portillo rejected requests for commutation in the cases of Fermín Ramírez, Amilcar Cetín Pérez and Tomás Cerrate Hernández. Ramírez had been convicted of rape and homicide, and Cetín and Cerrate of kidnapping and homicide. Cetín and Cerrate were executed by lethal injection on June 29, 2000. MINUGUA had reported confirming procedural irregularities in all three cases.[148] In its observations on the draft report, the State indicated that "it considers that in these cases the accused were provided the right of defense to guarantee their ability to contest decisions with which they did not agree. In each and every procedural stage, they were found guilty by the courts…."

While the derogation of Decree 159 has left the process to petition for clemency confused, it cannot be read to mean that this recourse simply no longer exists, because it is required by international law. A number of groups in Guatemala, including the National Commission for Follow-up and Support for the Strengthening of Justice have manifested the need to respect this requirement.[149] Article 4(6) of the American Convention stipulates that: "Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases." The penalty may not be carried out while a decision on such a request is pending. The ICCPR (Article 6(4)) and the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (safeguard 7) contain similar provisions. Such provisions require a last opportunity to evaluate the situation of the individual condemned in the face of an irrevocable penalty, and the Commission has indicated that

[147] *See*, Case 11.686, Roberto Girón and Pedro Castillo Mendoza; Case 11.782, Rodríguez Revelorio et al; Case 11.834, Manuel Martínez Coronado.

[148] MINUGUA, *Eleventh Report*, para. 26, and Supplement, paras. 102, 109. Days later, the European Union sent a communication to the State questioning the two executions, and asking that Ramírez be spared. Further, the EU asked that the State reconsider the legislation that had expanded the applicability of the death penalty, and take the steps necessary to define a mechanism to apply for clemency.

[149] That Commission took out a paid ad expressing its view, which was run by and covered in all the major newspapers on July 16, 2000. *See also*, Instituto de Investigaciones Jurídicas*, "Recurso de Gracia*," June 2000.

there should be a procedure prescribed, encompassing certain minimum procedural guarantees, to ensure that this right can be effectively exercised.[150]

Recently, on October 31, 2000, the Court of Constitutionality issued a compelling sentence applying the terms of Article 4(2) of the American Convention in determining that the application of the death penalty to crimes for which it did not apply at the time the State became a party to that treaty violated its obligations under the constitution and international law. As the sentence correctly reflects, Article 4(2) of the Convention stipulates that once a State has become a party to the Convention, it may not extend the coverage of the death penalty to apply to additional crimes.[151]

The opinion in question examined the reforms to Article 201 of the Criminal Code adopted in 1994 (decree 38-94), 1995 (decree 14-95) and 1996 (decree 81-96), by means of which the Congress of Guatemala extended coverage of the death penalty to apply, not only to kidnappings which result in the death of the victim (the law in effect at the time of ratification of the Convention), but also to kidnappings which do not result in death, as well as to the crimes of extrajudicial execution and forced disappearance which had not been typified in domestic law at the time of ratification. According to these decrees, the death penalty is to apply to: extrajudicial executions where the victim is younger than 12 or older than 60 years of age, or when the circumstances such as the means or motive suggest the special dangerousness of the offender; enforced disappearance resulting in the death or serious injury or permanent psychological trauma of the victim; kidnapping, whether it results in the death of the victim or not; and the killing of the president or vice-president, when the offender is considered especially dangerous.

This legislation and the apparent conflict with the State's obligations under international law caused confusion in some lower courts, with the resulting imposition of diverse sentences for equivalent crimes. On the one hand, some courts carefully construed the terms of Article 201 in the context of the Constitution and applicable norms of international law and imposed prison terms rather than the death penalty. For example, on May 21, 1999, the Fifth Chamber of Appeals of Jalapa granted a special

[150] Report No. 41/00, Cases 12.023 et al., Jamaica, Apr. 13, 2000, at paras. 228-32.

[151] The Inter-American Court of Human Rights has provided clear guidance on the scope of Article 4(2), having affirmed that, pursuant to its terms, *any* expansion of the list of offenses subject to the death penalty is absolutely prohibited. IACtHR, "Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of Sept. 8, 1983, Ser. A No. 3, paras. 56-59. It has also confirmed the international responsibility that attaches when a State promulgates a law in manifest conflict with its obligations under the Convention. IACtHR, "International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention" (Arts. 1 and 2 of the American Convention on Human Rights) Advisory Opinion OC-14/94 of December 9, 1994, Ser. A No. 14.

appeal filed on behalf of five persons condemned to death at first instance for a kidnapping which did not result in the death of the victim. In reversing that sentence, the appellate court invoked the primacy accorded to international human rights treaties in the Constitution, the State's duties as a Party to the American Convention and the provisions of the Vienna Convention on the Law of Treaties concerning the obligation to comply with treaty obligations in good faith. It further emphasized that the amplification of the death penalty to apply to kidnappings not resulting in the death of the victim provides no disincentive to dissuade perpetrators from killing their victims.

Similarly, in matter 29-98, the Third Chamber of the Court of Appeals granted a special appeal and commuted the death sentence imposed on three defendants for the crime of kidnapping not resulting in death to terms of 50 years imprisonment, and in matter 268-99 the Twelfth Chamber affirmed the 50 year prison sentence imposed in a similar case where a special appeal had been sought by the prosecution to elevate the penalty to death. The Commission recognizes and values the foregoing decisions upholding national law and international obligations for their important contribution to the process of consolidating respect for the rule of law and human rights.[152]

On the other hand, however, a number of courts imposed or upheld the death penalty in cases involving kidnapping not resulting in death absent due consideration of the State's international obligations or the constitutional hierarchy accorded to such obligations. On November 26, 1999, following similar rulings by some lower courts, the Criminal Chamber of the Supreme Court of Justice, sitting in cassation, confirmed the imposition of the death penalty in two cases involving seven persons condemned for the crime of kidnapping which did not result in death. It posited that the revisions to Article 201 do not contradict the terms of the American Convention because both the application of the penalty in effect at the time of ratification (to kidnapping resulting in death), and the application in effect pursuant to the adoption of decrees 38-94, 14-95 and 81-96 (to kidnapping not resulting in death), deal with kidnapping – so there has been no amplification of the coverage of the penalty.

The October 31, 2000 opinion of the Court of Constitutionality, overturning the November 26, 1999 decision of the Criminal Chamber of

[152] In its previous report, the Commission recognized the positive contribution of the Ninth Chamber of the Court of Appeals, which in a sentence of January 30, 1997, commuted three death sentences to noncommutable sentences of 50 years imprisonment on the basis of the requirements of domestic law including the State's obligations pursuant to Article 4 of the American Convention. The Court of First Criminal Instance, Narcoactivity and Crimes against the Environment of the Department of Santa Rosa, Cuilapa issued a similar decision on May 8, 1997, having determining that, under the terms of the applicable legal regime, the court could not legally impose the death penalty for a crime for which that punishment was not prescribed at the time of Convention ratification. *See* "Guatemala," *Annual Report of the IACHR 1997*, OEA/Ser.L/V/II.95, Doc. 7 rev., Mar. 14, 1997.

> the Supreme Court on the basis of the latter's failure to apply Article 4(2) of the American Convention, provides definitive guidance on how Article 201 of the Criminal Code must be interpreted and applied in domestic law, as well as on the proper role of international obligations in a system based on the rule of law. The opinion first reviews articles of the Constitution that refer to the role of international law and its normative status in Guatemalan law, noting particularly the primacy accorded to international obligations in the area of human rights under Article 46. Given that the Constitution was adopted subsequent to ratification of the American Convention, the Court notes that legislators were fully aware that the latter would fall within the scope of application of Article 46.
>
> With respect to the argument that both the crime of kidnapping resulting in death and "simple" kidnapping fall under the same heading, the Court looked past the heading to the nature of the juridical good sought to be protected. The punishment imposed on kidnapping resulting in death seeks to protect the "supreme" interest of life, the Court opined, while the punishment imposed on kidnapping not resulting in death seeks to protect liberty. To ignore this distinction, it cautioned, would be to ignore the principle of legality in the definition of crimes. The Court affirmed that applicable international norms may be invoked before domestic tribunals to challenge incompatible national legislation, with the result that in the case under study it was ordering the issuance of a new sentence. This commendable, well-reasoned opinion provides clear guidance to lower courts and policy makers, and deserves full recognition for ensuring that the State gives proper effect to its freely undertaken international obligations. It is critical that all judges have the information, training and capacity to properly construe and apply domestic law in harmony with those obligations.

88. Also regarding **Guatemala**, the Court affirmed that when interpreting Article 4(2) of the American Convention: [153]

> (…) There cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State.[154]
>
> The representatives and the Inter-American Commission argue that the modifications that were made to Article 201 of the Guatemalan Penal Code, which defined the crime of kidnapping or abduction, are contrary to Article 4 of the Convention because they apply the death penalty to

[153] I/A Court H.R., Case of Raxcacó-Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, paras. 57-66, 87-88.

[154] *Cf. Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), *supra* note 40, para. 59.

conducts for which it was not provided when Guatemala ratified the American Convention. The State indicated, initially, that this violation of the Convention did not exist, because the death penalty was already established for the crime of kidnapping or abduction before the entry into force of the Convention. Nevertheless, in its final written arguments the State acknowledged that "the reform of Article 201 of the Penal Code entailed a clear violation of the provisions of Article 4(2) of the American Convention […] because it established the death penalty as the principal punishment and 25 to 50 years of imprisonment as the secondary punishment."

In its concluding observations on the second periodic report[155] submitted by Guatemala, the Human Rights Committee indicated that it was:

> Concerned about the application of the death penalty and, in particular, about the increase in the number of crimes carrying that penalty, its application having been extended to abduction not resulting in death, contrary to the provisions of the Covenant. The State party should limit the application of the death penalty to the most serious crimes and restrict the number of crimes carrying that penalty in accordance with Article 6, paragraph 2, of the Covenant. The State party is invited to move towards the full abolition of the death penalty.[156]

When Guatemala ratified the American Convention, Decree No. 17/73 (Penal Code) was in force (*supra* para. 43(1), and its Article 201 established the punishment of the death penalty for kidnapping followed by the death of the person kidnapped:

> The kidnapping or abduction of a person in order to obtain a ransom, an exchange for third parties or other illegal purpose of the same or similar nature, shall be punished by eight to fifteen years of imprisonment.
>
> The death penalty shall be imposed on the person responsible, when owing to the kidnapping or abduction or during it, the person kidnapped dies.

This norm was modified on several occasions (*supra* paras. 43(1) to 43(4)), and finally the provision established in Legislative Decree No.

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[155] *Cf.* Second periodic report submitted by Guatemala to the United Nations Human Rights Committee (CCPR/C7GTM/99/2 and HRI/CORE/1/Add. 47).

[156] *Cf.* UN, Human Rights Committee. Concluding observations on Guatemala issued on August 27, 2001, CCPR/CO/72/GTM, paragraph 17.

81/96, of September 25, 1996, was applied to the alleged victim in the instant case. This establishes that:

> The death penalty shall be imposed on the perpetrators or masterminds of the crime of the kidnapping or abduction of one or more persons in order to obtain a ransom, an exchange of persons, or a decision contrary to the will of the person kidnapped, or with any similar or equal purpose and, when this cannot be imposed, the punishment shall be twenty-five to fifty years of imprisonment. In this case, no attenuating circumstances shall be taken into consideration.
>
> Accomplices or accessories after the fact shall be punished with twenty to forty years of imprisonment.
>
> Those who are sentenced to imprisonment for the crime of kidnapping or abduction shall not be granted a reduction in the punishment for any reason.

The phrase "and when this cannot be imposed" refers to Article 43 of the same Penal Code, which establishes that:

> The death penalty shall not be imposed:
> 1. For political crimes.
> 2. When the sentence is based on presumptions.
> 3. On women.
> 4. On men over the age of 60 years.
> 5. On persons whose extradition has been granted on this condition.

[…]

To establish whether the modification introduced by Legislative Decree No. 81/96 to the crime category of kidnapping or abduction entails an "extension" of the application of the death penalty, prohibited by Article 4(2) of the American Convention, it should be recalled that the crime category delimits the scope of the criminal prosecution, delimiting the juridical conduct.

The action described in the first paragraph of Article 201 of Legislative Decree No. 17/73 corresponds to the abduction or fraudulent detention of a person for a specific purpose (obtaining a ransom, an exchange for third persons, or other illegal purpose); thus, the crime category basically protects individual freedom. The act embodied in the second paragraph of this Article included an additional element: in addition to the abduction or detention: the death, in any circumstances, of the victim; this protected the juridical right to life. Consequently, there is a difference between simple kidnapping and kidnapping aggravated by the

death of the victim. In the first case, the punishment of deprivation of liberty was applied; in the second, the death penalty.

Article 201 of Legislative Decree No. 81/96, which was applied in the sentencing of Mr. Raxcacó Reyes, defines a single conduct: abduction or detention of a person for a specific purpose. The act of assassination is not included in this crime category which protects individual freedom, not life, and provides for the imposition of the death penalty on the kidnapper.

Although the *nomen iuris* of kidnapping or abduction remains unaltered from the time Guatemala ratified the Convention, the factual assumptions contained in the corresponding crime categories changed substantially, to the extent that it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend the death penalty contained in Article 4(2) of the Convention.

(…)

Article 2 of the American Convention obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms that it protects. It is necessary to reaffirm that the obligation to adapt domestic laws is only complied with when the reform is effectively carried out.[157]

In this case, the Court finds that, even though Mr. Raxcacó Reyes has not been executed, the State has failed to comply with Article 2 of the Convention. The mere existence of Article 201 of the Guatemalan Penal Code, which punishes any form of kidnapping or abduction with the mandatory death penalty and expands the number of crimes punishable with this sanction is, per se, a violation of this provision of the Convention.[158] This opinion corresponds to the Court's Advisory Opinion OC-14/94, according to which "in the case of self-executing laws, […] the violation of human rights, whether individual or collective, occurs upon their promulgation."[159]

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[157] *Cf. Case of the Indigenous Community Yakye Axa*, *supra* note 4, para. 100, and *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

[158] *Cf. Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 221; *Case of Hilaire, Constantine and Benjamin et al.*, *supra* note 39, paras. 114 and 116; *Case of Cantoral Benavides.* Judgment of August 18, 2000. Series C No. 69, para. 176, and *Suárez Rosero case*, Judgment of November 12, 1997. Series C No. 35, para. 98.

[159] *Cf. Case of Hilaire, Constantine and Benjamin et al.*, *supra* note 39, para. 116, and *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2

Continues…

E. The death penalty and persons under 18 years old

The overwhelming evidence of global state practice displays a consistency and generality indicating that the world community considers the execution of offenders aged below 18 at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is of the view that a norm of international customary law has emerged prohibiting the execution of offenders who were under 18 at the time of their crime.

89. Article 4(5) of the American Convention establishes "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

90. On this issue, the Commission has indicated: [160]

> The Commission recalls that in its recent decisions in *Michael Domingues v. United States*[161] and *Napoleon Beazley v. United States,*[162] it found that the state of international law had evolved since the Commission's determination in 1987 of the case of Roach and Pinkerton, so as to prohibit as a *jus cogens* norm the execution of persons who were under 18 years of age at the time of their crimes. In reaching this conclusion, the Commission canvassed international legal and political developments and state practice over the 14 year period between the period of 1987 and 2001 concerning the execution of juveniles. This evidence included the promulgation and ratification of treaties, United Nations resolutions and standards,[163] domestic practice of states, and the practice of the United States. (…)
>
> In the present case, Mr. Patterson was executed by the state of Texas on August 28, 2002, more than 9 months following the Commission's October 15, 2001 preliminary report in the *Domingues Case*. The Commission therefore adopts for the purposes of this report its findings in the *Domingues* case, and concludes that at the time of Mr. Patterson's execution, the United States was likewise bound by a norm of *jus cogens* prohibiting the carrying out of the death penalty on individuals

…continuation
American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 43.

[160] IACHR, Report No. 25/05, Case 12.439, Merits, Toronto Markkey Patterson, United States, March 7, 2005, paras. 45-47.

[161] IACHR, Report Nº 62/02, Case 12.285, Michael Domingues, United States, October 22, 2002.

[162] IACHR, Report Nº 101/03, Case 12.412, Napoleon Beazley, United States, December 29, 2003.

[163] Pertinent United Nations instruments in this respect include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), Principle 17.2, which provides that "[c]apital punishment shall not be imposed for any crime committed by juveniles."

who committed their crimes when they had not yet reached 18 years of age.

Consequently, the Commission finds that by executing Mr. Patterson for a crime that he was found to have committed when he was 17-years-old, the United States is responsible for violating Mr. Patterson's right to life under Article I of the American Declaration.

91. In its decision on ***Michael Domingues v. United States***, the IACHR held:[164]

The Commission notes at the outset of its analysis that the Petitioner's arguments draw significantly upon the Commission's 1987 decision in the case of Roach and Pinkerton against the United States. [165] That case concerned two juvenile offenders, James Terry Roach and Jay Pinkerton, who were sentenced to death in the states of, respectively, South Carolina and Texas, for crimes committed when they were seventeen years of age. Both petitioners were subsequently executed by those states. In determining the complaint brought before it on behalf of the Mr. Roach and Mr. Pinkerton, the Commission considered whether the United States had in sentencing the two prisoners to death and subsequently allowing their executions acted contrary to a recognized norm of *jus cogens* or customary international law. While the Commission determined the existence of a *jus cogens* norm prohibiting the execution of children, it found that uncertainty existed as to the applicable age of majority under international law. (…)

The Commission ultimately concluded that there did not exist at that time a norm of *jus cogens* or other customary international law prohibiting the execution of persons under 18 years of age: (…)

(…)

Since 1987, several notable developments have occurred in relation to treaties that explicitly prohibit the execution of individuals who were under 18 years of age at the time of committing their offense. These developments include the coming into force of new international agreements as well as broadened ratifications of existing treaties.

(…)

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[164] IACHR, Report No. 62/02, Case 12.285, Michael Domingues, United States, October 22, 2002, paras. 40, 41, 55, 68, 71, 76-79, 84-87. On the issue of the death penalty applied to persons under 18 years old when committing the offense, see also IACHR, Report No. 25/05, Case 12.439, Merits, Toronto Markkey Patterson, United States, March 7, 2005, IACHR, Report No. 101/03, Case 12.412, Napoleon Beazley, United States, December 29, 2003; IACHR, Report No. 97/03, Case 11.193, Gary Graham/Shaka Sankofa, United States, December 29, 2003, paras. 50-55; IACHR, Report No. 100/03, Case 12.240, Douglas Christopher Thomas, United States, December 29, 2003.

[165] Roach and Pinkerton v. United States, *supra*.

The foregoing analysis therefore indicates that since 1987, and consistent with events prior to that date, there has been concordant and widespread development and ratification of treaties by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of committing their offense.

(…)

It is therefore apparent that the United Nations bodies responsible for human rights and criminal justice have consistently supported the norm expressed in international human rights agreements prohibiting the execution of offenders under the age of 18.

(…)

Domestic practice over the past 15 years therefore evidences a nearly unanimous and unqualified international trend toward prohibiting the execution of offenders under the age of 18 years. This trend crosses political and ideological lines and has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then, as the following discussion indicates, only in certain state jurisdictions.

d. Practice of the United States

Within the United States, judicial determinations and legislative initiatives over the past 20 years have also demonstrated a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18 years. At the time of the decision of the U.S. Supreme Court in the case *Thompson v. Oklahoma* in 1988, 36 states authorized the use of capital punishment and of those, 18 required that the defendant attain at least the age of 16 years at the time of his or her offense, while another 19 provided no minimum age for the imposition of the death penalty.[166] In the Thompson decision, the U.S. Supreme Court held that the execution of offenders under the age of sixteen years at the time of their crimes was prohibited by the Eighth Amendment to the United States Constitution.[167] In its analysis of that case, the Supreme Court concluded that it would "offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense," and cited in support of its conclusion the fact that

> [r]elevant state statutes - particularly those of the 18 States that have expressly considered the question of a

[166] Thompson v. Oklahoma, 487 U.S. 815, 823-831(1988).

[167] *Id*.

> minimum age for imposition of the death penalty, and have uniformly required that the defendant have attained at least the age of 16 at the time of the capital offense - support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense. That conclusion is also consistent with the views expressed by respected professional organizations, by other nations that share the Anglo-American heritage, and by the leading members of the Western European Community.[168]

Moreover, since this initiative by the U.S. Supreme Court to establish a minimum age of 16 at which an offender may be executed in the United States, additional state jurisdictions have moved toward a higher standard. In 1999, for example, the Florida Supreme Court interpreted the Florida Constitution to prohibit the death penalty for sixteen-year-old offenders, ruling that the execution of a person who was 16 years old at the time of his crime violated the Florida Constitution and its prohibition against cruel and unusual punishment.[169] On April 30, 1999 a revision of Montana state law raised the minimum age of offenders who are eligible for the death penalty from 16 year to 18 years of age.

Currently within the United States, 38 states and the federal military and civilian jurisdictions have statutes authorizing the death penalty for capital crimes. Of those jurisdictions, 16 have expressly chosen the age of 18 at the time of the crime as the minimum age for eligibility the death sentence,[170] compared to approximately 10 in 1986,[171] and 23 states allow the execution of those under 18, compared to 27 in 1986.[172] These statistics complement the international movement toward the establishment of 18 as the minimum age for the imposition of capital punishment. The Commission considers it significant in this respect that the U.S. federal government itself has considered 18 year to be the

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[168] *Id*.

[169] Brennan v Florida 754 So. 2d 1 (Fla. July 8, 1999) following its decision in Allen v The State 636 So. 2d 494 (Fla. 1994).

[170] These 16 jurisdictions include California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Montana, and the Federal Government.

[171] Roach and Pinkerton v. United States, *supra*, para. 57.

[172] Five states have chosen age seventeen as the minimum age, Georgia, New Hampshire, North Carolina, Texas, and Florida. The other eighteen death penalty jurisdictions use age sixteen as the minimum age, either through an express age prescribed by statute or by court ruling. *See* The Juvenile Death Penalty Today: Death sentences and executions for juvenile crimes, January 1, 1973 – December 31, 2000 by Victor L. Streib Professor of Law The Claude W. Pettit College of Law Ohio Northern University Ada, Ohio 45810-1599 (last modified February 2001), <http: // www . law.onu.edu/faculty/streib/juvdeath.htm>. *See also* United States v. Burns [2001] 1 S.C.R. 283, para. 93 (Can.)

minimum age for the purposes of federal capital crimes.[173] As the U.S. government is the authority responsible for upholding that State's obligations under the American Declaration and other international instruments, the Commission considers the federal government's adoption of 18 as the minimum age for the application of the federal death penalty as a significant indication by the United States itself of the appropriate standard on this issue.

(…)

In the Commission's view, the evidence canvassed above clearly illustrates that by persisting in the practice of executing offenders under age 18, the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community. The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is therefore of the view that a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.

Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision. As noted above, nearly every nation state has rejected the imposition of capital punishment to individuals under the age of 18. They have done so through ratification of the ICCPR, U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws. The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards. Indeed, it may be said that the United States itself, rather than persistently objecting to the standard, has in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard. On this basis, the Commission considers that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed

[173] 18 U.S.C. § 3591 (1994).

> their crimes when they had not yet reached 18 years of age. As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.
>
> Interpreting the terms of the American Declaration in light of this norm of *jus cogens*, the Commission therefore concludes in the present case that the United States has failed to respect the life, liberty and security of the person of Michael Domingues by sentencing him to death for crimes that he committed when he was 16 years of age, contrary to Article I of the American Declaration.
>
> As a further consequence of this determination, the Commission finds that the United States will be responsible for a further grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration if he is executed for crimes that he committed when he was 16 years of age.

F. Right to apply for amnesty, pardon or commutation and no execution while this petition is pending

This obligation encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, to receive a decision from that authority within a reasonable period of time prior to his or her execution, and not to have capital punishment imposed when such a petition is pending decision by the competent authority.

92. Article 4.6 of the American Convention establishes that "[e]very person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

93. The IACHR has examined the process for exercising the prerogative of mercy in some OAS States, finding that it is not in line with the American Convention or the Declaration. For example, with respect to **Grenada**, the Commission has held: [174]

> The Petitioners in the present case have also contended that the process for granting amnesty, pardon or commutation of sentence in Grenada is not consistent with Article 4(6) of the Convention because it does not provide for certain procedural rights which the Petitioners assert are

[174] IACHR, Report No. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 75-81. See similarly, IACHR, Report No. 56/02, Merits, Case 12.158, Benedict Jacob, Grenada, October 21, 2002, paras. 81-89.

integral to render this right effective. In this connection, the authority of the Executive in Grenada to exercise its Prerogative of Mercy is prescribed in Sections 72, 73 and 74 of the Constitution of Grenada, (…)

> In addressing this issue, the Commission first observes that in the cases of Rudolph Baptiste and Donnason Knights, the Commission determined that the process for exercising the Prerogative of Mercy under Sections 72, 73, and 74 of the Grenadian Constitution did not guarantee the condemned prisoners in those cases an effective or adequate opportunity to participate in the mercy process, as required under Article 4(6) of the Convention.[175]

In reaching this conclusion, the Commission interpreted the right to apply for amnesty, pardon or commutation of sentence under Article 4(6), when read together with the State's obligations under Article 1(1) of the Convention, as encompassing certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections were held to include the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution.[176] It was also held to entail the right not to have capital punishment imposed while such a petition is pending decision by the competent authority.[177]

In making this determination in the cases of Rudolph Baptise, Donnason Knights, McKenzie et al., the information before the Commission indicated that neither the legislation nor the courts in Grenada and in Jamaica guaranteed the prisoners in those cases any procedural

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[175] Rudolph Baptiste *supra*, 760-76; Donnason Knights, *supra* 878-882; and McKenzie et al. Case, *supra*, paras. 227-232.

[176] Mckenzie et al. Case para. 228.

[177] Id. The Commission reasoned that the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive" asylum in foreign territory, in accordance with the laws of each country and with international agreements, which the Commission has interpreted, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status. *See* Haitian Center for Human Rights and others v. United States, Case 10.675 (13 March 1997), Annual Report of the IACHR 1996, para. 155. The Commission also observed that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process *See* Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). *See also* Ohio Adult Parole Authority v. Woodward, Court File Nº 96-1769 (25 March 1998)(U.S.S.C.).

protection in relation to the exercise of the Prerogative of Mercy. Rather, the petitioners and the State in those cases indicated that according to domestic jurisprudence at that time, the exercise of the power of pardon in Jamaica involved an act of mercy that was not the subject of legal rights and therefore is not subject to judicial review, and cited in support the decision of the Judicial Committee of the Privy Council in the Reckley Case*, supra.*

Since adopting its report in the cases of Rudolph Baptise and Donnason Knights and McKenzie et al., the Commission has received information that in a September 12, 2000 judgment in the case of Neville Lewis et al. v. The Attorney General of Jamaica, the Judicial Committee of the Privy Council found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review.[178] The Judicial Committee of the Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision.[179]

Notwithstanding the determination in the Neville Lewis Case, however, there is no information in the present case indicating that the State has extended the legal requirements articulated in that decision to Mr. Lallion. Accordingly, based upon the information available, the Commission finds that the procedure available to Mr. Lallion to seek amnesty, pardon or commutation of sentence has not guaranteed him an effective or adequate opportunity to participate in the mercy process.

The Commission also concludes that the State has violated Mr. Lallion's right pursuant to Article 4(6) of the American Convention by failing to guarantee him an effective right to apply for amnesty, pardon or commutation of sentence, to make representations, in person or by counsel, to the Advisory Committee on the Prerogative of Mercy, and to receive a decision from the Advisory Committee within a reasonable time prior to his execution.

[178] Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000) (J.C.P.C.), at p. 23.

[179] Id., at 23-24.

94. Regarding **The Bahamas**, the Commission has indicated that:[180]

> The law in The Bahamas therefore provides for a process by which the Executive may exercise the authority to grant amnesties, pardons, or commutations of sentences. The Commission is not, however, aware of any prescribed criteria that are applied in the exercise of the functions or discretion of the Advisory Committee, save for the requirement in death penalty cases that the Minister cause a written report of the case from the trial judge, and possibly other information in the Minister's discretion, to be taken into consideration at the meeting of the Advisory Committee. Nor is the Commission aware of any right on the part of an offender to apply to the Advisory Committee, to be informed of the time when the Committee will meet to discuss the offender's case, to make oral or written submissions to the Advisory Committee or to present, receive or challenge evidence considered by the Advisory Committee. The submissions of the Petitioners confirm that the exercise of the power of pardon in The Bahamas involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review.[181]
>
> This process is not consistent with the standards prescribed under Articles I, XVIII, XXIV, XXV, and XXVI of the Declaration, that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in The Bahamas clearly does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.
>
> Moreover, based upon the information before it, the Commission finds that the procedure for granting mercy in The Bahamas does not guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the condemned men's rights under Article XXIV of the Declaration to submit respectful petitions to any competent authority,

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[180] IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 167-174. In a 2007 decision also regarding The Bahamas, the IACHR stated: "60. (…) the Commission finds that the procedure for granting mercy in The Bahamas does not guarantee condemned prisoners with an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure Mr. Goodman's rights under Article XXIV of the Declaration to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon". IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, Commonwealth Of The Bahamas, October 15, 2007, para. 60.

[181] See Reckley v. Minister of Public Safety (Nº 2) [1996] 2 W.L.R. 281 at 289-291 (finding that the exercise of the Prerogative of Mercy by the Minister of Public Safety in The Bahamas involved an act of mercy that was not the subject of legal rights and was therefore not judicable.); de Freitas v. Benny [1976] 2 A.C. 239.

for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

In the Commission's view, the right to petition under Article XXIV of the Declaration, when read together with the State's obligations under the Declaration, must be read to encompass certain minimum procedural protections for condemned prisoners, if the right is to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned persons with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article XXIV of the American Declaration is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the American Declaration.

In this respect, the right to petition under Article XXIV of the Declaration may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements," and the corresponding Article 22(7) of the Convention, which provides for the right to "seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."[182] The Commission has interpreted the former provision, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status.[183] Other internationally articulated requirements governing the right to seek asylum reflect similar minimum standards, namely, the right of an individual to apply to appropriate

[182] See similarly Universal Declaration on Human Rights, Article 14 (providing for the right of every individual to "seek and to enjoy in other countries asylum from persecution.").

[183] I/A. Comm. H.R., Haitian Interdiction Case (United States), Case Nº 10.675 (March 13 1997), Annual Report 1996, para. 155.

authorities for asylum, to make representations in support of their application, and to receive a decision.[184]

Consistent with the interpretation of the right to seek asylum by the Commission and other international authorities, the Commission finds that Article XXIV of the Declaration must be interpreted to encompass certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. The Commission notes in this regard that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process.[185]

The information before the Commission indicates that the process in The Bahamas for granting amnesty, pardon or commutation of sentence does not guarantee the condemned men any procedural protections. By its terms, Sections 91 and 92 of the Constitution of The Bahamas does not provide condemned prisoners with any role in the mercy process.

The Petitioners have claimed that the condemned men have no right to make submissions to the Advisory Committee. Whether and to what extent prisoners may apply for amnesty, pardon or commutation of sentence remains entirely at the discretion of the Advisory Committee, and no procedure or mechanism is provided for, that specifies the manner in which prisoners may file an application for amnesty, pardon or commutation of sentence, submit representations in support of his or her application, or receive a decision. Consequently, the Commission finds that the State has failed to respect the rights of the condemned men

[184] See e.g. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, paras. 189-219 (prescribing basic requirements for the procedures for determining refugee status, including the right of an applicant to be given the necessary facilities for submitting his case to the authorities concerned, and that the applicant be permitted to remain in the country pending a decision on his initial request for refugee status); Council of Europe, Resolution on minimum guarantees for asylum procedures, Brussels, 21 June 1995, Articles 10, 12, 14, 15, 23 (prescribing common procedural guarantees to be provided by Member States of the European Union in processing asylum application, including the right of an asylum-seeker, at the border or otherwise, to have an opportunity to lodge his asylum application as early as possible, to remain in the territory of the state in which his application has been lodged or is being examined as long as the application has not been decided upon, to be given the opportunity of a personal interview with an official qualified under national law before a final decision is taken on the asylum application, and to have the decision on the asylum application communicated to the asylum-seeker in writing.).

[185] In the State of Ohio, for example, clemency review has been delegated in large part to the Ohio Adult Parole Authority (OAPA). In the case of an inmate under sentence of death, the OAPA must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole board members. The OAPA holds a hearing, completes its clemency review, and makes a recommendation to the Governor. If additional information later becomes available, the OAPA may in its discretion hold another hearing or alter its recommendation. See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). See also Ohio Adult Parole Authority v. Woodward, Court File Nº 96-1769 (25 March 1998)(U.S.S.C.) (finding that Ohio's clemency procedures do not violate the U.S. Constitution's Due Process Clause).

under Article XXIV of the American Declaration to submit respectful petitions to any competent authority to apply for amnesty, pardon or commutation of sentence, and to obtain a prompt decision thereon.

95. With respect to **Jamaica**, the Commission affirmed that: [186]

The Petitioners in the present case have also contended that the process for granting amnesty, pardon or commutation of sentence in Jamaica is not consistent with Article 4(6) of the Convention because that process does not provide for certain procedural rights which the Petitioners assert are integral to render this rights effective. In this connection, the authority of the Executive in Jamaica to exercise its Prerogative of Mercy is prescribed in Sections 90 and 91 of the State's Constitution.[187]

In addressing this issue, the Commission first observes that in the case of *McKenzie et al. v. Jamaica*, the Commission determined that the process for exercising the Prerogative of Mercy under Sections 90 and 91 of the Jamaican Constitution did not guarantee the condemned prisoners in that case an effective or adequate opportunity to participate in the mercy process, as required under Article 4(6) of the Convention.[188]

More particularly, the Commission interpreted the right to apply for amnesty, pardon or commutation of sentence under Article 4(6), when read together with the State's obligations under Article 1(1) of the Convention, as encompassing certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections were held to include the right on the part of condemned prisoners to submit a request for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution.[189] It was also held to entail the right

[186] IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 116-122. For more information regarding the prerogative of mercy in Jamaica, see also: IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001; IACHR, Report No. 127/01, Case 12.183, Joseph Thomas, Jamaica, December 3, 2001; IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000.

[187] The Petitioners in the present case have also contended that the process for granting amnesty, pardon or commutation of sentence in Jamaica is not consistent with Article 4(6) of the Convention because that process does not provide for certain procedural rights which the Petitioners assert are integral to render this rights effective. In this connection, the authority of the Executive in Jamaica to exercise its Prerogative of Mercy is prescribed in Sections 90 and 91 of the State's Constitution.

[188] McKenzie *et al*. Case, *supra*, paras. 227-232.

[189] Id, para. 228.

not to have capital punishment imposed while such a petition is pending decision by the competent authority.[190]

In making this determination in the *McKenzie et al. Case,* the information before the Commission indicated that neither the legislation nor the courts in Jamaica guaranteed the prisoners in that matter any procedural protection in relation to the exercise of the Prerogative of Mercy. Rather, the petitioners and the State in that case indicated that according to domestic jurisprudence at that time, the exercise of the power of pardon in Jamaica involved an act of mercy that was not the subject of legal rights and therefore is not subject to judicial review, and cited in support the decision of the Judicial Committee of the Privy Council in the *Reckley Case, supra.*

The Petitioners in the present case confirmed that subsequent to the Commission's decision in the *McKenzie et al. Case*, the Judicial Committee of the Privy Council issued a judgment on September 12, 2000 in the case *Neville Lewis et al. v. The Attorney General of Jamaica*, in which it found that an individual's petition for mercy under the Jamaican Constitution is open to judicial review.[191] The Judicial Committee of the Privy Council also found that the procedure for mercy must be exercised by procedures that are fair and proper, which require, for example, that a condemned individual be given sufficient notice of the date on which the Jamaican Privy Council will consider his or her case, to be afforded an opportunity to make representations in support of his or her case, and to receive copies of the documents that will be considered by the Jamaican Privy Council in making its decision.[192]

Notwithstanding the determination in the *Neville Lewis Case*, however, there is no information in the present case indicating that the State has extended the legal requirements articulated in that decision to Mr. Aitken. Rather, the Petitioners have contended that until the issuance of

[190] Id, para. 228. The Commission reasoned that the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention may be regarded as similar to the right under Article XXVII of the American Declaration of every person "to seek and receive" asylum in foreign territory, in accordance with the laws of each country and with international agreements, which the Commission has interpreted, in conjunction with the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, as giving rise to a right under international law of a person seeking refuge to a hearing in order to determine whether that person qualifies for refugee status. See Haitian Center for Human Rights and others v. United States, Case Nº 10.675 (13 Match 1997), Annual Report of the IACHR 1996, para. 155. The Commission also observed that some common law jurisdictions retaining the death penalty have prescribed procedures through which condemned prisoners can engage and participate in the amnesty, pardon or commutation process See Ohio Constitution, Art. III, s. 2, Ohio Revised Code Ann., s. 2967.07 (1993). *See also* Ohio Adult Parole Authority v. Woodward, Court File Nº 96-1769 (25 March 1998)(U.S.S.C.).

[191] Neville Lewis et al. v. The Attorney General of Jamaica and The Superintendent of St. Catherine District Prison, Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000 (12 September 2000)(J.C.P.C.), at p. 23.

[192] *Id.*, at 23-24.

> the *Neville Lewis* decision, the domestic law of Jamaica did not provide Mr. Aitken with the rights prescribed in that case and therefore that the substance of his case is not affected by whether or not the Jamaican Privy Council already met to consider the exercise of the Prerogative of Mercy in his case. The State has not provided the Commission with any additional information regarding whether or in what manner the Prerogative of Mercy might be considered in the circumstances of Mr. Aitken's case, in light of the *Neville Lewis* Case or otherwise. Accordingly, based upon the information available, the Commission finds that the procedure available to Mr. Aitken to seek amnesty, pardon or commutation of sentence has not guaranteed him an effective or adequate opportunity to participate in the mercy process.
>
> The Commission therefore concludes that the State has violated Mr. Aitken's rights under Article 4(6) of the Convention, in conjunction with violations of Articles 1(1) and 2 of the Convention, by denying him an effective right to apply for amnesty, pardon or commutation of sentence.

96. Regarding States' obligations to adopt legislative or other measures necessary to give effect to the right to apply for pardon, amnesty or commutation of sentence, the Court affirmed with respect to **Guatemala** that: [193]

> As described in the chapter on Proven Facts (*supra* para. 43(17)), Decree No. 159 of April 18, 1892, established the authority of the President of the Republic to hear and decide on pardons. However, Decree No. 32/2000 expressly revoked this authority and the pertinent procedure.
>
> Despite the foregoing, Mr. Raxcacó Reyes applied for a pardon before the Minister of Governance of Guatemala on May 19, 2004 (*supra* para. 43(18)), basing his petition, *inter alia,* on Articles 1(1), 2 and 4(6) of the American Convention. From the Court's case file, it is clear that the Ministry of Governance has not processed the said application for pardon (*supra* para. 43(18)).
>
> On this point, in a previous case the Inter-American Court ruled against the State, in the sense that the revocation of Decree No. 159 of 1892, by Decree No. 32/2000, resulted in the elimination of the powers granted to an organ of the State to hear and decide the right to a pardon stipulated in Article 4(6) of the Convention.[194] Consequently, the Court considered that the State failed to comply with the obligation arising from Article 4(6) of the Convention, in relation to Articles 1(1) and 2 thereof.[195]

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[193] I/A Court H.R., Case of Raxcacó-Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, paras. 83-87, 89.

[194] I/A Court H. R., *Fermín Ramírez v. Guatemala Case*. Judgment of June 20, 2005. Series C No. 126, para. 107.

[195] I/A Court H. R., *Fermín Ramírez v. Guatemala Case*. Judgment of June 20, 2005. Series C No. 126, para. 110.

In the instant case, the Court finds no cause to deviate from its previous case law.

Article 2 of the American Convention obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms that it protects. It is necessary to reaffirm that the obligation to adapt domestic laws is only complied with when the reform is effectively carried out.[196]

(…)

(…) the lack of national legislation to make effective the right to apply for pardon, amnesty or commutation of sentence, in the terms of Article 4(6) of the American Convention, constitutes a fresh violation of Article 2 thereof.

V. THE DEATH PENALTY AND THE RIGHT TO A FAIR TRIAL

A. The right to due process and the death penalty

Observance of due process becomes all the more important in capital punishment cases.

The Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation under the Convention or the Declaration.

Those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees.

97. In this regard, the Commission has established: [197]

The Inter-American Court has recognized, that Articles 4, 5, and 8, of the Convention, include strict observance *and review* of the procedural requirements governing the imposition or application of the death penalty. In this connection, the Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation under the Convention or the Declaration. Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have

[196] *Cf. Case of the Indigenous Community Yakye Axa*, *supra* note 4, para. 100, and *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

[197] IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, para. 144.

the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects what is at stake: human life."[198] The Commission found in the cases of Rudolph Baptiste (Grenada),[199] Desmond Mckenzie, Andrew Downer and Alphonso Tracey, Carl Baker, Dwight Fletcher, and Anthony Rose, (Jamaica) that imposing a mandatory death penalty in all cases of murder is not consistent with the terms of Articles 4, 5, and 8 of the American Convention, particularly, where the due process rights of the condemned men were not strictly observed.[200]

98. In a 2002 merits decision the Commission affirmed: [201]

(…) the Inter-American Court emphasized the strict standard of due process that must be considered to apply in the prosecution of capital offenses. The Court recalled in this regard its previous Advisory Opinion OC-3/83, in which it observed that

> the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it.[202]

The Inter-American Court interpreted this tendency as an "internationally recognized principle whereby those States that still have the death

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[198] Advisory Opinion OC-16/99, *supra*, para. 135. *See similarly* UNHRC, Champagnie, Palmer and Chisholm v. Jamaica, Communication No. 445/991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), para. 9 (finding that in capital punishment cases, "the obligations of states parties to observe vigorously all the guarantees of a fair trial set out in Article 14 of the Covenant [on Civil and Political Rights] admits of no exception.").

[199] Case Nº 11.743, Report Nº 38/00, at 721 (Grenada), Annual Report of the Inter-American Commission on Human Rights 1999, Volume I, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000.

[200] Report Nº 41/00, Case Nos. 12.023, 12.044, 12.107, 12.146, Annual Report of the Inter-American Commission on Human Rights 1999, Volume II, OEA/Ser.L/V/II.106, Doc. 3 rev., April13, 2000.

[201] IACHR, Report No. 52/02, Case 11.753, Ramón Martinez Villareal, United States, October 10, 2002, paras. 67-68.

[202] OC-16/99, *supra*, para. 134, citing I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights), (Ser. A) Nº 3 (1983).

> penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases."[203] According to the Court, "because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."[204]

99. In a 2001 report on the merits of a case, the Commission stated:[205]

> In this connection, the Commission reiterates the fundamental significance of ensuring full and strict compliance with due process protections in trying individuals for capital crimes, from which there can be no derogation. The Commission has recognized previously that, due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether death is the appropriate punishment in a given case.[206] Further, the Inter-American Court of Human Rights recently noted the existence of an "internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases," such that "[i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life."[207] The U.S. Supreme Court has similarly emphasized in addressing allegations of due process violations in capital cases that it is of vital importance to a defendant and to the community more broadly that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.[208]

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[203] *Id.*, para. 135.

[204] *Id.*, para. 136.

[205] IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, para. 100.

[206] *See e.g.* McKenzie *et al*. v. US, *supra*, para. 188, referring in part to Woodson v. North Carolina, 449 L Ed 944, 961 (U.S.S.C.).

[207] Advisory Opinion OC-16/99, *supra*, para. 135. *See similarly* UNHRC, Champagnie, Palmer and Chisholm v. Jamaica, Communication Nº 445/991, U.N. Doc. CCPR/C/51/D/445/1991 (1994), para. 9 (finding that in capital punishment cases, "the obligations of states parties to observe vigorously all the guarantees of a fair trial set out in Article 14 of the Covenant [on Civil and Political Rights] admits of no exception.").

[208] *See e.g*. Gardner v. Florida, 430 U.S. 349, 357-358.

B. Due process guarantees

100. In interpreting the requirements of due process, the Commission has indicated: [209]

> (…) in accordance with the Commission's previous jurisprudence[210] as well as the terms of pertinent international instruments and general principles of international law, the requisite due process and fair trial protections guaranteed under Articles XVIII and XXVI of the American Declaration include most fundamentally the right of a defendant to be presumed innocent until proven guilty according to law,[211] the right to prior notification in detail of the charges against him,[212] the right to adequate time and means for the preparation of his defense,[213] the right to be tried by a competent, independent and impartial tribunal previously established by law,[214] the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel,[215] and the right not to be compelled to be a witness against himself or to plead guilty.[216]

101. In a 2001 merits decision the Commission affirmed: [217]

> Consistent with these fundamental principles, the Commission considers that Articles I, XVIII and XXVI of the Declaration must be interpreted and applied in the context of death penalty prosecutions so as to give stringent effect to the most fundamental substantive and procedural due

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[209] IACHR, Report No. 52/02, Case 11.753, Ramón Martinez Villareal, United States, October 10, 2002, para. 63.

[210] *See e.g.* Garza v. U.S., *supra*, para. 101.

[211] Universal Declaration of Human Rights, GA Res. 217A, UN Doc. A/810 at 71 (1948), Article 11(1); American Declaration of the Rights and Duties of Man, Article XXVI; International Covenant on Civil and Political Rights, 999 U.N.T.S. 3, entered into force Jan. 3, 1976, Article 14(2); American Convention on Human Rights, Article 8(2).

[212] Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(a); American Convention on Human Rights, Article 8(2)(b).

[213] Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(b); American Convention on Human Rights, Article 8(2)(c).

[214] Universal Declaration of Human Rights, Article 10; American Declaration of the Rights and Duties of Man, Arts. XVIII, XXVI; International Covenant on Civil and Political Rights, Article 14(1); American Convention on Human Rights, Article 8(1).

[215] Universal Declaration of Human Rights, Article 11(1); International Covenant on Civil and Political Rights, Article 14(3)(b), (d); American Convention on Human Rights, Article 8(2)(d).

[216] *See* International Covenant on Civil and Political Rights, Article 14(3)(g); American Convention on Human Rights, Article 8(2)(g). *See also* Advisory Opinion OC-16/99, *supra*, para. 117 (identifying the right not to incriminate oneself as one example of a new procedural right that has developed as part of the right to the due process of law under international human rights law).

[217] IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, paras. 101-102.

process protections.[218] The essential requirements of substantive due process in turn include the right not to be convicted of any act or omission that did not constitute a criminal offense, under national or international law, at the time it was committed,[219] and the right not to be subjected to a heavier penalty than the one that was applicable at the time when the criminal offense was committed.[220] The requisite procedural due process protections include most fundamentally the right of a defendant to be presumed innocent until proven guilty according to law,[221] the right to prior notification in detail of the charges against him,[222] the right to adequate time and means for the preparation of his defense,[223] the right to be tried by a competent, independent and impartial tribunal, previously established by law,[224] the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel,[225] and the right not to be compelled to be a witness against himself or to plead guilty.[226]

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[218] *See similarly* Advisory Opinion OC-16/99, *supra*, para. 136 (concluding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.").

[219] Universal Declaration of Human Rights, Proclaimed by General Assembly Resolution 217 (III) of December 10, 1948, U.N. GAOR, 3rd Sess., Res. (A/810), p. 71, Art. 11(1); American Declaration of the Rights and Duties of Man, Art. XXVI; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Art. 15(1); American Convention on Human Rights, Art. 9 ; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Art. 7.

[220] Universal Declaration of Human Rights, Art. 11(2); International Covenant on Civil and Political Rights, Art. 15(1); American Convention on Human Rights, Art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 7.

[221] Universal Declaration of Human Rights, Art. 11(1); American Declaration of the Rights and Duties of Man, Art. XXVI; International Covenant on Civil and Political Rights, Art. 14(2); American Convention on Human Rights, Art. 8(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(2).

[222] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(a); American Convention on Human Rights, Art. 8(2)(b); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(a).

[223] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(b); American Convention on Human Rights, Art. 8(2)(c); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(b).

[224] Universal Declaration of Human Rights, Art. 10; American Declaration of the Rights and Duties of Man, Arts. XVIII, XXVI; International Covenant on Civil and Political Rights, Art. 14(1); American Convention on Human Rights, Art. 8(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(1).

[225] Universal Declaration of Human Rights, Art. 11(1); International Covenant on Civil and Political Rights, Art. 14(3)(b), (d); American Convention on Human Rights, Art. 8(2)(d); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(3)(c).

[226] *See* International Covenant on Civil and Political Rights, Art. 14(3)(g); American Convention on Human Rights, Art. 8(2)(g). *See also* Advisory Opinion OC-16/99, *supra*, para. 117 (identifying the right not to incriminate oneself as one example of a new procedural right that has developed as part of the right to the due process of law under international human rights law).

> The Commission considers that these protections apply to all aspects of a defendant's criminal trial, regardless of the manner in which a state may choose to organize its criminal proceedings.[227] Consequently, where, as in the present case, the State has chosen to establish separate proceedings for the guilt/innocence and sentencing stages of a criminal prosecution, the Commission considers that due process protections nevertheless apply throughout.

102. Concerning the right to due process applied to the sentencing phase, the IACHR established in a 2009 decision: [228]

> (…) The Commission has stated in this respect that the due process guarantees under the American Convention and the American Declaration applicable to the sentencing phase of a defendant's capital prosecution guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.[229]

1. Right to trial without undue delay and other delays in the proceedings

Persons detained have the right to be promptly notified of charges against them and to be brought promptly before a judge or judicial authority.

A detainee must be brought promptly before a judge or judicial authority in order to review the lawfulness of his or her detention, to ensure the protection of the prisoner's other guaranteed rights while in detention and to minimize the risk of arbitrariness.

Detainees have the right to be brought to trial within a reasonable time. The reasonableness of the delay cannot be judged in the abstract but most be evaluated on a case by case basis.

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[227] The Commission has similarly found in the context of the American Convention on Human Rights that the due process guarantees under Article 8 of the Convention apply to the sentencing phase of the victim's capital prosecution so as to guarantee him an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. *See* Baptiste, *supra*, paras. 91, 92; McKenzie et al., *supra,* at paras. 204, 205. *See similarly* Eur. Comm. H.R., Jespers v. Belgium, 27 D.R. 61 (1981) (applying the principle of equality of arms to sentencing proceedings).

[228] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, para. 134.

[229] *IACHR,* Report Nº 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report Nº 41/00 (McKenzie *et al*.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case Nº 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153. See also I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case.* Judgment of June 21, 2002, Series C Nº 94, paras. 102, 103.

103. With respect to the right to be promptly notified of charges and to be promptly brought before a judge or judicial authority, the Commission stated in a case against **Grenada**:[230]

> The Petitioners allege violations of Articles 7(2), 7(4) and 7(5) of the Convention, because Mr. Lallion was detained in police custody for over 48 hours and was not promptly notified of the charges against him or brought promptly before a judge or other judicial officer. The Petitioners contend that Mr. Lallion was detained from 4:15 p.m. on September 29, 1993 to 1:15 p.m. on October 2, 1993, in excess of the 48 hours established by the domestic law of Grenada. He was formally charged on October 2nd 1993, and was not brought before a Judge until October 4th 1993.[231] The Petitioner states that Section 22(3) of the Police Act of Grenada provides: "It shall be lawful for any police officer to detain for questioning, for a period not exceeding forty-eight hours, any person whom he believes upon reasonable suspicion to have committed or to be about to commit a criminal offence."
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> (…)
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> In addressing the issue of Article 7(5) with regard to being brought promptly before a judge, the Commission has held that it is fundamental that a person be brought before a judge promptly subsequent to their detention in order to ensure their well-being and avoid any infringement of their other rights.[232] In Report Nº 2/97, the case of Jorge Luis Bernstein and others, the Commission declared that "[t] he right to the presumption of innocence requires that the duration of preventive detention not exceed the reasonable period of time cited in Article 7(5)."[233] Furthermore, the Commission noted that:

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[230] IACHR, Report No. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 100, 102-110.

[231] Trial transcript pages 70-73, and 82-83.

[232] In some cases from Jamaica, Report Nº 41/00, Case 12.023,, Desmond Mckenzie, Case Nº 12.044, Andrew Downer y Alphonso Tracey, Case 12.107, Dwight Fletcher, 12.146, Anthony Rose, Annual Report of the Inter-American Commission on Human Rights 1999, Volume II, OEA/Ser.L/V/II.106, Doc. 3 rev. April 13, 2000, at 996.

[233] I/A Comm. H.R., Jorge Luis Bernstein and others, Annual Report 1997, , p. 244, para. 12. The Commission notes that the Constitution of Jamaica has a clause which declares that any person who is arrested or detained "…shall be brought without delay before a court…." Constitution of Jamaica, 1962, Section 15(2) "Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention." [emphasis added] Article 15(3) "Any person who is arrested or detained (a) for the purpose of bringing him before a court in execution of the order of a court; or (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released, *shall be brought without delay before a court*; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not *tried within a reasonable time*, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably

Continues…

> In order to ensure the effective judicial oversight of the detention, the competent court must be quickly appraised of the persons who are held in confinement. One of the purposes of such action is to protect the well-being of the persons detained and to avoid any violation of their rights. The [Commission] has determined that, unless such detention is reported to the court, or the court is so advised after an appreciable length of time has elapsed from the time the subject has been deprived of his freedom, the rights of the person in custody are not being protected and the detention infringes that person's right to due process.[234]

In addition, the Commission stated that when the Commission finds that a State has purported to provide a justification for [preventive detention], "[the Commission] must proceed to ascertain whether [the State] authorities have exercised the requisite diligence in discharging the respective duties in order to ensure that the duration of such confinement is not unreasonable."[235] In the Commission's view, such justifications might include the presumption that the accused has committed an offense, danger of flight, the risk that new offences may be committed, the need to investigate, the possibility of collusion, the risk of pressure on the witnesses, and the preservation of public order.[236]

Other international human rights tribunals have endeavored to define the "prompt" appearance of a detainee before a judge more precisely. The United Nations Human Rights Committee in the case of Peter Grant v. Jamaica,[237] found that a one week period from the time of arrest to the date of being brought before a judge constitutes a violation of Article 9(3) of the ICCPR[238] [equivalent to Article 7(5) of the Convention].

…continuation
necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." [emphasis added]

[234] Id., citing I/A Comm. H.R., Second Report on the Situation of Human Rights in Suriname. OEA/Ser.L/V/II.66, doc. 21/Rev.1, 1985, pages 23 and 24.

[235] Id. at para. 24.

[236] Id., at pp. 247-248.

[237] Peter Grant v. Jamaica, Communication Nº 597/1994, U.N. Doc. Nº CCPR/C/56/D/597/1994 (1996).

[238] International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, Article 9(3) "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

Additionally, in the decision of the Committee in the case of Paul Kelly v. Jamaica,[239] the individual opinion submitted by Mr. Bertil Wennergren indicated that the word "promptly" does not allow for a delay in excess of two or three days.

Additionally, the European Court of Human Rights has emphasized the importance of "promptness" in the context of Article 5(3) of the European Convention as follows:[240]

> [I]t enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (citation omitted). Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3) [of the European Convention on Human Rights], which is intended to minimize the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society"....[241]

Furthermore, in the case of Brogan and Others, the European Court of Human Rights found that a period of detention of four days failed to comply with the requirement of a "prompt" appearance before a judicial authority.[242] Similarly, in the case of Koster v. The Netherlands, the European Court found a delay of five days to be in excess of the meaning of "promptness" in bringing a detainee before a judicial authority, therefore in violation of Article 5(3) of the European Convention.[243]

The Commission likewise considers that it is essential for a detainee to be brought before a judicial authority in order to review the lawfulness of his or her detention, not only in order to comply with the requirements under Article 7(5), but also to ensure the protection of the prisoner's other guaranteed rights while in detention and to minimize the risk of arbitrariness.[244] In addition, the Commission also notes that the domestic law of Grenada prohibits the Police from detaining a suspect for questioning in excess of 48 hours. This provision is found in Section 22(3)

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[239] U.N.H.R.C., Paul Kelly v. Jamaica, Communication Nº 253/1987.

[240] Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. Nº 5, (4 November 1950), Article 5(3) (providing that "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial").

[241] Eur. Court H.R., Case of Brogan and Others, Ser. A, vol. 145, 29 Nov. 1988, at para. 58.

[242] Id. at para. 62.

[243] Eur. Court H.R., Case of Koster *v.* The Netherlands, Ser. A, Vol. 221, 28 Nov. 1991, at paras. 24-25.

[244] Jorge Luis Bronstein and others, *supra.*

of the Police Act of Grenada which provides that: "It shall be lawful for any police officer to detain for questioning, for a period not exceeding forty-eight hours, any person whom he believes upon reasonable suspicion to have committed or to be about to commit a criminal offence." However, the State failed to comply with its own domestic law in Mr. Lallion's case, and he was questioned in excess of time permitted by Section 22(3) of the Police Act.

The Commission believes that what occurred during the delay in Mr. Lallion's case before he was brought promptly before a judge is precisely what the American Convention and international human rights courts applying human rights treaties and jurisprudence discussed above seek to prevent. Mr. Lallion was detained for questioning at about 4:15 p.m., on Wednesday September 29th 1993, and was kept in detention until 4:00 p.m., on October 2nd, 1993, a total of 3 days after which he was forced to sign a confession. He was formally charged on October 2nd 1993, and was not brought before a Judge until October 4th, 1993.[245] Mr. Lallion's unsworn testimony before the Trial Court reveals that during the period of his detention he was questioned for an extensive period of time as to his involvement in the deceased's death. The former Assistant Superintendent of Police, Mr. Joseph, held him by his shirt, and the other policeman "Mason" punched him in his belly. Mr. Lallion was then taken to where the deceased was laying in the morgue, and was asked by a police officer to uncover the "plastic" over the deceased's body, and he complied with this request.

The Commission finds that the delay of 3 days in Mr. Lallion's case was in excess of the 48 hours as provided by the Criminal Code of Grenada, although not of the same duration as the delays which were found to constitute violations before the United Nations Human Rights Committee and the European Court on Human Rights. The Commission notes that the provisions of the ICCPR[246] and European Convention[247] under consideration by those tribunals are virtually identical to Article 7(5) of the American Convention, and the Commission sees no reason why the Convention should be subject to any lesser standard with respect to the right of a detained person to be brought promptly before a judge. Moreover, the State has not provided any response to the allegations concerning the issue of delay, nor has the State offered any adequate explanation or justification for the delay in Mr. Lallion's case.

In assessing the totality of the circumstances of Mr. Lallion's detention, the Commission finds that throughout Mr. Lallion's detention he was not

[245] Trial transcript pages 70-73, and 82-83.

[246] International Covenant on Civil and Political Rights, Art. 9(3), *supra*.

[247] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5(3), *supra*.

> informed promptly of the charges against him in violation of Article 7(4). The Commission also finds that because Mr. Lallion was not brought promptly before a judge, the State violated his right guaranteed under Article 7(4) of the Convention. In addition, the Commission finds that Mr. Lallion's detention by the State in violation of Article 7(4) and 7(5) also constituted an arbitrary deprivation of Mr. Lallion's right to personal liberty pursuant to Article 7(2) of the Convention. The Commission therefore concludes that the State violated Mr. Lallion's right to personal liberty guaranteed by Article 7(2), 7(4) and 7(5) of the Convention.

104. Specifically regarding the delay in being brought promptly before a judge or judicial authority following the arrest, the Commission affirmed in a case regarding **Jamaica**:[248]

> The Petitioners in the three cases noted above allege that the State is responsible for violations of Article 7(5) and 7(6) of the Convention, by reason of the delay in bringing the victims before a judge following their arrests. In particular, the Petitioners in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) claim that the victims in these cases were detained for one month following their arrests before they were brought before a judicial officer, and the Petitioners in Case Nº 11.843 (Kevin Mykoo) allege that Mr. Mykoo was detained by authorities for four months prior to being brought before a judge. In response, the State denies that the victims suffered such delays and claims that there is no evidence to support the Petitioners' contentions in this regard.
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> In reviewing the records in these cases, the Commission notes that, while the State had denied the Petitioners' specific allegations in this regard, it has provided no information or evidence as to when the victims were in fact taken before a judicial officer. In light of the clear obligation on state parties under Articles 7(5) of the Convention to bring any person who is detained "promptly" before a judge, the Commission considers that a plain denial by the State is not sufficient to meet the Petitioners' specific allegations as to the timing of his pre-trial process. These allegations have been supported by questionnaires completed by the victims in these cases. Moreover, it is reasonable to expect that the State, as the authority responsible for detaining the victims, would possess documentation or other information establishing precisely when the victims were first taken before a judicial authority, and yet the State has not provided such information to the Commission. Consequently, the Commission concludes, based upon the material before it, that the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) were detained for one month following their arrests before they were

[248] IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, paras. 171, 172, 176-178. Regarding the Commission's analysis of the right of every person to be brought promptly before a judge or judicial authority in Jamaica, see also IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 243-253.

brought before a judicial officer, and that the victim in Case Nº 11.843 (Kevin Mykoo) was detained by authorities for four months prior to being brought before a judge.

(…)

The Commission likewise considers that it is essential for a detainee to be brought before a judicial authority in order to review the lawfulness of their detention, not only in order to comply with the requirements under Article 7(5), but also to ensure the protection of the prisoner's other guaranteed rights while in detention and to minimize the risk of arbitrariness.[249]

Clearly, the delays in bringing the victims before a judge in the three cases referenced above are far in excess of the delays which were found to constitute violations before the United Nations Human Rights Committee and the European Court on Human Rights. The provisions of the ICCPR[250] and European Convention[251] under consideration by those tribunals are virtually identical to Article 7(5) of the American Convention, and the Commission sees no reason why the Convention should be subject to any lesser standard regarding the right of a detained person to be brought promptly before a judge. Moreover, the State has offered no adequate explanation or justification for the delays in these cases.

In light of the above principles, the Commission therefore finds the State responsible for violations of Article 7(5) of the Convention in respect of the victims in Case Nos. 11.843 (Kevin Mykoo), 11.846 (Milton Montique) or 11.847 (Dalton Daley), with regard to the delay in bringing them before a judge following their arrests. Further, given that the victims were, as a consequence of their detention, deprived of recourse without delay to a competent court to determine the lawfulness of their detention, and in the absence of any information from the State as to the availability of such recourse, the Commission finds the State responsible for violations of Article 7(6) of the Convention in respect of the victims in these same cases.

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[249] Jorge Luis Bronstein and others, supra.

[250] International Covenant on Civil and Political Rights, Art. 9(3), *supra*.

[251] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5(3), *supra*.

105. Regarding the right to be brought to trial within a reasonable time, the Commission found in a case against **Trinidad and Tobago**:[252]

> It is alleged that the petitioner is a victim of a violation of Article 7(5) of the American Convention in that the Respondent failed to bring him to trial within a "reasonable time."[253] Specifically he alleges that: 1) he was arrested and charged on March 17, 1993, seven months after the murder which occurred in August 1992 and 2) he was detained in custody for a period of 3 years and 3 months from his initial arrest until his trial.
>
> (…)
>
> Pursuant to the jurisprudence of the Inter-American Commission, the issue of the alleged unreasonable pre-trial delay should not be viewed exclusively from a theoretical point of view, taking account solely the period from the date of arrest of the accused until his conviction and sentence. The Commission is of the opinion that the reasonableness of the delay cannot be judged in the abstract but must be evaluated on a case by case basis.[254] Consequently, it is not sufficient for a petitioner to argue that three years and three months have expired from the date of the arrest as in the instant case and that therefore a breach has occurred ipso facto.
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> In this context, the leading case considered by the Inter-American Commission is that of Mario Firmenich, a member of the armed political dissident group, Movimiento Montoneros, in Argentina, who was detained at the time of his complaint for over three and a half years, in spite of a provision in the Argentine Code of Criminal Procedure which provided that ?all (sic) trials must be completed within two years.[255] In that case the Commission held that the definition of a reasonable length of time? (sic) involves weighing the objective assessment of the characteristics of the event and the personal characteristics of the accused.[256] Consequently, the Commission referred to three factors: a) the actual duration of the imprisonment; b) the nature of the acts which

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[252] IACHR, Report No. 44/99, Case 11.815, Anthony Briggs, Trinidad and Tobago, April 15, 1999, paras. 46, 48-55.

[253] Article 7(5) of the American Convention provides that: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

[254] See Report Nº 2/97, Cases 11.205, 11.236, et al. (Argentina) March 11, 1997, ANNUAL REPORT 1997 at 241, 245-6. This reasoning was set forth in the leading European Court case on this issue, the Stogmuller v. Austria judgment of 10 November 1969, Series A no. 9, p. 40.

[255] See Report Nº 17/89, Case 10.037 (Argentina), April 13, 1989, ANNUAL REPORT 1988-1989, at p. 6 et seq.

[256] Id. at p. 62.

led to proceedings and c) the difficulties or judicial problems encountered when conducting said trials.[257] Upon consideration of these factors, the Commission found no violation of Article 7(5) of the Convention in that case.

This analysis is consistent with the jurisprudence on this issue of the European Court. In a 1993 case involving pre-trial detention of four years and three days, the European Court rejected the European Commission's opinion that there existed "a maximum length of pre-trial detention" and stated that "the reasonableness of an accused person's continued detention must be assessed in each case according to its special features."[258] The test established by the European Court is the following: "The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices: the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were `relevant' and `sufficient', the Court must also ascertain whether the competent national authorities displayed `special diligence "in the conduct of the proceedings (...)."

The U.N. Human Rights Committee in a case involving an individual on death row in Jamaica held that a delay of 28 months between arrest and trial was a violation of the petitioner's right to be tried without undue delay:

> As regards the author's claim that he was not tried without undue delay because of the unreasonably long period, 28 months, between arrest and trial, the Committee is of the opinion that a delay of two years and four months was a violation of his right to be tried within a reasonable time or to be released. The period in question is also such as to amount to a violation of the author's right to be tried without undue delay. The Committee therefore finds that there has been a violation of Articles 9, paragraph 3, and 14, paragraph 3 (c). Communication No. 707/1996, Patrick Taylor (Jamaica), CCPR/C/60/D/707/1996, 15 August 1997.

In another U.N. Human Rights Committee case, the delay between arrest and trial added up to two years.[259] The State party argued that a preliminary inquiry was held during the period of pre-trial detention, and

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[257] Id. at p. 63.

[258] W. v. Switzerland, 26 January 1993, Series A, no. 254-A, at para. 30.

[259] Communication Nº 561/1993, Desmond Williams (Jamaica), CCPR/C/59/D/561/1993, 24 April 1997 para. 9.4.

that there was no evidence that the delay was prejudicial to the author. The Committee held that by rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with Article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention. The Committee concluded that in the circumstances of the case there had been a violation of Article 14, paragraph 3(c).16.[260]

The Inter-American Commission, simultaneous with its case by case analysis of the reasonableness of the pre-trial delay, has established that the burden of proof is on the State to present evidence justifying the prolongation of the delay. In assessing what is a reasonable time period, the Commission, in cases of prima facie unacceptable duration has placed the burden of proof on the respondent government to adduce specific reasons for the delay, and in such cases, the Commission will subject these reasons to the Commission's closest scrutiny.[261]

In the instant case the State party did not attempt to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention. On the contrary, the State party placed the burden of proof on the petitioner alleging that the petitioner was estopped from raising the issue of his pre-trial detention since he had not raised it during trial.

In the present case the delay between arrest and trial is a period of three years and three months. Given the allegations of the petitioner that he had no opportunity to consult with Counsel during the preliminary stage of the trial, the Commission cannot find that petitioner is estopped from raising the issue of his pre-trial detention at this stage. Consequently, the Commission finds a delay of three years and three months was a violation of the petitioner's right to be tried within a reasonable time or to be released. The period in question is such as to amount to a violation of the petitioner's right to be tried within a reasonable time. The Commission, therefore, finds that there has been a breach of Article 7(5) of the American Convention in this case.

[260] Article 14 (3)(c) of the ICCPR states: ? In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ? to be tried without undue delay.? (sic)

[261] Report Nº12/96, Case 11.245 (Argentina), March 1, 1996, ANNUAL REPORT 1995, at 33, 51.

106. Also regarding the right to be tried within a reasonable time, the Commission held in a case against **Jamaica**:[262]

> In relation to a trial within a reasonable time and the length of detention, the Petitioners in two of the cases within this Report, Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) allege that the State failed to try the victims within a reasonable time, contrary to Article 7(5) and 8(1) of the Convention. In this regard, the Petitioners refer specifically to the pre-trial delays outlined in Table 4, which is reproduced below, and which are confirmed by the victims' affidavits:

Table 4

Case Nº	Victim(s)	Date of Arrest	Date of Conviction	Delay between Arrest and Conviction
11.846	Milton Montique	01/04/92	07/11/94	2 yrs. 7 mos.
11.847	Dalton Daley	30/03/92	07/11/94	2 yrs. 7 mos.

> The State responded to the allegations relating to the delay in trying the victims in these cases by recognizing that the delays had been "longer than desirable". It suggested, however, that the delays were justified due to the fact that preliminary inquiries had been held in each case, and owing to the complexities of the issues in the cases.
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> In addressing the issue of a "reasonable time" under Articles 7(5) and 8(1) of the Convention, the Inter-American Court has confirmed that the purpose of the reasonable time requirement is to prevent accused persons from remaining in that situation for a protracted period and to ensure that a charge is promptly disposed of.[263] The Inter-American Court has also considered that the point from which a reasonable time is to be calculated is the first act of the criminal proceedings, such as the arrest of the defendant, and that the proceeding is at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases. According to the Inter-American Court, the calculation of a reasonable time must, particularly in criminal matters, encompass the entire proceeding, including any appeals that may be filed.[264]
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> In determining the reasonableness of the time in which a proceeding must take place, the Inter-American Court has shared the view of the

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[262] IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, paras. 179-189. See also IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, paras. 119-128; IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 254-257, 261-267.

[263] I/A Court H.R., *Suarez Rosero Case*, Judgment, 12 November 1997, ANNUAL REPORT 1997, p. 283, para. 70.

[264] *Id*., para. 71.

European Court of Human Rights that three points must be taken into account: (a) the complexity of the case; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities.[265] This Commission has likewise suggested that the reasonableness of a pre-trial delay should not be viewed exclusively from a theoretical point of view, but must be evaluated on a case by case basis.[266]

In addition to its case by case analysis of the reasonableness of the pre-trial delay, the Inter-American Commission has established that the burden of proof is on the State to present evidence justifying any prolongation of a delay in trying a defendant. In assessing what is a reasonable time period, the Commission, in cases of *prima facie* unacceptable duration, has placed the burden of proof on the state to adduce specific reasons for the delay. In such cases, the Commission will subject these reasons to the Commission's "closest scrutiny."[267]

In both of the above cases, the victims have been subjected to a pre-trial delay of more than 2 years. In light of the past jurisprudence of this Commission and other international authorities, the Commission is of the view that the delays in these cases are prima facie unreasonable and call for justification by the State.[268]

In addition, the State has failed to provide any proper justification for the delays in bringing these victims to trial. While the State noted in these cases that part of the delay was attributable to a preliminary inquiry, the Commission considers that preliminary inquiries cannot in and of themselves constitute justification for a prolonged delay. Such inquiries, like the other elements of the State's criminal procedural machinery,

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[265] *Id.*, para. 72. *See also* I/A Court H.R., *Genie Lacayo Case*, Judgment of January 29, 1997, Annual Report 1997, para. 77. *See also* Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina) March 11, 1997, Annual Report 1997 at 241, 245-6. This reasoning was set forth in the leading European Court case on this issue, the *Stogmuller v. Austria* judgment of 10 November 1969, Series A Nº 9, p. 40.

[266] *See* Report 2/97, Cases Nos. 11.205, 11.236, et al. (Argentina), *supra*.

[267] Report Nº 12/96, Case Nº 11.245 (Argentina), March 1, 1996, Annual Report 1995, at 33, *See similarly* U.N.H.R.C., *Desmond Williams v. Jamaica*, Communication Nº 561/1993, U.N. Doc. CCPR/C/59/D/561/1993 (1997) (holding that by "rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, paragraph 3(c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention.").

[268] *See e.g. Suarez Romero Case*, *supra* , p. 300, para. 73 (finding that a period of delay 4 years and 2 months between the victim's arrest and disposition of his final appeal to "far exceed" the reasonable time contemplated in the Convention and therefore to violate Articles 7(5) and 8(1) of the Convention.); I/A Comm. H.R., Report on Panama, Annual Report 1991, at p. 485 (finding an average pre-trial delay of 2 years and 4 months to be unreasonable contrary to Article 7(5) of the Convention); *Desmond Williams v. Jamaica*, *supra*, para. 9.4 (finding a delay of two years between arrest and trial to be prolonged and unreasonable); U.N.H.R.C., *Patrick Taylor v. Jamaica*, Communication Nº 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997) (finding a delay of 28 months between arrest and trial to be a violation of the Petitioner's right to be tried without undue delay).

must as a whole be regulated so as to ensure that individuals are tried within a reasonable time.[269]

In addition, upon having reviewed the records in these cases, the Commission is not satisfied, based upon the materials available, that the delay is adequately explained based upon the nature of the prosecutions. As the Petitioners point out, the victims' convictions appear to have been based principally upon the evidence of three witnesses who were present at or near the scene of the crime and were interviewed by and available to the police apparently from the time of the incident. The State has failed to point to any particular aspect of the case that would explain why over two and a half years was required to bring the victims to trial based upon this evidence.

After considering the information before the Commission in these cases, in light of the factors laid out by the Inter-American Court in analyzing whether there has been a breach of the right to a trial within a reasonable time, the Commission concludes that the delays in trying the victims was unreasonable contrary to Articles 7(5) and 8(1) of the Convention. According to the information before the Commission, the victims' prosecutions do not appear to have been particularly complex, and the State has failed to provide the Commission with any information suggesting that the case was sufficiently complex so as to warrant a 2 year and 7 month delay in each of the victim's pre-trial proceedings. Similarly, there is no information before the Commission concerning the procedural activity of the victim or the conduct of the judicial authorities that explains or justifies such a delay.

Therefore, the Commission finds that the State has violated the right of the victims in Case Nos. 11.846 (Milton Montique) and 11.847 (Dalton Daley) to a trial within a reasonable time, contrary to Articles 7(5) and 8(1) of the Convention.

Given its conclusions in Part IV.B.4 of this Report that the death sentences imposed upon the victims contravene Articles 4, 5, and 8 of the Convention and are therefore unlawful, the Commission does not consider it necessary to determine whether the length of the delays in trying the victims or their prolonged period of post-conviction detention, as outlined above, constitute cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and therefore may also render the victims' executions unlawful.

[269] *See similarly* U.N.H.R.C., *Andre Fillashe v. Bolivia*, Communication Nº 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 (1991), para. 6.5 (finding that the fact that the investigation into a criminal case in Bolivia was carried out by way of written proceedings did not justify the delay in bringing a defendant to trial).

107. In a case regarding **The Bahamas**, the Commission examined the right to trial without undue delay under the provisions of the American Declaration in the following terms:[270]

> The Petitioners indicate that the deceased's death occurred between January 6 and January 9, 1992, and that an identification parade was held on May 5, 1993, at which Mr. Goodman was identified, and he was charged on May 6, 1993 for the murder. The Petitioners maintain that Mr. Goodman was committed for trial on September 25 or 26, 1993, and he was arraigned on July 17 or 20, 1995, two years and two months after being charged. The Petitioners argue that the period of time which elapsed between charging Mr. Goodman on May 6, 1993 and his first trial on May 20, 1996, a period of over three years, violated his right under Article XXV of the Declaration "to be tried without undue delay". The Petitioners contend that Mr. Goodman's first trial was aborted for reasons unconnected with Mr. Goodman, and his retrial began on November 4, 1996, just short of three years and six months from the original date when he was charged for the murder.
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> The State has not responded to the merits of Mr. Goodman's petition relating to a violation of Article XXV of the Declaration.
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> Article XXV of the Declaration provides:
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> > No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.
> >
> > No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.
>
> Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time that he is in custody.
>
> (…)
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> In Mr. Goodman's case, he has been subjected to a pre-trial delay of more than three years from May 6, 1993, the date on which he was charged, to the date of his first trial on May 20, 1996. In light of the

[270] IACHR, Report Nº 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, Commonwealth Of The Bahamas, October 15, 2007, paras. 68-70; 74, 75. See also IACHR, Report No. 48/01, Case Nº 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 216-225.

Commission's prior jurisprudence[271] and that of the Inter-American Court of Human rights,[272] and other international authorities, the Commission is of the view that the delay in Mr. Goodman's case from the date of his arrest in 1993, to the date of his first trial in 1996, is *prima facie* unreasonable and calls for justification by the State.[273] In addition, the State has failed to respond to the issue of "delay" and has failed to provide any proper justification for the delay in bringing Mr. Goodman to trial. There is also no indication that the case involved a complicated investigation or complex evidence.

The Commission finds that Mr. Goodman's prosecution does not appear to have been particularly complex, and there is also no indication that the prosecution's case consisted of complex evidence that might assist in explaining such a delay. The State has failed to provide the Commission with any information suggesting otherwise. Similarly, there is no information before the Commission concerning the procedural activity relating to, or the conduct of the judicial authorities that explains or justifies, a delay of almost three years between Mr. Goodman's arrest and his first trial. The Commission concludes that the State failed to try Mr. Goodman without undue delay and within a reasonable time contrary to Article XXV of the American Declaration. Therefore, the Commission finds that the State has violated Mr. Goodman's right to be tried without undue delay and within a reasonable time, pursuant to Article XXV of the Declaration in relation to his first trial.

2. Right to an independent and impartial trial

Impartiality of a tribunal and, in the context of a criminal prosecution, the principle that a defendant be presumed innocent until proven guilty are part of the right a fair trial. In systems that employ a jury system, these requirements apply both to judges and to juries. The international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality." According to this standard, it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors.

[271] *Id*. See Report No. 41/00, Case 12.023, Desmond McKenzie, Case 12.044, Andrew Downer and Alphonso Tracey, Case 12.027, Carl Baker, Case Nº 12.126, Dwight Fletcher. Inter-American Commission's Report at 918.

[272] *Id*. June of June 21, 2002, pp., 50-55, paras. 132-152, p. 71, para. 3.

[273] See e.g. I/A Court H.R., *Suarez Romero Case*, *supra*, p. 300, para. 73 (finding that a period of delay 4 years and 2 months between the victim's arrest and disposition of his final appeal to 'far exceed' the reasonable time contemplated in the Convention and therefore to violate Articles 7(5) and 8(1) of the Convention.); I/A Comm. H.R., Report on Panama, ANNUAL REPORT 1991, at p. 485 (finding an average pre-trial delay of 2 years and 4 months to be unreasonable contrary to Article 7(5) of the Convention); Desmond Williams v. Jamaica, *supra*, para. 9.4 (finding a delay of two years between arrest and trial to be prolonged and unreasonable); U.N.H.R.C., Patrick Taylor v. Jamaica, Communication N° 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997) (finding a delay of 28 months between arrest and trial to be a violation of the petitioner's right to be tried without undue delay).

The principle of independence requires: that the courts be autonomous from other branches of government, be free of influences, threats, or interference of any origin or for any reason, and have other characteristics necessary for ensuring the appropriate and independent performance of judicial functions, including the stability of a position and adequate professional training.

The impartiality of the courts should be evaluated from a subjective and objective perspective to ensure that there is no real prejudice on the part of the judge or the court. These requirements, in turn, demand that the judge or court not harbor any real bias in a particular case and that the judge or court is not reasonably perceived as inclined by such a bias.

108. In a case regarding **Jamaica** the Commission examined the impartiality of a trial judge who instructed the jury beforehand on the culpability of the defendant. In this regard, the IACHR affirmed: [274]

> The Petitioners have alleged that the State is responsible for violations of Article 8 of the Convention in respect of Mr. Thomas, based upon the absence of an identification parade following his arrest and the directions given by the trial judge to the jury during Mr. Thomas' criminal proceeding.
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> In particular, the Petitioners allege that the trial judge violated his obligation of impartiality in instructing the jury before their deliberations as follows:
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> > Now, as I said, the prosecution has to prove the death of the deceased. Well, **I do not anticipate you having any problem there that it was the accused who killed him** and perhaps here I should indicate the principle of what is known as common design. When two or more persons join together to commit an offense, commit a crime, that offense is committed, then each person takes an active or participates in the offense is guilty of the crime. That is the broad principle. So if you accept that there were two persons taking part - this is the prosecution's case, in a planned robbery, it does not matter which of them is charged with the fatal act. If they were acting in concert, both of them would be guilty of the crime - of the offense. [emphasis added]
>
> According to the Petitioners, this, in addition to the failure of the police to hold an identification parade following Mr. Thomas' arrest, deprived

[274] IACHR, Report No. 127/01, Case 12.183, Joseph Thomas, Jamaica, December 3, 2001, paras. 137-146.

Mr. Thomas of his right to be presumed innocent and therefore violated his right to a fair trial under Article 8 of the Convention.

In response, the State contends that it is generally for domestic appellate courts to examine the issues when the conduct of a trial is in question, including review of the specific instructions to a jury by a trial judge. The State further implies that the error alleged by the Petitioners in this case, if proved, could not be considered to have manifestly violated the trial judges' obligation of impartiality. Consequently, the State argues that it would be inappropriate for the Commission to determine violations of the Convention in relation to the judge's jury instructions in Mr. Thomas' case.

In addressing this issue, the Commission acknowledges its approach, as articulated in previous cases, that it is generally for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality.[275] Based upon the record in the present case when evaluated in the context of the Commission's prevailing jurisprudence, however, the Commission considers that the judge manifestly violated his obligation of impartiality during Mr. Thomas' trial, and therefore that the matter is properly the subject of review by the Commission.

The Commission recognizes in this respect that its evaluation and conclusions on this matter differ from those of the Court of Appeal of Jamaica. In its review of Mr. Thomas' case, the Jamaican Court of Appeal rejected Mr. Thomas' contention that the trial judge was "less than even-handed" in instructing the jury, as cited above, that he "[did] not anticipate you having any problem there that it was the accused who killed [the deceased]." According to its judgment, the Court of Appeal reached this conclusion on the basis that the trial judge's directions prior and subsequent to the impugned statement were in law correct and repaired the "lapse" complained of by Mr. Thomas. The Court of Appeal therefore concluded that:

> [t]he evidence of the prosecution witness was forthright and convincing and the summing up of the learned trial judge was fair, balanced and presented with clarity to the jury. The defence was adequately addressed. We find no merit in the ground advanced by [the Appellant] and the application is accordingly refused.[276]

[275] See e.g. McKenzie et al. Case, *supra*, para. 298.

[276] R. v. Joseph Thomas, Supreme Court Criminal Appeal Nº 126/96, Judgment of the Court of Appeal of Jamaica, December 17, 1997.

In contrast to the Court of Appeal, however, the task of the Commission is not to assess whether the judge was "even-handed " in his directions to the jury, but rather whether Mr. Thomas' rights to be tried by an impartial tribunal and to be presumed innocent were strictly respected. In making this determination, the Commission must according to its jurisprudence apply an objective standard under Article 8 of the Convention as to whether Mr. Thomas' trial was tainted by a reasonable apprehension of bias. And as indicated previously, the Commission must conduct this review with a heightened level of scrutiny, to ensure strict compliance with due process and other pertinent standards under the American Convention.

The Commission notes in this respect that among the requirements for a fair trial under Article 8 of the Convention are impartiality on the part of a tribunal and, in the context of a criminal prosecution, that a defendant be presumed innocent until proven guilty. In systems that employ a jury system, these requirements apply both to judges and to juries. The Commission has previously recognized in this connection that the international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality."[277] According to this standard, it must be determined whether there is a real danger of bias affecting the mind of the relevant juror or jurors.[278] In a previous capital case involving the United States, for example, the Commission addressed the question of whether the jury before which the defendant in that case was tried had a reasonable appearance of bias. Although the complainant had failed to obtain relief before domestic courts, the Commission evaluated Mr. Andrews' circumstances under the pertinent provisions of the American Declaration of the Rights and Duties of Man and concluded that:

> in assessing the totality of the facts in an objective and reasonable manner the evidence indicates that Mr. Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to voir dire the jury tainted the trial and resulted in him being convicted, sentenced to death, and executed. The record before the Commission reflects ample evidence of "racial bias."[279]

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[277] William Andrews v. United States, Case 11.139, Annual Report of the IACHR 1997, para. 159, citing Eur. Court H.R., Piersack v. Belgium, 5 H.R.R. 169 (1982); Eur. Court H.R., Gregory v. United Kingdom, 16 H.R.L.J. 238 (1995).

[278] *Id.*, fn 96

[279] *Id.*, para. 165.

The European Court of Human Rights has similarly examined the objective impartiality of judges and juries in criminal trials, in the context of Article 6 of the European Convention on Human Rights.[280]

After carefully reviewing the allegations and information presented by the parties on this issue in the present case, the Commission considers that, viewed objectively, the comments by the trial judge were such that, even when read in conjunction with his directions on the law, they gave rise to a clear and real danger of bias on the part of the court trying Mr. Thomas, so as to compromise his right to be presumed innocent and to be tried by an impartial tribunal. The trial judge's words may reasonably be interpreted as suggesting that he had reached a conclusion as to Mr. Thomas' responsibility for the deaths for which he had been charged. Further, the comments were made in the course of the trial and before the jury had rendered a final decision as to Mr. Thomas' guilt or innocence. The Commission also finds that the trial judge's comments, coming as they did from the judicial authority responsible for the conduct of the trial as a whole, can reasonably be considered to have had a influential and prejudicial impact on the jury's deliberations; indeed, on their face they could be read to have encouraged the jury to find Mr. Thomas guilty of the charges against him.[281] Finally, the trial judge did not take distinct steps to clarify his comments or otherwise clearly negate the risk that his words would be interpreted by the jury as a prejudgment of Mr. Thomas' guilt. In the Commission's view, general directions as to the burden and standard of proof would not have been sufficient for this purpose, particularly to the extent that such directions preceded the trial judge's controversial statement. In this connection, the significance of maintaining confidence on the part of the public and the accused in the impartiality of a tribunal adjudicating a criminal prosecution cannot be overemphasized, all the more so when the result of the proceeding will determine whether the defendant lives or dies.

In these circumstances, and in light of the heightened scrutiny test applicable in capital cases, the Commission finds violations of Article 8(1) and 8(2) of the Convention, in conjunction with violations of Article 1(1) of the Convention, by reason of the manner in which the judge instructed the jury during Mr. Thomas' trial.

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[280] See e.g. Eur. Court H.R., Remli v. France, Judgment (Merits and Just Satisfaction), April 23, 1996, R.J.D. 1996-11, Nº 8, paras. 43-48.

[281] In the case Gregory v. United Kingdom, *supra*, the European Court of Human Rights recognized the influence of a judge's directions on a jury. In this case, a note was received from the jury during its deliberations in the applicant's case stating "jury showing racial overtones one member to be excused." In response, the judge consulted counsel and addressed the jury respecting their obligation to decide the case without prejudice and according to the evidence. The European Court concluded that a firmly-worded direction by an experienced judge was in the circumstances sufficient to dispel doubts as to the jury's impartiality.

The Commission also finds in this connection that this serious violation of due process should be considered to have deprived Mr. Thomas' criminal proceedings of their efficacy from the outset and thereby invalidate Mr. Thomas' conviction. Consequently, a re-trial in accordance with due process or, where this is not possible, release, is the appropriate remedy in the circumstances of Mr. Thomas' case.[282]

109. In a case regarding **Cuba**, the Commission established: [283]

In the same way, one of the guarantees demanded in trials where the application of the death penalty is a possibility, is the right to be tried by a competent, independent, and impartial court, previously established according to law. Article XXVI of the Declaration guarantees the right to be tried by an impartial court, that means, the person responsible for making that decision must be impartial.

The Commission on many occasions has stated that a proper separation does not exist in Cuba between the public authorities charged with guaranteeing the administration of a system of justice free from interference from other public authorities. In effect, the Cuban constitution, in Article 121, states that "the Courts constitute a system of state bodies, structured with the independence of function like any other, and subordinate in hierarchy to the People's National Assembly and to the Council of State." The Commission considers that the subordination of the courts to the Council of State, headed by the Head of State, amounts to the direct dependency of the judiciary on the executive. With such a system, the Commission considers that Cuban courts are unable to effectively guarantee the rights protected in the American Declaration in favor of those undergoing trial. The independence of judges, prosecutors, and even of defense counsel appointed by the State is compromised by this structure of the Cuban legal system. By virtue of the above, the Commission considers that the trial of Messrs. Copello, Sevilla, and Martínez by a court that does not meet the requirements of independence and impartiality demanded by the American Declaration, violates the right to justice enshrined in Article XVIII of the American Declaration.

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[282] See I/A Court H.R., Castillo Petruzzi et al., Judgment of May 30, 1999, para. 219 (finding that in circumstances in which the acts upon which a judgment stands are affected by serious defects that deprive them of the efficacy they should normally have, "the judgement shall not subsist. It will lack its vital support: a process carried out according to Law. The institution of procedural restitution (reposición del procedimiento) is well known for causing certain acts to be considered invalid and allowing for the repetition of the procedural steps taken as from the step where the violation that caused the invalidation first occurred. This may require issuing a new judgment. The invalidity of the process conditions the validity of the judgment."). Translation of the Commission.

[283] IACHR, Report No. 68/06, Case 12.477, Merits, Lorenzo Enrique Copello Castillo and Others, Cuba, October 21, 2006, paras. 112-115.

> On the basis of the foregoing, the Commission considers that Messrs. Copello, Sevilla, and Martínez were tried and condemned to death by a court that did not meet the requisite standards of impartiality and independence, by means of an expedited summary procedure that did not allow them to exercise their right to an adequate defense, and the conduct for which they were accused was subjected to a criminal definition that was inappropriate.
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> Therefore, the Commission concludes that the State of Cuba violated Articles XVIII and XXVI of the American Declaration to the detriment of Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.

110. In its 2010 Annual Report the Commission noted the following with respect to **Cuba**:[284]

> In the course of 2010 the Commission continued receiving worrisome information related to the structural lack of independence and impartiality of the courts; and the absence of judicial guarantees and due process in the prosecution of persons sentenced to death, and of persons considered to be political-ideological dissidents, an especially serious situation due to the use of summary procedures.
>
> The case-law of the inter-American system has consistently held that all organs that exercise materially judicial functions have the duty to reach fair decisions based on full respect for due process guarantees. The American Declaration establishes that every person has the right to turn to the courts[285], to protection from arbitrary arrest[286], and to due process. [287] These rights are part of what has been called the body of due process guarantees, and constitute the minimum guarantees recognized for all human beings in respect of any type of judicial proceeding.
>
> In addition, the American Declaration indicates that every human being has the right to liberty[288], and no one may be deprived of it except in those cases and in keeping with those procedures established by pre-existing laws.[289] According to the American Declaration, every individual who has been deprived of his or her liberty has the right for a judge to verify, without delay, the legality of the measure, and to be tried without

[284] See IACHR, Annual Report 2010, Chapter IV: Cuba, paras. 323-329, 331, 334, 335, 337-348.

[285] American Declaration, Article XVIII.

[286] American Declaration, Article XXV.

[287] American Declaration, Article XXVI.

[288] American Declaration, Article I.

[289] American Declaration, Article XXV.

unwarranted delay, or otherwise to be released.[290] In addition, every person accused of a crime has the right to be heard impartially and in public, to be tried by courts previously established in accordance with pre-existing laws, and not to be subject to cruel, infamous, or unusual punishment.[291]

The right to trial by a court with jurisdiction that is independent, impartial, and previously established by law has been interpreted by the Inter-American Commission and the Inter-American Court so as to entail certain conditions and standards that must be satisfied by the courts in charge of judging any criminal accusation or determining the civil, fiscal, labor, or other rights or obligations of persons. [292]

This right to a fair trial, based on the fundamental concepts of independence and impartiality of justice, and the principles of criminal law recognized by international law – presumption of innocence, the principle of non bis in idem, and the principles of nullum crimen sine lege and nulla poena sine lege, as well as the precept that no one may be convicted for a crime other than on the basis of individual criminal liability, are widely considered as general principles of international law essential for the proper administration of justice and the protection of fundamental human rights.[293] The requirement of independence, in turn, requires that the courts be autonomous from other branches of government, be free of influences, threats, or interference of any origin or for any reason, and have other characteristics necessary for ensuring the appropriate and independent performance[294] of judicial functions, including the stability of a position and adequate professional training.[295] The impartiality of the courts[296] should be evaluated from a subjective

[290] American Declaration, Article XXV.

[291] American Declaration, Article XXVI.

[292] IACHR, Report on Terrorism and Human Rights, 2002, para. 228.

[293] Report of the Special Rapporteur on the Independence of Judges and Lawyers, submitted in keeping with Resolution 1994/41 of the Commission on Human Rights. Commission on Human Rights, 51st Session, February 6, 1995, E/CN.4/1995/39, para. 34. IACHR, Report on Terrorism and Human Rights, 2002, para. 229.

[294] Similarly, the Court indicated that the impartiality of the court implies that its members not have any direct interest, a position taken, a preference for any of the parties, and that they are not involved in the dispute. I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 146.

[295] IACHR, *Report on the Situation of Human Rights in Chile*, 1985, Chapter VIII, para. 139; *Report on the Situation of Human Rights in Haiti*, 1995, Chapter V, paras. 276-280; *Report on the Situation of Human Rights in Ecuador,* 1997, April 24, 1997, Chapter III; *Report on the Situation of Human Rights in Mexico,* 1998, Chapter V, paras. 393-398. *Report on Terrorism and Human Rights,* 2002, para. 229.

[296] The Inter-American Court has indicated that the right to be judged by an impartial and independent judge or court is a fundamental guarantee of due process. In other words, one must guarantee that the judge or court, in the performance of its function as trier, has the utmost objectivity to confront the trial. In addition, the independence of the judicial branch vis-à-vis the other branches of government is essential for the exercise of the judicial function. I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 145; Case of Herrera Ulloa, para. 171.

Continues…

and objective perspective to ensure that there is no real prejudice on the part of the judge or the court, as well as sufficient guarantees to avoid any legitimate doubt in this regard. These requirements, in turn, demand that the judge or court not harbor any real bias in a particular case and that the judge or court not be reasonably perceived as inclined by such a bias.[297]

With respect to the guarantees of independence and impartiality, one should note that Article 121 of the Constitution of Cuba establishes:

> The courts constitute a system of state bodies which are set up with functional independence from all other systems and they are subordinated only to the National Assembly of People's Power and the Council of State.

Accordingly, the Commission observes that the subordination of the courts to the Council of State, presided over by the head of state, represents direct dependence of the judicial branch on the directives of the executive branch. In the view of the Commission, this dependency on the executive branch does not offer an independent judicial branch capable of providing guarantees for the enjoyment of human rights.

(…)

The Commission considers the repeated use of summary trials in Cuba, without observing due process guarantees, including the minimum guarantees necessary for the accused to exercise his or her right to an adequate legal defense, to be an extremely serious matter. On this last point, the IACHR has previously received information regarding the

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…continuation

"one of the principal purposes of the separation of public powers is to guarantee the independence of judges. Such autonomous exercise must be guaranteed by the State both in its institutional aspect, that is, regarding the Judiciary as a system, as well as in connection with its individual aspect, that is to say, concerning the person of the specific judge. The purpose of such protection lies in preventing the Judicial System in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien to the Judiciary or even by those judges with review or appellate functions." I/A Court H.R., Case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 55.

Likewise, public officials, particularly the top Government authorities, need to be especially careful so that their public statements do not amount to a form of interference with or pressure impairing judicial independence and do not induce or invite other authorities to engage in activities that may abridge the independence or affect the judge's freedom of action. I/A Court H.R., Case of Apitz Barbera *et al.* ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

[297] IACHR, Case 11,139, Report No. 57/96, William Andrews (United States), *Annual Report of the IACHR 1997*, paras. 159-161. See, by way of analogy, European Court of Human Rights, Findlay v. United Kingdom, February 25, 1997, *Reports* 1997-I, p. 281, para. 73. IACHR, Report on Terrorism and Human Rights, 2002, para. 229.

ineffectiveness of public defenders, particularly when the State keeps them from communicating freely and previously with their clients.[298]

(…)

In addition, in Report on the Merits 68/06 on Case 12,477 [299] (Lorenzo Enrique Copello Castillo et al.), regarding three persons who were executed by firing squad after a very summary procedure, in violation of the right to defense, impartiality, and judicial independence, the IACHR recommended to the Cuban State:

> 1. Take the necessary steps to adapt its laws, procedures and practices to international human rights legislation. In particular, the Commission has recommended that Cuba's criminal legislation be amended in order to ensure the right to justice and the right to a fair trial, and to initiate a process to reform its Constitution to ensure the independence of the judiciary.

Articles 479 and 480 of the Law on Criminal Procedure provide for the possibility of applying a summary procedure. The same law also establishes that in the event of prosecution by a summary procedure, the court may, insofar as it considers it necessary, reduce the terms for the preliminary proceedings, the oral trial, and the appeals.

(…)

The Commission has observed that in Cuba political dissidents and those who have attempted to flee the island have been prosecuted through summary trials. Indeed, the death penalty has been applied as a result of such trials, which violate the minimum standards of due process. [300]

In this context of lack of independence, arbitrariness, and summary procedures, another special concern of the IACHR is that the death penalty is a sanction for a significant number of crimes. In effect, the Criminal Code of Cuba establishes the death penalty in crimes against state security; peace and international law; public health; life and bodily integrity; the normal development of sexual relations; the normal development of childhood and youth; and against property rights. Under the title on crimes against state security, the crimes for which the death

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[298] See Report on the Merits No. 67/06, approved October 21, 2006.

[299] IACHR, Report on the Merits No. 68/06, Case 12,477, Lorenzo Enrique Copello Castillo *et al.*, October 21, 2006.

[300] IACHR, Report on the Merits No. 68/06, Case 12.477, Lorenzo Enrique Copello Castillo *et al.*, October 21, 2006, paras. 87-92.

penalty applies as the maximum punishment are the following: acts against the independence or territorial integrity of the state; promotion of armed action against Cuba; armed service against the state; helping the enemy; espionage; rebellion[301]; sedition; usurpation of political or military command; sabotage; terrorism; hostile acts against a foreign state; genocide; piracy; mercenary activity; crime of apartheid[302]; and, other acts against the state. In addition, the death penalty is a possible punishment for following forms of criminal conduct: unlawful production, sale,, demand, trafficking, distribution, and possession of drugs, narcotics, psychotropic substances, and other substances with similar effects[303]; murder[304]; rape[305]; pederasty with violence[306]; corruption of minors[307]; robbery with violence or intimidation of persons.[308]

The Commission considers that the application of the death penalty requires the existence of an independent judicial branch in which the judges exercise a high level of scrutiny and in which the guarantees of

[301] Article 98: 1. Anyone who takes up arms to obtain any of the following objectives by force, shall be deprived of his/her freedom for ten to twenty years or sentenced to death: (a) wholly or partially, even if temporarily, prevent the higher organs of State and Government from exercising their functions; (b) change the economic, political and social regime of the socialist State; (c) wholly or partially change the Constitution or the form of government established thereby.

2. The same punishment shall be applied to anyone who takes any action aimed at promoting an armed uprising, if it materializes; otherwise the punishment is deprivation of freedom for four to ten years.

[302] Article 120: 1. Anyone who, in order to set up and maintain domination by one racial group over another, and in accordance with extermination, segregation or racial discrimination policies, does any of the following, shall be deprived of his/her freedom for between ten and twenty years or sentenced to **death**: (a) denies the members of this group the right to life and freedom by murder; serious attempts against the physical or psychic integrity, freedom or dignity; torture or penalties or cruel, inhumane or denigrating treatment; arbitrary detention and illegal imprisonment; (b) imposes legislative or other measures on the group, aimed at preventing them from taking part in the political, social, economic and cultural life of the country and deliberately creating conditions to hamper its proper development, denying its members the rights and fundamental freedoms; (c) divides the population according to racial criteria, creating reserves and ghettos, forbidding marriages between different racial groups and expropriating their property; (ch) exploits the work of the members of the group, especially subjecting them to forced labor.

1. 2. If the deed consists of persecuting or in any way harassing the organizations and people who oppose apartheid, or fight against it, the sanction is deprivation of freedom for between ten and twenty years.

2. 3. Anyone committing any of the acts envisaged in the former sub-paragraphs, is responsible therefor, regardless of the country in which the guilty parties act or reside, and such responsibility extends, whatever the motive, to all individuals, members of the organizations and institutions and representatives of the State.

[303] Cuban Criminal Code, Article 190.

[304] Cuban Criminal Code, Article 263.

[305] Cuban Criminal Code, Article 298.

[306] Cuban Criminal Code, Article 299.

[307] Cuban Criminal Code, Article 310.

[308] Cuban Criminal Code, Article 327.

due process are observed. In this respect, the Inter-American Court has held that

> capital punishment is not per se incompatible with or prohibited by the American Convention. However, the Convention has set a number of strict limitations to the imposition of capital punishment.[309] First, imposition of the death penalty must be limited to the most serious common crimes not related to political offenses.[310] Second, the sentence must be individualized in conformity with the characteristics of the crime, as well as the participation and degree of culpability of the accused.[311] Finally, the imposition of this sanction is subject to certain procedural guarantees, and compliance with them must be strictly observed and reviewed.[312]

According to the information that the IACHR has, the last time that the death penalty was applied in Cuba was in 2003, when Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac were executed. [313] Nonetheless, that judgment continues to be imposed as a result of summary proceedings. As indicated in Chapter IV of its 2008 Annual Report, the IACHR values the decision of the Council of State adopted on April 28, 2008 to commute the death sentence of those who had been sentenced to such a grave and irreparable sanction to life imprisonment or 30 years incarceration. The IACHR hopes that the commutation is extended to all those who have been sentenced to capital punishment, including those convicted of the committing terrorist offenses.

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[309] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights).* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, paras. 60-66.

[310] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs.* Judgment of June 21, 2002. Series C No. 94, para. 106; *Case of Raxcacó Reyes*, *supra* note 37, para. 68. See also *Restrictions on the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights),* para. 55.

[311] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al., supra* note 42, paras. 103, 106, and 108; and *Case of Raxcacó Reyes, supra* note 37, para. 81. See also *Restrictions on the Death Penalty (Articles 4(2) and 4(4) Americana Convention on Human Rights),* para. 55.

[312] I/A Court H.R., *Case of Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, See also I/A Court H.R., *Case of Fermín Ramírez, supra* note 37, para. 79. See also *Restrictions on the Death Penalty* (Articles 4(2) and 4(4) American Convention on Human Rights), *supra* note 7, para. 55, and *El The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 135.

[313] IACHR, Report on the Merits No. 68/06, Case 12,477, Lorenzo Enrique Copello Castillo *et al.*, October 21, 2006.

The IACHR reiterates its observation that maintaining the death penalty as a sanction for a significant number of forms of criminal conduct described by broad or vague language[314], together with criminal procedures that lack sufficient due process guarantees, as they are carried out in summary form, without trustworthy defense counsel, and with juries of dubious independence and impartiality, are violative of the international human rights instruments and case law. This may lead to the application of disproportionate sanctions and to enormous discretion that may eliminate any possibility of effective defense of the individual vis-à-vis the authorities.[315] For example, Article 91 of the Criminal Code provides for sentences of 10 to 20 years in prison, or the death penalty, for "whoever, in the interest of a foreign State, commits an act intended to cause damage to the independence of the Cuban State or the integrity of its territory."

In addition, Article 72 of the Criminal Code provides that "special inclination on the part of a person to commit crimes, as demonstrated by behavior that is clearly contrary to the standards of socialist morality is considered dangerous." The definition of "dangerous state" is established at Article 73(1), which provides that a "dangerous state is present when an individual displays some of the following signs of dangerousness: (a) habitual drunkenness and dipsomania; (b) drug addiction; (c) antisocial behavior." Article 73(2) provides: "an individual who habitually breaks the rules of social coexistence by acts of violence, or by other provocative acts, violates the rights of others or by his general behavior breaks the rules of coexistence or disrupts the order of the community or lives, as a social parasite, off the work of others or exploits or practices socially reprehensible vices, is considered to be in a dangerous state on account of his or her antisocial behavior."

For its part, Article 75(1) of the Criminal Code provides that "an individual who, without being in any of the dangerous states listed in Article 73, by his links or relationships with persons potentially dangerous to society, other persons and the social, economic and political order of the socialist

[314] As the Inter-American Court has observed, "Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty." See, for example, I/A Court H.R., Case of Castillo Petruzzi *et al.*, Judgment of May 30, 1999, Series C. No. 52, para. 121.

[315] According to the State of Cuba, the application of the death penalty is exceptional and only for committing the most serious crimes. The Cuban Criminal Code establishes as follows:

> Article 29.1. The death penalty is an exceptional punishment and shall only be applied by the court to persons who have committed the most serious of crimes for which it was established.
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> 2. The death penalty is not applicable to minors under the age of 20, or to women who were pregnant when they committed the crime or are pregnant when sentenced to death.
>
> 3. Execution by shooting is the method used for capital punishment.

State, could become prone to crime, will be warned by the competent police authority with a view to preventing him from carrying out socially dangerous or criminal activities." The IACHR has noted in previous reports that the Cuban Government uses the concepts of "dangerousness" as well as "special proclivity of a person to commit crimes" to detain opponents of the regime.[316]

If a person engages in one of the types of dangerousness cited above, so-called *security measures* can be applied to him or her, which may be post-delictive or pre-delictive (*post o predelictivas*). In the case of pre-delictive security measures, Article 78 provides that the National Revolutionary Police can impose therapeutic, re-educational, or surveillance measures on a person declared to be in a dangerous state. One of the therapeutic measures entails, according to Article 79, admission to an assistance, psychiatric, or detoxification center.[317] Re-educational measures are applied to antisocial individuals and consist of admission to a specialized work or study center and turning the person over to a work collective to keep tabs on and orient the person's conduct. Such measures are for one to four years.

These provisions of the Cuban Criminal Code are supplemented by Decree No. 128, issued in 1991. That decree establishes that the declaration of pre-delictive dangerous state should be decided summarily. In effect, according to that decree, the Revolutionary National Police opens a case that shows the conduct of the "dangerous person" and presents it to the local prosecutor, who decides in two days whether to present the case to the Municipal Court. If the Municipal Court considers the file complete, it shall set a date for the hearing in which the parties will appear. Twenty-four hours after the hearing is held, the Municipal Court must hand down its judgment.

The Inter-American Commission on Human Rights considers that the criminal law should sanction criminal acts or possibly their frustrated attempt, but never attitudes or presumptions of such acts.[318] *Dangerousness (peligrosidad)* is a subjective concept on the part of the person who makes the assessment, and its vagueness is a factor of juridical insecurity for the population, since it creates the conditions for the authorities to commit arbitrary acts. The Commission considers it extremely serious that these provisions – in themselves incompatible with the principles established in the American Declaration – are applied by means of a summary procedure to persons who have not committed any criminal offense but who as per the discretion of the Cuban authorities are considered *dangerous* to society, and therefore deserving

[316] IACHR, Annual Report of the Inter-American Commission, 1998, April 16, 1999.

[317] IACHR, Annual Report of the Inter-American Commission, 1998, April 16, 1999.

[318] IACHR, Annual Report of the Inter-American Commission, 1998, April 16, 1999

of severe security measures in which they are deprived of liberty.[319] In these cases, the State intervenes in the lives of citizens without limitations to maintain *social peace* and violates, without hesitation, the right to individual liberty.

The Commission reiterates that the lack of an independent administration of justice in Cuba, together with the lack of guarantees of due process, as well as the use of summary trials and the ambiguity and/or breadth of some criminal law provisions in the legislation affect the fundamental rights of persons.

In summary, the Commission calls on the Government of Cuba to bring its procedural rules into line with the international standards on due process so that those persons who come before or are brought before the courts for the determination of their rights and responsibilities may have minimal legal guarantees to mount their defense. The Commission considers that the existing legal framework does not comply with Cuba's international obligations in this respect. The full observance of the judicial guarantees enshrined in the American Declaration is based on an independent and autonomous judicial branch and on the enforcement of provisions that are clear and specific and do not allow for the discretional abuse of authority.

3. Use of evidence of an unadjudicated offense during the sentencing hearing

If a State permits the introduction of evidence of an unadjudicated crime during the victim's capital sentencing hearing contributing to the imposition of the death penalty, it violates the rights to a fair trial and to due process of law.

The intent and consequence of using evidence of unadjudicated crimes in this manner is, effectively, to determine the defendant's guilt and punishment for the other unadjudicated crimes, but through a sentencing hearing rather than a proper and fair trial process accompanied by all of the substantive and procedural protections necessary for determining individual criminal responsibility.

A significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense (for example, the age or infirmity of the offender's victim or whether the defendant had a prior criminal record), and an effort to attribute to an offender individual criminal responsibility and punishment for violations of additional serious offenses that have not been charged and tried pursuant to a fair trial offering.

[319] IACHR, Annual Report of the Inter-American Commission, 1998, April 16, 1999.

111. In this regard, the Commission found in a case against the **United States**:[320]

> It is in light of the above principles that the Commission has analyzed the allegations of the Petitioner's representatives regarding the conduct of Mr. Garza's sentencing proceeding. In this respect, several facts, as described previously, are particularly relevant to determining this aspect of his claim. First, the parties agree that during Mr. Garza's sentencing hearing, the prosecution introduced evidence relating to four additional murders that Mr. Garza was alleged to have committed in Mexico. Mr. Garza was never previously charged or convicted of these crimes; indeed the Mexican authorities were not able to resolve or prosecute them, which resulted in their "unadjudicated" status. Moreover, the Petitioner's representatives have alleged, and the State has not disputed, that these murders could not have been prosecuted under U.S. Federal law at the time that they were committed, as they did not occur within the special maritime or territorial jurisdiction of the United States, a prerequisite for prosecuting the crime of murder under U.S. federal law.[321] The evidence presented by the prosecution consisted of the testimony of several alleged accomplices to these murders, who agreed to testify in exchange for substantial reductions in their sentences.
>
> It also appears to be common ground, as supported by the record and judicial decisions in Mr. Garza's case, that the jury was required to conclude, and in fact did conclude "beyond a reasonable doubt" on the evidence presented that Mr. Garza committed each of these four murders. Finally, it is apparent from the record that the jury considered Mr. Garza's responsibility for these additional murders in determining whether he should be sentenced to the death penalty.
>
> Based upon these facts, the Commission can only conclude that during his criminal proceeding, Mr. Garza was not only convicted and sentenced to death for the three murders for which he was charged and tried in the guilt/innocence phase of his proceeding; he was also convicted and sentenced to death for the four murders alleged to have been committed in Mexico, but without having been properly and fairly charged and tried for these additional crimes. Considered in this light, in the Commission's view, the introduction of evidence of this nature and in this manner

[320] IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, United States, April 4, 2001, paras. 103-112. On this issue of the use of evidence of an unadjudicated offense during the sentencing hearing, see also IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 144-148; IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, paras. 77-79; IACHR Report No. 52/02, Ramón Martinez Villarreal, United States, October 10, 2002.

[321] *See* 18 U.S.C. Section 1111(b) (providing that "[w]ithin the special maritime and territorial jurisdiction of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.").

during Mr. Garza's sentencing hearing was inconsistent with several fundamental principles underlying Articles XVIII and XXVI of the Declaration.

First, based upon the record in this case, the United States would have been prevented from prosecuting Mr. Garza for these additional crimes under the *nullum crimen sine lege* principle, as U.S. federal law did not render conduct of this nature perpetrated in Mexico as a crime under U.S. law at the time that Mr. Garza was alleged to have committed them. To this extent, then, the State appears to be seeking to do indirectly what it cannot do directly, namely secure responsibility and punishment on the part of Mr. Garza for four murders through a sentencing hearing, which are otherwise outside of U.S. federal jurisdiction to prosecute.

In addition, it cannot be said that Mr. Garza was tried for these four additional murders before an impartial tribunal. Rather, the Commission is of the view that the jury that sentenced Mr. Garza could not reasonably have been considered impartial in determining his criminal liability for the four unadjudicated murders in Mexico when the same jury had just convicted Mr. Garza of three murders. The Commission has previously articulated the international standard on the issue of "judge and juror impartiality" as employing an objective test based on "reasonableness and the appearance of impartiality".[322] In the Commission's view, it cannot reasonably be contended that the facts concerning these additional four murders were presented to an untainted, unbiased jury in a forum in which the full protections of the rights under the American Declaration were afforded to Mr. Garza. To the contrary, presentation of evidence of prior criminal conduct is generally considered to be irrelevant and highly prejudicial to the determination of guilt for a current criminal charge. This conclusion is corroborated by the State's own Federal Rules of Evidence, which preclude the introduction of evidence of prior crimes during the guilt/innocence phase of a criminal trial, unless it is relevant to proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[323]

Further, the prejudice resulting from the determination of Mr. Garza's guilt for four additional murders during his sentencing hearing was compounded by the fact that lesser standards of evidence were applicable during the sentencing process. As the Petitioner's representatives have pointed out, the application of strict rules of evidence during trials of criminal charges, where the onus is solely upon

[322] Andrews v. US, *supra*, para. 159.

[323] *See* Federal Rules of Evidence, R. 404(b). *See also* Gregg v. Georgia, 428 U.S. 153, 190 (noting that much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question).

the prosecution, is generally intended to protect the defendant from conviction based upon information that is prejudicial or unreliable.[324] Such protections were not, however, applicable when the jury found Mr. Garza responsible for the four murders in Mexico, as is clear from the terms of 21 U.S.C. Section 848(j). Consequently, Mr. Garza was not afforded the strictest and most rigorous standard of due process when his liability for the four foreign murders was determined.

The State appears to argue in this respect that the unadjudicated murders were simply another aggravating factor properly taken into account in determining the appropriate sentence for Mr. Garza. The Commission must emphasize, however, that a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, such as those enumerated in 21 U.S.C. 848(n), and an effort to attribute to an offender individual criminal responsibility for violations of additional serious offenses that have not, and indeed could not under the State's criminal law, be charged and tried pursuant to a fair trial offering the requisite due process guarantees. The State itself asserts that the purpose of a sentencing hearing is to determine the appropriate punishment for a defendant's crime, not to prove guilt. Yet proving Mr. Garza's guilt for the four unadjudicated murders so as to warrant imposition of the death penalty was, by the Government's own admission, precisely the intended and actual effect of its effort in introducing evidence in this regard during Mr. Garza's sentencing hearing.

Based upon the foregoing, the Commission considers that the State's conduct in introducing evidence of unadjudicated foreign crimes during Mr. Garza's capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes. Accordingly, the Commission finds that the State is responsible for imposing the death penalty upon Mr. Garza in a manner contrary to his right to a fair trial under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration.

The Commission also concludes that, by sentencing Mr. Garza to death in this manner, and by scheduling his execution for December 12, 2000 and thereby exhibiting its clear intention to implement Mr. Garza's sentence, the State had placed Mr. Garza's life in jeopardy in an arbitrary and capricious manner, contrary to Article I of the Declaration. In addition, to execute Mr. Garza pursuant to this sentence would constitute a further deliberate and egregious violation of Article I of the American Declaration.

[324] *See e.g. id*.

In light of the Commission's conclusion that evidence pertaining to the four unadjudicated murders should not have been introduced during Mr. Garza's sentencing hearing, the Commission does not consider it necessary to determine whether, in the alternative, introduction of this evidence violated Mr. Garza's right to equality of arms and was for this reason contrary to the Declaration.

112. Furthermore, the Commission has affirmed:[325]

The Commission has decided in previous cases that the state's conduct in introducing evidence of unadjudicated crimes during a sentencing hearing was "antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes."[326] This conclusion is based upon the Commission's finding that the consequence of using evidence of unadjudicated crimes in this manner is, effectively, to presume the defendant's guilt and impose punishment for the other unadjudicated crimes, but through a sentencing hearing rather than a proper and fair trial process accompanied by all of the substantive and procedural protections necessary for determining individual criminal responsibility. The Commission has also found that the prejudice resulting from the use of the evidence relating to these other alleged crimes is compounded by the fact that lesser standards of evidence are applicable during the sentencing process.

(…)

The Commission must again emphasize that a significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense (for example, the age or infirmity of the offender's victim or whether the defendant had a prior criminal record), and an effort to attribute to an offender individual criminal responsibility and punishment for violations of additional serious offenses that have not been charged and tried pursuant to a fair trial offering the requisite due process guarantees.

[325] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 145, 147.

[326] IACHR Report Nº 52/02 (Ramón Martinez Villarreal), United States, Annual Report of the IACHR 2002; Report Nº 127/01, Case Nº 12.183, (Joséph Thomas), Jamaica, Annual Report of the IACHR 2001.

4. Incompetent state counsel appointed as legal representative

The right to due process and to a fair trial include the right to adequate means for the preparation of a defense, assisted by adequate legal counsel. Adequate legal representation is a fundamental component of the right to a fair trial.

The fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. Legal representation is inadequate when representatives fail to raise certain arguments in favor of the defendant before domestic courts.

The State cannot be held responsible for all deficiencies in the conduct of State-funded defense counsel. National authorities are, however, required under Article 8(2)(c) of the American Convention to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. Rigorous compliance with the defendant's right to competent counsel is compelled by the possibility of the application of the death penalty.

113. In a 2009 report on a case against the **United States**, the Commission found:[327]

> The petitioner alleges that the prejudice suffered by Messrs. Medellín, Ramírez Cardenas and Leal García was exacerbated by the incompetence of state appointed counsel during the pre-trial investigation, the trial phase and the sentencing phase of the proceedings. The State, for its part, asserts that the US Constitution and federal and state laws and regulations "ensure that all persons, including foreign nationals unfamiliar with English or the US judicial system, will have adequate interpreters and competent legal counsel who can advise them" and that failure to honor these protections can be corrected through appeals.[328]
>
> As the Commission has established, the fundamental due process requirements for capital trials include the obligation to afford a defendant a full and fair opportunity to present mitigating evidence for consideration in determining whether the death penalty is the appropriate punishment in the circumstances of his or her case. The Commission has stated in this respect that the due process guarantees under the American Convention and the American Declaration applicable

[327] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras. 133-143. On the issue of incompetent state counsel appointed as legal representative for the victims in the United States, see also: IACHR, Report No. 1/05, Case 12.430, Roberto Moreno Ramos, United States, paras. 52-55; IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, paras. 35-37, 41-43, 45.

[328] IACHR, Report 41/00 (Desmond McKenzie *et al*.), Jamaica, Annual Report of the IACHR 1999, paras. 207-209.

to the sentencing phase of a defendant's capital prosecution guarantee an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of the defendant's case, in light of such considerations as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.[329]

Similar requirements are reflected under domestic standards of legal practice in the United States. In particular, the American Bar Association, the principal national organization for the legal profession in the United States, has prepared and adopted guidelines and related commentaries that emphasize the importance of investigating and presenting mitigating evidence in death penalty cases.[330] They indicate, for example, that the duty of counsel in the United States to investigate and present mitigating evidence is now "well-established" and emphasize that:

> [b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation in to personal and family history." In the case of the client, this begins with the moment of conception.[331]

The Guidelines also emphasize the need for prompt and early mitigation investigation, stating that:

> [t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses),

[329] *See* Report Nº 38/00 (Baptiste), Grenada, Annual Report of the IACHR 1999, paras. 91, 92; Report Nº 41/00 (McKenzie et al.) Jamaica, Annual Report of the IACHR 1999, paras. 204, 205; Case Nº 12.067 (Michael Edwards *et al.*), The Bahamas, Annual Report of the IACHR 2000, paras. 151-153. See also I/A Court H.R., *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case.* Judgment of June 21, 2002, Series C Nº 94, paras. 102, 103.

[330] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf), Guideline 10.7 – Investigation.

[331] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf), Guideline 10.7 – Investigation, at 82.

> decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[332]

The Commission recognizes that the laws of the United States offer extensive due process protections to individuals who are the subject of criminal proceedings, including the right to effective legal representation supplied at public expense if an individual cannot afford an attorney. While it is fundamental for these protections to be prescribed under domestic law, it is also necessary for States to ensure that these protections are provided in practice in the circumstances of each individual defendant.

In the present case, the State has not contested the specific allegations of the petitioner that the attorneys provided by the state for Messrs. Medellín. Ramírez Cardenas and Leal García were inadequate and negligent. The information in the record of the case indicates that in two cases the attorneys were suspended from the practice of law for ethics violations in other cases; one of the attorneys was held in contempt of court and arrested for seven days for violating his suspension and spent a total of eight hours on the investigation of the case prior to the commencement of jury selection; during jury selection two of the attorneys failed to strike jurors who revealed their inclination to impose automatically the death penalty; in all of the cases few or no witnesses or expert witnesses were called during the trial phase; there was no cross examination on the credibility or relevance of fingerprint, DNA, Luminol and other evidence produced by the prosecution; in all of the cases the attorneys failed to exploit suspicious gaps in the prosecution's investigation; in all of the cases few or no witnesses or expert witnesses were called during the sentencing phase; in two cases expert witnesses were called whose testimony was detrimental to the alleged victim's case; (see supra Section III, paras. 18, 19, 30, 42-47).

In this regard, the Commission wishes to reiterate[333] its concern respecting the petitioner's submissions on the deficient state of the capital public defender system in the state of Texas, which has no state-wide agency responsible for providing specialized representation in capital cases. A great majority of lawyers who handle death penalty cases in Texas are sole practitioners lacking the expertise and resources

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[332] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised editions) (February 2003) (http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines.pdf), Guideline 10.7 – Investigation, at 83.

[333] See IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para. 56.

necessary to properly defend their clients, and as a result, capital defendants frequently receive deficient legal representation.[334]

The Commission has found in a previous case[335] that the systemic problems in the Texas justice system are linked to deficiencies in part due to the lack of effective oversight by the State. The Commission considers that this may have contributed to the deficiencies in Messrs. Medellín, Ramírez Cardenas and Leal García's legal representation.

Based upon the information and evidence on the record, it is not apparent to the Commission that the proceedings were fair notwithstanding the State's failure to comply with the consular notification requirements. To the contrary, the Commission considers, based upon the information presented, that the State's failure in this regard had a potentially serious impact upon the fairness of Messrs. Medellín, Ramírez Cardenas and Leal García's trial.

Based upon the foregoing, the Commission concludes that the State's obligation under Articles XVIII and XXVI of the American Declaration include the right to adequate means for the preparation of a defense, assisted by adequate legal counsel and that the State's failure to respect and ensure this obligation resulted in additional violations of their rights to due process and to a fair trial under these provisions of the Declaration.

In the circumstances of the present case, where the defendants' convictions have occurred as a result of sentencing proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes the convocation of new sentencing hearings, in accordance with the due process and fair trial protections prescribed under Articles I, XVIII and XXVI of the American Declaration.[336]

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[334] See Texas Defender Service *A State of Denial: Texas Justice and the Death Penalty* (2000) available at http://texasdefender.org/state%20of%20denial/Part1.pdf. The report was based upon a study of hundreds of death penalty cases in the state of Texas. The Report identifies many instances of poor representation by defense lawyers in capital trials and state habeas corpus proceedings, which in some cases result from the State's refusal to both appoint lawyers with sufficient experience and training and to fund an adequate defense. The Report also indicates that the Texas Court of Criminal Appeals routinely denies any remedies to inmates whose court-appointed lawyers performed poorly.

[335] IACHR Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005, para. 57.

[336] IACHR Report No. 52/02 (Ramón Martinez Villarreal), United States, Annual Report of the IACHR 2002, para. 86; Report No. 127/01, Case No. 12.183, (Joséph Thomas), Jamaica, Annual Report of the IACHR 2001, para. 146.

114. In a case regarding **Cuba** the Commission pointed out the brevity of the trial as a factor impeding the defendants to question the competence of their counsel. In this regard the Commission affirmed:[337]

> In the present case, no information is available as to whether the defense lawyers appointed by the State carried out a serious investigation into the acts imputed to their clients, into the attenuating circumstances that might have reduced the penalty proposed by the prosecutor and accepted by the court. The only reference made in the judgment regarding the role played by the defense lawyers is the following: "That defense lawyers Jorge Betancourt Ortega and Ramón Manso Janet[338] changed their conclusions as recorded on folios number sixty-nine and three of the roll, the other lawyers made conclusive what had been provisional on folios number thirty-two and thirty-four of the above mentioned roll."[339]
>
> Nor is it clear from the judgment that the defense counsel presented any evidence regarding the possible existence of attenuating circumstances or that they took issue with any of the facts accepted by the court of first instance as aggravating circumstances, such as for example the description of aggravating circumstances in the case of accused Sevilla García, when the court in addition to reporting a crime for which he had previously been accused stated that "his conduct continues to be very anti-social in his neighborhood, he prides himself on being good-looking, he disturbs the peace, and spends time with anti-social elements."
>
> The failure by the defense lawyers in the trial against Messrs Copello, Sevilla, and Martínez, to properly investigate and, if appropriate, lodge evidence of possible attenuating circumstances, prevented the accused from benefiting from an examination by the court of information that was potentially important for its decision regarding the appropriate punishment. Consequently, Messrs Copello, Sevilla, and Martínez were not provided with adequate legal advice and representation which is a fundamental element of their right to a fair trial. In the present case, the responsibility of the State derives directly from its power to appoint the public prosecutors in the trial against Messrs. Copello, Sevilla, and Martínez.

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[337] IACHR, Report No. 68/06, Case 12.477, Merits, Lorenzo Enrique Copello Castillo and Others, Cuba, October 21, 2006, paras. 100-104.

[338] Ramón Manso Janet was the court appointed defense counsel for Lorenzo Enrique Copello Castillo and Bårbaro Leodán Sevilla García. Jorge Betancourt Ortega was the court-appointed defense counsel for Jorge Luis Martínez Isaac.

[339] In Judgment 11/2003 of the People's Provincial Court of the City of Havana, dated April 8, 2003. Fourth Finding.

Therefore, given the brevity of the trial, the accused had no opportunity to question the competence of their defending counsel during the trial at first instance, and in the later stages of the proceedings taken against them. In the opinion of the Commission, this constitutes a serious failure to guarantee the basic right of the accused to due legal process in the domestic courts of the State for crimes punishable by the death penalty.

Having regard to the foregoing, the Commission considers that the right of Messrs. Copello, Sevilla, and Martínez to be provided with adequate legal advice and representation was not recognized in the proceedings taken against them, and consequently concludes that the State is responsible for violating the right of Messrs. Copello, Sevilla, and Martínez to a fair trial according to Article XVIII of the American Declaration, and their right to due process of law according to Article XXVI of the American Declaration.

115. In a case regarding **Jamaica**, the Commission affirmed:[340]

The Commission has also considered the Petitioners' allegations concerning the competence of Mr. Myrie's trial attorney. In this respect, the Commission notes that according to Article 8(2)(d) of the Convention, every person accused of a criminal offense has the right to defend himself personally or to be assisted by legal counsel of his own choosing. Article 8(2)(e) of the Convention provides every such person the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time limit established by law. Strict compliance with these and other guarantees of due process are particularly fundamental in the context of trials involving capital offenses. The Commission also considers that these rights apply at all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, leading to his committal for trial, and at all stages of the trial itself.[341]

In the present case, the Commission notes that the State provided Mr. Myrie with legal representation for the criminal proceedings against him. As with all rights under the Convention, however, the right to legal representation must be guaranteed in a manner that renders it effective and therefore requires not only that counsel be provided, but that defense counsel be competent in representing the defendant. The Commission has also recognized that the State cannot be held responsible for all deficiencies in the conduct of State-funded defense

[340] IACHR, Report No. 41/04, Case 12.417, Merits, Whitley Myrie, Jamaica, October 12, 2004, paras. 61-64.

[341] *See* McKenzie *et al*. v. Jamaica, Annual Report of the IACHR 1999, paras. 304-305. S*ee similarly* U.N.H.R.C., Paul Kelly v. Jamaica, Communication Nº 253/1987 (1991).

counsel, owing to the independence of the legal profession from the State and the State's corresponding lack of knowledge or control over the manner in which a defense attorney may represent his or her client.[342] National authorities are, however, required under Article 8(2)(c) of the Convention to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention.[343]

In the present case, the record does not suggest that Mr. Myrie made it known to State officials that he considered his legal representation to be inadequate, prior to or during his trial. However, in the Commission's view, it is apparent on the basis of information available that it would or should have been manifest to the trial judge that the behavior of Mr. Myrie's trial attorney was incompatible with the interests of justice.[344] In particular, as noted above, the information available indicates that Mr. Myrie's attorney failed to request that the jury retire during the *voir dire* on the admissibility of Mr. Myrie's statement; rather, contrary to established jurisprudence and with no apparent justification, he requested that the jury remain during the *voir dire* and thereby potentially caused Mr. Myrie prejudice by possibly leaving the jury with the impression that the trial judge had reached a final conclusion as to Mr. Myrie's credibility. In addition, Mr. Myrie's attorney was absent from the courtroom for portions of the trial, including a period when evidence potentially significant to Mr. Myrie's guilt was adduced. According to the Petitioners, Mr. Myrie's attorney did not request an adjournment or otherwise attempt to accommodate his inability to appear. In the Commission's view, these circumstances should have led the trial judge to take positive measures to ensure that Mr. Myrie received adequate legal representation. Rigorous compliance with Mr. Myrie's right to competent counsel was also compelled by the fact that he was being tried for a crime for which, if convicted, he would be sentenced to death. As with the jury's presence during the *voir dire*, the Commission notes that the conduct of Mr. Myrie's trial attorney was not a matter that was addressed by the Court of Appeal in its judgment of January 11, 1993.[345]

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

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[342] *See* Leroy Lamey *et al*. *v.* Jamaica, Case Nº 11.826, Report Nº 49/01, Annual Report of the IACHR 2000, paras. 216-217. See similarly Eur. Court H.R., Kamasinski v. Austria, 19 December 1989, Series A. Nº 168 para. 65; U.N.H.R.C., Young v. Jamaica, Communication Nº 615/1995 (1997).

[343] *Id.*

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

[345] R. v. Whitley Myrie, Judgment of January 11, 1993, Supreme Court Criminal Appeal Nº 128/91 (Court of Appeal of Jamaica).

5. Irregularities in the confession and confession obtained through torture or coercion

A written confession ought to be excluded at trial, when there is clear evidence that it has been coerced.

It is generally for the appellate courts of States Parties, and not the Commission, to review the conduct of domestic proceedings, unless it is clear that there was judicial conduct that was arbitrary or amounted to a denial of justice or violated judicial obligations of impartiality.

116. In a 2007 report on a case regarding **Guyana**, the Commission held: [346]

> The Petitioner contends that the oral and written confessions attributed to the condemned men should have been excluded from evidence, given that they were extracted by force. The Commission notes that the Court of Appeal of Guyana in upholding the convictions and death sentences of the Vaux brothers held, *inter alia* that:
>
> > a) there was ample evidence apart from the confession evidence upon which a jury could reasonably have convicted the Vaux brothers the defense of both men (alibi evidence) has been fairly put to jury (and rejected).
>
> The Commission acknowledges that the voluntariness of the Vaux brothers' statements was fully ventilated before trial and appellate courts of Guyana, after which all the statements were reaffirmed by the Court of Appeal as voluntary, except the written statement by Daniel Vaux. At the trial, the trial judge relied primarily on police witnesses in arriving at her ruling on the voluntariness of all of the statements. In past decisions concerning issues of this nature, the Commission has observed that it is generally for the appellate courts of States Parties, and not the Commission, to review the conduct of domestic proceedings, unless it is clear that there was judicial conduct that was arbitrary or amounted to a denial of justice or violated judicial obligations of impartiality.[347]
>
> However, there are several aspects of the manner in which the Petitioners oral and written statements were taken and subsequently relied upon by the trial court that concern the Commission, having regard

[346] IACHR, Report 81/07, Case 12.504, Merits (Publication), Daniel and Kornel Vaux, Guyana, October 15, 2007, paras. 53-69.

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

for previous cases considered by the Commission where criminal convictions have been grounded primarily in coerced confessions.[348]

Firstly, the Court of Appeal found that Daniel Vaux' written confession ought not to have been admitted as evidence at the trial in the face of evidence that it was given involuntarily. While the Court of Appeal acknowledged that Daniel's Vaux's right to due process had been violated by the admission of this written confession at the trial, the Court nevertheless upheld his conviction on the basis that there was other available evidence on which a conviction could be sustained and that there had been no substantial miscarriage of justice occasioned to Daniel Vaux.[349] Accordingly, Daniel Vaux was never accorded any remedy by the Court of Appeal or by any other organ of the State for this incursion on his due process rights.

Secondly, according to the record before the Commission, this confession was given at or around the same time as (a) the oral confession elicited from Daniel Vaux and (b) the oral and written confessions elicited from Kornel Vaux.

With respect to both Daniel and Kornel Vaux, the Court of Appeal upheld the ruling of the trial judge that their oral statements were admissible, on the basis that they represented spontaneous admissions, unprompted by coercion or the threat thereof.

In the absence of any evidence to the contrary, the Commission considers that all of the confessions were indivisible components of a single *res gestae*.[350] In respect of both of the alleged victims, the trial judge considered that the oral and written statements were part of one continuing event.[351] In the particular circumstances of this case, and having regard for the heightened scrutiny test adumbrated above, the Commission finds it difficult to accept that only a portion of the *res gestae* (namely the written statement of Daniel Vaux) was vitiated by

[348] See for example, IACHR Report Nº 2/99 Case 11.509 Manuel Manríquez, Mexico, February 23, 1999 where the public officers of the State of Mexico beat and tortured the petitioner to extract a confession that he had murdered Armando and Juventino López Velasco. The petitioner was later convicted of murder principally on the basis of this confession. The Commission found multiple violations of Mr. Manríquez's rights under the American Convention, the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), and the right to judicial protection (Article 25). The Commission also found that violations of Articles 8 and 10 of the Inter-American Convention to Prevent and Punish Torture.

[349] The Court of Appeal upheld the conviction by applying the proviso to section 13 of the Guyana's Court of Appeal Act (see footnote 3 *supra*).

[350] At page 15 of their judgment, the Court of Appeal quoted the trial judge's ruling that "I have considered the flow of events immediately preceding and find that the statements were one continuing event. In the circumstances I rule the statements free and voluntary…In the exercise of my residual discretion, I find no reason to exclude the statements on the ground of unfairness to the accused."

[351] Ibid.

coercion, but that the remaining contemporaneous statements were immune from such coercion.

It is evident to the Commission, based upon the information available, and the Commission's heightened scrutiny test, that the State's conduct had a potentially serious impact upon the fairness of the trial of the Vaux brothers, in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. In a case such as the present, where the defendants' convictions have occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy would be a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI. This was an option that was open to the Court of Appeal of Guyana, but which it declined to exercise. The Commission further notes that the State has provided no indication that it has taken steps to investigate and/or to sanction those who might have been responsible for coercing Daniel Vaux's confession. Similarly, there is no indication of any steps taken by the State to investigate and/or remedy the disappearance of the medical evidence regarding the alleged beating of Kornel Vaux. In the Commission's view, the absence of any remedial action by the State reinforces its view that the State is in violation of the due process and fair trial protections under Articles XVIII and XXVI, particularly with respect to the right of the Vaux brothers to be protected "from acts of authority that, to [their] prejudice, violate any fundamental constitutional rights."[352]

The Commission's concern is heightened by the fact that according to the transcript of the trial (supplied by the Petitioners), Vic Puran, a former magistrate gave evidence that when the Vaux brothers first appeared before him (in a preliminary inquiry), they complained of having been beaten by the police, and that he saw welts on their bodies about their stomachs/backs[353]. The former resident magistrate's files notes could not be found, and accordingly, he was compelled to rely on his memory. However, the trial judge in ruling on Kornel Vaux's allegations of coercion, rejected Mr. Puran's evidence, preferring the evidence of a police constable, Ryan George, who deponed that he had seen no signs of injuries.[354]

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[352] Article XVIII of the American Declaration.

[353] At page 100 of the trial transcript, former resident magistrate Vic Puran is recorded as stating: *"…In their first appearance the (sic) complained of being beaten by the police and requested that they be permitted to show the Court, the injuries they received. I invited them to the Back and the (sic) and the (sic) both lifted their top garment. I saw several black and blue marks on their top front between chest and abdomen. I made a note on the Magistrate's jacket of the marks which I saw. The jackets are kept by the clerk of the Court, and not by the Magistrate."*

[354] According to the trial judge : *"Mr. Puran, the Magistrate said he saw 'weal' and black and blue marks on the chest and abdomen of the prisoner (Kornel), he could not remember the date when the prisoners first appeared neither did he remember where he made a note of seeing those injuries. It is important to note that it*

Continues…

The Commission is further concerned about the unexplained disappearance (and consequent unavailability) of medical evidence that Kornel Vaux intended to (and was entitled to) rely on to corroborate his claim of being beaten to elicit a confession to murder. The Commission considers that this clearly impinged on Kornel Vaux's right to due process, particularly having regard for the doctrine of 'equality of arms' as is discussed below.

The Commission notes that according to the Court of Appeal of Guyana, the trial judge had a residual discretion to exclude the evidence of confessions, if it was thought that it would be unfair to the accused to do otherwise. The Court of Appeal ruled that:

> In these days of ever mounting crime it is essential not to fetter the hands of the police of unnecessarily so as to hinder them in their difficult and vital task of the detection of crime and of bringing offenders to justice. To do this effectively they must be allowed a certain latitude, and after arrest, ought to be permitted to detain persons for reasonable time for enquiries. Once they act fairly and refrain from threats and any unlawful attempt to induce or exert any admission, the courts should not shut out any statement then made...

When regard is had to the circumstances surrounding the taking of the statements, as accepted by the Trial Judge, as well as to the fact that appellant had been in custody for about three (3) days prior to the taking of the statements, I cannot say that she had wrongly exercised her discretion to admit the statements in evidence.

With the greatest of respect to the Court of Appeal of Guyana, having regard for the Commission's observations on the doctrine of heightened scrutiny and the *res gestae* dimensions of the confession evidence, the Commission considers the Court's conclusion falls short of Guyana's international obligation to protect the due process rights of the Petitioners, particularly with respect to the treatment of the confession evidence. In this regard, while the Commission appreciates the imperative of effective policing, it does not accept that this can or should occur at the expense of the rights of accused person in their custody. As the Court of Appeal itself acknowledged, the written confession of Daniel Vaux ought to have been excluded at the trial, given the clear evidence that it had been coerced. Given this fact, together with the contemporaneity of all of the confessions, the Commission is unable to

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…continuation

was the very afternoon Mr. Puran said that he Ryan George observed nothing. Is Mr. Puran mistaken from the lapse of time with no notes to aid his memory. I would accept George's evidence to that of Puran's."

accept the Court of Appeal's implicit finding that (a) these other confessions were untainted by unlawful threats or inducements and (b) were undeserving of a favourable discretion to exclude them. As indicated previously, the Commission considers that this approach of the Court of Appeal failed to conform with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration. In the Commission's view, this situation is compounded by the fact the Vaux brothers were in custody for almost a week before they were taken before a magistrate.[355]

Apart from considerations revolving around the doctrine of "heightened scrutiny", the Commission also considers that this case reflects a clear inequality of arms as between the Petitioners and the State, particularly as it relates to the issue of the missing medical evidence. The Commission notes that all international human rights systems, including the Inter-American system, stress the importance of "equality of arms" before a tribunal[356]. For example, the United Nations Covenant on Civil and Political Rights indicates this equality in the first sentence of Article 14, and Article 5 of the American Convention refers to it in relation to criminal proceedings. Case-law from the European system, for example has held that the doctrine of equality of arms is indispensable for a fair trial. For example, in the case of *Ofner and Hopfinger v Austria*,[357] the European Commission of Human Rights (as it then existed) observed that "what is generally called the equality of arms, that is the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'". In a matter involving a sentence of death and the right to information on consular assistance, the Inter-American Court in its Advisory Opinion, OC-16/99, expressed the following view:……[paras 118-119, 135-136]

> "the Court has held that the procedural requirements that must be met to have effective and appropriate judicial guarantees "are designed to protect, to ensure,

[355] According to trial transcript provided by the Petitioner, the Vaux brothers were both arrested on July 08, 1993 and appeared before a magistrate (Magistrate Puran) for the first time on July 14, 1993; see pages 358, 422, 428, 448. They were in custody for three days before the police elicited confessions from them; see pages 433, 438.

[356] See Judicial Process and Human Rights, United Nations, European, American and African Systems, Texts and Summaries International Case-Law, by Louise Doswald-Beck and Robert Kolb, published by N.P.Engel, Publisher*Kehl*Strasbourg*Arlington, VA, 2004, page 144.

[357] European Commission of Human Rights, Applications Nos. 524/59 and 617/59, Report of 23.11.1962, Yearbook No.6 at page 680. See also ECHR, Case of Nikolova v Bulgaria 1999-II, pages 83, 96 and 106, where the European Court of Human Rights (EurCt) found there was an inequality of arms in breach of Article 5 (4) of the European Convention on Human Rights, where the petitioner/accused had not been permitted to consult the evidence in a case file prepared by a prosecutor or to respond to comments made by the prosecutor on the case file. Similarly in the case of Foucher v. France, Rep. 1997-II, page 157, the EurCt found that a petitioner/accused had been deprived of 'equality of arms when he was deprived access to the prosecution case file in order to make copies of documents therein for the preparation of his defence.

> or to assert the entitlement to a right or the exercise thereof" and are "the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."

To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

> States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases… If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.

In the case of *Derrick Tracey*[358] from Jamaica, (dealing with the right to counsel within the context of a right to a fair hearing) , the Commission considered that the due process rights of the Petitioner had been violated where the Petitioner alleged that he had been forced to sign a confession after being beaten by the police. The Petitioner's confession was given in the absence of counsel. At the trial, the arresting police officers were unavailable to give evidence relating to this, but despite this, the Petitioner's confession was ruled admissible. The Commission considered that unavailability of at least one of the arresting officers to testify at the trial was "contrary to Mr. Tracey's right to defend his interests effectively and in full procedural equality".[359] The Commission also took this into account when deciding that "counsel was required [for the Petitioner] to ensure that proceedings against him were fair and to obtain appearance of persons who could throw light on issue of coerced

[358] IACHR, Report No. 75/05 Jamaica, October 15, 2005.

[359] *Ibid*, para. 33.

statement…in connection with the use of the statement against him at the trial".[360]

In the case under consideration, the Court of Appeal of Guyana was content to rely on the assertions of the prosecution that the medical evidence was simply unavailable. Despite the unavailability of the medical evidence at the trial, the Court of Appeal was "unable to find that the learned Trial Judge had acted wrongly in admitting the [confession] evidence as being free and voluntary", holding that " there was no misapplication by her of the relevant law nor did she fail to assess the evidence properly…" On behalf of the Court of Appeal, the Chancellor of Guyana opined:

> I am convinced that the prosecution had made determined efforts to locate the relevant records but to no avail. I cannot therefore fault the prosecution for failing to locate any of the records which may or may not have indicated whether these appellants and especially [Daniel Vaux] was in fact suffering from any injury and the identity of the doctors who examined the appellants on the 13th of July 1993. If any of the records had been found which revealed the identity of the doctors who had examined these appellants and the prosecution had not called the doctors at the High Court then I am sure that learned trial judge would have herself have called the doctors in the interest of justice…

Having regard to the state of evidence led at the Voir Dire, the learned Trial Judge had to do her best on the available evidence to determine whether or not the statements allegedly made by this appellant [Kornel Vaux], were proved by the prosecution to have been voluntarily made by him…

Not having the benefit of the evidence of the doctor, the Trial Judge was left with the evidence of Detective Constable Parsram and Raymond Hall who were present when this appellant made the statements, Ryan George, who took this appellant to the Georgetown Prisons on the 14th July, 1993 and saw no injuries on him, Clement Duncan, the Medex at the Georgetown Prisons who saw no injuries on the appellant on 15th July, 1993 and the appellant himself…

In the Commission's view, there appears to be conspicuous inequality of arms reflected primarily in the unavailability of critical medical evidence and or judicial notes by a former resident magistrate at the time that the

[360] *Ibid*. para. 34.

> confession evidence was considered by the trial court. Ultimately, the court was left to rely principally on agents of the State who (a) had control of the medical evidence and judicial notes; and (b) could hardly be considered to be disinterested parties in resolving the issue of whether the confession evidence was voluntary or not. The Commission notes that a former resident magistrate gave evidence of having seen injuries on the Vaux brothers, but his evidence was dismissed by the trial judge in the absence of any corroborating notes from the magistrate's court file. These notes had been lost or mislaid. In the circumstances, in the case of Kornel Vaux, he was deprived of the opportunity to fully contest the voluntariness of his statements, as alleged by the prosecution.
>
> In these circumstances, the treatment of the confession evidence by the courts of Guyana, together with the unavailability of medical evidence affected the fairness of the proceedings against the Vaux brothers (particularly Kornel Vaux) by hindering their ability to effectively raise and argue serious deficiencies in the proceedings against him and thereby contravened their rights under Articles XVIII, XXV, and XXVI of the American Declaration. The Commission further finds that should the State execute the Vaux brothers based upon the criminal proceedings for which they are presently convicted and sentenced, that this would constitute an arbitrary deprivation of the lives of the Vaux brothers contrary to Article I of the Declaration.

117. In a 2001 report on a case regarding **The Bahamas**, the Commission found:[361]

> With regard to Messrs. Schroeter's and Bowleg's claims, the Petitioners contend namely, that the condemned men did not have a fair trial because of the confessions obtained from them by the police were coerced and obtained through police violence and oppression; procedural irregularities occurred during the trial; the trial judge's summing-up to the jury was not impartial, and was prejudicial to the condemned men, because the trial judge indicated to the jury that he disbelieved the condemned men as to what transpired when they were detained by police officers; and that the trial judge should not have informed the jury that he ruled on *voir dire* that their confessions were obtained by the police during the condemned men's detention and were admissible, which affected their credibility.
>
> In addition, the Petitioners contend that Messrs. Schroeter and Bowleg complained of their inhumane treatment by police officers in the Magistrates Court on July 19, 1996, which resulted in the Magistrate,

[361] IACHR, Report No. 48/01, Case Nº 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 212-215.

Cheryl Albury, directing that that they be taken to hospital. The Petitioners maintain that at the Accident and Emergency Department of the Princess Margaret Hospital both victims received treatment for injuries sustained whilst in police custody. The Petitioners allege that at trial, the Casualty sheets containing the treating doctors notes in respect of the victims had been "inadvertently misplaced" and what remained were summarized notes in the Hospital's Accident and Emergency Ledger.

The Petitioners claim that at trial the medical evidence was not given by the treating doctor because he was "unavailable" but by a colleague based on a summarized note. The Petitioners indicate that the police witnesses at trial could not explain how the injuries were sustained, because they had not seen the condemned men injure themselves or suffer any accident. The Petitioners argue that the nature of the medical evidence and the failure of the Crown to explain the injuries raised at least the possibility that the confessions were obtained by oppression. The Petitioners contend that in such circumstances the oral and written confessions attributed to the condemned men should have been excluded from evidence. In support of their argument the Petitioners cite the following statement from the judge's summing-up to the jury:

> Just to give my ruling in the matter, and my decision has been arrived at after considering all the evidence adduced, the arguments raised, including the comments regarding alleged omissions and the detention forms and the absence of medical reports. And my conclusion is that I would allow the evidence to go forward.[362]

After carefully reviewing Messrs. Schroeter's and Bowleg's allegations and the information in the records before it, the Commission is of the view that the submissions in the above cases in respect of the manner in which the condemned men's trials were conducted are matters which are more appropriately left to the domestic courts of States Parties to the American Declaration. The Commission considers that it is generally for the courts of States Parties to the Declaration to review the factual evidence in a given case and give directions as to the applicable domestic law. Similarly, it is for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. In the present cases, the petitioners have failed to demonstrate that the manner in which their criminal proceedings were conducted warrants interference by this Commission.

[362] Trial transcript p 872.

6. Unavailability of legal aid for constitutional motions

In capital punishment cases, where Constitutional Motions directly relate to the right to life and to humane treatment, the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these rights must be guaranteed through the effective provision of legal aid for Constitutional Motions.

When a convicted person seeking constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State.

Constitutional Motions dealing with legal issues such as the right to due process of law, the right to humane treatment, and the adequacy of prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal representation.

118. In a 2002 report on a case regarding **Grenada**, the Commission affirmed:[363]

> Based upon the material before it, the Commission is satisfied that a Constitutional Motion dealing with legal issues of the nature raised by Mr. Lallion in his petition, such as the right to due process and the adequacy of his prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal representation. The Commission has also found in previous cases from Grenada, Rudolph Baptiste[364] and Donnason Knights[365] that the State does not provide legal aid to individuals in Grenada to bring Constitutional Motions, and that Mr. Lallion is indigent and is therefore not otherwise able to secure legal representation to pursue a Constitutional Motion.
>
> The Commission considers that in the circumstances of Mr. Lallion's case, the State's obligations regarding legal assistance for him to pursue a Constitutional Motion flows from both Article 8 and Article 25 of the Convention. In particular, the determination of rights through a Constitutional Motion in the High Court must conform with the requirements of a fair hearing in accordance with Article 8(1) of the

[363] IACHR, Report No. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 93-96, 98-99. On the issue of unavailability of legal aid for constitutional motions in Grenada, see also: IACHR, Report No. 56/02, Merits, Case 12.158, Benedict Jacob, Grenada, October 21, 2002, paras. 99-107; IACHR, Report No. 47/01, Case No. 12.028, Donnason Knights, Grenada, April 4, 2001, paras. 130-137; and IACHR, Report No. 38/00, Case 11.743, Rudolph Baptiste, Grenada, April 13, 2000, paras. 139-146.

[364] Report Nº 38/00, Case 11.743, IACHR, 721 at 767-769.

[365] Report Nº 47/01, Case 12.028, IACHR Annual Report 2000, 841 at 886-888.

Convention. In the circumstances of Mr. Lallion's case, the High Court of Grenada would be called upon to determine whether Mr. Lallion's conviction in a criminal trial violated his rights under the Grenada's Constitution. In such a case, the application of a requirement of a fair hearing in the High Court should be consistent with the principles in Article 8(2) of the Convention.[366] Accordingly, when a convicted person seeking Constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State.

Due to the unavailability of legal aid, Mr. Lallion has effectively been denied the opportunity to challenge the circumstances of his conviction under Grenada's Constitution in a fair hearing. This in turn constitutes a violation of his right under Article 8(1) of the American Convention.[367]

Moreover, Article 25 of the Convention provides individuals with the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate their fundamental rights recognized by the Constitution or laws of the state concerned or by the Convention. The Commission has stated that the right to recourse under section 25 when read together with the obligation in Article 1(1) and the provisions of Article 8(1), "must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the Constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation." [368]

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[366] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 28 (interpreting Article8(1) of the Convention as follows):

> For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature, article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases.

See also I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report Nº 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

[367] See similarly Currie v. Jamaica, Communication No. 377/1989, U.N.Doc. Nº CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

[368] See Peru Case, *supra*, pp. 190-191.

(…)

By failing to make legal aid available to Mr. Lallion to pursue a Constitutional Motion in relation to his criminal proceedings, the State has effectively barred recourse for Mr. Lallion to a competent court or tribunal in Grenada for protection against acts that potentially violate his fundamental rights under Grenada's Constitution and under the American Convention. Moreover, in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these most fundamental rights must be guaranteed through the effective provision of legal aid for Constitutional Motions.[369] The State cannot be said to have afforded such protection to Mr. Lallion. As a consequence, the State has failed to fulfill its obligations under Article 25 of the American Convention in respect of Mr. Lallion.

Accordingly, the Commission concludes that the State has failed to respect Mr. Lallion's right under Article 8(1)of the Convention by denying him an opportunity to challenge the circumstances of his conviction under the Constitution of Grenada in a fair hearing. The Commission also concludes that the State has failed to provide Mr. Lallion with a simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the Constitution or laws of Grenada or by the Convention, and has therefore violated the right of Mr. Lallion to judicial protection under Article 25 of the American Convention.

119. Similarly, the Commission held in a case against **Jamaica**:[370]

In light of the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by Mr. Aitken in his proceeding before the Commission such as the mandatory nature of his death sentence and his right to due process are

[369] See similarly U.N.H.R.C., William Collins v. Jamaica, Communication Nº 240/1987, U.N. Doc. Nº CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice).

[370] IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 147-148, 150-151. On the issue of unavailability of legal aid for constitutional motions regarding Jamaica, see also IACHR, Report No. 41/04, Case 12.417, Merits, Whitley Myrie, Jamaica, October 12, 2004, paras. 66-73; IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, paras. 129-136; IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, paras. 219-227; and IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 307-317.

procedurally and substantively complex and cannot be effectively raised or presented by a victim in the absence of legal representation. The Commission also finds, in the absence of evidence to the contrary, that Mr. Aitken lacks the financial means to bring a Constitutional Motion on his own, and, based upon the observations of both the Petitioners and the State, that Jamaica does not provide legal aid to individuals in Jamaica to bring such motions.

Based upon these submissions and the Commission's existing jurisprudence, the Commission considers that the State is subject to an obligation under the American Convention to provide individuals with effective access to Constitutional Motions, which may in certain circumstances require the provision of legal assistance. In particular, the Commission considers that a Constitutional Motion in the Supreme Court of Jamaica must, as a proceeding for the determination of an individual's rights, conform with the requirements of a fair hearing in accordance with Article 8(1) of the Convention. Moreover, in the circumstances of the present case where the Supreme Court would be called upon to determine Mr. Aitken's rights in the context of his trial, conviction and sentencing for a criminal offense, the Commission considers that the requirements of a fair hearing mandated by Article 8(1) of the Convention should be interpreted in a manner consistent with the principles in Article 8(2) of the Convention, including the right under Article 8(2)(e) to the effective assistance of counsel.[371] Accordingly, when a convicted person seeking constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State. In the present case, the effective unavailability of legal aid has denied Mr. Aitken the opportunity to challenge the circumstances of his criminal conviction under the Constitution of Jamaica in a fair hearing, and therefore has contravened his right to a fair hearing under Article 8(1).[372]

(…)

[371] *See* I/A Court H.R., Constitutional Court Case, Judgment of January 31, 2001, Ser. C No. 7, paras. 69, 70 (finding that the minimum guarantees established under Article 8(2) of the Convention are not limited to judicial proceedings in a strict sense, but also apply to proceedings involving the determination of rights and obligations of a civil, labor, fiscal or other nature.). *See also* I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report No. 49/99 (13 April 1999), ANNUAL REPORT 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

[372] *See similarly* Currie v. Jamaica, supra, para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights required the State to provide legal assistance).

> By failing to make legal aid available to Mr. Aitken to pursue a Constitutional Motion in relation to his criminal proceedings, the State has effectively barred his recourse to a competent court or tribunal in Jamaica for protection against acts that potentially violate his fundamental rights under the Constitution of Jamaica and under the Convention. As a consequence, the State has failed to fulfill its obligations under Article 25 of the Convention in respect of Mr. Aitken.
>
> Accordingly, the Commission concludes that the State has failed to respect Mr. Aitken's rights under Article 8(1) of the Convention by denying him an opportunity to challenge the circumstances of his trial, conviction and sentencing under the Constitution of Jamaica in a fair hearing. The Commission also concludes under the present circumstances that the State has failed to provide Mr. Aitken with simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by the Convention, and has therefore violated his rights to judicial protection under Article 25 of the Convention.

120. In a 2001 report on a case against **The Bahamas**, the Commission stated:[373]

> The Petitioners argue that legal aid is not effectively available for Constitutional Motions before the courts in The Bahamas, and that this constitutes a violation of the right to a fair trial under Articles XVIII and XXVI of the Declaration.
>
> The Petitioners contend that the failure of the State to provide legal aid denies the condemned men access to the Courts in fact as well as in law. The Petitioners argue that to bring a Constitutional Motion before the domestic courts often involve sophisticated and complex questions of law that require the assistance of Counsel. In addition, the Petitioners claim that the condemned men are indigent, and that legal aid is effectively not available to them to pursue Constitutional Motions in the courts of The Bahamas. The Petitioners contend that there are a dearth of lawyers who are prepared to represent the condemned men pro bono.
>
> Based upon the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by the condemned men in their petitions, such as the right to due process of law, the right to humane treatment, and the adequacy of their prison conditions, are procedurally and substantively complex and cannot be effectively raised or presented by a prisoner in the absence of legal

[373] IACHR, Report No. 48/01, Case Nº 12.067 and others (Michael Edwards *et al.*), The Bahamas, April 4, 2001, paras. 199-207.

representation. The Commission also finds that the State does not provide legal aid to individuals in The Bahamas to bring Constitutional Motions, and that the condemned men are indigent and are therefore not otherwise able to secure legal representation to bring Constitutional Motions.

As discussed above, the Commission considers that in light of the evolving nature of the American Declaration, that Articles XVIII, and XXVI of the Declaration must be interpreted in the circumstances of the condemned men's cases to require that the State has an obligation to provide legal assistance for Constitutional Motions in capital punishment cases. In particular, because of the complexity involved in initiating and pursuing a Constitutional Motion in the Supreme Court of The Bahamas for the determination of rights of the condemned men, the Commission believes that the provisions of Articles XVIII, and XXVI of the Declaration must be given effect by The Bahamas. In the circumstances of the condemned men's cases, the Supreme Court of The Bahamas would be called upon to determine whether the condemned men's convictions in a criminal trial violated their rights under Constitution of The Bahamas. In such cases, the application of a requirement of a fair hearing in the Supreme Court should be consistent with the principles in Articles XVIII, and XXVI of the Declaration.[374] Accordingly, when a convicted person seeking Constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State.

Due to the unavailability of legal aid, the condemned men have effectively been denied the opportunity to challenge the circumstances of their convictions under Constitution of The Bahamas, to an impartial hearing. This in turn constitutes a violation of their rights under Article XXVI of the American Declaration.[375]

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[374] See I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Annual Report 1991, para. 28 (interpreting Article 8 (1) of the Convention as follows:

> For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal or any other nature, article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases.

See also I/A Comm. H.R., Loren Laroye Riebe Star and others v. Mexico, Report Nº 49/99 (13 April 1999), Annual Report 1998, para. 70 (interpreting Article 8(1) in the context of administrative proceedings leading to the expulsion of foreigners as requiring certain minimal procedural guarantees, including the opportunity to be assisted by counsel or other representative, sufficient time to consider and refute the charges against them and to seek and adduce corresponding evidence.).

[375] See similarly Currie v. Jamaica , Communication Nº 377/1989, U.N.Doc. Nº CCPR/C/50/D/377/1989 (1994), para. 13.4 (concluding that where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional

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Moreover, Article XVIII of the Declaration provides individuals with the right to resort to the courts to ensure respect for his legal rights, and the availability of a simple and brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights. In this regard the Commission has stated that the right to recourse under Article 25 of the American Convention when read together with the obligation in Article 1(1) and the provisions of Article 8(1), "must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the Constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation."[376]

In addition, the Inter-American Court has held that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, then that person is exempted from the requirement under the Convention to exhaust domestic remedies.[377] While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article XVIII of the Declaration, in the circumstances of the present cases.

By failing to make legal aid available to the condemned men to pursue Constitutional Motions in relation to their criminal proceedings, the State has effectively barred recourse for the condemned men to a simple and brief procedure whereby the courts in The Bahamas would protect them from acts of authority that, to their prejudice, violate their fundamental rights under the Constitution of The Bahamas and under the American Declaration. Moreover, in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge. The right to judicial protection of these most fundamental rights must be guaranteed through the

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remedy and where the interests of justice so require, Article 14(1) of the International Covenant on Civil and Political Rights require the State to provide legal assistance).

[376] See Peru Case, supra, pp. 190-191.

[377] I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies, supra, para. 30.

effective provision of legal aid for Constitutional Motions.[378] The State cannot be said to have afforded such protection to the condemned men. As a consequence, the State has failed to fulfil its obligations under Article XVIII of the American Declaration in respect of the condemned men.

Accordingly, the Commission concludes that the State has failed to respect the rights of Messrs. Edwards, Hall, Schroeter and Bowleg under Article XXVI of the Declaration by denying them an opportunity to challenge the circumstances of their convictions under the Constitution of The Bahamas in an impartial and public hearing. The Commission also concludes that the State has failed to provide Messrs. Edwards, Hall, Schroeter and Bowleg with a simple and brief procedure whereby the courts in The Bahamas would protect them from acts of authority that, to their prejudice, violate their fundamental constitutional rights under the Constitution of The Bahamas and under the American Declaration, and has therefore violated the rights of Messrs. Edwards, Hall, Schroeter and Bowleg to judicial protection under Articles XVIII, and XXVI of the Declaration.

7. Violation of the right to consular notification and assistance

The Commission can examine compliance by a state party to the Vienna Convention on Consular Relations with the requirements of Article 36 of that treaty[379] in interpreting

[378] See similarly U.N.H.R.C., William Collins v. Jamaica, Communication Nº 240/1987, U.N. Doc. Nº CCPR/C/43/D/240/1987 (1991), para. 7.6 (finding that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defense in circumstances that can ensure justice.).

[379] Article 36 Communication and Contact with Nationals of the Sending State

1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2.The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the

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and applying the provisions of the American Declaration to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state.

A violation of the right to information for foreign nationals established under Article 36(1)(b) of the Vienna Convention on Consular Relations, when applicable, infringes the rights to due process and to a fair trial. In capital punishment cases, this entails that the victim has been "arbitrarily" deprived of his or her life.

121. In a 2009 report on a case against the **United States**, the Commission found:[380]

> The petitioner alleges that the State is responsible for violations of Messrs. Medellín, Ramírez Cardenas and Leal García's rights to due process and to a fair trial because of failure to inform them of their rights to consular notification under Article 36 of the Vienna Convention thereby causing prejudice to their defense. The State alleges that the petitioner fails to demonstrate that the fact that consular notification procedures were not followed amounts to a violation of the American Declaration. The State alleges that the Declaration does not include consular notification or assistance as an integral component of the protections set forth in Articles XVIII and XXVI of the Declaration nor does it indicate that consular notification may be relevant to due process protections. Therefore, in its view, the fact that consular notification procedures may not have been followed does not amount to a violation of the American Declaration.
>
> The Commission has determined in previous cases[381] that it is appropriate to consider compliance with Article 36 of the Vienna Convention by a state party to that Treaty when interpreting and applying the provisions of the American Declaration to a foreign national

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> said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

UN, Vienna Convention on Consular Relations, Vienna, 24 April 1963, entered into force on 19 March 1967, United Nations, *Treaty Series*, vol. 596, p. 261.

[380] IACHR, Report No. 90/09, Case 12.644, Admissibility and Merits (Publication), Medellín, Ramírez Cardenas and Leal García, United States, August 7, 2009, paras 124-132. On this issue of consular notification and assistance in capital punishment cases, see also: IACHR, Report No. 91/05, Case 12.421, Merits, Javier Suarez Medina, United States, October 24, 2005, paras. 81-87; IACHR, Report No. 1/05, Case 12.430, Roberto Moreno Ramos, United States, paras. 62-64; IACHR, Report No. 99/03, Case 11.331, Cesar Fierro, United States, December 29, 2003, paras. 37-42; IACHR, Report No. 52/02, Case 11.753, Ramón Martinez Villareal, United States, October 10, 2002, paras. 64-84. In connection with this issue, see: I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16.

[381] IACHR Report 52/02, Case 11.753 (Ramón Martinez Villarreal), United States, Annual Report of the IACHR 2002; Report No. 91/05 (Javier Suarez Medina), United States, Annual Report of the IACHR 2005; Report No. 1/05 (Roberto Moreno Ramos), United States, Annual Report of the IACHR 2005.

who has been arrested, committed to trial or to custody pending trial, or is detained in any other manner by that state. In particular, the Commission may consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention for the purpose of evaluating that state's compliance with a foreign national's due process rights under Articles XVIII and XXVI of the American Declaration. Also, the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas"[382] adopted by the Commission in 2008 establish that

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.[383]

In the present case, the petitioner alleges that Messrs. Medellín, Ramírez Cardenas and Leal García are nationals of Mexico and that law enforcement authorities in Texas were aware of this fact from the time of their detention. In addition, Messrs. Medellín, Ramírez Cardenas and Leal García have stated that they were never informed of their right to consular notification when arrested or subsequent thereto, nor did their state appointed defense attorneys seek consular assistance. The State has not disputed the petitioners contentions in this regard. Accordingly, based upon the information and arguments presented, the Commission concludes that Messrs. Medellín, Ramírez Cardenas and Leal García were not notified of their right to consular assistance at or subsequent to the time of their arrest and did not have access to consular officials until after their trials had ended.

The Commission notes that non-compliance with obligations under Article 36 of the Vienna Convention is a factor that must be evaluated together with all of the other circumstances of each case in order to determine whether a defendant received a fair trial. In cases in which a state party to the Vienna Convention on Consular Relations fails to fulfill its consular notification obligation to a foreign national, a particular responsibility falls to that state to put forward information indicating that

[382] "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm

[383] Principle V (Due Process) of the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" approved by the Commission during its 131st regular period of sessions, held from March 3-14, 2008, http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm

the proceeding against a foreign national satisfied the requirements of a fair trial notwithstanding the state's failure to meet its consular notification obligation.

It is apparent from the record before the Commission that, following Messrs. Medellín, Ramírez Cardenas and Leal García's conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning their character and background. This evidence, including information relating to their family life as well as expert psychological reports, could have had a decisive impact upon the jury's evaluation of aggravating and mitigating factors in their cases. In the Commission's view, this information was clearly relevant to the jury's determination as to whether the death penalty was the appropriate punishment in light of their particular circumstances and those of the offense.

The Commission notes in this respect that the significance of consular notification to the due process rights of foreign nationals in capital proceedings has also been recognized by the American Bar Association, which has indicated in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases that:

> [u]nless predecessor counsel has already done so, counsel representing a foreign national should: 1. immediately advise the client of his or her right to communicate with the relevant consular office; and 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest […][384]

The Commission emphasizes in this regard its previous decisions concerning the necessity of individualized sentencing in capital cases, where a defendant must be entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense for consideration by the sentencing court in determining whether the death penalty is a permissible or appropriate punishment.[385]

The potential significance of the additional evidence in Mr. Leal García's case is enhanced by the fact that apart from the circumstances of his crime, the only aggravating factors against him consisted of evidence of

[384] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition)(February 2003), Guideline 10.6B "Additional Obligations of Counsel Representing a Foreign National."

[385] IACHR, Report 41/00 (Desmond McKenzie *et al*.), Jamaica, Annual Report of the IACHR 1999, paras. 207-209.

an unadjudicated crime. Moreover, the petitioner made additional submissions based on evidence gathered before and after his conviction and sentencing, which raises serious doubts regarding the criminal conduct attributed to him. These elements confirm that the evidence gathered through the assistance of the consular officials may have had a particularly significant impact upon the jury's determination of responsibility or at the very least the appropriate punishment for Mr. Leal García.

Based upon the foregoing, the Commission concludes that the State's obligation under Article 36.1 of the Vienna Convention on Consular Relations to inform Messrs. Medellín, Ramírez Cardenas and Leal García of their right to consular notification and assistance constituted a fundamental component of the due process standards to which they were entitled under Articles XVIII and XXVI of the American Declaration, and that the State's failure to respect and ensure this obligation deprived them of a criminal process that satisfied the minimum standards of due process and a fair trial required under Articles XVIII and XXVI of the Declaration.

8. Other due process violations in capital punishment cases

Any person who is arrested has access to an adequate judicial process during which the appropriate arguments and evidence can be studied seriously. These requirements must be even more rigorous in cases where the persons are accused of crimes punishable by the death penalty.

The guarantees of due legal process apply in cases when the State has opted to apply an exceptional process like the expedited summary trial. Having sufficient time for the preparation of the defense is part of the right to an adequate defense.

The interest of justice and the guarantees of due process in the determination of rights demand that the benefits offered by the U.S. Supreme Court in *Ring v. Arizona* be granted, when applicable – all the more so in cases in which the result is the State's deprivation of a person's life, and in which the guarantees must be as broad as possible to overcome the standard of heightened scrutiny.

122. In addition to the violations of the right to a fair trial and due process guarantees highlighted in the previous sections, the IACHR has found other violations in cases related to the imposition of the death penalty. The Commission found in a 2003 report on a case against the **United States** that the manner in which certain exculpatory evidence was treated amounted to denial of justice. In this regard, the IACHR held:[386]

[386] IACHR, Report No. 97/03, Case 11.193, Gary Graham/Shaka Sankofa, United States, December 29, 2003, paras. 42-49.

In light of the procedural background summarized above, the Petitioners contend that the United States and the Texas governments failed to guarantee Mr. Sankofa the right to a fair trial or due process of law because of the denial of a fair hearing in which Mr. Sankofa could present exculpatory evidence. They contend that the evidence of the eye witnesses other than Bernadine Skillern together with the alibi witnesses constituted overwhelming evidence exonerating Mr. Sankofa and that this evidence should have been presented in Court but was not due to the assistance of ineffective counsel who represented Mr. Sankofa at trial. The Petitioners also argue that the state and federal courts procedurally barred Mr. Sankofa from presenting any evidence of innocence at an evidentiary hearing, either because of the threshold necessary under applicable case law for a reviewing court to consider new evidence or because applicable state or federal legislation precluded the courts from entertaining successive habeas corpus applications.

In addressing this aspect of the Petitioners' complaint, the Commission must consider its previous jurisprudence according to which it is generally for the courts of member states to review the factual evidence in a given case.[387] Similarly, it is for the appellate courts of states, and not the Commission, to review the conduct of a trial, including such matters as the weight to be given to evidence and the propriety of instructions to a jury, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality.[388] At the same time, States are obliged to ensure that criminal proceedings comply with the minimum standards of due process encompassed by Articles XVIII and XXVI of the American Declaration, which apply to all stages of a criminal proceeding[389] and, as noted above, are subject to a heightened level of scrutiny in capital cases. In light of these applicable standards, the Commission must determine whether the arguments raised by the Petitioners warrant intervention by this Commission in the manner in which the domestic courts considered and treated the evidence raised on Mr. Sankofa's behalf.

In evaluating the information on the record in light of applicable principles, the Commission concludes that the manner in which certain evidence directly pertinent to the basis for Mr. Sankofa's capital conviction was treated in the course of his criminal proceedings failed to meet the rigorous standard of due process applicable in capital cases and consequently amounted to a denial of justice contrary to the fair trial and due process standards under the American Declaration. This includes in particular the identification evidence pertaining to Mr. Lambert's murder

[387] *See, e.g.*, Mckenzie v. Jamaica, *supra*, para. 298.

[388] *Id*.

[389] *See, e.g.*, Juan Raul Garza v. United States, Case 12.243, Report Nº 52/01, Annual Report of the IACHR 2000, para. 102.

as well as the ballistics evidence concerning the firearm found on Mr. Sankofa at the time of his arrest.

With respect to the identification evidence in Mr. Sankofa's case, the Commission notes that according to the record, at least eight witnesses were present at the time of or shortly after Mr. Lambert's murder. Of these, only three testified at trial, Bernadine Skillern, who was the only witness to identify Mr. Sankofa as the killer, and Wilma Amos and Daniel Grady, who were unable to do so because they did not get a good enough look at, or did not sufficiently recall, the perpetrator's face.[390] In the course of Mr. Sankofa's second habeas corpus review to the state district court, affidavits sworn by four of the witnesses (…) were provided to the court in support of Mr. Sankofa's claim of innocence by disputing Ms. Skillern's identification of Mr. Sankofa as the shooter, but the Court determined without an evidentiary hearing that the evidence either lacked credibility on the record as a whole or did not undermine Ms. Skillern's identification evidence.[391] Affidavits of two further eyewitnesses, (…) were presented to the federal district court during Mr. Sankofa's first habeas corpus application before the federal district court but that court denied Mr. Graham's application without an evidentiary hearing and without considering the substance of these additional affidavits.[392]

With respect to the ballistics evidence, the record indicates that the Houston Police Department Firearms Report of May 1981 according to which the firearm confiscated from Mr. Sankofa upon his arrest was not the firearm used to shoot Mr. Lambert was not considered in substance by any court as part of the evidence pertinent to Mr. Sankofa's guilt or innocence for the crime at issue.

As noted above, the only evidence upon which Mr. Sankofa's conviction was based was the identification evidence of one eyewitness to the crime as well as evidence that the caliber of the lethal bullet matched that of a gun found in Mr. Sankofa's possession at the time of his arrest. Consequently, the evidence of the additional witnesses to the crime who did not testify at trial as well as the ballistics evidence were highly relevant to the soundness of Mr. Sankofa's conviction for the crime at issue, and, on the information available, could very well raise a reasonable doubt as to Mr. Sankofa's guilt. In these circumstances, the Commission considers that the strict standard of due process applicable in capital cases demand that a trier of fact be permitted to re-evaluate

[390] For an overview of the evidence presented in Mr. Sankofa's post-conviction habeas corpus proceedings, see Graham v. Johnson, *supra*.

[391] Graham v. Johnson, *supra*. See also Graham v. Collins, Civil Action NºH-93-2217, U.S. District Court for the Southern District of Texas, Houston Division (August 13, 1993).

[392] *See* Graham v. Johnson, *supra*; Graham v Collins, *supra*.

> Mr. Sankofa's responsibility for the crime at issue based upon the entirety of pertinent evidence through a procedure that incorporates the fundamental fair trial protections under the Declaration, including the right to present and examine witnesses. In the Commission's view, the review procedures applied in Mr. Sankofa's case failed to meet this standard, as they permitted certain of this evidence to be rejected without an evidentiary hearing, and other evidence to be rejected without any substantive consideration. The Commission therefore considers at a minimum that the whole of the identification and ballistics evidence raised in Mr. Sankofa's case should have been the subject of re-evaluation through a trial procedure satisfying the requirements of Articles XVIII and XXVI of the American Declaration in order to determine whether the totality of pertinent evidence supported Mr. Sankofa's guilt for Mr. Lambert's murder.
>
> Based upon the foregoing, the Commission finds that the State is responsible for violations of Mr. Sankofa's right to a fair trial and to due process under Articles XVIII and XXVI in respect of the criminal proceedings against him.
>
> The Commission also finds that these serious violations of due process should be considered to have deprived Mr. Sankofa's criminal proceedings of their efficacy from the outset and thereby invalidate his conviction and sentence.[393] Consequently, by executing Mr. Sankofa on June 22, 2000 pursuant to these flawed criminal proceedings, the Commission considers that the United States arbitrarily deprived Mr. Graham of his life and is thereby responsible for a serious violation of his right to life under Article I of the American Declaration.

123. Regarding the imprecision of a legal norm and its direct consequence in the application of the death penalty, the Commission held in a 2006 report regarding **Cuba**:[394]

> Concerning the allegation by the petitioners that Messrs. Lorenzo Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Marínez Isaac were condemned to death in violation of the Cuban Law against Acts of Terrorism, the Commission observes that the aforementioned law envisages the death penalty for application in some crimes.
>
> However, the legal definition of criminal acts covered by Articles 10, 11(c), 14(1), and 16(1)(a) referred to, the death penalty is only envisaged in Article 10 which states: "*Any person who makes, facilitates, sells,*

[393] *See similarly* Joseph Thomas v. Jamaica, Case 12.183, Report Nº 127/01, Annual Report of the IACHR 2001, para. 146, citing I/A Court H.R., Castillo Petruzzi *et al*., Judgment of May 30, 1999, para. 219.

[394] IACHR, Report No. 68/06, Case 12.477, Merits, Lorenzo Enrique Copello Castillo and Others, Cuba, October 21, 2006, paras. 106-115.

transports, remits, brings into the country or has in his possession, in what ever form or place, arms, munitions or materials, inflammable, asphyxiant, or toxic substances or instruments, plastic explosives or of any other class or nature, or chemical or biological agents, or whatever other element from the study, design, or combination of which it is possible to derive products so described, or any other similar substance or explosive or lethal device, shall be punished by from ten to thirty years imprisonment, life imprisonment, or death."

The Commission further observes that the court of first instance itself did not consider that the crime of carrying weapons fell within the legal definition of the criminal act because "because the use of the pistol and knives was the means to carrying out the terrorist act."[395]

In accordance with the facts of the present case and taking into account that the judgment of the court of first instance was available, the criminal act that is the subject of this action and that was committed by Messrs. Copello, Sevilla, and Martínez and the other persons who took part in the hijacking, in fact corresponds to the definition established in Article 16(1) of the aforementioned law, that states: *"The punishment of from ten to thirty years' imprisonment for any person who: a) seizes a boat or exercises control over it by means of violence, threat of violence or any other form of intimidation."* This norm does not envisage the death penalty as punishment.

Therefore, the court might have used the same criterion to avoid applying Article 10 of the Law against Acts of Terrorism which envisages the death penalty as punishment.

In criminal law, the tribunal has to remain strictly within the boundaries of the law and has to observe the greatness precision when applying the legal description of a crime to the facts of a particular case. The Commission observes that this error in defining the crime in relation to the actions of the accused, in the present case, represented the difference between life and death, to the detriment of Messrs. Copello, Sevilla, and Martínez.

In the same way, one of the guarantees demanded in trials where the application of the death penalty is a possibility, is the right to be tried by a competent, independent, and impartial court, previously established according to law. Article XXVI of the Declaration guarantees the right to be tried by an impartial court, that means, the person responsible for making that decision must be impartial.

[395] Judgment 11/2003 of the People's Provincial Court of the City of Havana, April 8, 2003, First Whereas.

> The Commission on many occasions has stated that a proper separation does not exist in Cuba between the public authorities charged with guaranteeing the administration of a system of justice free from interference from other public authorities. In effect, the Cuban constitution, in Article 121, states that "the Courts constitute a system of state bodies, structured with the independence of function like any other, and subordinate in hierarchy to the People's National Assembly and to the Council of State." The Commission considers that the subordination of the courts to the Council of State, headed by the Head of State, amounts to the direct dependency of the judiciary on the executive. With such a system, the Commission considers that Cuban courts are unable to effectively guarantee the rights protected in the American Declaration in favor of those undergoing trial. The independence of judges, prosecutors, and even of defense counsel appointed by the State is compromised by this structure of the Cuban legal system. By virtue of the above, the Commission considers that the trial of Messrs. Copello, Sevilla, and Martínez by a court that does not meet the requirements of independence and impartiality demanded by the American Declaration, violates the right to justice enshrined in Article XVIII of the American Declaration.
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> On the basis of the foregoing, the Commission considers that Messrs. Copello, Sevilla, and Martínez were tried and condemned to death by a court that did not meet the requisite standards of impartiality and independence, by means of an expedited summary procedure that did not allow them to exercise their right to an adequate defense, and the conduct for which they were accused was subjected to a criminal definition that was inappropriate.
>
> Therefore, the Commission concludes that the State of Cuba violated Articles XVIII and XXVI of the American Declaration to the detriment of Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.

124. In this same 2006 report on a case against **Cuba,** the Commission examined arguments related to the application of expedited summary trials and the imposition of the death penalty, in the following terms:[396]

> Because the right to life and to freedom are considered basic human rights, it is essential that any person who is arrested has access to adequate judicial process within a reasonable period during which the appropriate arguments and evidence can be studied seriously, all of which requirements must be even more rigorous in cases where the persons are accused of crimes punishable by the death penalty.

[396] IACHR, Report No. 68/06, Case 12.477, Merits, Lorenzo Enrique Copello Castillo and Others, Cuba, October 21, 2006, paras. 87-99, 114-115.

The trial against Messrs. Copello, Sevilla, and Martínez, began on April 5, 2003, and finished on April 11, 2003, during which time they were even sentenced to death. In this regard, in order to determine whether the length of the trial was reasonable or not, the Commission is obliged to take into account the complexity of the matter, the part played in the trial by the accused person, and the conduct of the judicial authorities.[397]

From the information provided by the petitioners, and the content of public statements by the Ministry of Foreign Affairs of Cuba, and from the judgment of first instance dated April 8, 2003 by the People's Provincial Court of the City of Havana, it is clear that the proceedings in which the alleged victims were tried was an expedited summary trial, in which the most serious punishment envisaged by Cuban legislation was imposed, i.e. the death penalty.

Although Articles 479 and 480 of the Cuban Law of Criminal Process envisage the possibility of holding an expedited summary proceeding, the law itself only envisages it in the case of exceptional circumstances. The Commission in this regard observes that the judgment of first instance dated April 8, 2003, does not lay down any exceptional reasons by virtue of which an expedited summary trial could have been applied in this case.

The Cuban Law of Criminal Process stipulates that in the case of an expedited summary trial, the competent Court may, in as far as it judges necessary, reduce the periods for processing prior proceedings, the oral hearings, and the appeal.

In an expedited summary trial, the competent Court may, in as far as it judges necessary, reduce the periods for processing prior proceedings, the oral hearings, and the appeal.[398]

With regard to the attribution granted by Article 480 to Cuban courts of justice, the Commission observes that the decision to apply an exceptional proceeding is left to those who must hand out justice on the ground; therefore, the decision of how long the periods should be for the proceedings of the trial, including the prior proceedings, the proceedings of the hearing, and the appeal, are all also left to the judge to decide.

The judgment pronounced on April 8, 2003 by the Court of first instance in this case, neither refers to nor presents arguments relating to the motives that lead the Court to decide to apply such an exceptional

[397] These three criteria have repeatedly been applied by the Commission and the Inter-American Court when evaluating the reasonable length of a trial: Report No. 12/96, *supra*, note 108; *Suárez Rosero Case, supra* note 112, paragraph 25; *Caso Genie Lacayo,* Judgment January 29, 1997, paragraph 77.

[398] Article 680, Law of Penal Procedure. On Special Proceedings. Title X. Expedited Summary Proceedings, Articles 479, and 480. In http://www.gacetaoficial.cu

procedure, and nor did it explain any grounds for reducing the time periods.

The Commission considers that all procedural guarantees should apply to all the aspects of the criminal trial of an accused, independently of the manner chosen by the State to organize its criminal trials. Consequently, when, as in this case, the State has opted to apply an exceptional process like the expedited summary trial, the Commission considers that the guarantees of due legal process should also apply to that process too.[399]

Without prejudice to the foregoing, the Commission notes that trying the alleged victims by expedited summary trials was not proportional to the complexity of the case and the gravity of the penalties imposed, for which reason their trials can not be considered either appropriate or fair.

Although Article XVIII of the American Declaration refers to the simple and brief procedure whereby the courts will protect persons from acts of authority that violate any fundamental rights, the requirement of simplicity and brevity can not be applied to a trial that does not allow the accused to defend themselves with all the guarantees of due process of law, and even more so in cases where the penalty that could be applied is irreversible by nature, that is, death.

Extending the analysis, the Commission observes that the application of a procedure that was so reduced in character, amongst other things, prevented the victims from adequately exercising their right to a defense.

As said above, in trials where the application of the death penalty is a possibility, basic guarantees of due legal process are necessary, as is the right to the proper time and means for constructing a defense.

It is clear from the length of the trial itself that the accused did not have sufficient time to meet their lawyers in order to prepare a defense.

(…)

On the basis of the foregoing, the Commission considers that Messrs. Copello, Sevilla, and Martínez were tried and condemned to death by a court that did not meet the requisite standards of impartiality and independence, by means of an expedited summary procedure that did not allow them to exercise their right to an adequate defense, and the conduct for which they were accused was subjected to a criminal definition that was inappropriate.

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[399] See also, Garza, *supra*, paragraph 102. See, also, European Commission of Human Rights, Jespers vs. Belgium, 27 D.R. 61 (1981) (in which at the moment of pronouncing judgment the principle of equality of weapons is applied).

> Therefore, the Commission concludes that the State of Cuba violated Articles XVIII and XXVI of the American Declaration to the detriment of Messrs. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla García, and Jorge Luis Martínez Isaac.

125. Regarding the application of the benefit of review of the sentence established by the U.S. Supreme Court in *Ring v. Arizona*, the Commission found in a 2011 report on a case against the **United States**:[400]

> The American Declaration guarantees the right of all persons to justice and to due process, respectively, in the following terms:
>
> > Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
> >
> > Every accused person is presumed to be innocent until proved guilty.
> >
> > Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.
>
> As seen above, the petitioners claim that the State denied Jeffrey Landrigan a remedy afforded to other prisoners who were convicted in similar circumstances. The petitioners argue that it is arbitrary to deny a constitutional right based on a random circumstance of legal timing and not on the basis of principles or individual merits. They contend that the State's judicial economy argument is based on the inconvenience that would be caused by applying the Ring decision to the alleged victim by reason of the procedural status of his case. Finally, they refer to the IACHR's earlier conclusion that the State's deprivation of a criminal's life must not depend on the happenstance of where the crime was committed, and they maintain, by analogy, that depriving the alleged victim of his life must not depend on such an equally circumstantial element as when the sentence became final. As an example, the petitioners cite the case of James Van Adams, which, in their view, illustrates the arbitrary nature of the Ring decision. Mr. Van Adams was sentenced to death on November 21, 1997, nine months later than Mr. Ring, but his case was finally resolved at review following appeal on June

[400] IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, paras. 30-34, 38-40, 44, 45.

18, 1999, almost three years before the Ring decision. Because of the speed with which his appeal was processed, Mr. Van Adams is not entitled to the benefit of a new sentencing hearing, whereas Mr. Ring is.

The petitioners argue that irrespective of other remedies or redress actions following the conviction, the procedure whereby Mr. Landrigan was sentenced was later ruled to be in violation of defendant's right to due process. In spite of that, he was denied access to the procedure for setting a new sentence, which would be the ideal mechanism for correcting that situation. Consequently, the alleged victim suffered a violation of his rights at the time of his sentencing, and has continued to suffer it as long as he remains under that sentence.

In contrast, the State contends that there are no violations of due process in this case, holding the Summerlin decision to be a reasonable and well grounded conclusion. The State further believes that the review sought by the petitioners would not be likely to bring about a significant change in the result of the judicial decision whereby the death sentence was imposed. Finally, the State maintains that the failure to retroactively enforce the Ring decision represents no prejudice in the case of Jeffrey Timothy Landrigan or with respect to the other individuals affected by Summerlin.

The IACHR notes that in the case at hand, the competence of the court that handed down Mr. Landrigan's death sentence has been questioned. Although the State claims that the failure to review the original sentence following the Ring decision probably did not affect Jeffrey Timothy Landrigan's rights, the petitioners submit specific evidence to the contrary. Thus, the petitioners provided specific statistical data indicating that 66% of the prisoners affected by the Ring decision who were able to have their death sentences reviewed later received other punishments.

(…)

At the hearing before the Inter-American Commission on October 12, 2007, the petitioners explained that 30 of the more than 100 people sentenced to death in Arizona met the standard set in Summerlin for the benefits offered by the Ring decision. The Supreme Court of Arizona upheld the death penalty in only two of those 30 cases on initial review, and it stated that the other 28 must also be reviewed. Of those 28 cases, 15 subsequently obtained new sentencing hearings: in only five cases were the prisoners sentenced to death, while the other ten accused were sentenced to life imprisonment. The petitioners also report that members of the jury in some of the alleged victims' cases had stated that they did not believe the death penalty to be an appropriate sentence. The State has not contested these claims made by the petitioners during the processing of the case.

The petitioners further cite decisions of the United States Supreme Court regarding the constitutionality of procedures for imposing the death penalty that have been applied retroactively in as many or more cases as those addressed in the Summerlin group --including Landrigan-- and that have had no perceptible effect whatsoever on the capacity of the state court systems. [401] They also note that the effects of those judgments would remain in place indefinitely in the courts of all those states where the death penalty applied, whereas the Ring decision would only apply retroactively to cases such as Jeffrey Landrigan's and would have no effect on any others.

Regarding the State's arguments about the pernicious effect of extending benefits such as that offered by Ring to people subject to a final judgment, the Inter-American Commission holds that, on the contrary, the interest of justice and the guarantees of due process in the determination of rights demand that the benefit be granted – all the more so in cases such as the one at hand, in which the result is the State's deprivation of a person's life, and in which the guarantees must be as broad as possible to overcome the standard of heightened scrutiny referred to at the start of this analysis.

(…)

The IACHR also concludes that the benefit of a review of the judgment whereby Jeffrey Landrigan received a death sentence is covered by the right to due process and the right of access to justice guaranteed by the American Declaration [402] – in particular, since the United States Supreme Court itself ruled a given procedure unconstitutional, but in practice denied Mr. Landrigan and a specific group of individuals access to a remedy for asserting their legitimate right to the review of their death sentences handed down by means of that unconstitutional procedure. The IACHR also finds that in such circumstances, the execution of Jeffrey Landrigan would also constitute unusual punishment and a violation of his right to be tried by a competent court.

In sum, the IACHR concludes that the lack of access to effective defense and the refusal to review Jeffrey Landrigan's death sentence, imposed by means of a procedure ruled unconstitutional by the United States Supreme Court, constitute violations of the rights to justice and to due

[401] United States Supreme Court, *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ford v. Wainwright*, 477 U.S. 399 (1986)

[402] In this regard, note should be taken of the precedents set in the cases of *Balkissoon Roodal v. Trinidad and Tobago*, [2003] United Kingdom Privy Council 18, and *Charles Matthews v. Trinidad and Tobago* [2004] United Kingdom Privy Council 2. In those decisions, the Judicial Committee of the Privy Council concluded that the refusal of anticipated relief would lead to cruel and unusual punishment and that "the same considerations apply to anyone else sentenced to death and awaiting execution at the date of this judgment."

process enshrined, respectively, in Articles XVIII and XXVI of the American Declaration.

VI. THE DEATH PENALTY AND THE OBLIGATION OF NON DISCRIMINATION AND EQUAL PROTECTION

The right to a fair trial encompasses the right to an impartial hearing. A reasonable appearance and ample evidence of "racial bias" by the jury preempts the right to an impartial hearing.

Consideration of the nationality of the victim, when irrelevant, in sentencing death penalty cases is a violation of the right to equality before the law.

126. Regarding discrimination based on race, the Commission affirmed in a 1996 merits report against the **United States**:[403]

> The petitioners allege violations of the following Articles of the American Declaration which provide:
>
> > a. Article I - Every human being has the right to life, liberty and the security of his person.
> >
> > b. Article II - All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."
> >
> > c. Article XXVI - Every accused person is presumed to be innocent until proved guilty.
>
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.
> (…)
>
> A. Did Mr. Andrews Have a Fair and Impartial Hearing?
> Article XXVI of the American Declaration, paragraph 2 provides: "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment." This Article refers to four rights:

[403] IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, December 6, 1996, paras. 144, 147-177.

> i) every accused person is presumed to be innocent until proved guilty,
> ii) every person accused of an offense has the right to be given an impartial and public hearing,
> iii) and to be tried by courts previously established in accordance with pre-existing laws,
> iv) and not to receive cruel, infamous or unusual punishment.

The issues in this case come within the ambit of the second and fourth rights. However, the Commission will address the second right "every person accused of an offense has the right to be given an impartial and public hearing," first, and will address the fourth right under the relevant heading later in this Report. Upon examining all arguments, documentary and testimonial evidence including exhibits submitted to it, the Commission notes that: Mr. Andrews was tried, convicted, sentenced, and executed by the State of Utah on three counts of first degree murder, and two counts of aggravated robbery, which occurred after he participated in the robbery of a radio store. He was tried in the State of Utah where the teaching of the Mormon church doctrine prevailing at the time of his trial, was that all black people were damned to death by God and were inferior beings. This doctrine was changed after the trial and conviction of the victim, Mr. Andrews.

a) Petitioners' Evidence

The Commission has noted the petitioners' argument and their evidence: exhibits reflecting a copy of the "napkin" depicting the racial notation; a copy of the transcript of the afternoon Session of the Court Proceeding questioning the bailiff as to the origin of the napkin; LDS Church Historical Department, 1971 census page 206, which shows that the jury venire was drawn from Davis County, in the State of Utah where the petitioner was tried, 73.9 % of that community was of the Mormon religion; the Code of Criminal Procedure, 1953, Amendments to the Utah Criminal Code, 1978 Replacement Volume of the Utah Code of Criminal Procedure; Jury Instructions in the William Andrews' trial; and the domestic and international case law cited.

b) Proceedings in the Trial Court/Napkin

i. The Bailiff's Testimony

The Commission, upon examining the trial transcript of the proceedings referring to the "notation on the napkin," noted, that a hearing was held in the afternoon session of the trial proceedings, on the renewal of a motion to sequester the jury and a motion for a mistrial by the co-defendants attorney, including William Andrews' attorney in the absence of the jury, after the jurors returned from lunch. The trial transcript of the testimony of the bailiff, Thomas R. Linox, to whom the napkin was given by a member of the juror reveals the following:

> On the day in question, November 4, 1974, he was in the company of the jurors in Lee's restaurant where they went for lunch on that day, shortly after they had been seated a Mr. Weaver, one of the jurors said, "bailiff I have some evidence for you...", and gave him a napkin. The bailiff said that "myself as well as some of the other people thought it was one of Mr. Weaver's jokes, he is quite a hilarious gentleman. So I went up there very honestly at first thinking I was just humoring a joke and that is when he produced that napkin with the writing that you see on it.[404]

He had not seen the napkin prior to the time that he had handed it to him, and stated that the napkin was with Mr. Weaver's regular place setting, the blank portion of the napkin showing to anyone who would have cared to walk along the table. It had the appearance of any other napkin until, according to him, he turned it over to open it up and that is when he saw the writing that the judge had before him. The bailiff read the words on the napkin "hang the niggers," and described the drawing on the napkin as "a character of a gallows and a stick figure hanging therefrom."

The bailiff was asked the following questions:
"Was this, Pierre's exhibit No.4, discussed or shown to other prospective jurors?".[405] He replied: "I do believe the people immediately to the left and the right of Mr. Weaver would have had to have seen it. I couldn't say with any degree of certainty." The bailiff was then asked: "After the napkin was handed to you, what, if any conversations existed between jurors and yourself or Mr. Weaver and other jurors, in your presence?" He responded: "Nothing pertinent to that. They felt it was that important that I should have it to show the court and nothing more was discussed. There was no comments one way or another about it. There was some concern shown on the part of some of the jurors who asked me directly, 'do you think this will affect our present situation as far as where we are eating or what the court may do about this.' I said, I have no idea. That is a matter for the court to decide.[406]"

Upon further examination the bailiff was asked by Mr. Davis:

> "Mr. Linox, do you think perhaps one of the jurors themselves could have drawn that? Are you able to make such a conclusion that it was possible or not?

[404] Transcript submitted by petitioner. The napkin was referred to as Pierre's exhibit No.4. Pierre was one of Mr. Andrews' co-defendants. Pags. 2445-2456.

[405] Id. at 2445-2456.

[406] Id. at 2450.

> That is what I want to know?" He responded, "Mr. Davis, I say it is possible, that small amount, that much time could have lapsed.[407]"

ii. The Trial Court's Action

The Court asked the bailiff the following question:
"Did I tell you to say anything to Mr. Weaver?" The bailiff stated that: "You did" and stated that "I admonished Mr. Weaver not to mention the incident any further, to let the issue die." The judge then asked the bailiff, "have you been able to do that?" the bailiff responded, "I have." The judge then asked the bailiff, "did he say anything to you?" the bailiff responded, "he said he would."[408]

There is language in the trial transcript which shows concern expressed by a defense attorney. He requested of the Court that, "the jury be sequestered, that they be put under guard that would guard against influencing this jury which is accumulative now, with the talk in the hallway, now this action."[409] The trial court denied the motions to sequester the jury and for a new trial and stated that "the only thing that this kind of foolishness can do is cause the trial to start all over again. It is that foolish, but I will deny your motions at this time."[410]

c) Appellate Review of Mr. Andrews' Case

Mr. Andrews has had several reviews of his case by the United States' Courts to no avail. The Supreme Court of Utah held that the following admonishment by the trial court to the jury when they returned to trial was sufficient to cure any prejudice which might have occurred: "...Occasionally some foolish person will try to communicate with you. Please disregard the communications from foolish persons and ignore the same ....Just ignore communications from foolish people."[411]

The United States Supreme Court denied Mr. Andrew's motion for certiorari. However, two of the Justices, Marshall and Brennan in the Supreme Court dissented. The note was referred to as "a vulgar incident of lynch-mob racism reminiscent of Reconstruction days."[412] Justice Marshal referred to the denial of due process by stating that Mr. Andrews merely sought an evidentiary hearing to determine the origins of the note, and that "the Constitution [of the United States], not to

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[407] Id at 2453-2454.

[408] Id. at 2451.

[409] Id. at 2454.

[410] Id. at 2455-2456.

[411] State v. Andrews, 376 P.2d 857, Wilkins Justice at 859.

[412] Andrews v. Shulsen, 485 U.S. 919, 920 (1988).

mention common decency, require[d] no less than this modest procedure."[413] Justice Marshall stated:

> Was it one or more of [Mr. Andrews'] jurors who drew a black man hanging on a gallows and attached the inscription, "Hang the niggers"? How many other jurors saw the incendiary drawing before it was turned over to the bailiff? Might it have had any effect on the deliberations?[414]

d) United States Domestic Law

The Fifth Amendment of the Constitution of the United States of America 1787 provides: "No person shall be held to answer for a capital, or otherwise infamous crime ... nor deprived of life, ... without due process of law...." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." The Commission notes the principles enunciated by the Courts in the United States. The United States Supreme Court held in the Rosales-Lopez v. United States, that a "reasonable possibility" of juror bias is sufficient to find reversible error for a federal court's refusal to ask venire-persons about possible racial bias."[415] Jury misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial.[416] Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error.[417]

The Code of Criminal Procedure for the State of Utah requires the Court to admonish the jury at each adjournment... that it is their duty not to converse among themselves nor with any one else on any subject connected with the trial, and not to form or express any opinion thereon until the case is finally submitted to them.[418] Under the Code jurors can be challenged in the State of Utah on "peremptory" grounds, and for "cause" (for bias-opinion) and can be examined as to such bias-opinion[419] by the Court. Such challenges are made prior to the commencement of a trial.

e) The International Standard on Impartiality

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[413] Id. Andrews v. Shulsen

[414] Id.

[415] 451 U.S. 182 (1981).

[416] United States Harris 908 F.2d 728, 733 11th Cir. 1990). United States v. Brantley, 733 F.2d 1429, 1439 (11th cir.1984), cert denied, 470 U.S. 1006. 105 S.Ct. 1362, 84 1.Ed.2d.383 (11th Cir. 1984), cert denied.

[417] United States v. Chiantese, 582 F.2d 974, 979 (5th. Cir. 1978), cert. denied.

[418] 77-31-28 Utah Code Annotated 1953, Amendments to Utah Criminal Code during its 1975 Session.

[419] Id. Utah Code 77-30-1-28.

The international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality." The United Nations Committee to Eliminate Racial Discrimination has held that a reasonable suspicion of bias is sufficient for juror disqualification, and stated that: "it is incumbent upon national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased."[420] The Commission notes that in the European System of Human Rights an objective test was enunciated in the cases of Piersack v. Belgium,[421] and Gregory v. United Kingdom.[422]

In the case of Remli v. France the European Court of Human Rights referred to the principles laid down in its case-law concerning the independence and impartiality of tribunals, which applied to jurors as they did to professional and lay judges and found that there had been a violation of Article 6(1) of the European Convention For the Protection of Human Rights and Fundamental Freedoms.[423] That Article provides that:

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[420] Narrainen v. Norway, UN Ctte. Elim. Racial Discrim., Communication No. 3/1991, views adopted 15 March 1994. In that case a Norwegian citizen of Tamil origin, who was charged with a drug-related offense, complained that he had not obtained a fair and impartial trial. He alleged that racial views had played a large part in the decision against him, pointing to a statement of one of the jurors that people such as him, living on taxpayers' money, should be sent back from where they had come, and alleged that slurs were made about the color of his skin.

[421] 5 HRR 169 (1982). The European Court of Human Rights held that there was a violation of Article 6 of the European Convention which guarantees the right to a fair and impartial trial. The European Commission stated that: "Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can.. be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect."

[422] 16 H.R.L.J. 238 (1995). In this case an Afro-Caribbean male, had been convicted of armed robbery. During jury deliberations, the trial judge received a handwritten note for a juror stating: "Jury showing racial overtones 1 member to be excused." The trial judge redirected the jury, and did not hold an evidentiary hearing. The European Commission found the case admissible and found that the defendant essentially makes the case that it was clear from the jury note that there was, at the very least, a strong objective indication of racial bias within the jury. It looked at the international standard and stated:

> [i]f the possibility of bias on the part of the juror comes to the attention of the trial judge in the course of a trial, the trial judge should consider whether there is actual bias or not (a subjective test). If this has not been established, that trial judge or appeal court must then consider whether there is "a real danger of bias affecting the mind of the relevant juror or jurors"(objective test). Note, the real danger test originated in the English common law in the case of R. v. Gough, 4 A.E.R.481 (Court of Appeal, Criminal Division 1992).

However, the European Commission concluded that the judge's detailed and careful redirection of the jury was sufficient. The Gregory's case is now before the European Court of Human Rights.

[423] [1996] HRCD Vol. VII No. 7, European Court of Human Rights: Judgments, at 608-613. Judgment was delivered on April 23, 1996. The case involves the trial of an Algerian national in France for escape, during which a prison guard was struck and killed. The applicant and another person (both of them were of North African origin) were tried and convicted for intentional homicide and attempted escape in the Rhone Assize Court. The applicant was sentenced to life imprisonment on April 14, 1989. He submitted evidence that during his trial, a person overheard one of the jurors say, "What's more, I'm a racist." That person so certified in writing, and defense counsel asked that the court take formal note of the racist remark, and that the court append the written statement to the record. The trial court refused the first request but granted the second. As to the first request,

Continues…

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...by an independent and impartial tribunal established by law...."[424]

The European Court considered that Article 6(1) of the Convention imposed an obligation on every national court to check whether, as constituted, it was "an impartial tribunal" within the meaning of that provision where, as in the instant case, that was disputed on a ground that did not immediately appear to be manifestly devoid of merit. In Remli's case the Rhone Assize Court had not made any such check, thereby depriving Mr. Remli of the possibility of remedying, if it had proved necessary, a situation contrary to the requirements of the Convention.[425]

The Commission has noted the United States Government's argument that the admonishment by the trial court to the jury to disregard communications from foolish people was appropriate. It has also noted its argument that the jury was not racist because Mr. Andrews' co-defendant, Keith Roberts, who was African American, and whose counsel was African American and also charged with murder, was not convicted of murder, nor sentenced to death; and the attorneys for the other two co-defendants were not African American. The Commission finds that these factors are not dispositive of whether the United States violated the Articles of the American Declaration as pertaining to Mr. William Andrews' right to an "impartial hearing." The Commission has also noted that Mr. Andrews' other co-defendant who was African American was convicted and sentenced to death by the State of Utah, and executed in 1987.

The United States Government's evidence produced at the hearing on the merits of the case before the Commission through the testimony of its own witness Mr. Yocum, Assistant Attorney General of Utah substantiates the petitioners' case. Mr. Yocum testified that the jury members were not questioned by the trial judge about the note. The trial judge held a hearing, but only the bailiff was questioned. The judge

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…continuation
the Assize Judge stated that it was "not able to take formal note of events alleged to have occurred out of its presence."

[424] November 4, 1950, 312 U.N.T.S. 221, E.T.S 5 as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118.

[425] In Remli's case the Rhone Assize Court dismissed their application without even examining the evidence submitted to it, on the ground that it was "not able to take formal note of events alleged to have occurred out of its presence." Nor had it ordered that evidence should be taken to verify what had been reported and, if had been established, take formal note of it as requested by the defence, although it could have done so. The applicant had been unable either to have the juror in question replaced by one of the additional jurors or to rely on the fact in issue in support of his appeal on points of law. Nor had he been able to challenge the juror, since the jury had been finally empaneled and no appeal lay against the Assize Court's judgment other than on points of law. Id. at 612.

denied the motion for a mistrial and proceeded to trial with the same members of the jury.

Conclusion: The Commission finds that the United States has not disputed that a napkin was found by one of the jurors, and given to the bailiff (who took the jurors to lunch in a restaurant) with words written in black stating "hang the nigger's" and a figure drawn in black hanging therefrom. Nor has it disputed that the napkin was brought to the attention of the trial judge who questioned the bailiff as to its origin.

The Commission finds that in assessing the totality of the facts in an objective and reasonable manner the evidence indicates that Mr. Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to voir dire the jury tainted his trial and resulted in him being convicted, sentenced to death and executed. The record before the Commission reflects ample evidence of "racial basis."

First, Mr. Andrews was a black male, and was tried by an all white jury some of whom were members of the Mormon Church and adhered to its teachings that black people were inferior beings.[426] The transcript reveals that the bailiff testified that when the juror told him he had some evidence for him, both the bailiff and some of the other jurors thought that it was one of the juror's jokes which they were humoring and there was discussion among the jurors concerning the "napkin."[427]

Second, was the conduct and manner, in which the note was handed to the bailiff by the juror. (See trial transcript, the bailiff thought he was humoring a joke.) The note depicts racial words "hang the nigger's," written on the napkin that was given to the Court. (See the opinions of Justices Brennan and Marshall.) The trial transcript states "Hang the Niggers," and the drawing on the napkin was described by the bailiff as "a gallows and a stick figure hanging therefrom."[428] The transcript refers to express language by the bailiff, that the jurors who were immediate to the left and the right of Mr. Weaver, (the juror who found the napkin) would have had to have seen it. The jurors asked the bailiff, if it would affect their present situation and what the court may do about it.[429] The bailiff himself stated under oath that it was possible that one of the jurors could have drawn that note because "that small amount, that much time could have elapsed".[430]

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[426] In Davis County, Utah, 73.9% of the people who resided there were Mormons.

[427] Id. at 2448.

[428] Id. at 2450.

[429] Id. at 2450.

[430] Id. at 2452.

Third, the admonishment by the trial court to the jury was inadequate. The trial judge at the very least if he did not want to grant a mistrial, should have conducted an evidentiary hearing of the jury members to ascertain whether some of them had seen the note and they had been influenced by it. The trial judge instead, warned them against foolish people, and questioned the bailiff and left such an important and fundamental issue for the bailiff, whom he instructed to admonish the juror who found the note. The trial judge appeared to be more concerned to continue the trial with the same members of the jury without questioning them, as to whether they had seen the note, and denied both motions to sequester the jury and for a mistrial.

Fourth, in addition to the note being found, there is language in the trial transcript which indicates the concern expressed by the defense attorneys, that two things had occurred during the trial, "the talk in the hallway, and the note," which would influence the jury members in their deliberations and in making their decisions, and which language had become accumulative.

It should be noted that while it is not the function of the Inter-American Commission on Human Rights to act as a quasi-judicial fourth instance court and to review the holdings of the domestic courts of the OAS member states,[431] it is mandated by its Statute and its Regulations to examine petitions alleging violations of human rights under the American Declaration against member States who are not parties to the American Convention.[432]

The Commission finds that Mr. Andrews did not receive an impartial trial because there was evidence of "racial bias" present during his trial, and because the trial court failed to conduct an evidentiary hearing of the jury in order to ascertain whether members of the jury found the napkin as the juror claimed or whether the jurors themselves wrote and drew the racial words on the napkin. If the note did not originate from the jurors and was "found" by the juror then the trial court could have inquired of the jurors by conducting an evidentiary hearing as to whether they would be influenced or their judgment impaired by the napkin depicting the racial words and drawing so that they would be unable to try the case impartially. Had the Court conducted the hearing it would have had the possibility of remedying, if it had proved necessary so to do, a situation contrary to the requirements of the American Declaration.

[431] See Case No. 9260. Decision rendered on 14 September 1988, OEA/Ser.L/V/II.74, Doc. 10. rev.1, 16 September 1988.

[432] Articles 1, 2, 18, 20; Articles 1,2, 26 and its other Articles.

Therefore, the Commission finds the United States in violation of Article XXVI, paragraph 2, of the American Declaration, because Mr. Andrews had the right to receive an impartial hearing as provided by the Article, and he did not receive an impartial trial in United States Courts. In capital punishment cases, the States Parties have an obligation to observe rigorously all the guarantees for an impartial trial.[433]

B. Did Mr. Andrews Receive Equal Treatment Without Distinction as to Race?

Article II provides: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." This Article has been defined as "the right of everyone to equal protection of the law without discrimination."[434] This right to equality before the law means not that the substantive provisions of the law will be the same for everyone, but that the application of the law should be equal for all without discrimination.[435] The provision was intended to ensure equality, not identity of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals."[436]

The Commission finds that on the basis of the above definitions and interpretations, Mr. Andrews had a right to an impartial hearing as required by Article XXVI of the American Declaration. He also had a right to be treated equally at law without discrimination. The facts reveal that he was not treated equally at law without discrimination, and he did not receive an impartial hearing at trial because of evidence of "racial bias" during his trial. Therefore, the Commission finds that the United States violated Mr. Andrews' right to equality at law pursuant to Article II of the American Declaration.

C. Was Mr. Andrews' Right to Life Violated?

With regard to the petitioner's claim that the United States violated Article I of the American Declaration, Article I provides: "Every human

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[433] See Communication No. 333/1988, Lenford Hamilton v. Jamaica (views adopted on 23 March 1994, fiftieth session) United Nations Report of the Human Rights Committee Volume II, Official Records, Forty-ninth Session Supplement No. 40 (A/49/40) 37-41. Covenant on Civil and Political Rights, Articles 6, the right to life, and 14 the right to equality of the law, and the right to a fair and public hearing by an impartial tribunal considered.

[434] Bjorn Stormorken and Leo Zwaak, Human Rights Terminology in International Law: A Thesaurus, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).

[435] Article 26 of the International Covenant on Civil and Political Rights provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See Travaux preparatoires of the ICPR, Annotation on the Text of the Draft International Covenant on Human Rights, 10. U.N. GOAR, Annexes (Agenda item 28, pt.II) 1, 61, U.N. Doc. A/2929 (1955).

[436] Id. See also Case Relating to Aspects of Laws on the Use of Languages in Education in Belgium, 1EHRR 252.

being has the right to life, liberty and the security of his person." Article I is silent on the issue of the death penalty. However, when the definitive draft of the "Project of Declaration of the International Rights and Duties of Man, formulated by the Inter-American Juridical Committee," was presented for consideration by the Ninth International Conference of American States in 1948, the original Article I, provided:

> Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity.[437]

The explanation given for the amendment of the last part of Article I was stated by the Committee as follows:

> The Committee is not taking sides in favor of the death penalty but rather admitting the fact that there is a diversity of legislation in this respect, recognizes the authority of each State to regulate this question.
>
> The Committee must note that several constitutions of America based on generous humanitarian conceptions, forbid the legislator to impose the said penalty.[438]

Thus, the construction of Article I of the Right to Life of the American Declaration does not define nor sanction capital punishment by a member State of the OAS. However, it provides that a member State can impose capital punishment if it is prescribed by pre-existing law for crimes of exceptional gravity. Therefore, inherent in the construction of Article I, is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes guarantees contained in its Constitution, and its international obligations, including those rights and freedoms enshrined in the American Declaration. These guarantees include, the right to life, and not to be arbitrarily deprived of one's life, the right to due process of law, the right to an impartial and public hearing, the right not to receive cruel, infamous, or unusual punishment, and the right to equality at law. Evidence produced to the Commission was sufficient to prove that Mr. Andrews did not receive an impartial trial because the trial court failed to

[437] CB-7-E, Pan American Union Washington, 1948, at 2.

[438] Article 29 of the Constitution of Colombia, Article 30 of the Constitution of Panama 1946, Article 25 of the Constitution of Uruguay 1946, Articles 141, number 31, of the Constitution of Brazil 1946, and Article 29, of the Constitution of Venezuela of 1947. Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man, Background, at 5-6.

> grant Mr. Andrews an evidentiary hearing for the reasons discussed above. The Commission therefore finds, that Mr. Andrews' right to life was violated because he was tried by an impartial and incompetent court which did not provide him with equal treatment at law. Therefore, the Commission finds for the reasons discussed above that Mr. Andrews' right to life was violated by the United States pursuant to Article I of the American Declaration.

127. Regarding discrimination based on nationality, the Commission stated in a 2005 report on a case against the **United States**: [439]

> In the case of William Andrews v. United States, for example, the Commission addressed the question of whether the jury before which Mr. Andrews, an African American defendant on death row in Utah, was tried had a reasonable appearance of bias, based upon a racially derogatory note found among the jurors during the trial. The Commission ultimately found the State responsible for violations of both the right to equality before the law under Article II of the Declaration and the right to a fair trial under Article XXVI of the Declaration, concluding that
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> > in assessing the totality of the facts in an objective and reasonable manner the evidence indicates that Mr. Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to voir dire the jury tainted the trial and resulted in him being convicted, sentenced to death, and executed. The record before the Commission reflects ample evidence of "racial bias."[440]
>
> After carefully reviewing the allegations and information presented by the parties on this issue in the present case, the Commission considers that, viewed objectively and in the context of the circumstances of Mr. Moreno Ramos' crime and the purpose of the sentencing hearing more broadly, there is a real danger that Mr. Moreno Ramos' nationality was considered by the jurors in determining his punishment. This conclusion

[439] IACHR, Report Nº 1/05, Case 12.430, Roberto Moreno Ramos, United States, paras. 67-70. Also, the Commission has indicated in admissibility reports issued in 2011 that allegations by petitioners of discrimination based on race, nationality, sexual orientation or indigence if proven at the merits stage, would tantamount to violations of the right to equality before the law enshrined in Article II of the American Declaration. See IACHR, Report No. 131/11, Petition 593-11, Admissibility, Kevin Cooper, United States, October 19, 2011, paras. 24-25; IACHR, Report No. 115/11, Petition No. 11.829, Admissibility, Pedro Luis Medina, United States, July 22, 2011, para. 31; IACHR, Report No. 60/11, Petitions P-11.575 - Clarence Allen Lackey *et al*., Admissibility, United States, March 24, 2011, para. 156; IACHR, Report No. 83/11, Petition 12.145, Admissibility, Kevin Dial and Andrew Dottin, Trinidad and Tobago, July 21, 2011, para. 41.

[440] I/A Court H.R., Advisory Opinion OC-18/03 of September 17, 2003, Juridical Condition of Rights of Undocumented Migrants, Ser. A Nº18, para. 165.

is suggested by numerous aspects of Mr. Moreno Ramos' punishment hearing, including the fact that the prosecutor referred to Mr. Moreno Ramos' status as a foreign national in the following terms:

> We are a nation of laws. We are a people of laws. And, we are governed by our nation's laws. And the flags that you see in this courtroom are merely symbols of our great nation. If you look back, you'll see the flag of the United States. It is a great nation, but merely a symbol of who we are. And if a man chooses to enter this country, then that man must abide by the laws, And he must walk this country, understanding that our country is governed by laws…And so Robert Moreno Ramos chose to enter the United States…And if you look in the audience, you'll see the State of Texas…You decide the message that people of this State will receive by your verdict.[441]

The Commission also notes that in the context of the present case, Mr. Moreno Ramos' nationality was entirely irrelevant to and unconnected with the issues under consideration at the punishment phase of his trial, raising a particular danger that this evidence would be relied upon as a consideration in determining an appropriate sentence.[442] The Commission observes in this regard that no steps were taken, by the trial judge or otherwise, to clarify that the jurors were not to consider Mr. Moreno Ramos' nationality as an element in deciding upon his punishment. All of these factors together, viewed objectively, give rise to a real possibility that the jurors took into account Mr. Moreno Ramos' status as a foreign national in determining whether he should be executed for his crime, and thereby failed to afford him his right to be tried by an impartial tribunal as well as his right to equal protection of the law without discrimination.

Accordingly, the Commission finds that the State is responsible for violations of its obligations under Articles XVIII and XXVI of the American Declaration, together with a violation of Article II of the Declaration, based upon the statements made by the prosecutor during his punishment hearing concerning the fact that Mr. Moreno Ramos was a national of Mexico.

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[441] Trial Transcript, *supra*, Vol. 84, p. 81.

[442] In this respect, the Inter-American Court of Human Rights recently emphasized the need to ensure due process of law to all persons irrespective of their immigration status, in full compliance with the principle of equality and non-discrimination, and cautioned against cultural prejudices concerning non-nationals that exacerbate the vulnerable status of such persons, including ethnic prejudice, xenophobia and racism. Advisory Opinion OC-18/03, supra, paras. 111-127. See similarly, Advisory Opinion OC-16/99, supra, paras. 97, 115.

128. Regarding a procedural distinction made by the **United States** which resulted in the person not having his sentence reviewed, the Commission affirmed in a 2011 report:[443]

> The right to equality before the law and the obligation to refrain from discriminating against any person are the basic foundation of the inter-American human rights system. Thus, the Preamble to the American Declaration states that "all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another." In addition, Article II provides that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Article 3 of the OAS Charter includes, among the principles affirmed by the American States, the proclamation of "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."
>
> In its analysis of the right to equality before the law, the Inter-American Court explained that "the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified." [444]
>
> Article II of the American Declaration establishes:
>
> > All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
>
> In the instant case the petitioners submit that the denial by the courts to review Jeffrey Landrigan's case in accordance with the new legal precedent described above constitutes a violation of the rights of the alleged victim. As mentioned above, the State considers that there is no violation of the right to equality of Mr. Landrigan, since it considers that his case is not identical to the others. It is the opinion of the State that the case would be equal if the murder occurred in a state at a time when its law allowed a trial judge alone to find aggravating circumstances

[443] IACHR, Report No. 81/11, Case 12.776, Merits, Jeffrey Timothy Landrigan, United States, July 21, 2011, paras. 46-54.

[444] I/A Court H. R., Advisory Opinion OC-4/84 of January 19, 1984, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, requested by the Government of Costa Rica, para. 55.

rendering the defendant eligible for the death penalty; such circumstances were found; the death penalty was imposed; and the stage of direct review had been completed in the defendant's case at the moment of the Ring decision.

The Inter-American Commission observes that this case refers to a situation where the common element is that all persons involved were tried under the same procedure that was later found unconstitutional by the Supreme Court of the United States. However, as a consequence of another decision by the Supreme Court, only one specific group of persons benefitted from the possibility of obtaining judicial review of their sentences. That is, Mr. Landrigan is part of the group of persons that was denied access to the benefit of review of a sentence that resulted from an unconstitutional procedure, on the sole basis of the procedural stage of his case.

In an earlier case dealing with the death penalty in the United States, the Inter-American Commission ruled as follows:

> The Commission finds that the diversity of state practice in the U.S. (…) results in very different sentences for the commission of the same crime. The deprivation by the State of an offender's life should not be made subject to the fortuitous element of where the crime took place.[445]

In the matter under examination, there can be seen to be a difference between the treatment given to Mr. Landrigan by the U.S. courts and that given to other people who were able to secure the review of their sentences. The arguments offered by the State to justify that differentiated treatment are judicial economy, certainty, and legal security. On that point, the IACHR has previously stated that "while questions of the volume of claims and the need to preserve judicial resources for important questions may present a reasonable and justified aim, this must be balanced against the nature of the individual rights at issue – which may involve the protection of life, liberty and physical integrity."[446] Based on the foregoing, and under the strict scrutiny demanded by this case, the Inter-American Commission finds that justifications that might be legitimate in matters of another kind are not allowable when the imposition and application of the death penalty are involved.

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[445] IACHR, Report No. 3/87, Case 9.647, Roach and Pinkerton (United States), September 22, 1987, para. 62.

[446] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para. 101.

As has been seen, the distinction used in the case of Jeffrey Landrigan was based on the fact that his case was already on appeal, at the final review stage, on the date of the Ring decision, and so he did not benefit from its retroactive enforcement. The grounds argued by the State, based on what it believes to be legitimate and reasonable factors in the administration of justice, are not enough to deny Jeffrey Landrigan the benefit of such a review. The claim does not seek the guaranteed result of a more lenient sentence, but simply access to the review that was afforded to the other persons sentenced by means of the same unconstitutional procedure.

The IACHR concludes that the distinction applied to Jeffrey Landrigan's case is not reasonable, and that the differentiated legal treatment received from the courts constitutes inadmissible discrimination. The State is therefore responsible for violating his right to equal treatment before the law by denying him, in an unjustified and discriminatory fashion, the determination of his basic rights including, possibly, the right to life itself.

VII. THE DEATH PENALTY AND THE RIGHT TO HUMANE TREATMENT AND PUNISHMENT

A. Conditions on death row

States have the obligation, as guarantors of the rights of people under their custody, to provide adequate prison conditions, as interpreted in light of minimum international standards in this area. All detained persons have the right to live in conditions compatible with the inherent dignity of every human being. This entails a duty upon States to ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention, and that the detainees' health and welfare are adequately safeguarded. A failure to do so may result in a violation of the absolute prohibition of cruel, inhuman or degrading punishment or treatment.

Standards of humane prison conditions apply irrespective of the nature of the conduct for which the person has been imprisoned and regardless of the level of development of a particular State. States may not invoke economic hardships to justify imprisonment conditions that do not conform to the very minimum international standards in this area and that fail to respect the inherent dignity of human beings.

It is an essential part of a detainee's right to respect for family life that the authorities enable him/her or, if need be, assist him/her in maintaining contact with his/her close family.

129. Regarding the conditions on death row in **Grenada**, the Commission has held:[447]

> The Commission considers that the [conditions of detention] should be evaluated in light of minimum standards articulated by international authorities for the treatment of prisoners, including those prescribed by the United Nations. More particularly, Rules 10, 11A, 11B, 12, 13,15, 19, 21, 22(1), 22(2), 22(3), 24, 25(1),25 (2),26(1), 26(2), 35(1) 36(1), 36(2), 36(3), 36(4), 40, 41, 57, 71(2), 72(3), and 77 of the United Nations Standard Minimum Rules for the Treatment of Prisoners[448] (UN Minimum Rules) provide for minimum basic standards in respect of accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners, as follows:
>
> 10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
>
> 11. In all places where prisoners are required to live or work,
>
> (a) the windows shall be large enough to enable prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;
> (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
>
> 12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
>
> 15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

[447] IACHR, Report No. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 86-90. See also IACHR, Report No. 56/02, Merits, Case 12.158, Benedict Jacob, Grenada, October 21, 2002, paras. 90-97; and IACHR, Report No. 38/00, Case 11.743, Rudolph Baptiste, Grenada, April 13, 2000, paras. 133-138.

[448] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc E/5988 (1977).

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

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

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

26. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should see daily all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the

institution and having in his possession the books of religious observance and instruction of his denomination.

It is evident that based upon the Petitioners' allegations that the State has failed to meet these minimum standards of proper treatment for Mr. Lallion. The cumulative impact of such conditions, together with the length of time for which Mr. Lallion has been incarcerated in connection with his criminal proceedings, cannot be considered consistent with the right to humane treatment under Article 5 of the Convention.[449] Based upon the information provided by the Petitioners the conditions of detention to which he has been subjected fail to meet several of these minimum standards of treatment of prisoners, in such areas as hygiene, exercise and medical care.

For example, Mr. Lallion claims that the cell has no windows, no natural lighting, and no ventilation, and that the lighting in his cell is insufficient. They claim that he is provided with a bucket to use as a toilet, and that he is only entitled to empty the bucket once a day and is therefore forced to ensure unpleasant smells and unhygienic conditions once the bucket is used. Mr. Lallion asserts that he is not allowed to use the prison library, nor is he allowed access to the chaplain or religious services. Further, Mr. Lallion states that he receives inadequate medical care, because visits from the doctor are not regular and it is not clear whether he will be able to see a doctor when necessary. Finally, Mr. Lallion contends that there are no adequate mechanisms or procedures in the prison for dealing with his complaints.

The State did not specifically reply to Mr. Lallion's petition with respect to prison conditions in Grenada, generally, or as they pertain to Mr. Lallion. The State in the penultimate paragraph in its Reply to Mr. Lallion's petition, addressed the issue of prolonged detention on death row, and stated the following: "I also agree that condemned prisoners on death row should no[t], in principle, be subjected to a prolonged period of imprisonment as they undoubtedly suffer a certain level of anguish and mental agony whilst awaiting execution. Such anguish is however, an inevitable consequence of their detention and does not amount to an independent infringement of their constitutional rights."

Consequently, the Commission finds that the conditions of detention to which Mr. Lallion has been subjected fail to respect his physical, mental

[449] See similarly European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Second General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991, Ref. CPT/Inf. (92) 3 (13 April 1992), paras. 44-50 (criticizing prison conditions involving overcrowding, the absence of at least one hour of exercise in the open air every day for prisoners, and the practice of prisoners discharging human waste in buckets, and stating that the Committee is "particularly concerned when it finds a combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment. The cumulative effect of such conditions can prove extremely detrimental to prisoners").

and moral integrity as required under Article 5(1) of the Convention. The Commission therefore finds that the State is responsible for violating this provision of the Convention in respect of Mr. Lallion in conjunction with the State's obligations under Article 1(1) of the Convention.

130. With regard to **Jamaica**, the IACHR stated:[450]

(…) After carefully considering the information available, the Commission has found that Mr. Aitken's detention conditions, when considered in light of the lengthy period of nearly four years for which he has been detained on death row, fail to satisfy the standards of humane treatment under Articles 5(1) and 5(2) of the Convention.

In reaching this conclusion, the Commission has evaluated Mr. Aitken's conditions in light of previous decisions of this Commission and by the Inter-American Court of Human Rights, in which similar conditions of detention were found to violate Article 5 of the Convention.[451] As in these previous cases, the record in the present case indicates that Mr. Aitken has been held in solitary confinement on death row, in confined conditions with inadequate hygiene, ventilation and natural light. In addition, the Petitioners claim that Mr. Aitken is allowed out of his cell infrequently, and does not have access to any work or education facilities. The Petitioners' information also indicates that prisoners are often the subject of abuse by prison guards and Mr. Aitken contends that he was assaulted by police officers upon his arrest in July 1996. These observations, together with the length of time over which Mr. Aitken has been held in detention, indicate that Mr. Aitken's treatment has failed to meet the minimum standards under Articles 5(1) and 5(2) of the Convention. As the Commission has observed in previous cases, these standards apply irrespective of the nature of the conduct for which the person in question has been imprisoned[452] and regardless of the level of development of a particular State Party to the Convention.[453]

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[450] IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 133, 134. See also IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, paras. 103-118; IACHR, Report No. 49/01, Case No. 11.826, Leroy Lamey *et al.*, Jamaica, April 4, 2001, paras. 190-206; IACHR, Report No. 127/01, Case 12.183, Joseph Thomas, Jamaica, December 3, 2001, paras. 121-136; and IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al*., Jamaica, April 13, 2000, paras. 270-294.

[451] In its merits judgment in the Suarez Rosero Case, for example, the Inter-American Court found that the treatment of the victim, who had been held incommunicado for over one month in a damp and poorly ventilated cell measuring five meters by three, together with sixteen other persons, without necessary hygiene facilities, constituted cruel, inhuman or degrading treatment or punishment contrary to Article 5(2) of the Convention. I/A Court H.R., Suarez Rosero Case, Judgment, 12 November 1997, ANNUAL REPORT 1997, at p. 283. See similarly McKenzie et al. Case, supra, paras. 270-291.

[452] *See e.g*. Mckenzie *et al.* Case, *supra*, para. 288, citing Eur. Court H.R., Ahmed v. Austria, Judgment of 17 December 1996, REPORTS OF JUDGMENTS AND DECISIONS 1996-VI, p. 220, para. 38.

[453] *Id*., citing U.N.H.R.C., Mukong v. Cameroon, Communication Nº 458/1991, U.N. Doc. Nº CCPR/C/51/D/458/1991 (1994), para. 9.3 (observing that certain minimum standards governing conditions of detention for prisoners, as prescribed by the International Covenant on Civil and Political Rights and reflected in

Continues…

131. In a 2007 report regarding **The Bahamas**, the Commission indicated: [454]

> In considering Mr. Goodman's claim relating to his inhumane treatment and conditions of detention, to which he was subjected, the Commission is of the view that these conditions of detention, when considered in light of the periods of time for which he has been held in detention prior to trial and the final disposition of his appeals, fail to satisfy the standard of humane treatment prescribed under Article XXVI of the Declaration. Mr. Goodman has been held in confined conditions for 24 hours a day, and is only allowed 10 minutes of exercise four days a week (Monday, Tuesday, Wednesday, and Friday). On all other days, including holidays, he is confined to his cell for the full 24 hours. In addition, Mr. Goodman is only allowed to shower on the days he is allowed to exercise.
>
> (…)
>
> (…) the conditions of detention to which Mr. Goodman has been subjected fail to meet several of these minimum standards of treatment of prisoners, in such areas as accommodation, ventilation, hygiene, medical treatment and exercise. (…)
>
> Therefore, the Commission concludes that, in relation to his conditions of detention, the State has violated Mr. Goodman's right to humane treatment, namely, his right not to receive cruel, infamous, or unusual punishment, pursuant to Article XXVI of the Declaration.

132. In a case submitted to the Inter-American Court regarding **Trinidad and Tobago**, the Commission stated that:[455]

> (…) during their pre-trial detention, the victims suffered from serious overcrowding, which forced them to sleep sitting or standing up. Moreover, the cells lacked adequate hygiene, natural light and sufficient ventilation, aggravated by the fact that the victims were confined in these conditions for at least twenty-three hours a day.
>
> With respect to their post-conviction detention, the Commission stated that the victims have been kept in solitary confinement and that opportunities to leave to get fresh air or exercise are rare. In these circumstances, the victims have no educational or recreational facilities.

…continuation
the U.N. Standard Minimum Rules for the Treatment of Prisoners, must be observed regardless of a state party's level of development).

[454] IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, The Bahamas, October 15, 2007, paras. 84, 87-88. See also IACHR, Report No. 48/01, Case No. 12.067 and others, Michael Edwards *et al.*, The Bahamas, April 4, 2001, paras. 183-198.

[455] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002. Series C No. 94, paras. 154-158.

> Access to medical and dental services for some of the victims has been inadequate since visits by medical and dental personnel are rare and requests for attention have often not been met.
>
> The Inter-American Commission stated that the victims have suffered these conditions for extensive periods of time, and therefore the State has failed to ensure respect for the dignity inherent to all human beings in all circumstances, as well as their right not to be subjected to cruel, inhuman or degrading treatment or punishment.
>
> The Commission also alleged that the State of Trinidad and Tobago violated Article 5(4) with respect to Francis Mansingh due to the fact that before his trial, he was held in a cell with prisoners who had already been convicted of murder and were awaiting the resolution of their appeals.
>
> Finally, the Commission alleged that the State did not make any attempt to reform or socially readapt Haniff Hilaire and Krishendath Seepersad, which constitutes a violation of Article 5(6) of the Convention. Specifically, they were not taught to read or write, nor were they given any training on violence prevention and control. The Commission stated that for persons sentenced to death, the possibility of the death sentence being revoked or commuted continues until all appeals have been exhausted. Therefore, it stated that during this transitional period, there should be no discrimination in providing opportunities for reform or social readaptation based solely on the fact that these prisoners were sentenced to death.

133. With regard to these allegations, the Court found in *Hilaire, Constantine and Benjamin et al. v.* ***Trinidad and Tobago***:[456]

> (…) that the detention conditions that all the victims in this case (…) have experienced and continue to endure compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment.

134. Further, in a death penalty case regarding **Guatemala**, the Court stated that:[457]

> (…) Keeping a person imprisoned in overcrowded conditions, without ventilation and natural light, without a bed to rest on or adequate conditions of hygiene, in isolation or *incommunicado*, or with undue

[456] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002. Series C No. 94, para. 169.

[457] I/A Court H. R., *Case of Raxcacó Reyes v. Guatemala*. Judgment of September 15, 2005. Series C No. 133, para. 95.

> restrictions in the visiting regime, is a violation of his personal integrity.[458]

135. In relation to the conditions of detention on death row in **Barbados**, the Court affirmed:[459]

> The Court has previously examined in other cases the obligation that States Parties to the Convention have, as guarantors of the rights of people under their custody, to provide adequate prison conditions in accordance with Article 5 of the Convention and as interpreted in light of minimum international standards in this area.[460] Pursuant to Article 5 of the Convention, all detained persons have the right to live in conditions compatible with the inherent dignity of every human being.[461] This entails a duty upon States to ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention, and that the detainees' health and welfare are adequately safeguarded.[462] A failure to do so may result in a violation of the absolute prohibition of cruel, inhuman or degrading punishment or treatment.[463] In this regard, States may not invoke economic hardships to justify imprisonment conditions that do not conform to the very minimum international standards in this area and that fail to respect the inherent dignity of human beings.[464]
>
> (…)

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[458] Cf. Case of Fermín Ramírez, supra note 1, para. 118; Case of Caesar, supra note 55, para. 96, and Case of Lori Berenson Mejía, supra note 56, para. 102.

[459] I/A Court H.R., *Case of Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, paras. 88, 94, 97, 102.

[460] *Cf. Case of Neira Alegría et al. V. Perú. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60; *Case of Penal Miguel Castro Castro, supra* note 24, para. 315, and *Case of Montero Aranguren et al. (Detention Center of Catia) V. Venezuela. Merits, Reparations and Costs*. Judgment of July 5, 2006. Series C No. 150, paras. 85 and 87.

[461] *Cf. Case of Neira Alegría et al., supra* note 82, para. 60; *Case of Penal Miguel Castro Castro, supra* note 24, para. 315, and *Case of Montero Aranguren et al. (Detention Center of Catia), supra* note 82, para. 85.

[462] *Cf. Case of the "Juvenile Reeducation Institute" V. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, para. 154; *Case of Montero Aranguren et al. (Detention Center of Catia), supra* note 82, para. 86, and *Case of López Álvarez V. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141, para. 104. See also *UN Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 57.

[463] *Cf. Case of Cantoral Benavides V. Perú. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 95; *Case of Bueno Alves, supra* note 80, para. 76, and *Case of the Miguel Castro Castro Prison, supra* note 24, para. 271.

[464] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra* note 82, para. 85. See also ECHR, *Case of I.I v Bulgaria*. Judgment of 9 June 2005. Application No. 44082/98, para. 77; ECHR, *Case of Poltoratskiy v. Ukraine.* Judgment of 29 April 2003. Application No. 38812/97, para. 148, and UNHRC, *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.3.

> The Court considers that the combined conditions of detention, particularly the use of a slop-bucket, the lack of adequate lightning and ventilation, and the fact that the alleged victims had to stay in their jail cells for 23 hours of each day for more than four years, as well as the overcrowded conditions, together amount to treatment contrary to the dignity of every human being, and thus constitutes a violation of Articles 5(1) and 5(2) of the American Convention, in conjunction with Article 1 of the same instrument, to the detriment of Messrs. Boyce, Joseph, Atkins and Huggins.[465]
>
> (…)
>
> The Court considers that three aspects of the conditions of detention in this temporary prison are particularly troubling. Firstly, the alleged victims have been held for more than two and a half years in cells that resemble cages.[466] There are no walls or ceiling that may provide them with at least some measure of privacy. Rather, prisoners and officers can easily observe the alleged victims at all times through the grilled bars, including when using the slop bucket. Even if deprivation of liberty entails certain limitations to the enjoyment of the right to personal privacy, the Court is of the view that keeping detainees in "cages" cannot but infringe the right to be treated humanely. Secondly, during this time the alleged victims have not had proper time to exercise or leave their cells. At most, they are allowed out into the yard once a week.[467] They must remain in their cages at all other times, except for 15 minutes every day when they may use the bathrooms and showers.[468] Finally, the alleged victims have not had direct contact either with family members or friends since at least March of 2005, and are allowed, in theory, limited visual contact with them by way of a video conferencing system.[469] On other occasions,

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[465] Cf. Case of Neira Alegría et al., supra note 82, para. 60; Case of the Miguel Castro Castro Prison, supra note 24, para. 315, and Case of Montero Aranguren et al. (Detention Center of Catia), supra note 82, para. 97.

[466] *Cf.* Affidavit of Lennox Boyce on prison conditions at Harrison's Point, June 1, 2007 (case file of affidavits and observations thereto, appendix 2, folio 6620); Affidavit of Jeffrey Joseph on prison conditions at Harrison's Point, June 1, 2007 (case file of affidavits and observations thereto, appendix 3, folio 6630); Affidavit of Michael Huggins on prison conditions at Harrison's Point, June 1, 2007 (case file of affidavits and observations thereto, appendix 4, folio 6641); Expert opinion of Prof. Andrew Coyle, *supra* note 88, (transcription, pg. 52), and Testimony of John Nurse, *supra* note 88, (transcription, pg. 42).

[467] *Cf.* Expert opinion of Prof. Andrew Coyle, *supra* note 88, (transcription, pg. 53), Affidavit of Lennox Boyce on prison conditions at Harrison's Point, *supra* note 104, (folio 6622-6623); Affidavit of Jeffrey Joseph on prison conditions at Harrison's Point, *supra* note 104, (folio 6633), and Affidavit of Michael Huggins on prison conditions at Harrison's Point, *supra* note 104, (folio 6644).

[468] *Cf.* Testimony of John Nurse, *supra* note 88, (transcription, pg. 36); Affidavit of Lennox Boyce on prison conditions at Harrison's Point, *supra* note 104, (folio 6621-6622); Affidavit of Jeffrey Joseph on prison conditions at Harrison's Point, *supra* note 104, (folio 6632), and Affidavit of Michael Huggins on prison conditions at Harrison's Point, *supra* note 104, (folio 6643).

[469] *Cf.* Expert opinion of Prof. Andrew Coyle, *supra* note 88, (transcription, pg. 53-54); Testimony of John Nurse, *supra* note 88, (transcription, pg. 42), and Affidavit of Lennox Boyce on prison conditions at Harrison's Point, *supra* note 104, (folio 6623); Affidavit of Jeffrey Joseph on prison conditions at Harrison's Point, *supra* note

Continues…

the Court has indicated that undue restrictions in visiting regimes may constitute a violation of the right to humane treatment.[470] Similarly, the European Court on Human Rights has acknowledged:

> …that detention, likewise any other measure depriving a person of his liberty, entails inherent limitations on [the detainees'] private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family.[471]

(…)

The Court thus concludes that the conditions in which these three alleged victims have been and continue to be detained, in particular in relation to the lack of privacy, contact with the outside world, and exercise, as well as being kept in cages and forced to use slop buckets in plain view of others, amount to inhuman and degrading treatment and fail to respect the human dignity of the person, in contravention to Article 5(1) and 5(2) of the Convention (…).

B. The "death row phenomenon"

The "death row phenomenon", characterized by a prolonged period of detention while awaiting execution, constitutes cruel, inhuman and degrading treatment.

136. The Inter-American Court has referred to the "death row phenomenon" in the following terms:[472]

> (…) any person deprived of his liberty has the right to be treated with dignity and the State has the responsibility and duty to guarantee his personal integrity while detained. As a result, the State, being responsible for detention facilities, is the guarantor of the rights of detainees.[473]

…continuation
104, (folio 6633), and Affidavit of Michael Huggins on prison conditions at Harrison's Point, *supra* note 104, (folio 6644).

[470] *Cf. Case of Loayza Tamayo V. Perú. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 58; Case of the "Juvenile Reeducation Institute", supra note 84, para. 154; Case of the Miguel Castro Castro Prison, supra note 24, para. 315, and Case of García Asto and Ramírez Rojas V. Perú. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, para. 221. Cf. also UN Standard Minimum Rules for the Treatment of Prisoners, supra note 84, Rules 10 and 11.

[471] ECHR, *Case of Bagiński V. Poland*, Judgment of October 11, 2005, Application No. 37444/97, para. 89.

[472] I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Judgment of June 21, 2002. Series C No. 94, paras. 165, 167, 168.

[473] *Cf.* I/A Court H.R., *Neira Alegría et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 60; and I/A Court H.R., *Cantoral Benavides Case*, *supra* note 134, para. 87.

(…)

> Likewise, in *Soering v. United Kingdom*, the European Court found that the "death row phenomenon" is a cruel, inhuman and degrading treatment, and is characterized by a prolonged period of detention while awaiting execution, during which prisoners sentenced to death suffer severe mental anxiety in addition to other circumstances, including, among others: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; the detention conditions while awaiting execution; delays in the appeal process or in reviewing the death sentence during which time the individual experiences extreme psychological tension and trauma; the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.[474]

> (…) all of the victims in the present Case live under the constant threat that they may be taken to be hanged at any moment. According to the report submitted by the expert Gaietry Pargass, the procedures leading up to the death by hanging of those convicted of murder terrorize and depress the prisoners; others cannot sleep due to nightmares, much less eat (*supra* para. 77(c)).

C. Method of execution

137. Regarding allegations with respect to the method of execution of detainees, the Commission has indicated: [475]

> The Petitioners have also contended that execution by hanging constitutes cruel, unusual or degrading punishment or treatment contrary to Article 5(2) of the Convention and claim that hanging is therefore inconsistent with the requirements under Article 4(2) of the Convention governing the implementation of capital punishment. Given its conclusions in Part IV.C.2 of this Report that Mr. Aitken's death sentence contravenes Articles 4, 5 and 8 of the Convention so as to render any subsequent execution unlawful, the Commission does not

[474] *Cf.* European Court of Human Rights, *Soering v. United Kingdom*. Judgment of July 7, 1989. Series A, Vol. 161. Likewise, the Supreme Court of the United States of America recognised in *Furman v. Georgia* that the time spent awaiting the execution of a death sentence destroys the human spirit and constitutes psychological torture that often leads to insanity. *Cf. Furman v. Georgia*, 408 U.S. 238, 287-288 (1972).

[475] IACHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, para. 138. See similarly, IACHR, Report No. 76/02, Case 12.347, Dave Sewell, Jamaica, December 27, 2002, para. 118; IACHR, Report No. 41/00, Case 12.023 and others, Desmond McKenzie *et al.*, Jamaica, April 13, 2000, para. 239; and IACHR, Report No. 56/02, Merits, Case 12.158, Benedict Jacob, Grenada, October 21, 2002, para. 98. The method of execution has been referred to "prima facie" by the Commission in recent admissibility decisions, see *e.g.* IACHR, Report No. 115/11, Admissibility, Petition 11.829, Pedro Luis Medina, United States, July 22, 2011, para. 30.

consider it necessary to determine for the purpose of this complaint whether the method of execution employed in Jamaica constitutes cruel, inhuman or degrading punishment or treatment contrary to Article 5(2) of the Convention. The Commission nevertheless reserves its competence to determine in an appropriate case in the future whether hanging is a particularly cruel, inhuman or degrading punishment or treatment in comparison with other methods of execution.

VIII. CONCLUSIONS AND RECOMMENDATIONS TO STATES

138. As was highlighted in the introduction, regional and international human rights instruments impose restrictions designed to bring about the gradual elimination of the death penalty. Accordingly, a human rights principle governing the death penalty in the Americas, as evidenced in the jurisprudence examined *supra* and the Protocol to the American Convention to Abolish the Death Penalty is that States that have abolished the death penalty cannot reintroduce it.

139. For States that maintain the death penalty, there are a number of restrictions and limitations established in the regional human rights instruments, which States are bound to comply with under international law. This report drew on the most important findings and interpretations of the bodies of the inter-American human rights system, and compiled these standards according to relevant themes.

140. As evidenced from the standards gathered in this report, States are in violation of their international human rights obligations when they apply the death penalty mandatorily without consideration of the specifics of a case; when their domestic legal systems fail to limit the application of the death penalty to the "most serious" crimes, or impose it for political offenses or related common crimes; if they expand the death penalty to other crimes; execute persons who have been tried and sentenced for crimes committed when they were under 18 years old; execute persons pending requests for amnesty, pardon or commutation or when they do not have an appropriate procedure in place for persons sentenced to death to seek pardon or clemency.

141. States are also bound by international law to comply with the strictest standards of due process in death penalty cases. Among due process guarantees, States are bound to ensure the exercise of the right to a fair trial, which includes the right to be tried by an independent and impartial tribunal, the right not to be sentenced based on evidence of an unadjudicated crime, and the right to consular notification and assistance for foreign nationals. States must also ensure the strictest compliance with the right to defense, including the right to competent state counsel for those who require it, to have legal aid for constitutional motions regarding the imposition of the death penalty and to have sufficient time and means for an adequate defense. Finally, as reviewed in this compilation, States are bound under international human rights law to ensure and guarantee the right to equality and non-discrimination.

142. The Commission reiterates the need for States to comply strictly with the guarantees of due process and fair trial with respect to all persons in the context of proceedings potentially resulting in the death penalty.

143. The Commission makes the following recommendations to States:

- Impose a moratorium on executions as a step toward the gradual disappearance of this penalty;

- Ratify the Protocol to the American Convention on Human Rights to Abolish the Death Penalty;

- Refrain from any measure that would expand the application of the death penalty or reintroduce it;

- Take any measures necessary to ensure compliance with the strictest standards of due process in capital cases;

- Adopt any steps required to ensure that domestic legal standards conform to the heightened level of review applicable in death penalty cases; and

- Ensure full compliance with decisions of the Inter-American Commission and Court, and specifically with decisions concerning individual death penalty cases and precautionary and provisional measures.

IX. SOURCES FROM THE INTER-AMERICAN HUMAN RIGHTS SYSTEM ON THE DEATH PENALTY

144. The following consists of a list of sources from the inter-American human rights system on the death penalty, as cited in this report.

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