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Institution: Inter-American Commission on Human Rights  
File Number(s): Report No. 57/96; Case 11.139  
Session: Ninety-Fourth Special Session (6 December 1996)  
Title/Style of Cause: William Andrews v. United States  
Doc. Type: Report  
Decided by: First Vice Chairman: Ambassador John S. Donaldson;  
Second Vice Chairman: Professor Carlos Ayala Corao;  
Members: Dr. Oscar Lujan Fappiano, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.  
Commission Members Profs. Claudio Grossman, Chairman, and Robert Goldman took no part in the proceedings, pursuant to Article 19.2 of the Commission's Regulations.

Dated: 6 December 1996  
Citation: Andrews v. United States, Case 11.139, Inter-Am. C.H.R., Report No. 57/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)  
Represented by: APPLICANTS: Steven W. Hawkins, Richard J. Wilson and Bartram S. Brown  
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## I. ALLEGATIONS IN PETITION DATED JULY 28, 1992

1. On July 27, 1992, the Commission received a fax communication informing it of the pending execution of Mr. William Andrews by the State of Utah on July 29, 1992, for three counts of Murder, and briefly outlined the petitioners' allegations.
2. On July 28, 1992 the Commission received a petition filed by Steven W. Hawkins of the LDF Capital Punishment Project; Richard J. Wilson, Director, International Human Rights Clinic, Washington College of Law, American University; and Bartram S. Brown of Chicago-Kent College of Law, on behalf of William Andrews which alleged that he was an African-American male born in Jonesboro, Louisiana, was now a prisoner on death row in Draper Correctional Institution, Draper, Utah, and was scheduled to be executed at or about 12:01 a.m on July 30, 1992. The petition alleged that in 1974, Mr. Andrews was convicted of three counts of first degree murder and two counts of aggravated robbery in the State of Utah, and that he was subsequently sentenced to death on all three counts by the same jury which convicted him.
3. The petitioners further alleged that both the victims and the jurors were Caucasian, and the sole black member of the jury pool was stricken peremptorily by the prosecution during jury selection. Mr. Andrews had left the premises prior to the offenses, and that his co-defendant, fatally shot the victims. His co-defendant, also African-American was executed by the State of Utah in 1987.

4. It is further alleged that a napkin (note) was found among the jurors during a recess of the trial, which stated "Hang the Nigger's" and that Mr. Andrews' attorney requested a mistrial and a right to question jurors concerning the note, but this request was denied by the trial judge. Instead the trial judge admonished the jurors to "ignore communications from foolish people". That the denial of the right to question the jury about the note and the mistrial coupled with the known racist Mormon Church doctrine was ground for a mistrial and at minimum, a further inquiry into the authorship, and source of the note, exposure of the note to members of the jury or their response to it.

5. Mr. Andrews filed several appeals and habeas corpus petitions before the State and Federal courts in Utah, including the United States Supreme Court, and the Utah Supreme Court, raising a number of issues which included the matters raised in this petition, and collateral attacks, and sought clemency from the Board of Pardons. All his appeals, and habeas corpus petitions were denied, the final denial was on July 29, 1992.

6. The petitioners requested precautionary measures, and requested an immediate stay of the execution proceedings against Mr. Andrews due to the urgency of this matter, the immediacy of the execution and to avoid irreparable damage. The petitioners stated further that the case was admissible, as a result of a final appeal, and that the United States Government violated Articles of the Organization of American States Charter and the American Declaration of the Rights and Duties of Man.

7. On March 5, 1993, the petitioners submitted an amended petition alleging violations of the American Declaration of the Rights and Duties of Man and requested relief from the Commission.

## II. ARTICLES ALLEGEDLY VIOLATED

8. Articles 3 (k) and 44 (a) of the Organization of American States' Charter. Articles I, (right to life, liberty and personal security) II, (right to equality before the law without distinction as to race), and XXVI (right to an impartial hearing, and not to receive cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man.

## III. THE PETITIONERS REQUEST THAT:

The Inter-American Commission on Human Rights

9. Find that in the trial, sentencing and execution of William Andrews, the United States violated Articles I, II, and XXVI of the American Declaration of the Rights and Duties of Man.

10. Find that confinement on death row for a period exceeding eighteen years, as well as the subjection to the issuance of at least eight death warrants, constitutes "cruel, infamous or unusual punishment" under Article XXVI of the American Declaration of the Rights and Duties of Man.

11. Make whatever additional recommendations it considers appropriate in order to bring about a more effective observance of fundamental human rights relevant to this case.

#### IV. PROCEEDINGS BEFORE THE COMMISSION

##### A. Receipt of documentary materials

12. Upon receipt of the petition of July 28, 1992, and amended petition of March 5, 1993, and up to the presentment of the petition, the Commission has complied with the procedural requirements of its Regulations, studied, considered, and examined all information submitted by the parties.

13. During this period it communicated with the petitioners and the United States Government by notes and the telephone. It sent the pertinent parts of the petition, amended petition and additional information to the United States Government with requests that it supply information which it deemed appropriate to the allegations of the complaint, and which addressed the issue of exhaustion of domestic legal remedies. The Commission qualified these requests by stating that "the request for information did not constitute a decision as to the admissibility of the communication."

14. Among the notes sent to the Government of the United States were two notes, dated July 28, 1992 addressed to the United States Government, and one addressed to the Governor of Utah dated July 27, 1992, which informed them of the pending execution of Mr. Andrews who was scheduled to be executed in the State of Utah at 12.10 a.m. on Thursday, July 30, 1992, for three counts of murder. The Commission requested a stay of the proceedings pending a full inquiry into the factual allegations of racial discrimination, and lack of an impartial hearing made by Mr. Andrews, and concluded that these issues should be addressed prior to the imposition of the penalty of death, which is irrevocable in its finality.

15. The Commission received several notes from the United States' Government including replies to the petition, which stated that the petitioners did not have standing to file the petition which was not filed in a timely fashion, and that it failed to establish any violation of the American Convention, that the American Declaration of the Rights on Duties of Man was not legally binding, and that the case was inadmissible pursuant to Article 41 of the Commission's Regulations.[FN1] The United States Government attached the relevant trial and appellate transcripts of the proceedings in the United States Courts.

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[FN1] Argument under part IV, submissions of the parties, of this Report.

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16. In addition to the petition which reflected that Mr. Andrews was executed on July 30, 1992, the Commission received several notes from the petitioners, including responses to the United States Government's reply to the petition. In addition the Commission received an exhibit depicting a note "Hang the Nigger's" and what appears to be a drawing with a black figure hanging from a rope.[FN2]

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[FN2] Argument under part IV submissions of the parties, of this Report.  
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17. On Thursday February 10, 1994, a hearing was held at the petitioners request. At that hearing the petitioners presented arguments in support of the admission of their petition and the merits of their case. The representative of the Government observed the hearing, but did not participate in the same.

B. Legal Submissions of the Petitioners

18. The petitioners argued that the case was admissible. Mr. Andrews pursued and exhausted all the remedies available under domestic law in this case. After his sentencing by the State of Utah he appealed to the Utah Supreme Court and to the United States Supreme Court by writ of certiorari. They argued that following denial of the initial writ, he pursued a variety of state and federal court interventions, including writs of habeas corpus in the federal courts and additional petitions to the United States Supreme Court, and his final appeal was rejected on March 30, 1992. The petitioners argued that the courts in the United States did not grant Mr. Andrews an evidentiary hearing to remedy the defect in his trial and sentencing. The petitioners stated that the subject of this petition was not pending in any other international proceeding for settlement, and that the facts of this case, clearly established a violation of Articles I, II, and XXVI of the American Declaration of the Rights and Duties of Man.

19. The petitioners also argued that the United States is bound by the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, and that these in addition to the Statute and Regulations of the IACHR[FN3] acquired binding force for OAS[FN4] members. Furthermore, they argued that the Statute entrusted the IACHR with the competence to promote the observance of and respect for those rights set forth in the American Declaration of the Rights and Duties of Man to States such as the United States which are OAS members but not parties to the American Convention on Human Rights.

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[FN3] Inter-American Commission on Human Rights.

[FN4] Organization of American States.  
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20. The petitioners argued that the OAS Charter and the American Declaration were violated by the racially discriminatory manner in which the death penalty was imposed in Mr. Andrews' case. The tainted procedure by which Mr. Andrews was found guilty and sentenced to death in this case violated Articles 3 (k) and 44 (a) of the Charter of the OAS. It also violated Mr. Andrews' rights to equality before the law without distinction as to race (Article II) and to an impartial hearing (Article XXVI) under the American Declaration of the Rights and Duties of Man.

21. The petitioners further argued that both the International Court of Justice and the European Commission of Human Rights have found that racial distinctions require that international tribunals examine "more seriously" the purported justifications for differences in treatment based on race.[FN5] Systematic racial discrimination has been recognized as a peremptory norm of the customary international law of human rights.[FN6] Moreover, the importance of freedom from racial discrimination is affirmed under Article 27(1) of the American Convention on Human Rights, which prohibits racial discrimination even in time of war or national emergence.

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[FN5] Cases are collected in Anne F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law," 11 Hum. Rts. L.J. 1, 6 (1990).

[FN6] See, § 702 (f), Restatement of the Law (Third): The Foreign Relations Law of the United States, vol. 2 (1987).

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22. The petitioners argued that the U.S., as a signatory to several instruments regarding protection of human rights in the Conference on Security and Co-Operation in Europe, agreed that "special measures" must sometimes be taken to assure that the rights of national minorities are protected.

23. The petitioners argued that in the past, this Commission has found that another petitioner did not satisfy a burden to produce sufficient evidence of racial discrimination in a capital trial or death sentence in the United States, the facts presented here and below demonstrate a clear satisfaction of any burden of production which can be said to lie with the petitioner, and should result in a shifting of the burden of proof to the United States to demonstrate the absence of racial prejudice in Mr. Andrews' death sentence.[FN7]

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[FN7] Celestine Case, Res. No. 23/89, Case 10.031 (Sept. 28, 1989).

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24. The petitioners also argued that the procedures in the trial and in the review of the death sentence imposed in William Andrew's case, when considered in the context of the racist doctrine of the Mormon Church at the time of Mr. Andrews' trial in Utah, a State which is overwhelming Mormon and white, demonstrate invidious racial discrimination in violation of the OAS Charter and the American Declaration. Mr. Andrews was denied his right to racial equality when his lawyer was denied both a request for a mistrial and a right to question jurors concerning a note that was found among them saying, "Hang the Nigger's [sic]."[FN8] The very fact that such a note was found with the jury, coupled with the known racist Mormon Church doctrine at the time, was grounds for a mistrial or, at minimum, a further inquiry into the authorship, source of the note, exposure of the note to members of the jury or their response to it. Yet, the trial judge--who himself was a Mormon--refused to grant the request, and cut off any questioning of the jury about the note.

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[FN8] Petitioners submitted the note appendix A as an exhibit.

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25. The petitioners argued that no reviewing court in the United States ever required the production of evidence or the holding of an evidentiary hearing on the issue of the influence of racial prejudice in the trial of William Andrews. These errors require redress as a violation of the law of international human rights. At Mr. Andrews' trial in 1974, the blatantly racist note was brought to the trial judge's attention by a bailiff. The bailiff told the judge that he had been given the note, which was written on a napkin, by a member of the jury over the lunch period. The bailiff was sworn and questioned, but could provide little information beyond hearsay. The bailiff told the judge that a juror had told him that he "found" the note in the jury lunchroom. The bailiff also stated that in his opinion one of the jurors could have written the note.

26. Moreover, the petitioners argued that despite the bailiff's own opinion, the trial judge blindly accepted the explanation of a juror who was never called to the stand to testify. The judge never attempted to determine if the juror's claim that the note was "found" was truthful or not by placing that person on the stand to testify. The judge never saw the juror's demeanor in order to adequately gauge his credibility. The judge's only response to this outrageous incident was to tell the jury to "ignore communications from foolish people."

27. The petitioners also argued that racism alone explains why William Andrews was executed in the State of Utah on July 30, 1992. The denial of his basic human right to be accorded the same level of dignity as that of a person of any other race is clearly the result of racist Mormon Church doctrine. The State of Utah is overwhelmingly Mormon and white. Although no inquiry into the racial views of the jurors was permitted at the time of the revelation of the note described above, it was unquestionably true that some or all of the members of the jury were Mormons, and that the tenets of their faith guided their determination to sentence Mr. Andrews to death.

28. The petitioners argued that members of the jury were unable to show William Andrews mercy or to render him compassion because their religion taught them that no person of the Negro race was worthy of their sympathy and had been already condemned to Hell by God. Tragically, to have shown Mr. Andrews mercy would have been sacrilegious to those Mormons who comprised the jury. They were duty-bound to sentence him to death by the Apartheid-type teachings of their religious faith. The racist Church doctrine has its origins in Brigham Young, a Prophet of the Mormon Church, who instructed the congregation in 1852 that Black skin was a mark of God's curse upon black people: "I tell you, these people that are commonly called negroes are the children of the old Cain. I know they are, I know that they cannot bear rule in the Priesthood for the curse upon them . . . ."

29. The petitioners argued that, a century later, racist teaching had not changed, but was actually even more virulent. A former First President of the Mormon Church, the Church's spiritual leader, expressly told the congregation in 1949 that Black people were "damned to death by God:" "Why are so many of the inhabitants of the earth cursed with a skin of blackness? It comes in consequence of their fathers rejecting the power of the holy priesthood, and the law of God. They will go down to death." Even with the advent of the Civil Rights Movement in the

United States, the Mormon Church still clung in 1969 to its racist ideology, believing that God had demanded that Blacks be treated as inferior beings. The First President told the congregation: "The seeming discrimination by the Church toward the Negro is not something that originated with man; but goes back to the beginning with God." This formal statement was made less than five years before Mr. Andrews was sentenced to death in Utah.

30. The petitioners argued that less than three years before Mr. Andrews was put on trial for his life, a poll conducted in Utah showed that over 70 percent of all Mormons vehemently believed that God had cursed black people to a life in Hell. Instead of appreciating criticism of their pre-Civil War view of Blacks, a third of the Mormons polled believed that there was a "black conspiracy" to destroy the Church.

31. The petitioners argued that in 1974, at the time when William Andrews was tried for a capital offense, Mormon Church doctrine still compelled that the jury show him no mercy because God had shown no mercy on Mr. Andrews' race. It was only in June of 1978, four years after the jury sentenced Mr. Andrews to death, that the First President of the Mormon Church announced that he had experienced a "revelation" and that from that day forward blacks could enter the Kingdom of Heaven. For Mr. Andrews, the "revelation" had come too late. He tried many times unsuccessfully to have Utah and federal courts address the obvious effect of the Church doctrine on his sentence of death, all to no avail.

32. The petitioners argued that the U.S. cannot demonstrate that it did not violate its obligation of racial equality as articulated in the OAS Charter and the American Declaration on the Rights and Duties of Man (hereinafter "American Declaration"), as well as in more recent international human rights instruments to which it has become a party. The U.S. Government has internationally recognized obligations to racial equality before the law, binding on it in the Inter-American system in which it participates, pursuant to Article II of the American Declaration, as well as Articles 3 (k) and 44 (a) of the OAS Charter, which provide, in relevant part: Article 3 "The American States reaffirm the following principles: . . . (k) The American States proclaim the fundamental rights of the individual without distinction as to race . . ." Article 44. "The Member States . . . agree to dedicate every effort to the application of the following principles and mechanisms: a) All human beings, without distinction as to race, . . . have a right to . . . liberty, dignity, [and] equality of opportunity . . ."

33. The petitioners argued that the "fundamental rights of the individual" referred to in Article 3(k) unquestionably refer to the specific provisions of the American Declaration and its antecedent, the Universal Declaration of Human Rights. The latter instrument specifically protects the right to life (Article 3), the right to equality before the law (Article 7) and the right to due process of law in the face of criminal charges (Article 10). These rights are more specifically developed in the American Declaration. It is particularly noteworthy that the United States recently ratified the International Covenant on Civil and Political Rights. There were no reservations by the United States to Articles 2 and 26, which cover equal treatment under the law.[FN9] Those rights are non-derogable, pursuant to the provisions of Article 4 (1) of the Covenant. Given its recent affirmation to the right to racial equality before the law, the United States cannot now argue that it has no burden to show adherence to racial equality in the case before the Commission.

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[FN9] The U.S. did adopt an understanding with regard to the application of Articles 2 and 26, stating that discrimination based on race is understood in the United States "to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective." See, United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645, 659 (1992). This understanding applies only when the treaty is sought to be applied domestically and does not affect the obligations of the United States under the international law of human rights.  
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34. The petitioners argued that finally, the U.S. has been an active participant in the Conference on Security and Co-Operation in Europe (CSCE). As a full participant in the deliberations of the Conference, the U.S. became a signatory of the Report of the CSCE Meeting of Experts on National Minorities, held in Geneva, Switzerland in 1991. The report states that the participating States "consider that respect for human rights and fundamental freedoms must be accorded on a non-discriminatory basis throughout society." [FN10] That report, in turn, refers to the concluding document of the Copenhagen conference, in which the states parties, including the United States, agreed to the following: "Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms." [FN11]

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[FN10] Conference on Security and Co-Operation in Europe: Report of the CSCE Meeting of Experts on National Minorities, 30 I.L.M. 1692, 1696 (1991).

[FN11] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 I.L.M. 1305, 1318 (1990).  
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35. The petitioners argued that taken as a whole, the U.S. has an internationally recognized obligation to guarantee racial equality before the law. Moreover, when, as here, overwhelming evidence of governmental complicity in racial discrimination is shown, the burden shifts to that government to prove the absence of discrimination in guaranteeing racial equality. The United States cannot discharge that burden here. The Commission should therefore find that the United States has violated its obligations to racial equality as found in the OAS Charter and the American Declaration. William Andrews was denied his right to life and to due process of law by the decision of the U.S. Government to execute him without an impartial hearing on the issue of racial discrimination at his trial. Despite his many claims to fundamental fairness and his ultimate efforts to seek the intervention of this Commission to review his case, William Andrews was executed on July 30, 1992. Mr. Andrews was improperly deprived of his life in violation of Article I of the American declaration. Article I, as it relates to the imposition of the death penalty in criminal proceedings, must be read in conjunction with Article XXVI, paragraph 2, which guarantees due process in such proceedings.

36. The petitioners argued that in this case, the American Declaration's protection of the right to life must be read in the broadest possible fashion. Unquestionably, the right of the State to involuntarily extinguish a life must be circumscribed by the protection of due process and fundamental fairness. While it is true that the American Convention on Human Rights contains, in its Article 4 provisions relating to the right to life, a number of clauses which suggest that the death penalty is appropriate if properly administered, those provisions carefully circumscribe the imposition of capital punishment, most prominently, in Article 4.3, prohibiting States which have abolished the penalty from reestablishing it. As noted by the Court in its Advisory Opinion on Restrictions to the Death Penalty in the Convention, "Article [4] as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned . . . ." Moreover, the U.S., by refusing to ratify the Convention, cannot now claim any benefit from its provisions which might support a position advanced by the Government.

37. The petitioners argued that Mr. Andrews' right to an impartial hearing was violated in his trial, and more importantly, in his sentencing. In complete disregard of universal notions of an impartial trial, no state or federal court ever granted Mr. Andrews the right to inquire into the origins of the racist note. The Supreme Court of the United States would not grant review of Mr. Andrews' case. Justices Marshall and Brennan were the lone dissenters, calling the note "a vulgar incident of lynch-mob racism reminiscent of Reconstruction days." *Andrews v. Shulsen*, 485 U.S. 919, 920 (1988) (dissent from denial of certiorari). Justice Marshall described the denial of basic due process by pointing out 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 mention common decency, require[d] no less than this modest procedure." *Id.* Justice Marshall gave examples of obvious questions about the note that have never been answered: "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?" *Id.* These questions remain unanswered to this day.

38. The petitioners argued that because no court granted Mr. Andrews the right to question the jurors about the note, the worst scenario cannot be ruled out: the entire jury was involved in the drawing of the note and joked about it before finally giving it to the bailiff; the judge then joined in their conspiracy by telling them to "ignore communications by foolish people." It cannot be ruled out that a "lynch-mob atmosphere" existed within the jury which sentenced Mr. Andrews to death since he has never been accorded a hearing. The failure of the U.S. Government to afford a hearing on the issue of racial discrimination, and its subsequent execution of William Andrews, constitute a violation of Articles I and XXVI of the American Declaration.

39. The petitioners argued that disparity in the application of the death penalty within the State of Utah, based on race alone, constitutes a further violation of Articles I and II of the American Declaration. The evidence against Mr. Andrews at trial revealed that he and Pierre Selby had gone to a radio store to rob it, and had come upon people still in the store. The evidence showed that Mr. Andrews assisted Mr. Selby in tying the victims up in the basement. Mr. Selby saw some liquid drain cleaner nearby and requested that Mr. Andrews pour some into

a cup, which he did. To Mr. Andrews' horror, Mr. Selby began forcing the victims to drink the drain cleaner. Mr. Andrews is reported by one survivor to have said that this point, "I'm afraid. I can't do it." Mr. Andrews then ran from the store and Mr. Selby, unbeknownst to Mr. Andrews, shot the victims.

40. The petitioners argued that Mr. Andrews was not present when anyone was shot, and by a surviving victim's own account, was frightened by what Mr. Selby was doing. In contrast, many white persons in Utah have killed others in horrible ways but were spared the death sentence. Richard Worthington took a hospital nurse and infants hostage before shooting the nurse in the back; he was plea bargained to a term of years.[FN12] Lance Wood sodomized a male hitchhiker and attached jumper cables to the victim's testicles before slitting his throat and bludgeoning him; he was sentenced to life.[FN13] Edward Steven Deli shot three people as they returned home from Christmas shopping, but was sentenced to life.[FN14] Mark Hofmann used a large car bomb to kill two prominent leaders of the Mormon Church but was not sentenced to death.[FN15]

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[FN12] Robin Abravian, "A Web of Terror: Survivors of Siege at Utah Maternity Ward Try to Understand What Made Richard Worthington Do What He Did," L.A. Times, Oct. 6, 1991, at E1; "Jailed Hostage Taker Attempts Suicide," Wash. Times, May 13, 1992, at A6.

[FN13] "Utah," U.S.A. Today, March 12, 1990, at 5A.

[FN14] "Parolees Charged in Killings During Botched Utah Burglary," Chicago Tribune, Dec. 25, 1990, at M4.

[FN15] "Tried to Kill Self, Mormon Artifacts Dealer Says," L.A. Times, Aug. 1, 1987, at A1.

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41. The petitioners argued that the most outrageous example of the separate systems of justice that exists for blacks and whites in Utah is seen in the treatment of Joseph Paul Franklin. Mr. Franklin, an avowed racist, repeatedly shot 2 young black men with a high-powered rifle simply because they were jogging with white women. He was sentenced to life.[FN16] The lack of proportionality in cases where the victim is white and the defendant is black--as in Mr. Andrews' case--explains why blacks make up less than one-half percent of the Utah population, yet account for 25% of those persons on death row.[FN17] This Commission has previously found that inequality in the imposition of the death penalty in the United States constitutes a violation of Articles I and II of the American Declaration.[FN18] There, the disparities in the sentencing and execution of juvenile offenders among the various states of the United States resulted in such inequality as to rise to a violation of the Declaration. Here too, inequality in imposition of the penalty within a State, based on race alone, also constitutes a violation of the same articles.

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[FN16] State v. Franklin, 53 Utah Adv. Rep. 7, 735 P.2d 34 (1987).

[FN17] All references to individual cases, and to statistical data, are from Proportionality Study conducted by the Salt Lake City Public Defender's Office, submitted with Petitioner's application to the Utah Board of Pardons for commutation of the sentence of death (1992), and available on request to the Petitioner.

42. The petitioners argued that the confinement of William Andrews on death row in the Utah State Prison while he awaited his execution for over eighteen years constituted cruel, infamous or unusual punishment in violation of Article XXVI of the American Declaration of the Rights and Duties of Man. William Andrews spent nearly half of his life, virtually all of his adult years, on death row awaiting execution. He was kept in custody from the date of his arrest, April 23, 1974, until his execution on July 30, 1992. After November, 1974, he spent the next eighteen years on death row in the Utah state Prison waiting for a decision from the State whether he was to live or die. There is no more compelling case for application of the American Declaration's prohibitions on cruel, infamous or unusual punishments.

43. The petitioners argued that Article XXVI of the American Declaration states, in relevant part, that: "Every person accused of an offense has the right . . . not to receive cruel, infamous or unusual punishment." That Article is among the panoply of "fundamental rights of the individual" which are protected by Article 3 (k) of the OAS Charter, which, in turn, draws meaning from the Universal Declaration of Human Rights. The Universal Declaration specifically protects against "cruel, inhuman or degrading treatment or punishment" in its Article 5.

44. The petitioners argued that the Commission has recognized, as early as its Annual Report of 1972, that Article XXVI's prohibition of cruel, unusual or infamous punishment has been "seriously violated in several American states, in which the prison system does not serve rehabilitation purposes but is a focus of moral and physical corruption and degradation".[FN19] The detention of William Andrews on death row for 18 years offers a compelling example of such degradation. Mr. Andrews was kept in a single-man cell on death row during his entire stay there. During period of months or years, while the prison was on lockdown, he was released from the cell for only a few hours a week, at most. At no time was he permitted to leave his cell for more than two to three hours a day, particularly during the earlier years of his stay. The most excruciating of conditions, however, was his proximity to death on multiple occasions. Mr. Andrews had at least eight execution dates set by the issuance of warrants for his execution, including the one which was actually carried out. On at least three occasions, he came within three to four days of execution, without any assurance that the execution would be stopped.

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[FN19] Organization of American States, Inter-American Commission on Human Rights: Ten Years of Activities, 1971-1981, 329 (1982).

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45. The petitioners argued that delays in the execution cannot be attributed to his inaction; his counsel met all court imposed deadlines for all actions in this case, and never requested an extension of time which caused any proceeding to be delayed. If there were delays, it was not because anyone wished them, but the delays do not make the waiting less cruel or infamous. The potential for delay in execution in the United States, resulting in what came to be referred to as the "death row phenomenon," was enough for the European Court of Human Rights to bar

extradition of a prisoner to the U.S. as a violation of Article 3 of the European Convention on Human Rights, which prohibits "inhuman or degrading treatment or punishment."

46. The petitioners argued that in *Soering v. United Kingdom*, 11 EHRR 439 (1989), the European Court found that "the very long time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty," taken with the age and mental state of the defendant, constituted a sufficiently grave violation of Article 3 to merit the withholding of extradition from Great Britain to Virginia of a German national charged with capital murder in the United States. *Soering*, para. 111. The Court based its conclusion on a finding that the condemned prisoner can expect to spend "on average six to eight years" in Virginia before being executed. *Soering*, para. 106. Thus, although the Court recognized that the death penalty itself is not prohibited by the European Convention (para. 101), it found that confinement of only one-third of that which William Andrews actually experienced was enough to constitute a violation of the European human rights provisions.

47. The petitioners argued that the imminence of execution itself constitutes cruel, infamous or unusual punishment. The European Court of Human Rights has recognized that anticipation of punishment can have "adverse psychological effects," In *Tyrer v. United Kingdom*, 2 EHRR 1, paragraph 33 (1979-80), the Court held that a child who was subjected to three strokes of a birch rod was also "subjected to the mental anguish of anticipating the violence he was to have inflicted on him" because he waited "several weeks" after the imposition of the punishment before it was actually carried out. This, the Court held, contributed to making the child's punishment "degrading" within the meaning of Article 3 of the European Convention on Human Rights.

48. The petitioners argued that here, William Andrews faced the certainty of his execution on eight different occasions. On each occasion, he received a reprieve, but often he came within days of his death without it being carried out. Though the Declaration does not use the term "degrading" when referring to punishments, surely the repeated imminence of one's death is more traumatic than the anticipation of strokes of a birch cane. This Commission must find that such action by the State constitutes cruel, infamous or degrading punishment under the Declaration.

49. The petitioners argued that in *Earl Pratt and Ivan Morgan v. Jamaica*, Communications nos. 210/1986 and 225/1987 the Human Rights Committee, considering a complaint filed under the Optional Protocol to the International Covenant on Civil and Political Rights, found that delay in notification of a stay of execution constituted cruel and inhuman treatment within the meaning of Article VII of the International Covenant.<sup>[FN20]</sup> Here, the delay was worse because it occurred repeatedly and over an 18 year period. Under the analogous language of the Declaration, Mr. Andrews was subjected to cruel, infamous and unusual punishment. The 18 year delay in the execution of William Andrews while under the conditions of death row in Utah, and his subjection to at least eight death warrants while awaiting execution, constitute a violation of Article XXVI, paragraph 2 of the American Declaration of the Rights and Duties of Man.

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[FN20] While the United States has ratified the International Covenant, Senate advise and consent was subject to a reservation to Article VII which states that "the United States considers itself bound by Article VII to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eight and/or Fourteenth Amendments to the Constitution of the United States." See, "United States: Senate committee on Foreign Relations Report on the International Covenant on Civil and Political Rights," 31 I.L.M. 645, 659 (1992).

The fact that the issue of cruel and unusual punishment pursuant to the U.S. Constitution was twice raised and rejected in this litigation should be taken not as a conclusion of compliance with international human rights law, but as evidence that the issue has been raised and preserved for review, though rejected by the U.S. courts under domestic law. See, *Andrews v. Morris*, 600 F. Supp., 408, 431 (D. Utah 1984); *State v. Andrews*, 1992 Westlaw 171582 (Utah 1992).

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### C. United States Government's Response to Petition

50. The United States argued that each of the allegations was carefully considered and rejected by the state and federal courts on numerous occasions during the lengthy judicial proceedings in which Mr. Andrews' conviction and sentence were fully reviewed. Not only has the petitioner in this proceeding offered no new evidence to support them, s/he has merely recast in terms of the American Declaration the same issues and arguments that were repeatedly considered and dispositively rejected by the U.S. Judicial system over the course of many years under the analogous provisions of the constitutions of the State of Utah and the United States.

51. The United States noted that Mr. Andrews' conviction and sentence were appealed to and affirmed by the Utah Supreme Court in 1977, and certiorari was denied by the United States Supreme Court in 1978. His first petition for post-conviction relief was rejected that same year and affirmed by the Utah Supreme Court in 1980; the U.S. Supreme Court again denied certiorari. Additional habeas corpus and other collateral proceedings brought by Mr. Andrews in state and federal courts resulted in dispositive rulings which the U.S. Supreme Court declined to review in 1988 and 1989. Including last minute efforts to obtain a stay of execution, Mr. Andrew's case was before the U.S. Supreme Court some ten times, and in each instance the Court declined to overturn the rulings of the courts. Copies of the most informative state and federal court decisions in this long history of judicial review have been enclosed for the benefit of the Commission.

52. The United States stated that in view of this history, the United States respectfully requests the Commission to determine this petition inadmissible under Article 38(1) of its Regulations on the ground that the petition was lodged more than six months after Mr. Andrews was notified of the final ruling in respect of his claims as presented in this petition. By any reasonable interpretation of the Regulations, Mr. Andrews and his representatives had obtained a final ruling on the issues of racially discriminatory treatment at his trial many years prior to the filing of this petition. Similarly, his efforts to obtain post-conviction relief, including on the basis of the "cruel and unusual punishment" argument, resulted in final decisions many years ago.

53. The United States stated that whether one considers the rejection of these claims by the U.S. Supreme Court to have been a conclusive determination sufficient to constitute exhaustion of domestic remedies, which is the position of the United States, or evidence that Mr. Andrews was effectively unable to have those claims heard (thus rendering pursuit of domestic remedies futile), which appears to be petitioner's view, it is undeniable that this petition was filed many years after Mr. Andrews could properly have presented his claims to this Commission under Article 37 of the Regulations. Under either interpretation, therefore, this petition is manifestly untimely.

54. The United States stated that the following information is provided to assist the Commission in considering the question of whether the petition is time-barred. The United States respectfully reserves the right to submit additional information and views on the merits of the petition, in the event there is a need to do so, to substantiate its view that in any event the petition fails to state facts constituting a violation of the principles enshrined in the American Declaration. In particular, the United States notes that it takes issue with many of the "facts" and the factual characterizations put forward by the petitioner.

55. The United States stated that Mr. Andrews and Mr. Pierre (co-defendant) were each convicted of three counts of first degree murder and two counts of aggravated robbery, and sentenced to death on November 27, 1974. Andrews and Pierre appealed their convictions and sentences to the Utah Supreme Court, inter alia, alleging various denials of due process and the violation of their right to a fair trial, and challenging the constitutionality of the Utah death penalty statutes as well as its application to them in the specific circumstances. Upon careful review, the Court affirmed their convictions. *State v. Pierre*, 572 P.2d 1338 (Utah 1977), reh'g denied, 576 P.2d 857 *Andrews*, 574 P.2d 709 (Utah 1977) reh'g denied, 576, P.2d 857 (Utah 1978). The United States Supreme Court denied certiorari in both cases in 1978. *Pierre v. Utah and Andrews v. Utah*, 439 U.S. 882 (1978).

56. The United States stated that the trial court's denials of their subsequent petitions for post-conviction relief were affirmed by the Utah Supreme Court. *Pierre v. Morris*, 607 P.2d 812 (Utah 1980), *Andrews v. Morris*, 607 P.2d 816 (Utah 1980). Again, the United States Supreme Court denied certiorari. *Andrews v. Utah*, 449 U.S. 891 (1980). Andrews' third effort to overturn his death sentence was rejected by the Utah Supreme Court in 1983, *Andrews v. Morris* 677 P.ed 81 (Utah 1983). Andrews then sought relief in federal district court, but his petition for a writ of habeas corpus was denied, *Andrews v. Shulsen*, 600 F.Supp. 40, 8 (D.Utah 1984) see also *Selby v. Shulsen*, 600 F.Supp. 432 (D.Utah 1984).

57. The United States stated that these decisions were upheld upon appeal, *Andrews v. Shulsen*, 802 F.2d 1256 and *Pierre v. Shulsen*, 802 F.2d 1282 (10th Cir. 1986). The U.S. Supreme Court denied certiorari in Selby's case in 1987, *Pierre v. Shulsen*, 481 U.S. 1033 (1987), and he was executed on August 28, 1987. Andrews' petition for certiorari was denied by the Court in February 1988, *Andrews v. Shulsen*, 485 U.S. 919 (1988), reh'g denied, 485 U.S. 1015 (1988). Andrews continued to challenge his conviction and sentence without success both in State Court (see *Andrews v. Shulsen*, Utah 1989), cert. denied 493 U.S. 945 (1989)) and in Federal Court (see *Andrews v. Barnes*, 1990 U.S. Dist. Lexis 19073 sub. nom. *Andrews v.*

Deland, 943 F.Supp 1496 (D.Utah 1990), aff'd cert. denied, --- U.S. ---, 117 L.E.2d 451, 112 S.Ct. 1213 (1992), reh'g denied, --- U.S. ---, 118 L.E.2d 221, 112 S.Ct. 1580 (1992)).

58. The United States stated that Mr. Andrews' final challenges and attempts to obtain a stay of sentence were likewise unsuccessful. See *State of Utah v. Andrews*, 843 P.2d 1027 (Utah 1992); *Andrews v. Utah Board of Pardons*, 836 P.2d 790 (Utah 1992); supplemental op., reh'g granted, *Andrews v. Utah Board of pardons*, 192 Utah adv. Rep. 10 (Utah 1992); stay denied, habeas corpus dismissed, *Andrews v. Carver*, 798 F.Supp. 659 (d. Utah 1992), cert. denied. --- U.S. ---, 113 S.Ct. 2, 3, 61 USLW 3082 (1992). Mr. Andrews was executed by lethal injection on July 30, 1992. This petition was filed with the Commission two days earlier, on July 28, 1992. Throughout these lengthy proceedings, Mr. Andrews and his legal representatives endeavored to convince the State and Federal courts of the merits of the very same "tainted procedure" and "cruel, infamous and unusual punishment" arguments that the petitioners have now put before this Commission. It is noteworthy that his conviction and sentence were upheld as valid and lawful by every court that considered them under constitutional standards equal to if not more rigorous than those contained in the American Declaration.

59. The United States argued that as it is not party to the American Convention on Human Rights, the Commission must look to the American Declaration of the Rights and Duties of Man for the relevant standards, pursuant to Article 20(a) of its Statute.[FN21] In this connection, the United States categorically rejects the petitioners' contention (pet. at 5) that the American Declaration and the Statute and Regulations of the Commission has acquired legally binding force for all OAS member countries. As the United States has previously noted, the Declaration is not a treaty and has not acquired binding legal force. This remains the view of the United States notwithstanding the Commission's decision in Case No. 2141 (United States), Res. 23/81, OEA/Ser. L/V/II.52, Doc. 48, Mar. 6, 1981, its decision in Case No. 9647 (United States), Res. 3/87, OEA/Ser. L/V/II.71, Doc. 9, rev. 1, Mar. 27, 1987, and the Advisory Opinion of the Inter-American Court of Human Rights OC-10/98 (Colombia) of July 14, 1989.

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[FN21] The reference to various CSCE documents (pet. at 7, 13-14) is doubly misplaced: the U.S. is not a "signatory" to them (nor are they legally binding), and whether a participating State is living up to its CSCE commitments is a matter for the CSCE.

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60. The United States argued that under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, inter alia by responding to petitions presented against it on the basis of the Charter and the Declaration. But as the United States stated for the record in the OAS General Assembly following issuance of the Court's Advisory Opinion:

The United States accepts and promotes the importance of the American Declaration. It is a solemn moral and political statement of the OAS member states, against which each member state's respect for human rights is to be evaluated and monitored, including the policies and

practices of the United States . . . The United States does not believe, however, that the American Declaration has binding force as would an international treaty.

Statement of Deputy Legal Adviser Alan J. Kreczko before the First Committee of the 29th OAS General Assembly, Washington, D.C., on November 14, 1989, at p. 3 (copy enclosed). See also the U.S. submission to the Court concerning the request for an Advisory Opinion (copy enclosed).

61. The United States argued that it considered that the binding constitutional and statutory standards in the U.S. law upon which Mr. Andrews rested his many efforts to invalidate his trial and evade his sentence are fully consonant with the principles set forth in the American Declaration. Because the courts carefully considered and consistently rejected those efforts, the United States denies that Mr. Andrews was deprived of the right to life, equality before the law, and/or an impartial hearing as set forth in Articles I, II and XXVI of the American Declaration.

62. Moreover, the United States argued that it rejected the petitioner's effort to shift the burden of proof by claiming a presumptive violation of human rights. S/he contends that because the United States has a duty under the Charter and the Declaration to secure rights without discrimination based on race, the United States accordingly has an affirmative duty to demonstrate that it did not violate that duty to Mr. Andrews. Pet. at 14. Not only is this argument legally unavailing, it is unsupported by any factual basis. The petition alleges "overwhelming evidence of governmental complicity" but provides no evidence of such "complicity" whatsoever, apart from the fact that the State of Utah successfully prosecuted Mr. Andrews for his role in an especially gruesome crime. The burden remains upon the petitioner to demonstrate the violations s/he alleges; that effort proves no more successful in this petition than it was for over a decade in the U.S. Court System.

63. The United States argued that the first and arguably most compelling element of petitioner's claim that Mr. Andrews' trial, sentencing and execution were fatally tainted by racially-motivated discrimination turns on the discovery by a juror of a note bearing a racist slur (an apparent copy of which is appended to the petition). According to the judicial record, the juror found the note while on a lunch break in a restaurant when s/he overturned the napkin on the back of which the note had been sketched. Although the jury had been sequestered during the break, there was no indication that the note had been written by a juror or circulated or discussed among members of the jury. Moreover, the note was promptly disclosed to the bailiff, who in turn brought it to the attention of the trial judge.

64. The United States argued that immediately thereafter, the Court held a hearing at which the bailiff was sworn and testified as to the circumstances of the discovery; defendants and counsel were present. Upon conclusion of the hearing, the Court denied defendants' motion to sequester the jury completely and thereafter admonished the jury to ignore such communications. Contrary to the implications of the petition, the trial judge did not fail to respond to the "napkin incident;" in point of fact, the court investigated the incident promptly and determined that it had not resulted in any prejudice to the defendants. Mr. Andrews' attorneys made their objections at the time; they were fully considered by the trial judge and were overruled.

65. The United States argued that more relevant to the current petition is the fact that the defendant's challenges to the court's handling of this incident, including its decision not to voir dire the jury or to declare a mistrial, were subsequently reviewed and resolved with finality many years ago. The petition simply misleads in suggesting that Mr. Andrews was denied an opportunity to have his objections heard. The truth is that they were heard and resolved on the merits. The Utah Supreme Court specifically concluded that the matter had been appropriately handled by the District Judge and concluded that "no actual prejudice was demonstrated showing that the jury was influenced adversely . . . ." State v. Andrews,[FN22] As indicated the United States Supreme Court declined to review the case in 1978. Andrews v. Utah.[FN23] The Federal courts subsequently reviewed the issue and came to the same conclusion, which the Supreme Court declined to overturn in 1988. Andrews v. Shulsen[FN24] Andrews v. Deland[FN25]

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[FN22] Id.

[FN23] Id.

[FN24] Id.

[FN25] Id.  
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66. Generalized Racism - The United States argued that the petition alleged that Mr. Andrews was deprived of his right to a fair and impartial jury free from outside influence because the State of Utah was at the time (and remains) overwhelmingly Mormon and white, the jurors were all white, some or all of them "unquestionably" were Mormons, and they were "compelled" by the Mormon Church's "racist doctrine" to sentence him to death. Petitioner adduces no evidence whatsoever for these conclusory allegations. While s/he argues that Mr. Andrews was denied an impartial hearing on the issue of racial discrimination at his trial (pet. at 17), s/he admits that "the obvious effect of the Church doctrine on [Mr. Andrews'] sentence to death" was present to the Utah and federal courts, "many times unsuccessfully, all to no avail."

67. The United States argued that the petitioners were entirely correct on this last point. It is clear that Mr. Andrews raised the issue of outside influence with the courts on numerous occasions, and that the courts repeatedly examined the claim and determined that his constitutional right to a fair and impartial jury had not been transgressed.[FN26] The fact is that Mr. Andrews failed to convince any court that his assertions concerning the lack of a fair trial had any merit.

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[FN26] Here the United States Government's response referred to and recited the names of cases and prior proceedings previously cited in relation to Mr. William Andrews and his co-defendant Pierre. (These citations have been omitted.)  
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68. As to the racial composition of the jury, the United States bears noting that Andrews and his co-defendants themselves objected to the only African-American who was a member of the jury panel; perhaps because that panel member was a law enforcement officer and knew several members of the Ogden Police Department, the attorneys for Andrews and Pierre both objected to

him and the State stipulated to his removal for cause. In any event, this claim too was considered by the courts and rejected on the merits. Cf. *Andrews v. Deland*[FN27] Moreover, the third defendant, Keith Roberts, was also an African-American and the only defendant represented by and African-American attorney at trial; surely, if racist doctrine had prevented the jury from reaching an impartial decision or had "compelled" its members to impose capital punishment, he would also have received the death penalty.[FN28]

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[FN27] *Id.* at 1176-80.

[FN28] See *Andrews v. Shulsen*, at 1274.

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69. Disparity in the Application of the death penalty - The United States argued that the Petitioners' final assertion in support of the discrimination allegation concerns alleged racism and racial disparities in the application of the death penalty in Utah. Andrews' argument that Utah's death penalty was applied arbitrarily and in a racially discriminatory manner, and that its sentencing scheme imposed the death penalty disproportionately on black defendants, was energetically presented to both the Utah and Federal courts and rejected on the merits.[FN29] It was specifically dealt with in *Andrews v. Shulsen* where the court held that absent a careful analysis of sentencing patterns in Utah, there was "no basis to conclude that anyone on death row is there because of systemic racial discrimination;" to the contrary, the court specifically found "ample indication that the jury sentenced Andrews to death for reasons other than his race or the race of the victims." [FN30]

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[FN29] Here reference was made to all previously cited cases and proceedings concerning William Andrews and his co-defendant Pierre.

[FN30] *Id.* at 1265-70.

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70. The United States argued that the petition refers briefly to several instances allegedly demonstrating disparity in the application of the death penalty. The description of these instances, however, contains errors and misleading implications.[FN31] In any event, it is clear that, even if they could be accepted without careful factual demonstration, these few examples in no way demonstrate that "separate systems of justice" exist for blacks and whites in Utah (pet. at 18). U.S. law requires that the death penalty be applied fairly, reasonably and without discrimination, and the Supreme Court has articulated specific constitutionally-based criteria to which state capital punishment schemes must adhere. See, for example, *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976). The United States notes that the Supreme Court has had occasion to review precisely the same type of objections to the death penalty as those raised here by petitioner, under constitutional principles very similar' to those of the American Declaration.

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[FN31] It is the understanding of the United States, for example, that while Lance Wood, a Caucasian, did not receive a death sentence, his partner in the murder, Michael Archuleta, a

Hispanic, was sentenced to death. The disparity was not race-related: Archuleta was older (26 compared to 20), had a more serious record, and was the instigator. Afterwards Archuleta made two damning statements that: Once he started beating their victim, a white homosexual, "the evil completely took over," and that the act of killing him was "the ultimate rush." Steven Deli, a Caucasian, did not receive a death sentence, but his partner in the murder, Von Lester Taylor also white, did. Their victims were a Caucasian woman and her daughter.

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71. The United States argued that in *McCleskey v. Kemp*, 481 U.S. 279 (1987), for example, it was argued that a state capital punishment statute was administered in such a fashion that persons who murdered whites were more likely to be sentenced to death than persons who murdered blacks, and that black murderers were more likely to be sentenced to death than whites. This argument was supported by a complex statistical study. The Court held that by itself such a study was not sufficient to prove that the state system was arbitrary or capricious in violation of the Eight Amendment or a violation of the Equal Protection Clause of the Fourteenth Amendment, without proof specific to the defendant's own case supporting the inference that racial considerations played a part in his sentencing.

72. With regard to the Petitioner's Claim of "cruel, infamous or unusual punishment" the United States Government argued that the petitioner expressly concedes (pet. at fn. 35), there is nothing new in the claim that Mr. Andrews' lengthy confinement on death row while he awaited execution constituted "cruel, infamous or unusual punishment" in violation of Article XXVI of the American Declaration. The same argument was presented to the courts by Mr. Andrews many years ago in the context of the functionally identical Eight Amendment protection against "cruel and unusual punishment." It was considered and rejected for the obvious reason that the delay was brought on by Andrews' own repeated efforts to evade his sentence.[FN32]

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[FN32] Mr. Andrews also challenged the mode of execution then mandated by Utah law (shooting or hanging) as cruel or unusual; that claim, not made in the present petition, was also considered and rejected. See *Andrews v. Morris*, 607 P.2d 816, 824 (Utah 1980).

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73. The United States argued that as the Federal District of Utah stated when this issue was raised in the first federal habeas corpus petition in 1984:

The court also rejected petitioner's claim concerning the repeated setting and staying of execution dates in its prior order. No developments since that time suggest a different conclusion. The process by which petitioner complains serves the important state interest of keeping the post conviction process moving forward at the same time it preserves petitioner's due process rights. The extensive and repeated review of petitioner's death sentence was sought by petitioner and is afforded by the Eight and Fourteenth Amendments and by federal law. To accept petitioner's argument would create an irreconcilable conflict between constitutional guarantees and would be a mockery of justice.[FN33]

See also *Andrews v. Carver*,<sup>[FN34]</sup> ("The delay has been attributable for the most part to aggressive attempts to avoid the death penalty. The delay is of Andrews' own making. Further, the circumstances are not so unusual or cruel as to violate the Eight Amendment.")<sup>[FN35]</sup>

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[FN33] *Id.* *Andrews v. Shulsen*, at 431 (D.Utah, 1984); n.16 (10th Cir. 1986); at 919 and 1015 (1988).

[FN34] 798 F.Supp. 659 (D.Utah 1992) at 664.

[FN35] *Cf. State v. Andrews* 843 P.2d 1027, 1029-30 and 1040 (Utah 1992).

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74. The United States argued that, as the Commission is aware, its law accords strict procedural safeguards in the application of capital punishment, safeguards designed to ensure that a condemned prisoner's rights are not violated. Mr. Andrews repeatedly invoked those safeguards in his efforts to evade his sentence. The petition misleads in suggesting that he was not responsible for the postponements and stays granted by the courts. In this respect, the petition essentially complains that Mr. Andrews received too much due process. Because the U.S. legal system permitted him so many opportunities to have his allegations reviewed by the courts, the argument goes, it should be held to have deprived itself of the very criminal sanction it imposed upon Mr. Andrews for a particularly brutish crime. This, of course is non-sensical.

75. The United States argued that underlying this argument is the proposition that repeated stays of execution (even when caused by the condemned individual's efforts to evade punishment) are themselves punishment. Thus, the petition asserts that "the anticipation of punishment can have "adverse psychological effects." (pet. at 22) and [t]he imminence of execution itself constitutes cruel, infamous or unusual punishment" (pet. at 22). The fallacy of this proposition is obvious, because if true it would require one of several unacceptable results: (a) the condemned would have to be executed immediately upon conviction and sentencing, as is in fact done in some countries, in order to spare the condemned any burden of "anticipation;" (b) a sharp limitation would need to be imposed on the rights of the condemned to seek judicial review and to contest the legality of the trial, conviction and sentence; or (c) it would have to be determined that the death penalty itself violates the principles of the American Declaration.

76. The United States argued that it is clear that what petitioner in fact seeks from the Commission is an advisory opinion to the effect that capital punishment per se violates the American Declaration and customary international law, in order to comport with what is described as the "general objective of world governments to abolish the death penalty" (pet. at n. 26). There is, however, no factual basis for such a statement, since a majority of countries retain the death penalty in one form or another. Nor is there a textual basis for the Commission to render such an opinion. The Declaration is intentionally silent on the question of the death penalty (a reference prohibiting capital punishment except in exceptional circumstances was deliberately deleted during the drafting process).

77. The United States argued that the Petitioner's reference to the European Court of Human Rights decision in the *Soering* case,<sup>[FN36]</sup> is an effort to overcome this obstacle. *Soering*, however, is clearly inapposite. The decision arose in an entirely different context (whether a

West German student could be extradited from the United Kingdom to stand trial for capital murder in Virginia in the face of a competing extradition request from West Germany), concerned a perceived conflict in treaty obligations, rested on the specific circumstances of the case (including in particular the accused's age and mental health), and specifically did not conclude that the death penalty violated either the European Convention on Human Rights or customary international law. More importantly, the Court's decision turned on the particular language in the European Convention ("degrading treatment") which has no counterpart in the American Declaration. In this respect, the Commission has no authority to rewrite the American Declaration, which is what the petition has invited it to do.[FN37]

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[FN36] 161 Eur. Ct. Hum. Rts., Ser. A (1989), 11 Eur. Hum. Rts Rep. 439 (1989), reprinted at 28 I.L.M. 1063.

[FN37] It has been established that the Commission has no authority to impose upon a State, by means of "interpretation," an international obligation based upon a treaty that such State has not duly accepted or ratified. See *Baby Boy*, Case No. 2141 (United States), Res. 23/81, OEA/Ser. L/V/II.54, Doc. 9, rev. 1, Oct. 16, 1981. The same reasoning applies to the Declaration.

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78. Conclusion - The United States argued that Mr. Andrews' case was one of considerable notoriety, not least because it involved an especially brutal crime and because it was the first case tried under Utah's revised death penalty statute adopted in the wake of the U.S. Supreme Court's holding in *Furman v. Georgia*.<sup>[FN38]</sup> Mr. Andrews' own efforts to evade his sentence by posing many challenges to his conviction and sentencing resulted in repeated judicial reviews and opinions, all of which concluded that his arguments--the same arguments posed in the present petition--lacked merit. The present petition suggests that throughout his multiple appeals, Mr. Andrews was denied his fundamental rights of due process to have his contentions heard and decided. As the foregoing demonstrates, that was simply not the case. What is the case, however, is that the courts determined--repeatedly-- that he had no valid claim to an evidentiary hearing or to a mistrial in connection with his assertions regarding racism in the jury. That was the decision of the trial judge, and it was specifically upheld upon review in both state and federal court. It would be entirely inappropriate for this Commission to replace the trial court's decision with its own on the basis of a scant and cold record.

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[FN38] 408 U.S. 238 (1972).

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79. The United States argued that Mr. Andrews' claims of outside influence on his trial, and of racial discrimination and disparity in his sentencing and punishment, were also thoroughly examined in the lengthy process of judicial review and found to be unsupported. There is no basis before this Commission for a contrary decision, or for a finding that the circumstances of Mr. Andrews' incarceration and/or execution constituted "cruel, infamous or unusual punishment" in violation of the American Declaration. For all of the above reasons the United States respectfully submits that the petitioner's claim is time-barred, is without merit on every ground it raises, and should be dismissed under Article 41 of its Regulations.

D. Petitioners' Rebuttal to the United States Government's Response to Petition

80. The petitioners argued that the United States Government failed to respond to the original and amended petitions, and that Mr. Andrews was never given a hearing on the issue of racial discrimination in his trial for capital murder, which culminated in the execution. They rejected the Government's argument that the petition was inadmissible under Article 38(1) of the Commission's Regulations because "the petition was lodged more than six months after Mr. Andrews was notified of the final ruling in respect of his claims as presented in this petition." The petitioners stated that the United States argued that a final ruling came years earlier, but it did not indicate which of the many decisions by domestic courts made the decision "final" for the purposes of the Regulations. The petitioner argued that commonly understood concepts of exhaustion of remedies compel the conclusion that his decision to delay filing with this Commission until the eve of his execution was extremely deferential to domestic courts and to the resources of this body, and thus in full keeping with the principles which underlie the doctrine of exhaustion.

81. The petitioners argued that under any reasonable interpretation of the law of exhaustion of remedies, the United States was wrong in asserting that "Mr. Andrews and his representatives had obtained a final ruling on the issues at his trial many years prior to the filing of this petition." No understanding of the law of exhaustion has ever suggested that the party seeking international relief must pursue a claim immediately following trial. The doctrine of exhaustion clearly contemplates a right to appeal; the question is when may the party, or must the party seek relief following a definitive appellate decision. The term "final ruling," as used in Article 38(1), is not defined, and no prior ruling of the Commission provides a definitive interpretation of the term. When such is the case, the purposes of the rule help clarify how it should be applied. The purposes of the "final ruling" requirement include the prevention of simultaneous adjudication of cases in domestic and international courts, strong deference by international bodies to domestic resolution of legal problems, and the need to preserve the resources of the international body to which recourse may be prematurely sought.

82. The petitioners argued that the "final ruling" provision should be read consistently with these purposes. It should be subject to a test of reasonableness. Clearly, the final ruling in Mr. Andrews' case did not come at his trial. Mr. Andrews' pursued all of the strategically viable routes of appeal in the domestic courts of the United States. No domestic court ever found that he had frivolously pursued a remedy, nor did any court find that venue was inappropriate or that review was being sought for deleterious purposes. After repeatedly being denied the right to a hearing to address the issue of racial discrimination in any domestic U.S. court, and when his execution date was imminent, Mr. Andrews filed a petition with this Commission.

83. The petitioners argued that in Mr. Andrews' case the ruling from which he made a determination to pursue international relief was rendered in July of 1992.[FN39] Mr. Andrews filed a preliminary complaint with this Commission on July 28, 1992. Therefore, Mr. Andrews lodged his petition well within the six month period required by the Commission. This is not to say that Mr. Andrews could not have filed a petition at some earlier date. His right to pursue an international remedy may well have been ripe at the point at which his first round of appeals had

been completed, but ripeness and exhaustion should not be confused. Given the purposes behind the exhaustion rules, Mr. Andrews pursued his international complaint at the appropriate time and in the appropriate manner. Therefore, the petition is admissible under Article 38(1) of the Regulations.

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[FN39] Andrews v. Utah Board of Pardons, 836 P.2d 790 (Utah 1992).

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84. The petitioners argued that the Government bears a duty to take positive actions in the sphere of racial discrimination, improperly seeks to shift the burden to the petitioner, and has failed to carry its burden of proof with regard to the specific claim of discrimination based on race raised on the facts of this case.[FN40] The U.S. Government's rejection of the legally binding force of the American Declaration and the OAS Charter, as well as its virtually exclusive reliance on decisions by domestic courts, is tantamount to a renunciation of the authority of the Commission and United States' obligations to honor international human rights law. Such a forthright renunciation of well established international law deserves severe condemnation by the Commission.

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[FN40] Full argument omitted, and will be referred to in the decision on the merits of the petition.

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85. The petitioners argued that the United States begins by rejecting the binding force of the OAS Charter, as well as the American Declaration and Statute and Regulations of the Commission. As noted in the original petition, it is well established that both of these instruments have acquired binding force for OAS members.[FN41] Delay in the execution of William Andrews for over eighteen years is solely the responsibility of the Government, and that delay, whatever its cause, constituted cruel, infamous, or unusual punishment in violation of Article XXVI of the American Declaration of the rights and duties of man. Mr. Andrews' confinement to death row for more than eighteen years clearly constitutes cruel, infamous or unusual punishment.[FN42]

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[FN41] Full argument will be referred to in the decision on the merits of the petition.

[FN42] Full argument will be referred to in the decision on the merits of the petition.

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E. The United States Government's Reply to the Petitioners' Rebuttal of its Response to the Petition

86. The United States Government stated that it has continuously asserted that the petition filed variously "by Mr. William Andrews" and on behalf of Mr. Williams Andrews[FN43] was inadmissible under Articles 37 and 41 of the Commission's Regulations. The petition was not filed in a timely manner, and fails to establish any violation of the American Declaration or the

OAS Charter. The U.S. Government remains of that view and respectfully requests the Commission to decide whether the petition concerning Mr. Andrews is admissible as a preliminary matter. It believes that this issue is dispositive and ripe for the Commission to decide. Notwithstanding any references to the substantive aspects of the petitioners' complaint that are mentioned in this communication, the United States reserves the right to address more fully the substance of the petition in the event that the Commission decides it is admissible.

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[FN43] The petition was filed by the students and professors at the International Human Rights Law Clinic at American University's Washington College of Law.

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87. The United States Government argued that the criterion for admissibility was clear: Article 38(1) provides that the Commission "shall refrain from taking up those petitions that are lodged after the six-month period following the date on which domestic remedies have been exhausted." The trigger date is not the date of execution, as the students' professor maintains in a recent article.[FN44] The latest rebuttal also implies that the United States incorrectly points to *Andrews v. Utah Board of Pardons*, 836 P.2d 790 (Utah 1992), as representing the final decision on the issues petitioner now seek to present to the Commission. The rebuttal now asserts that there are two other decisions that could represent a final ruling within six months of the date the petition was filed. The Commission should be aware, however, that the petitioners chose *Andrews v. Utah Board of Pardons* as representing the exhaustion of Mr. Andrews' remedies in their first rebuttal. The petitioners claim that it mentioned the two other decisions they now cite during their hearing before the Commission. They apparently now seek to rely solely on them.

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[FN44] Professor Wilson writes that "[w]ithin six months after the execution, a petition was sent to the Commission alleging that the execution violated Mr. Andrews' rights . . ." R. Wilson, "Action on U.S. Death Penalty Litigation in the Inter-American Commission on Human Rights," 11 *Amnesty-International-USA Legal Support Network Newsletter* 18, 20 (Spring 1994) (discussing his students' death penalty cases before the Commission) (attached).

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88. The United States Government argued that it questioned whether the petitioner's rebuttal was filed in a timely manner. The U.S.'s response was filed on September 3, 1993. Under Article 34(7) of the Commission's Regulations, a petitioner is asked to "submit his observations and any available evidence to the contrary within 30 days." Petitioner's rebuttal was filed nearly three months later, in January of 1994. Accordingly, the U.S. Government asks whether it should be declared inadmissible in accordance with Article 34(7) of the Commission's Regulations.

89. Article 26 provides that "any person or group of persons . . . may submit petitions to the Commission, in accordance with these Regulations, on one's own behalf or on behalf of third persons . . ." Article 27(2) provides that "the petitioner may appoint, in the petition itself, or in another written petition, an attorney or other person to represent him before the Commission." In the instant case, the petitioner is said to be William Andrews. Mr. Andrews, however, died on July 30, 1992, many months before the petition was filed. Thus, the only possibility is that, prior

to his death, Mr. Andrews authorized an attorney or other person to represent him before the Commission. If he appointed someone to represent him, then that appointment must be reflected in the petition or in another written petition. Clearly, the petition sent to the U.S. Government on April 2, 1993 contains no such authorization, and no other has been provided to the U.S. Government.

90. Accordingly, the United States Government argued that, it appears that the group of persons who purport to represent Mr. Andrews, consisting primarily of students at a local law school, have no authority to represent him before the Commission. As a result, the petition should be dismissed for failure to meet the requirements of Articles 26 and 27. Otherwise, to allow such a petition to proceed would constitute a violation of the Commission's Regulations and would invite unauthorized persons to file improper petitions in other cases.

91. Finally, the United States Government argued that it wished to note "that careful review of the petition makes it difficult to understand why the Commission granted the petitioner a hearing on February 10, 1994. It is the view of the United States that a petitioner should have to meet a certain threshold before being granted a hearing, such as establishing a prima facie case of an alleged violation of the American Declaration. This is essential if the Commission is to use its limited resources efficiently and remain a viable forum in which to raise serious human rights concerns. A hearing should not be an opportunity for law students, who purport to represent a petitioner, to practice their advocacy skills (which is indeed what happened at the hearing in this case). Rather, as stated in Article 43, it should serve as an opportunity to present testimony or other evidence that cannot be provided in a written format, if the Commission believes that could be helpful. Indeed, at the hearing in this case on February 10, 1994, the students purporting to represent the petitioner simply reiterated points already clearly made in the written submission." [FN45]

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[FN45] Other arguments addressing the merits of the petition will be referred to in the decision on the merits.  
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F. Petitioners' Final Submission and Reply to the United States Government's Responses to Petition

The petitioners reiterated their argument that the American Declaration was legally binding on the United States. [FN46] A summary of their other arguments follows:

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[FN46] Other arguments in this submission will be referred to in the decision on the merits of the petition.  
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92. The petitioners argued that though the original petition and all subsequent submissions would more properly have been filed under Article 26.1 of the Commission's Regulations rather than Article 27.2, the petition should be admissible because of the broad standing provisions

under the American Convention and the Regulations of the Commission. The pleadings in this case all indicated on title page that the petition was "submitted by the International Human Rights Clinic (IHRLC), with other nongovernmental entities", "on behalf of" William Andrews. The reference to Andrews as the petitioner in the body of the pleadings created an ambiguity.

93. The petitioners argued that under the standing provisions of the American Convention and the Commission's Regulations, the IHRLC is properly the petitioner on behalf of Mr. William Andrews. This misunderstanding, however, is not a reason to dismiss the petition, as the United States claims. The Commission's Regulations as to who may bring a complaint are broad and inclusive. They represent the most liberal procedures of all international bodies. In fact this flexibility, praised by scholars in the field, is one of the principal distinctions between the Inter-American Commission and the European system. "The provisions governing private access to the Inter-American system afford great flexibility in implementing its procedures." Therefore, this misnomer is a mere technicality which is not a basis to dismiss this petition.

94. The petitioners argued that the United States claimed that the Clinic lacks standing to file a petition before the Commission. The Government's response argues that, "persons who bear no special relationship to the alleged victim, or who have no compelling justification for representing such a person, such as a direct and immediate interest in the alleged incident, do not satisfy this important procedural prerequisite to proceeding before the Commission". The claim is flatly incorrect. It contravenes the plain language of the American Convention, the Commission's Statute and Regulations, as well as all scholarly writings on standing in the inter-American system. Regulation 26.1 of the Commission's Regulations contains language similar to that of the Convention, as does article 19(a) of the Commission's Statute. The Regulation clearly indicates that any "nongovernmental entity" or "group of persons" may file a petition on behalf of the alleged victim. Indeed, the language of the Regulation provides the broadest possible standing before the Commission by allowing "any person" to file. Numerous scholars on the Commission have spoken to the liberal procedures of the Commission.

95. The petitioners argued that "in the Inter-American system, all persons, not just victims, may present petitions alleging violation of rights recognized in the American Declaration or the American Convention. That non-victims may introduce petitions is extremely important because the actual victims sometimes are prevented from presenting a petition or are ignorant of the international protection mechanisms".[FN47] The American Convention, in Article 44, contains the operative language regarding standing to appear before the Commission. Article 44 states: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Thus, any change in the interpretation of this rule would require an amendment of the treaty itself, not merely the Commission's operating rules.

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[FN47] See Claudio Grossman, Proposals to Strengthen the Inter-American System of Protection of Human Rights, 32 German Yearbook of INT'L.L. 264, 271 (1990); See also Robert E. Norris, Bringing Human Rights petitions Before the Inter-American Commission, 20 SANTA CLARA L. Rev. 733, 738 (1980) ("Any person or group of persons may bring a complaint before the

Commission . . . The person filing the complaint need not be the person whose rights have been violated. He may be a spouse, relative, friend, or even a person unknown to the aggrieved party)."-----

96. The petitioners argued that the United States itself has supported liberal filing procedures at the Commission. In the U.S. Delegation Report on the 1969 Inter-American Human Rights Conference, the United States proposed the following language for Article 44 of the Convention: "Petitions under Article 44 may be submitted to the Commission either by the party alleging violation of his rights or by another person, group of persons, or entity on behalf of that party." The IHRLC falls under either the "nongovernmental entity" or the "group of persons" designation. Therefore, this petition should be deemed admissible under Article 26.1 of the Commission's Regulations. The original petition was filed within six months of the final ruling. The United States cannot escape scrutiny in Mr. Andrews' case by claiming that the petition is time barred. Indeed, the U.S. response itself recognizes a possible final ruling which would have fallen within six months before the original petition was filed. First, the government cites *Andrews v. Utah Board of Pardons*, 836 P.2d 790 (Utah 1992), as the decision the petitioner alleges as the final ruling. At the hearing before the Commission on February 10, 1994, petitioner put forth two possible decisions, either of which could be deemed a final ruling: *State of Utah v. Andrews*, 843 P.2d 1027 (Utah July 21, 1992), and the unpublished decision of Judge Hyde from the Second District of Utah, Weber County, June 2, 1992.

97. The petitioners argued that even if the United States were to challenge these two cases as representing a final ruling, the Government itself proposes a final ruling which falls well within the six-month time period. "Indeed, the petitioner raised the 'Napkin incident' again in a second habeas petition, which the U.S. Court of Appeals for the Tenth Circuit held was successive and dismissed on that basis." This could have redressed the issues pending before this Commission. Therefore, the original petition was submitted well within the six-months of final ruling, whichever final ruling the Commission deems to be operative.

#### G. Issues on admissibility

98. At its 88th period of Sessions the Commission considered and decided on the following issues of the admissibility of the petition:

- a. Is this petition pending settlement in another procedure under an international governmental organization of which the State concerned is a member?
- b. Do the petitioners have standing to file this petition?
- c. Was this petition timely filed?
- d. Should the Commission dismiss this petition because of the petitioner's delay in submitting a rebuttal to the United States Government's Response to the Petition?
- e. Have domestic remedies been invoked and exhausted?
- f. Do the allegations referred to in the petition constitute a violation of rights referred to in the American Declaration of the Rights and Duties of Man?

#### H. The Commission's Decision on Admissibility

a. Is This Petition Pending Settlement In Other Procedure?

99. This Commission has reviewed, studied, and considered all documentation, arguments, and exhibits submitted by the parties in this case, and determines that "this petition is not pending settlement in another procedure under an international governmental organization of which the State concerned is a member." [FN48] The petition does not "essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization of which the state concerned is a member." [FN49]

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[FN48] Article 39(1) of the Regulations of the Commission.

[FN49] Article 39(1)(a) of the Commission's Regulations.

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b. Do The Petitioners Have Standing To File Petition?

100. The petition has been filed by non-governmental organizations on behalf of William Andrews. No argument has been raised that the petitioners are not non-governmental entities within the terms of Article 26(1) of the Regulations, and this Commission finds that the petitioners have satisfied the first requirement of Article 26 (1) of the Commission's Regulations.

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the Organization may submit petitions to the Commission, in accordance with these Regulations, on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man.

101. The second requirement of Article 26(1) is that the petition submitted by a nongovernmental organization on behalf of a third person must be "with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man." The petitioners have satisfied this requirement by submitting a petition with regard to alleged violations of a human right recognized in the American Declaration of the Rights and Duties of Man.

c. Was This Petition Timely Filed?

102. The Commission has reviewed all arguments by the parties concerning this issue. Article 38(1) of the Commission Regulations provide that:

The Commission shall refrain from taking up those petitions that are lodged after the six-month period following the date on which the party whose rights have allegedly been violated has been notified of the final ruling in cases where the remedies under domestic law have been exhausted.

103. The petitioners submitted the first communication to the Commission on July 27, 1992, and the petition (original petition) to the Commission on July 28, 1992. They requested

precautionary measures for a stay of execution pending a full inquiry of the allegations raised in the petition, and informed the Commission that Mr. Andrews' final appeal was rejected by the Courts on March 30, 1992. On July 27, 1992, this Commission transmitted a letter by fax and requested that the Governor of Utah, and the United States Government on July 28, 1992, stay the proceedings pending a full inquiry of the allegations of violations raised in the petition. On that day Mr. Andrews was still alive and was scheduled to be executed on July 30, 1992. On March 5, 1993, the petitioners submitted an amended petition.

104. The Commission, upon review of the various court decisions submitted by both parties in this case notes that Mr. Andrews pursued several domestic remedies in the courts of the United States, and the Board of Pardons in Utah, raising a variety of different arguments. These include the alleged violations raised in the petition before the Commission, several stays of execution, and habeas corpus applications. All of Mr. Andrews challenges were unsuccessful in pursuing domestic remedies in the United States.

105. The Commission finds that the following dates are the only dates which could be taken as the date of the "final ruling" as required by the provisions of Article 38(1) of its Regulations. The first is the decision in the case of Andrews v. Deland, 112 S.Ct. 1580 (1992) which was decided on March 30, 1992. The second is the decision in the case of Andrews v. Utah Board of Pardons 836 P.2d 790 (Utah 1992) which opinion was filed on July 28, 1992. The third is the case of State of Utah v. Andrews 843 P.2d 1027 (Utah 1992) which denied a rehearing on July 29, 1992, one day before Mr. Andrews' execution.

106. Therefore, the Commission concludes that the petition was timely filed, since it was filed within six months of all three decisions mentioned in paragraph 105 above.

d. Should The Petition be Dismissed because of Petitioners' Delay in Submitting Rebuttal?

107. The United States Government asks whether the petition should be dismissed because of the petitioners delay in submitting its rebuttal to the Government's response. Article 34 (7) of the Commission's Regulations state that:

The pertinent parts of the reply and the documents provided by the government shall be made known to the petitioner or to his representative, who shall be asked to submit his observations and any available evidence to the contrary within 30 days.

108. Neither the American Convention on Human Rights nor the Commission's Regulations renders a petition inadmissible for failure to comply with the provisions of Article 34(7) of the Regulations. Moreover, the Commission notes that the United States Government was given an opportunity to reply to the petitioners' rebuttal, did in fact reply, and was not prejudiced by the submission of the petitioner's reply outside the period set out in Article 34(7). The Commission finds this ground for dismissal of the petition raised by the United States Government, which was itself the beneficiary of several extensions beyond the time periods set out in Article 34 of the Regulations, to be unmeritorious.

e. Have Domestic Remedies been Invoked And Exhausted?

109. This issue is not contested by the parties. However, the Commission finds upon examination of the parties submissions that adequate and effective domestic remedies have been "invoked and exhausted" pursuant to Article 37 of the Commission's Regulations, by Mr. William Andrews, culminating in his execution on July 30, 1992.

f. Do the Allegations Raised in Petition Constitute a Violation of a Right Recognized in the American Declaration of the Rights and Duties of Man?

110. The Commission found that the alleged facts raised in the petition raised questions of a human right violation of those rights within the meaning of Article 41(b) of the Commission's Regulations.

The Commission concluded that:

- i. The petition was admissible.
- ii. The merits of this petition will be considered at its 89th period of Sessions.
- iii. The parties should submit arguments, if any, on the merits of this petition within 30 days.

I. Subsequent Submissions by the Parties on the Merits of the Case

a. Petitioners' Argument on the Merits

111. The Petitioners reiterated their arguments in support of the petition that Mr. Andrews' execution violated Articles I and II of the Declaration which guarantees the right to equality before the law. The petitioners argued that the U.S. Government's treatment of Mr. Andrews' claims of racial discrimination is an affront to the legally binding force of the American Declaration, the OAS Charter, and international human rights law. The United States Government's attempt to avoid its duty to protect Mr. Andrews from racial discrimination by seeking to shift the burden of proving racial discrimination to petitioner violates international human rights law and is morally repugnant.[FN50]

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[FN50] On May 23, 1995, the petitioners submitted a 15 page brief arguing the merits of their petition, only a summary is reproduced here.  
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112. The Petitioners reiterated their argument that the delay in the execution of William Andrews for over eighteen years constituted cruel, infamous, or unusual punishment in violation of Article XXVI of the American Declaration. The petitioner stated that the death row phenomenon has been criticized by international law jurists as being tortuous treatment and punishment on grounds that a condemned person suffers undue psychological torture awaiting the execution of a death sentence, and cited *Soering v. United Kingdom*;<sup>[FN51]</sup> *Vateeswaran v. State of Tamil Nadu*;<sup>[FN52]</sup> and *Catholic Comm'n for Justice & Peace In Zimbabwe v. Attorney General*.<sup>[FN53]</sup>

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[FN51] 1 EUR.HUM RTS. REP. 439 (1989) 161 Eur. Comm'n H.R. Dec. & Rep. at paras. 82, 122-23, January 19, 1989, reprinted in 161 Eur. Ct.Hr. (Ser. A) (1989) Annex, and in 28 I.L.M. 1063 (1989).

[FN52] 2 S.C.R. 348, 353.

[FN53] No. S.C. 73/93 (Zimb.June 24, 1993) (reported in 14 Hum.Rts L.J. 323(1993).)

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b. The United States Government's Argument on Merits

113. The Government of the United States submitted arguments on the merits and requested that the Commission reconsider the admissibility of the petition which was not timely filed. The Government argued that the American Convention, other Conventions, customary international law and Jus Cogens were beyond the Commission's competence vis a vis the United States. It argued that Articles 3(k) and 44 (a) of the OAS Charter were not violated. It argued that Article I of the American Declaration which states that: "Every human being has the right to life, liberty and the security of his person" was not violated because the Article does not preclude a government from restricting the liberty of one who is awaiting trial for committing a crime or who has been sentenced to confinement for committing a crime, nor does it preclude a government from executing a criminal convicted and sentenced to death where execution is a punishment proportionate to the offense.[FN54]

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[FN54] On December 21, 1995, the Government submitted a 35 page brief on the merits of the petition. However, only a summary is reproduced here.  
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114. The Government argued that Article II of the Declaration was not violated. The Article states 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." It argued that William Andrews was not prosecuted, convicted, or executed because of his race/ethnicity. He was prosecuted, convicted, and executed because, during the course of an armed robbery, he helped to torture and attempted to murder five innocent people--and killed three of them.

115. The Government argued that Article XXVI was not violated. The Article states that: "Every 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." The Government argued that William Andrews was given a choice of trial by jury or by judge. He chose to be tried by a jury of his peers, who were instructed that he was presumed innocent until proven guilty. Each juror swore or affirmed that he or she would be impartial and there is no evidence that they were not. Andrews was tried publicly by courts long-established in accordance with pre-existing law. He was fairly convicted and sentenced to death. Neither the death penalty nor the incarceration between his sentencing and execution constituted cruel, infamous or unusual punishment.

116. The Government also argued that Andrews acted inconsistently with Articles XXIX and XXXIII of the American Declaration. Article XXIX states that: "It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality." Article XXXIII provides that: "It is the duty of everya person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." The Government argued that individual states (and in some circumstances, the United States) have the sovereign right and responsibility to protect the weak from those who would victimize them, and that was the purpose of the criminal justice system.

117. The Government reiterated its argument that the American Declaration has no binding legal force, and argued that constitutional checks guaranteed the integrity of the criminal justice system and were to be found in the first eight amendments to the United States Constitution. It argued that the burden of proof always remains on the accuser who has the burden of proving that discrimination occurred. While the burden of producing evidence may shift to the accused government to prove lack of discriminatory animus, it does not shift until and unless a prima facie case is made that discrimination exists. It argued that the Commission understands this because in the Celestine case, the Commission held that the burden of production was on the petitioner to prove a prima facie case. Only then does the burden shift. In the Case of Willie L. Celestine supra, para. 45 at 72, the Commission said: "in its opinion, the petitioner has not provided sufficient evidence that the statistical studies presented make a prima facie case to prove the allegations of racial/ethnic discrimination and partiality in the imposition of the death penalty such as to shift the burden of proof (sic) to the United States Government."

118. The Government argued further that there was no credible evidence that any of the twelve jurors, let alone all of them were racist, or that any one connected to the case was racist. The sole African-American juror was peremptorily challenged by the State only after the defense challenged him for cause which was denied by the trial court judge. The prosecution obliged the defendants by peremptorily challenging him for them. The evidence reflected that the jury was impartial, and that the napkin incident did not reflect that the jury was racist. While the person who left the napkin was no doubt racist, there is no evidence that his or her racist appeal to the jury incited the juror who saw it to be racist, it was promptly handed over to the bailiff and the judge reflected awareness of the impropriety of the message. No one, including counsel for Andrews and counsel for the co-defendants asked the judge to voir dire the jury after the incident occurred, nor was it necessary after the napkin incident.

119. The Government stated that the admonition to the jury was appropriate. The judge told them: "Occasionally some foolish person will try to communicate with you. Please disregard the communications from foolish persons and ignore the same." See *Andrews v. Shulsen* 600 F.Supp. 408 (D. Utah 1984) (*Andrews IV*). It argued that treatment of the third co-defendant reflected that the jury was not racist. Keith Roberts, the third co-defendant, was also charged with murder. He was not convicted of murder, let alone sentenced to death. Yet he was African American, and his counsel was African American. The attorneys for the other two co-defendants were not African American. Had the jury truly been racist, it would have found Keith Roberts guilty of murder and sentenced him to death, regardless of his scope of involvement.

120. The Government argued further that there was substantial evidence of Andrews' guilt at trial. To find "racial" ethnic discrimination in this case, the Commission would have to find that there was no other possible basis for the jury's decision to convict Andrews. It stated that there was substantial and appropriate appellate review of Andrews' claims, and that the allegation of racism was being used as an indirect means to attempt to abolish the death penalty.

121. The Government stated that "death row syndrome" was being used as an indirect means to attempt to abolish the death penalty and to undermine the rights of criminal defendants. The delay of execution was caused by the convicted criminal not by the Government. Initial review of convictions and sentences was generally automatic in death penalty case, but no one was required to file appeals. Rather the criminal convicts generally filed direct and collateral appeals for the express purpose of delaying, if not avoiding, execution. It argued that delay of execution does not cause extreme suffering, and that Andrews did not suffer during the 18 year period he was on death row. These 18 years cannot be presumed to have been worse than immediate execution, and Andrews' 18 years on death row was not "cruel, infamous, or unusual." Delay of execution ensured that his convictions and sentences were compatible with constitutional protections. It argued that delay of execution allows for rehabilitation of the convicted criminal and the possibility of commutation of the sentence.

122. The Government concluded by stating that the Commission should find that neither the death penalty itself nor the delay between sentencing and execution violated the OAS Charter or the American Declaration, and that neither the criminal justice system nor the death penalty sentencing procedures served to discriminate against him on the basis of race/ethnicity in violation of the OAS Charter or of the American Declaration.

c. Petitioners' Response to Government's Argument on Merits

123. The petitioners reiterated most of their original arguments outlined above, that at the time of Mr. Andrews' trial, Mormon Church doctrine included the belief that African Americans were "dammed to death by God." That the trial was pervaded by racial controversy and fear. Public sentiment in the Weber County area was such that there were rumors of mob action, and jurors were afraid to serve, and the Prosecutor appealed to racial fears in his opening statement.[FN55]

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[FN55] On February 1, 1996, petitioners submitted a 25 page brief, only a summary is reproduced here.

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124. The petitioners argued that the Commission has competence to look to the American Convention and other treaties in interpreting the United States' obligations under the American Declaration. The Petitioners argued that it had established a prima facie case of racial discrimination in the application of the death penalty such that the burden shifted to the United States Government. That the United States' reliance on its domestic standard which required proof of intent to establish discrimination is inapposite; moreover even if the United States could rely on its standard it is still in violation of the American Declaration.

125. The Petitioners argued that the United States Government failed to provide Mr. Andrews the opportunity to establish racial discrimination due to the fact that the courts: 1) failed to investigate the authorship of the note and; 2) denied him his right to an evidentiary hearing. They argued that the United States referred to the Court's finding that the "napkin incident" amounted to harmless error and therefore Mr. Andrews was not entitled to an investigation into the possibility that "race" could have played a significant role in determining the outcome of a judicial proceeding, and countered that it was the duty of the United States court system to allow the claimant to establish the possibility of jury prejudice by, at a minimum, permitting an investigation. The petitioner's argument was that:

Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial. (emphasis added) *United States v. Brantley*, 733 F. 2d 1429, 1439 (11th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed. 2d. 383 (1985). Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error. *United States v. Chiantese*, 582 F.2d 974, 979 (5th. Cir. 1978, cert. denied 441 U.S. 92, 99 S.Ct. 2030, 60 L. Ed. 2d., 395 (1979)).[FN56]

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[FN56] *United States v. Harris*, 908 F 2.d 728, 733 (11th Cir. 1990).

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126. The petitioners argued further that even under the domestic standard, Mr. Andrews was never granted the opportunity to establish "racial intent" because the United States courts never investigated into the authorship of the note and denied him an evidentiary hearing to establish such prejudice. Therefore, under domestic law, Mr. Andrews was denied his right for a fair and impartial trial, and because the United States standard is less protective than the international standard.

127. The petitioners also argued that the international standard for determining racial discrimination was a "purpose or effects" test. The International Convention on the Elimination of all forms of Racial Discrimination has defined discrimination to mean:

any distinction, exclusion, restriction or preference based on race, colour, descent or national ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.. (emphasis added)[FN57]

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[FN57] Race Convention, Article 1.

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128. The international standard for determining prejudice or bias, set forth by the Race Convention, allows a claimant to establish racial discrimination by demonstrating either purpose or effects. Therefore, proof of intent of the actor is not the only way to establish racial discrimination. The seminal case in the international forum on the law on bias is *Piersack v. Belgium*, 5 EHRR 169 (1982). In *Piersack*, the issue of bias was based upon the fact that the trial

judge was the same individual who was involved with the decision to initially prosecute the petitioner. The European Court of Human Rights held that there existed bias in the judicial proceeding and thus this constituted a violation of Article 6 of the European Convention which guarantees the right to a fair and impartial trial. *Id.* The Court articulated a standard for determining the existence of bias in a judicial proceeding. The test is as follows:

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. at para. 30.[FN58]

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[FN58] *Id.* Piersack v. Belgium

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129. In April of 1995, this test was expanded by the European Commission of Human Rights in the case of *Gregory v. United Kingdom*.<sup>[FN59]</sup> The European Commission in *Gregory* applied the "effects" standard and created a test for determining racial bias in a judicial proceeding. In *Gregory*, the defendant, who was black, was tried for robbery in the Crown Court at Manchester. According to the facts, the jury retired to deliberate at 10:46 a.m. and returned at 12:28 p.m. when a handwritten note was presented to the judge. The note stated: "JURY SHOWING RACIAL OVERTONES 1 MEMBER TO BE EXCUSED."<sup>[FN60]</sup> The judge did not respond to this note and the black defendant was convicted. On Appeal, the defendant contended that:

discrimination took place against him on the grounds of his race... in that the trial judge allowed the jury to continue its deliberations when it was clear that one or more jurors were prejudiced against the defendant and failed to make an inquiry as to how many members were prejudiced and as to the reasons for their prejudice.<sup>[FN61]</sup>

In this case the options available to the trial judge were as follows: 1) "to make an inquiry into the authorship of the note as to its meaning (and according to the defendant, the trial judge had the ability in domestic law to make the inquires of jurors or; 2) to discharge the jury in total."<sup>[FN62]</sup> The trial judge did nothing to respond to the potential of racial bias in this proceeding.

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[FN59] 16 H.R.L.J. 238 (1995).

[FN60] *Id.* at 238.

[FN61] *Id.* at 240.

[FN62] *Id.*

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130. The European Commission of Human Rights found that, "[t]he 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."[FN63] The Commission looked at the international test of bias which states:

[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).[FN64]

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[FN63] Id.

[FN64] Id. at 239. 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). In Gough, two brothers were charged with robbery. One of the brothers was discharged and the other was indicted on the charge of conspiracy. The bias discussed in Gough was the fact that one of the jurors was a neighbor of the defendant's brother who had been involved in the crime but was not indicted. The Court of Appeal, criminal Division stated the test as follows:

[t]he proper test for determining whether a conviction obtained on a trial...should be quashed on the grounds of possible bias on the part of the juror was whether there was a real danger that the accused might not have had a fair trial. (emphasis added)

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131. The European Commission held that the case raised serious issues of fact and law on the potential of racial bias in a judicial proceeding, and deemed the case admissible, and expanded the Piersack test to include a real danger effects test. The test is interpreted to mean that there is a real danger that the action in question has discriminatory effects upon the defendant, and is quantified in terms of "possibility rather than probability." [FN65] Therefore, if there is a real danger that the action in question could possibly have the effect of prejudicing the defendant, then the defendant was not afforded a fair and impartial trial.

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[FN65] Id. at 239.

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132. The petitioners argued that the United States found no racial discrimination but the Commission by applying international law should find racial discrimination in the application of the death penalty. The Inter-American Commission, in the case of Willie L. Celestine,[FN66] decided that statistical studies alone, without more, do not establish a prima facie case of racial discrimination in the application of the death penalty. The petitioners argued that William Andrews' case represents more than statistical evidence to establish that a prima facie case of racial discrimination exists. The William Andrews' case contains a specific racial incident which the United States legal system chose to ignore during William Andrews' trial. It is this specific incident, and the manner in which the United States legal system dealt with the issue of potential bias infecting the trial and sentencing of William Andrews that establishes a prima facie case of racial discrimination in the application of the death penalty.

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[FN66] (United States), Case No. 10.031 Resolution No. 23/89, (Sept. 28, 1989), reprinted in Annual Report of the Inter-American Commission on Human Rights 1989-1990, 62, para 45. at 72.

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133. The petitioners reiterated their arguments on the issue of cruel, infamous, or unusual punishment and asked the Commission to grant them the relief requested, and stated that it was the same jury who found Mr. Andrews guilty and convicted him of murder that sentenced him to death.

d. Government's Reply to Petitioners' Argument on Merits

134. The Government reiterated its argument that Mr. Andrews received a fair and impartial hearing. The American Declaration and the OAS Charter did not require the United States to have vacated Mr. Andrews' conviction on appeal based on the trial judge's decision not to voir dire the jury or declare a mistrial as a result of a lone juror's discovery of an anonymous, racist note. It argued that the petitioner acknowledged that the complainant bears the burden of proof to establish a case of racial discrimination in the application of the death penalty and that the Petitioner had not met its burden of proof, and had failed to come forward with any concrete evidence that any of the jurors in the trial of Mr. Andrews were either racist or influenced by the note.[FN67]

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[FN67] On April 30, 1996, the United States Government submitted an 11 page response. Only a summary is reproduced here.

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135. The Government argued that in the petitioners' flawed attempt to establish a prima facie and irrebuttable case of racial bias, the petitioner relied almost entirely on a single case of the European Commission of Human Rights. The case cited by the petitioner, Gregory v. United Kingdom,[FN68] presented dramatically dissimilar questions of law and fact. Even if the cases were similar, the petitioner's argument would still prove deficient. The European Commission's decision in Gregory addressed only the admissibility of the claim or racial bias, not the merits of the case. The decision does not support the proposition that a racist note proves racial bias in a trial. The Gregory decision, in sum, has no bearing on whether an anonymous, racist note found by a juror creates an irrebuttable presumption of bias when the judge reasonably determined after investigation that the note was written by a non-juror and racial bias had not entered the trial.

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[FN68] 16 H.R.L.J. 238 (1995).

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136. The Government concluded that the Commission should dismiss the case on its merits for failing to prove a violation of the American Declaration or the OAS Charter.

e. Other Submissions

137. Subsequent to the hearing on February 22, 1996, the petitioners provided the Commission with exhibits which included the following: A copy of the transcript of the afternoon Session of the Court proceeding questioning the bailiff as to the origin and place where the napkin with the words "hang the nigger's" was found; LDS Church Historical Department, 1971 census pg. 206 and formal statistical documentation of the Religion of Davis County in the State of Utah where the William Andrews case was tried; Jury Instructions in the William Andrews trial; the Utah Criminal Code of Criminal Procedure, 1953, Amendments to the Utah Criminal Code and the 1975 Replacement Volume of the Utah Code.[FN69] The petitioners also forwarded to the Commission a copy of the case of Remli v. France for its consideration.[FN70]

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[FN69] Received on March 6, 1996.

[FN70] 1996 NRCD Vol. VII No.7, 608-631.

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138. The Commission received a 31 page Amicus Commisae brief from the President of Rights International, Francisco Forrest Martin; the Center for International Human Rights Law, Inc., Prof. David Baldus (Univ. of Iowa School of Law), Prof. Robert Rosen (Univ. of Miami School of Law), Prof. Burt Lockwood (Univ. of Cincinnati College of Law); which contained two main arguments.[FN71] First, that disclosure of specific evidence of possible juror racial bias or taint requires the trial judge to examine each juror individually in order to ensure tribunal impartiality as well as to fulfill the State-Party's affirmative duty to eliminate racial discrimination. This requires the State under both international and domestic law to avoid not only bias in fact but also the appearance of bias. International law employs an "objective test" and the domestic law of countries using juries in criminal cases also requires states to avoid the appearance of bias in their tribunals.[FN72]

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[FN71] Mr. Bryan Sells, Law student intern (Columbia Law School), Ms. Marguerite Marty, Law student intern (Columbia Law School), Mr. Joel Diegleman, Law student intern. Univ. of Wisconsin Law School), contributed to the brief. However, only a summary is reproduced here.

[FN72] Argument at 1-18.

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139. Second, under international law prohibiting the appearance of tribunal bias, statistical racial disparities in death penalty cases establish an Article XXVI violation of the American Declaration. Statistical racial disparities establish appearance of bias in seeking, sentencing, and imposition of the death penalty. Although statistical racial disparities alone many not be legally sufficient to shift the burden of proof in showing actual bias in a particular case, such disparities violate the Government's affirmative duty to eliminate appearance of tribunal racial bias under Article XXVI. The Government's measures to eliminate racial discrimination in the administration of the death penalty are ineffective requiring a moratorium on the death penalty in the United States.[FN73]

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[FN73] Id. at 19-31. In addition the Center for International Human Rights Law, Inc. submitted a Report of a Mission by the International Commission of Jurists on the Administration of the Death Penalty in the United States.

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#### J. Hearing on Merits of Petition

140. A hearing was held on the merits of the petition on February 22, 1996. Both the petitioners and the Government of the United States participated in this hearing. The petitioners argued their case before the Commission and called Professor Stephen B. Bright, a nationally known expert in the field of capital punishment as an expert witness.[FN74] Representatives of the United States Government were present at the hearing.[FN75] The Government was assisted by Mr. David Yocom.[FN76]

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[FN74] Professor Karen Musalo, Acting Director, International Human Rights Law Clinic, Washington College of Law, American University; Ms. LeeAnne Difilippo, student attorney. Professor Bright provided the Commission with a copy of Santa Clara Law Review, Death Penalty Symposium of addresses made by various legal writers and experts, including himself on this issue. Volume 35 1995, Number 2, at 433-483.

[FN75] Mr. Edgar L. Embrey, Alternate Representative to the Permanent Mission of the U.S.A. to the OAS and Mr. Nigel Purvis, Legal Adviser.

[FN76] Assistant Attorney General from the Attorney General's office in the State of Utah, U.S.A.

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141. The petitioners argued the merits of the case. Its expert witness testified on the racial disparity and discrimination in the application of the death penalty in the United States.

142. The United States Government outlined the facts of the case and stated that Mr. Andrews had a fair trial, an evidentiary hearing was held, and was attended by Mr. Andrews' attorney, however, the trial judge did not voir dire the jury as to the origins of the note. The bailiff to whom the note was given, was questioned in the presence of defense attorneys, and Mr. Andrews attorney's motion for a mistrial was denied by the trial judge,[FN77] and the trial continued with the same members of the jury.

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[FN77] Mr. David Yocom.

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#### V. ISSUES TO BE DECIDED ON THE MERITS OF PETITION

143. Did the action of the United States in trying, convicting, sentencing, and executing William Andrews on July 30, 1992 constitute violations of the American Declaration of the Rights and Duties of Man, in particular, Article I, the right to life, liberty and personal security,

Article II, the right to equality before the law and Article XXVI, the right to an impartial hearing, and not to receive cruel, infamous or unusual punishment?.

## VI. ANALYSIS

144. 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.

145. At the Commission's 88th period of Sessions it concluded that the alleged facts raised in the petition constituted questions of a human right violation within the meaning of Article 41(b) of the Commission's Regulations.

146. The Commission finds that the petitioners have established a prima facie case of human rights violations of the American Declaration and have met their burden of proof. The petitioners' main contentions are that 1) William Andrews' right to life was violated; 2) he was not treated equally at trial because of his race; 3) he did not receive an impartial hearing and he was subjected to cruel, infamous or unusual punishment. The issue of impartiality will be dealt with first; second, the issue of equality; third, the issue of the right to life; and finally, the issue of cruel, infamous or unusual punishment.

### A. Did Mr. Andrews Have a Fair and Impartial Hearing?

147. 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:

- 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.

148. 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

149. 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

150. 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.[FN78]

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."

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[FN78] 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.  
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151. The bailiff was asked the following questions:

"Was this, Pierre's exhibit No.4, discussed or shown to other prospective jurors?"[FN79] 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.[FN80]"

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[FN79] Id. at 2445-2456.

[FN80] Id. at 2450.  
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152. Upon further examination the bailiff was asked by Mr. Davis:

"Mr. Linux, 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? 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.[FN81]"

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[FN81] Id at 2453-2454.  
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ii. The Trial Court's Action

153. 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." [FN82]

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[FN82] Id. at 2451.

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154. 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." [FN83] 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." [FN84]

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[FN83] Id. at 2454.

[FN84] Id. at 2455-2456.

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c) Appellate Review of Mr. Andrews' Case

155. 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." [FN85]

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[FN85] State v. Andrews, 376 P.2d 857, Wilkins Justice at 859.

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156. 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." [FN86] Justice Marshall 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 mention common decency, require[d] no less than this modest procedure." [FN87] 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? [FN88]

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[FN86] Andrews v. Shulsen, 485 U.S. 919, 920 (1988).

[FN87] Id. Andrews v. Shulsen

[FN88] Id.

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d) United States Domestic Law

157. 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.[FN89] Jury misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial.[FN90] Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error.[FN91]

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[FN89] 451 U.S. 182 (1981).

[FN90] *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.

[FN91] *United States v. Chiantese*, 582 F.2d 974, 979 (5th. Cir. 1978), cert. denied

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158. 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.[FN92] 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[FN93] by the Court. Such challenges are made prior to the commencement of a trial.

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[FN92] 77-31-28 Utah Code Annotated 1953, Amendments to Utah Criminal Code during its 1975 Session.

[FN93] *Id.* Utah Code 77-30-1-28.

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e) The International Standard on Impartiality

159. 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."[FN94] The Commission notes that in the European System of Human Rights an objective test was enunciated in the cases of *Piersack v. Belgium*,[FN95] and *Gregory v. United Kingdom*. [FN96]

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[FN94] *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.

[FN95] 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."

[FN96] 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.

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160. 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.[FN97] That Article provides that: "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...."[FN98]

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[FN97] [1996] HRC 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, the Assize Judge stated that it was "not able to take formal note of events alleged to have occurred out of its presence."

[FN98] 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.

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161. 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.[FN99]

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[FN99] 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.

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162. 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.

163. 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 denied the motion for a mistrial and proceeded to trial with the same members of the jury.

164. 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.

165. 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."

166. 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.[FN100] 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." [FN101]

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[FN100] In Davis County, Utah, 73.9% of the people who resided there were Mormons.  
[FN101] Id. at 2448.

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167. 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." [FN102] 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. [FN103] 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". [FN104]

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[FN102] Id. at 2450.  
[FN103] Id. at 2450.  
[FN104] Id. at 2452.

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168. 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.

169. 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.

170. 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,[FN105] 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.[FN106]

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[FN105] See Case No. 9260. Decision rendered on 14 September 1988, OEA/Ser.L/V/II.74, Doc. 10. rev.1, 16 September 1988.

[FN106] Articles 1, 2, 18, 20; Articles 1,2, 26 and its other Articles.

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171. 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.

172. 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.[FN107]

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[FN107] 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.

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B. Did Mr. Andrews Receive Equal Treatment Without Distinction as to Race?

173. 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." [FN108] 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. [FN109] The provision was intended to ensure equality, not identity of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals. [FN110]

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[FN108] Bjorn Stormorken and Leo Zwaak, Human Rights Terminology in International Law: A Thesaurus, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).

[FN109] 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).

[FN110] Id. See also Case Relating to Aspects of Laws on the Use of Languages in Education in Belgium, 1EHRR 252.

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174. 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?

175. With regard to the petitioner's claim that the United States violated Article I of the American Declaration, Article I provides: "Every human 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.[FN111]

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[FN111] CB-7-E, Pan American Union Washington, 1948, at 2.

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176. 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.[FN112]

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[FN112] 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.

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177. 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 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.

D. Did Mr. Andrews Receive Cruel, Infamous or Unusual Punishment?

178. With regard to the question whether Mr. Andrews received cruel, infamous, or unusual punishment, the Commission finds that in this case the death penalty was not rendered by an impartial and competent court for the reasons discussed above. It was rendered by the same jury who found Mr. Andrews guilty. Mr. Andrews did not receive equal treatment at law, and his right to life was violated. He spent eighteen years on death row, and was not allowed to leave his cell for more than a few hours a week. During that time he received notice of at least eight execution dates and was executed by the State of Utah in July of 1992 on the basis of the jury's decision which was tainted because of evidence of "racial biasness" on their part. Therefore, for the reasons discussed above, the Commission finds that the United States violated Mr. Andrews' right not to receive cruel, infamous or unusual punishment pursuant to Article XXVI of the American Declaration.

179. The argument of the United States Government with regard to William Andrews' duty under Articles XXIX, and XXXIII of the American Declaration is noted. The Commission cannot however, examine William Andrews' actions because he is not a member State of the Organization of American States. The Commission can only examine and make findings under the American Declaration of the Rights and Duties of Man and the American Convention and other Treaties in the inter-American system against States who are members of the Organization of American States and who are States Parties to the Declaration and Treaties.

180. Reference has been made to the Celestine and the Roach and Pinkerton cases by the parties in their argument. The Celestine case dealt with the issue of generalized racism in Louisiana and the exclusion of jurors who indicated that they would automatically vote against imposition of the death penalty at the sentencing stage of the trial without regard to the evidence presented. This resulted in Celestine being sentenced by a death-qualified jury. Celestine relied on statistical studies to substantiate his case. The Commission found that Celestine had not provided sufficient evidence that the statistical studies presented made out a prima facie case to prove the allegations of racial discrimination and partiality, in the imposition of the death penalty such as to shift the burden of proof to the United States.

181. The Roach and Pinkerton cases dealt with the issue of the disparity in the application of the death penalty to juveniles in the United States, vis a vis among states. The punishment was not based on the nature of the crime committed but on the location where it was committed and the Commission found violations of the Articles I the right to life, and II, the right to equality before the law of the American Declaration.

182. In this case, reference is made to a specific issue of "racial bias" during the trial of William Andrews and evidence, which substantiated the petitioners' case, was provided to the Commission. The Commission limits its findings of violations to this case, based on the evidence it received.

183. Conclusion: Based on the reasons and findings discussed above, the Commission finds that the United States has violated Mr. William Andrews' rights pursuant to Articles I, (the right to life) II, (the right to equality before the law) XXVI (the right to an impartial hearing, and the right not to receive cruel, infamous, or unusual punishment) of the American Declaration of the Rights and Duties of Man.

THEREFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FINDS THAT:

184. The United States violated William Andrews right life pursuant to Article I of the American Declaration.

185. The United States violated William Andrews right to equality at law pursuant to Article II of the American Declaration.

186. The United States violated William Andrews right to an impartial hearing pursuant to Article XXVI of the American Declaration.

187. The United States violated William Andrews right not to receive cruel, infamous, or unusual punishment pursuant to Article XXVI of the American Declaration.

THE COMMISSION RECOMMENDS THAT:

188. The United States must provide adequate compensation to Mr. William Andrews' next of kin for the violations referred to in paragraphs 184 to 187 above.

VII. PUBLICATION:

189. On January 22, 1997, the Commission wrote to the Government of the United States of America and enclosed a copy of this Report, and requested that it "inform the Commission as to the measures that have been adopted to comply with the recommendations made to resolve the situation denounced within two months."

190. On March 14, 1997, the United States of America replied by letter to the Commission's request, and informed it inter alia that Mr. Andrews received an impartial trial free of racial bias, and stated that for the reasons stated in its letter and its prior detailed submissions, that it "cannot agree with the Commission's findings, or carry out its recommendations."

191. The Commission, considering that the United States of America has not complied with its recommendations, decides to ratify its conclusions and recommendations contained in this Report; and also decides that this Report be published in accordance with Article 54(5) of its Regulations in its Annual Report to the General Assembly.